West Virginia Judicial Benchbook

FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

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WEST VIRGINIA JUDICIAL BENCHBOOK

CHILD ABUSE AND NEGLECT PROCEEDINGS

(Revised January 2016)

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SUMMARY TABLE: TOPICS AND STATUTORY REFERENCES TO CHAPTER 49

Note: By topic, this table lists the most commonly cited provisions of Chapter 49 of the West Virginia Code in abuse and neglect cases. Cross-references to the former provisions of Chapter 49 are also included.

Topic	**Citations from the W. Va. Child Welfare Act**	**Former Citations to Chapter 49**
Definitions: abuse, neglect and imminent danger	§49-1-201	§49-1-3
Transitioning adult defined	§49-1-202	§49-2B-2(x)
Parent and other family terms defined	§49-1-204	§49-1-3
Sibling preference	§49-4-111(e)	§49-2-14(e)
Grandparent preference	§49-4-114(a)(3)	§49-3-1(a)
Petition (venue, contents, court action upon filing)	§§49-4-601(a) – (c)	§§49-6-1,2
Preliminary Hearing/Temporary Custody	§49-4-602	§49-6-3
Adjudicatory Hearing	§49-4-601(j)	§49-6-1 and -2
Disposition	§49-4-604	§49-6-5
Permanency Hearings	§49-4-608, §49-4-110(c)	§49-6-8
Improvement Periods	§49-4-610	§49-6-12
Child support provisions	§§49-4-801, et seq.	§49-7-5[1]
Quarterly status reviews	§49-4-110	§49-7-36

[1] The statutory provisions governing child support found in West Virginia Code §§ 49-4-801, *et seq.* are substantially different from the former statute governing child support. In addition, Rule 16a of the Rules of Procedure for Child Abuse and Neglect Proceedings sets forth requirements for the establishment of child support.

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TIMELINE SUMMARY

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Note: Rule 6(a) of the West Virginia Rules of Civil Procedure governs the computation of time periods established by the Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 7.

I. FILING OF PETITION

A. Initial Order

Court issues either: 1) Initial order upon filing petition and granting temporary custody to the Department of Health and Human Resources or to responsible relative; or 2) Initial order upon filing petition and not granting temporary custody.[2] W. Va. Code § 49-4-602. Temporary custody may only be ordered upon a finding of imminent danger to the physical well-being of the child. W. Va. Code § 49-4-602(a). The order must also state that continuation in the home is contrary to the welfare or best interests of the child and indicate whether reasonable efforts to preserve the family were made or whether reasonable efforts were not required because of the emergency situation. *Id.*

1. Initial order granting temporary custody
   W. Va. Code § 49-4-602(a); Rule 16.

[2] See W. Va. Code § 49-4-303 for ratification procedure when the Department takes emergency protective custody of child without prior court order. See also W. Va. Code § 49-4-301 (emergency custody by law-enforcement officers); and § 49-4-302 (emergency custody orders by family court).

a. Sets a preliminary hearing of petition within ten days of original filing; giving at least five days notice of such hearing. Rules 20 and 22.

b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

c. Appoints counsel for the child, any parent, legally established custodian or other persons standing in *loco parentis* to the child, and for any other qualified respondent who appears and requests appointed counsel. W. Va. Code § 49-4-601(f).

d. Provides for immediate transfer of child to the Department or responsible person.

e. Court may appoint a CASA representative for child in areas where CASA program is in good standing. Rules 20 and 52(a).

f. Court may also direct any party or the Department to initiate or become involved in services to facilitate reunification of the family.

2. Initial order which does not grant temporary custody
W. Va. Code § 49-4-602.

a. Court may set a preliminary hearing of petition upon at least five days notice to parents, if facts alleged in petition demonstrate imminent danger to child. If no preliminary hearing is set, the court should set the adjudicatory hearing, giving at least ten days notice. Rule 20. In such cases, the adjudicatory hearing must begin within 30 days of the filing of the petition, provided no preadjudicatory improvement period is granted. Rule 25.

b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

c. Appoints counsel for child, any parent, any legally established custodian or other persons standing in *loco parentis* to the child, and any qualified respondent who appears and requests appointed counsel. W. Va. Code § 49-4-601(f).

d. Court may appoint a CASA representative for child in area where CASA program is in good standing. Rules 20 and 52(a).

B. Notice

Notice of the first hearing should be provided with the initial order. W. Va. Code § 49-4-602(a)-(b); Rule 20.

1. Shall be sent to all parties and other persons entitled to notice and the right to be heard at the hearing. Rule 20.

2. Notice specifies time and place of hearing and statement that proceedings can result in termination of parental rights. Rule 20.

3. Notice specifies the respondent's right to counsel and right to appointed counsel upon proof of financial eligibility. Rule 17(c)(5); W. Va. Code § 49-4-601(f).

C. Disclosures

Unless otherwise ordered, within three days of filing of petition, prosecutors shall provide all parties and other persons entitled to notice and right to be heard with discovery relevant to preparation of case. Rule 10(b). Not less than five days before any hearing, parents shall disclose to all parties evidence and witnesses they intend to offer at hearing. Rule 10(c).

D. Answer

The parents shall file and serve a verified answer to the petition within ten days of being served with the petition or the applicable time prescribed when served by publication or other substituted service. Rule 17(b).

E. Multidisciplinary Treatment Team

Within 30 days of the original filing of the petition, the court shall cause to be convened a meeting of a multidisciplinary treatment team (MDT) assigned to the child's case. W. Va. Code § 49-4-405; Rule 51(a). The MDT shall submit written reports to the court, and shall meet with the court at least every three months until permanency is achieved and the case is dismissed. The MDT shall be available to meet with the court for status conferences and hearings. Rule 51(c); W. Va. Code § 49-4-405(d).

II. PRELIMINARY HEARING

A. Relevant Inquiry

The court will review the petition and take evidence regarding status of the child, whether the Department made reasonable efforts to preserve the family, and whether imminent danger necessitates removal of the child from custody of the parents or continuation of previously ordered emergency custody. W. Va. Code §§ 49-4-105; 49-4-602; Rules 16 and 22.

1. Order determines temporary custody of child giving reasons for need to remove from home if removal is ordered. W. Va. Code § 49-4-602(b).

2. Order sets date for adjudicatory hearing within 30 days if the child is placed in temporary custody of the Department or responsible relative, unless a pre-adjudicatory improvement period is awarded to the parents. Rule 25.

3. When a child is placed in the temporary custody of the Department or a responsible person, the adjudicatory hearing shall be given priority on the court docket. W. Va. Code § 49-4-601(j).

4. When a child has been placed in the custody of the Department or the custodial and decision-making responsibility has been altered, the order must establish a child support obligation. The order shall also require the parent(s) to complete financial forms to determine Title IV-D and IV-E eligibility and the amount of any child support obligation. Rules 16a and 17(c)(5).

5. Order requires any respondent to complete forms to determine eligibility for court-appointed counsel. Rule 17(c)(5).

III. PRE-ADJUDICATORY IMPROVEMENT PERIOD

At any time prior to the adjudicatory hearing, a respondent may move for a pre-adjudicatory improvement period in accordance with West Virginia Code § 49-4-610 and Rule 23.

A. Family Case Plan

If the motion is granted, the court shall order the Department to submit a family case plan within 30 days, which family case plan shall contain the information required by Rule 28. See also W. Va. Code § 49-4-408. The family case plan shall be formulated with the assistance of all parties, counsel, and the multi-disciplinary treatment team. The family case plan and improvement period order should closely track one another and taken together should constitute a program designed to remedy the circumstances which led to the filing of the petition. Rule 23(a).

B. Concurrent Plan

Concurrently with development of family case plan and improvement period, the Department may commence efforts to place the child for adoption or other permanent placement in the event that reunification attempts fail. Rule 23(a).

C. Length of Pre-adjudicatory Improvement Period

A pre-adjudicatory improvement period shall not exceed three months. The court shall further order that a status conference shall be conducted within 60 days of the granting of the improvement period; or that the Department submit a status report to the court within 60 days and a status conference shall be conducted within 90 days of the award of the improvement period. W. Va. Code § 49-4-610(1)(C); Rule 23(b).

D. Progress Reports

The court may require or accept progress reports or statements from other persons, including the parties, service providers, and persons entitled to notice and the right to be heard, provided that such reports or statements are provided to all parties. Rule 23(b).

IV. ADJUDICATORY PRE-HEARING CONFERENCE

The court may convene an adjudicatory pre-hearing conference on its own motion or upon the motion of any party in preparation for the adjudicatory hearing. Rule 24. A final pre-hearing conference may be scheduled within five days in advance of the adjudicatory hearing to determine that proper notice has been provided and any other matter affecting the hearing. Rule 24(d).

V. ADJUDICATORY HEARING

A. Timing -- No Pre-adjudicatory Improvement Period

If temporary custody has been ordered, an adjudicatory hearing shall commence within 30 days of entry of the temporary custody order following the preliminary hearing unless a pre-adjudicatory improvement period has been ordered. Rule 25. If temporary custody has not been ordered, an adjudicatory hearing shall commence within 30 days of the filing of the petition.

B. Timing -- Pre-adjudicatory Improvement Period

An adjudicatory hearing held at the end of a pre-adjudicatory improvement period shall be held as close in time as possible after the end of the improvement period and shall be held within 30 days of the termination of such improvement period. W. Va. Code §§ 49-4-601(j); 49-4-610(8); Rule 25.

C. Procedure for Adjudicatory Hearing

1. Where a respondent has been served, no order adjudicating that such respondent has abused or neglected the child shall be

entered until the time for answer for such respondent has expired and, if the answer is timely served, the respondent has been afforded at least 20 days from the date the answer was filed to prepare for adjudication or has waived such opportunity to prepare. Rule 25.

2. The adjudicatory hearing shall be conducted in accordance with the provisions of West Virginia Code § 49-4-601(h). The parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

3. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. W. Va. Code § 49-4-601(k). Any stipulated or uncontested adjudication should conform to Rule 26. It should include agreed upon facts supporting court involvement and a statement of the problems or deficiencies to be addressed at the final disposition hearing.

4. At the conclusion of the hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. If applicable, the court may find that a parent is a non-abusing parent because he or she is a battered parent or because he or she did not knowingly allow abuse. W. Va. Code § 49-1-201. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof. W. Va. Code §§ 49-1-201; 49-4-601(i); Rule 27.

5. The court shall enter an order including findings of fact and conclusions of law as to whether the child is abused or neglected, within ten days of the conclusion of the hearing, and the parties and all other persons entitled to notice and the right to be heard shall be given notice of the entry of this order. Rule 27.

6. When a child has been placed in the custody of the Department or custodial responsibilities have been altered, the court shall set the amount of the child support obligation according to the child support guidelines. Rule 16a.

VI. POST-ADJUDICATORY OR DISPOSITIONAL IMPROVEMENT PERIOD

A. Grounds for Improvement Period

After finding that a child is an abused or neglected child, a court may grant a respondent an improvement period not to exceed six months when: 1)

the respondent files a written motion requesting the improvement period; 2) the respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period; and 3) the court makes a finding, on the record, that the respondent has not previously been granted an improvement period or, has shown that since the granting of an initial improvement period, the respondent has experienced a substantial change of circumstances and that due to such change respondent is likely to fully participate in a further improvement period. Further, the court should make a finding, on the record, of the terms of the improvement period. W. Va. Code § 49-4-610(2) and (3).

B. Family Case Plan

If a post-adjudicatory or dispositional improvement period is granted, the court shall order the Department to submit a family case plan within 30 days of the order. Concurrent efforts may be made by the Department to place the child for adoption or secure other permanent placement. Rule 37.

C. Initial Review Hearing

When the improvement period is granted, the court shall order that a hearing be held to review the matter within 60 days of the granting of the improvement period; or, order that a hearing be held to review the matter within 90 days of the granting of the improvement period and that the Department shall submit a report as to the respondent parents' progress in the improvement period within 60 days of the order granting the improvement period. W. Va. Code §§ 49-4-610(2)(C) and (3)(C); 49-4-110; Rule 37.

D. Subsequent Review Hearing

The court shall thereafter convene a status conference at least once every three months for the duration of the improvement period. At the status conference, the MDT shall attend and report as to progress and developments in the case. W. Va. Code §§ 49-4-610(2)(C) and (3)(C); 49-4-110; Rule 37.

E. Extension

A court may extend an improvement period for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the Department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child. W. Va. Code § 49-4-610(6).

F. Revocation or Termination of Improvement Period

Upon the motion by any party, the court shall terminate any improvement period when the court finds that the respondent has failed to fully participate in the terms of the improvement period. W. Va. Code § 49-4-610(7).

VII. DISPOSITION HEARING

A. Timing -- After Adjudicatory Hearing

A disposition hearing shall commence within 45 days of the entry of the adjudicatory order. Rule 32(a). Notice of the date, time and place of the disposition hearing shall be given by the court to all parties, their counsel, and the other persons entitled to notice and the right to be heard. Rule 31. All persons entitled to notice and the right to be heard shall be provided with the child's case plan, as defined in Rule 28, and material from other parties necessary to preparation of their case at least five judicial days before the dispositional hearing. Rules 29 and 30.

B. Accelerated Disposition Hearing

The disposition hearing may immediately follow the adjudication hearing if: 1) all the parties agree; 2) a child's case plan meeting the requirements of West Virginia Code § 49-4-604 and § 49-4-408 was completed and provided to the court or the party or the parties have waived the requirement that the child's case plan be submitted prior to disposition; and 3) notice of the dispositional hearing was provided to or waived by all parties. Rule 32(b).

C. Timing -- After Dispositional Improvement Period

When a disposition improvement period has been awarded as an alternative to final disposition, a final disposition hearing shall be held no later than 30 days after the end of the disposition improvement period. W. Va. Code § 49-4-610(8)(B); Rule 38.

D. Legal Authority: Uncontested/Contested Disposition

If a parent voluntarily relinquishes parental rights or termination of parental rights is uncontested, the disposition hearing should conform to Rule 35(a). See also W. Va. Code § 49-4-607. Contested terminations and contests to case plans are governed by Rule 35(b).

E. Disposition Order: Contents

At the conclusion of the final disposition hearing, the court shall make findings of fact and conclusions of law in accordance with West Virginia Code § 49-4-604 and Rule 36. At disposition, the court may terminate parental rights when warranted by the evidence. The court may commit

the child to the permanent sole custody of a non-abusing parent, including a parent who has been found to be a battered parent. W. Va. Code § 49-4-604(b)(6).

F. Entry of Disposition Order

Within ten days of the conclusion of the final disposition hearing, the court shall enter a disposition order. Rule 38.

VIII. PERMANENCY HEARING

A. Purpose

The purpose of the permanency hearing is to determine the permanency plan and determine what efforts are necessary to provide the child with a permanent home. W. Va. Code § 49-4-608; Rule 36a. The court has exclusive jurisdiction to determine the permanent placement of a child. Rule 36(e).

B. Timing -- Reasonable Efforts Required

If the court finds, at any stage of the proceedings, that the Department must make reasonable efforts to preserve the family or any part of the family, then a permanency hearing must be held within 12 months of when the Department obtained physical custody of a child.[3] W. Va. Code § 49-4-608. The court is also required to conduct permanency hearings for "transitioning adults." W. Va. Code § 49-4-110(c). If permanency has been achieved by the adoption of a child, the establishment of a legal guardianship, permanent placement with a fit and willing relative, or another planned, permanent living arrangement before this 12-month period has elapsed, it is not necessary for the court to conduct an additional hearing designated as a "permanency hearing." See Chapter 3, Section XII. B. for a discussion of permanency hearing requirements.

C. Timing -- Reasonable Efforts Not Required

If the court finds that the Department is not required to make reasonable efforts to preserve the family, then a permanency hearing must be held within 30 days to determine the permanency plan for the child. W. Va. Code § 49-4-608; Rule 36a(a).

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[3] Rule 36a(b) has incorporated the slightly longer federal standard for the timing of a permanency hearing, and it provides that a permanency hearing must be conducted within one year of the earlier of: 1) the date of the adjudication of abuse or neglect, or 2) the date that is 60 days after the child's removal from the home. Rule 36a(b). If a court conducts a permanency hearing according to the slightly shorter period established by West Virginia Code § 49-4-608, the court will automatically meet the federal standard.

D. Additional Permanency Hearings

After the initial permanency hearing, the court must conduct a permanency hearing every 12 months for a child or "transitioning adult" who remains in the legal and physical custody of the Department. W. Va. Code §§ 49-4-608(b); 49-4-110.

IX. PERMANENT PLACEMENT REVIEW

A. MDT Responsibilities

The court, with the assistance of the MDT, shall continue to monitor implementation of the court-ordered permanency plan for the child or "transitioning adult" every three months until permanent placement as defined in Rule 3 is achieved. Rules 39 and 41; W. Va. Code § 49-4-110. The court shall conduct a review conference and require the MDT to attend and report the progress towards achieving a permanent placement for the child. The MDT and Department shall provide permanent placement review reports to the court at least ten days before the review conference. Rule 40.

B. Notice

The notice of the time and place of the permanent placement review conference shall be given to counsel and all other persons entitled to notice and the right to be heard at least 15 days prior to the conference unless otherwise provided by court order. Neither a party whose parental rights have been terminated by the disposition order nor his or her attorney shall be given notice of or the right to participate in post-disposition proceedings. The court shall hold a hearing in connection with such review and shall not merely conduct reviews by agreed order. Rule 39(c) and (d).

C. Issues Subject to Review

If the court finds that permanent placement has not been achieved, the court's order shall address those subjects set forth in Rules 41 and 42(c). Permanent placement of each child shall be achieved within 12 months of the disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay. Rule 43.

D. Timing for Entry of Order

Within ten days of the conclusion of the permanent placement review conference, the court shall enter an order determining whether permanent placement has been fully achieved within the meaning of Rule 6 and stating findings of fact and conclusions of law to support its determination. Rule 42(a).

E. Dismissal

If the court finds that permanent placement has been achieved, it may order the case dismissed from the docket. Rule 42(b).

CHAPTER 2:
CHECKLISTS FOR ABUSE AND NEGLECT PROCEEDINGS

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PRELIMINARY HEARING CHECKLIST

A. Notice and Appointments

1. Have all parties and persons entitled to notice and a right to be heard received timely notice of the hearing, pursuant to Rule 20? (This includes noncustodial parents, putative fathers and custodial relatives.) (If only one parent served, see Rule 21.)

2. Has counsel been appointed for the child and is that counsel present in court for the hearing? W. Va. Code § 49-4-601(f).

3. Has a CASA been appointed and is that CASA present in court for the hearing? Rule 52.

4. If parents or other parties have counsel, is such counsel present in court for the hearing? If the parents or other parties do not already have counsel, advise them of their right to counsel, and appoint such counsel as needed. W. Va. Code § 49-4-601(f). (See Overview Section IV. F.)

B. Temporary Custody and Placement

1. Should the child be returned home immediately or, based upon finding no alternative less drastic than removal, kept in an out-of-home placement prior to adjudication?
W. Va. Code § 49-4-602(b).

2. What services, if any, would allow the child to remain safely at home? W. Va. Code § 49-4-602(a)(1)(B).

3. Will the parties voluntarily agree to participate in such services?

4. If removal ordered, what services should be provided by the Department, if any, to facilitate the child's return home? W. Va. Code § 49-4-602(b)(5).

5. Are any protective orders necessary or appropriate?

6. Are orders needed for examinations, evaluations or other immediate services? W. Va. Code § 49-4-603.

7. If removal is being ordered, make finding that continuation in the home is contrary to the child's best interests, and provide specific reasons for such finding. W. Va. Code § 49-4-602(b)(1). (See pages 2-23 to 2-24 of Title IV-E Checklist.)

8. If removal is being ordered, make findings as to whether the Department made reasonable efforts to prevent removal of the child, or that such reasonable efforts were not possible or not required, and provide specific reasons for such findings. W. Va. Code § 49-4-602(b) & (d); W. Va. Code § 49-4-105. (See pages 2-24 to 2-25 of Title IV-E Checklist.)

9. Are there any responsible relatives or other responsible adults who are familiar with the child or family, who are available to serve as foster parents?

10. Does the Indian Child Welfare Act apply? (See Special Procedures Section IX.)

11. Is the placement proposed by the Department the least disruptive and most family-like setting that meets the needs of the child?

C. Other

1. Has the MDT met, or scheduled a meeting within 30 days of the filing of the petition? W. Va. Code § 49-4-405 and Rule 51(a).

2. If removal has been ordered, is visitation with parents or other close relatives consistent with the child's well-being and best interests, and if so, what are appropriate terms and conditions of such visitation? Rule 15.

3. Has petitioner's counsel provided the required disclosures and discovery? Rule 10(b).

4. If removal ordered, what should the terms of any child support order be? W. Va. Code § 49-4-801(c) – (e). If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the financial statement forms for child support and Title IV-D and IV-E eligibility. The affected respondents should also be required to complete the forms to determine eligibility for court-appointed counsel. Rules 16a and 17(c)(5) (See Special Procedures Section VII.)

D. Actions

1. Mark and admit any reports and exhibits.

2. Set date for next hearing or conference:

a) If no pre-adjudicatory improvement period is granted, set adjudicatory hearing within the time frames applicable to the circumstances, as set forth in Rule 25;

b) If pre-adjudicatory improvement period is granted, set status conference within the time frames applicable to the circumstances, as set forth in Rule 25.

3. Enter preliminary hearing order, with findings to include matters set forth in West Virginia Code § 49-4-602(b) and, if applicable, § 49-4-602(d).

4. Determine whether to set adjudicatory prehearing conference. Rule 24.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-4-105; 49-4-405; 49-4-601; 49-4-602; 49-4-603; 49-4-801

RULES

Rule 10, Rule 15, Rule 16a, Rule 17(c)(5), Rule 20, Rule 22, Rule 23, Rule 24, Rule 25, Rule 51, Rule 52

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ADJUDICATORY HEARING CHECKLIST

A. Service And Notice

1. Have all necessary parties been served?

2. If personal service not obtained on any parent or other custodian, ascertain and place on record whether "due diligence" efforts made under West Virginia Code § 49-4-601(e). See Rule 21.

B. Stipulated or Uncontested Adjudication

1. Stipulated or uncontested adjudication must include:

   a) Facts supporting adjudication (which may incorporate writeen reports and admissions by a respondent in an answer and any written stipulation); and

   b) Statement of a respondent's problems or deficiencies to be addressed at final disposition. Rule 26(a), (c) and (d).

2. Did the respondent understand the stipulation and the consequences of agreeing to a stipulation? Did the respondent voluntarily enter into the stipulation? Rule 26(b).

C. Other Matters To Be Addressed

1. If adjudication is contested, was alleged abuse or neglect existing at the time of the filing of the petition proven by clear and convincing evidence? W. Va. Code § 49-4-601(i). If not, petition to be dismissed.

2. Is one or more of the respondents a non-abusing parent because he or she is a battered parent or because he or she did not knowingly fail to take protective action in the face of abuse by another person? W. Va. Code § 49-1-201.

3. If abuse or neglect found, consider other issues that may need to be addressed before disposition, such as:

a) Continuing child placement;

b) Further evaluations, examinations or services;

c) Any appropriate protective orders;

d) Parental or sibling visitation as permitted under Rule 15.

4. If abuse or neglect found, direct the Department to prepare the child case plan, including the permanency plan, and (where applicable) the family case plan. W. Va. Code § 49-4-604(a); Rule 28.

5. If removal ordered, what should the terms of any child support order be? If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the financial statement forms for child support and Title IV-D and IV-E eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code § 49-4-801. (See Special Procedures Section VII.)

6. Does the Indian Child Welfare Act apply? (See Special Procedures Section IX.)

7. Inquire on record whether respondents desire appeal. If so, direct preparation of transcript. W. Va. Code § 49-4-601(k).

D. Actions

1. Mark and admit any reports and exhibits.

2. Enter adjudication order with findings of fact and conclusions of law within ten days of hearing, with notice of entry to all parties and other persons entitled to notice and right to be heard. Rule 27.

3. Set date for next hearing or conference:

a) Facts supporting adjudication (which may incorporate disposition hearing within the 45-day time frame set forth in Rule 32; and

b) Facts supporting adjudication (which may incorporate status conference within the time frames applicable to the circumstances, as set forth in Rule 37.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-1-201; 49-4-601(i) & (k); 49-4-604(a); 49-4-610; 49-4-801

RULES

Rule 15, Rule 16a, Rule 17(c)(5), Rule 26, Rule 27, Rule 28, Rule 32, Rule 37

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IX. Adjudicatory Hearing

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VI. Child Support in Abuse and Neglect Cases

IX. Procedural Protections for Children

X. Procedural Protections for Parents

XI. Abuse and Neglect Proceedings and the Right to Remain Silent

XIII. Adjudicatory Hearing

XX. Appeals

DISPOSITION HEARING CHECKLIST

A. Notice and Procedure

1. Have all parties, counsel and persons entitled to notice and the right to be heard been given notice of the hearing? Rule 31.

2. Has the Department prepared and filed the child's case plan that complies with Rule 28? See W. Va. Code § 49-4-604(a).

3. Has the child's case plan been provided to the parties, their counsel, and persons entitled to notice and the opportunity to be heard at least five judicial days prior to the hearing? Rule 29.

4. Has the MDT developed an individualized service plan for the child and provided such to the Court prior to disposition? W. Va. Code § 49-4-404 and -405. (See Overview Section VI.)

5. Have the parties each submitted to the court, other parties, and persons entitled to notice and the right to be heard, a witness list and a list of legal and factual issues at least five judicial days prior to the hearing? Rule 30.

B. Stipulated or Uncontested Dispositions

1. Does the proposed stipulated or uncontested disposition comply with Rule 33(a)?

2. Is the stipulation understood and voluntary? Rule 33(b).

3. If a parent intends to relinquish his or her parental rights, does the relinquishment satisfy the requirements of West Virginia Code § 49-4-607?

4. If the parent has voluntarily relinquished parental rights or if a parent does not contest termination, have the requirements of Rule 35(a) been met?

C. Contested Dispositions

If a disposition involving termination is contested and opposed:

a) Have findings been made under West Virginia Code § 49-4-604(b)(6) and, if applicable, § 49-4-604(b)(7)?

b) Should permanent sole custody of the child be awarded to a non-abusing parent, including a non-abusing parent who is a battered parent? W. Va. Code § 49-4-604(b)(6).

c) Does the case plan require amendment in light of disposition findings made? Rule 35(b).

d) Do any parties or persons entitled to notice and the right to be heard desire modification to the child's case plan, or have they offered a substitute child's case plan? If so, follow the hearing requirements set forth in Rule 35(b)(2).

D. Items To Be Considered In All Cases Involving Temporary Custody Or Termination

1. Are there objections to the child's case plan? If so, the court must enter an order in compliance with Rule 34.

2. If removal is being ordered, make finding that continuation in the home is contrary to the child's best interests, and provide specific reasons for such finding. W. Va. Code § 49-4-604(b)(5). (See pages 2-23 to 2-24 of Title IV-E Checklist.)

3. If removal is being ordered, make findings as to whether the Department made reasonable efforts to prevent removal of the

child, or that such reasonable efforts not possible or not required, and provide specific reasons for such findings. W. Va. Code §§ 49-4-604(b)(5),(7); 49-4-105. (See pages 2-24 to 2-25 of Title IV-E Checklist.)

4. If termination of parental rights is considered and the child is age 14 or older or otherwise of an age of discretion, has the court been informed of the child's wishes with regard to the termination of parental rights? W. Va. Code § 49-4-604(b)(6)(C).

5. If no permanency hearing was conducted with the disposition hearing (or earlier), then a permanency hearing should be scheduled within the time frames set forth in West Virginia Code § 49-4-608.

6. If removal ordered, what should the terms of any child support order be? If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the financial statement forms for child support and Title IV-D and IV-E eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code §§ 49-4-604(b)(5) and 49-4-801. (See Special Procedures Section VII.)

E. Actions

1. Mark and admit any reports and exhibits.

2. Make findings of fact and conclusions of law as to the appropriate disposition under West Virginia Code § 49-4-604, or under West Virginia Code § 49-4-610(3) if an improvement period is granted as an initial disposition.

3. If the court determines not to adopt the MDT's recommended service plan for the child (if such plan was provided by the MDT prior to disposition), schedule and hold a hearing within ten days to consider evidence from the MDT as to its rationale for the proposed service plan. W.Va. Code § 49-4-404.

4. If a disposition improvement period is granted, order the preparation of the family case plan within 30 days, and set a status conference within the 60 or 90-day time frames provided under Rule 37.

5. Following final disposition hearing, enter disposition order containing the items set forth in Rule 36(c) within ten days of the hearing.

6. The final disposition order shall also set the date and time of the permanency hearing under West Virginia Code § 49-4-608, or if the permanency plan is already in place, a permanent placement review conference under Rule 36(b) within 90 days.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-4-105; 49-4-404; 49-4-405; 49-4-408; 49-4-604; 49-4-607; 49-4-608; 49-4-610(3); 49-4-801

RULES

Rule 29, Rule 30, Rule 32, Rule 33, Rule 35, Rule 36, Rule 36a, Rule 37

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XIV. Dispositional Hearing

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XVII. Relinquishment of Parental Rights

XVIII. Achievement of Permanency

XIX. Children's Right to Continued Association

IMPROVEMENT PERIOD CHECKLIST

A. Requirements of Pre-Adjudicatory Improvement Period

1. A written motion filed at any time prior to the adjudication hearing.

2. Respondent demonstrates, by clear and convincing evidence, that he or she is likely to fully participate in improvement period; and findings made, on the record, of the terms of improvement period.

3. Has there been acknowledgment by the parent seeking an improvement period that abuse/neglect has occurred, and/or has requesting parent identified abuser? *DHHR v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996).

4. Court orders hearing to be held to review the matter within 60 days of granting improvement period **OR** court orders hearing to be held to review the matter within 90 days of the granting of improvement period and orders the Department to submit a progress report in 60 days of the order granting improvement period.

5. Order requires Department to prepare and submit a family case plan that complies with West Virginia Code § 49-4-408.

6. Improvement period not to exceed a period of three months, with no extensions allowed. W.Va. Code § 49-4-610(1) and Rule23.

B. Requirements of Post-Adjudicatory Improvement Period and Disposition Improvement Period

1. A written motion filed following adjudicatory hearing and prior to disposition hearing.

2. Respondent demonstrates, by clear and convincing evidence, that he or she is likely to fully participate in improvement period; and findings made, on the record, of the terms of improvement period.

3. Court orders hearing to be held to review the matter within 60 days of granting improvement period **OR** court orders hearing to be held to review the matter within 90 days of the granting of improvement period and orders the Department to submit a progress report in 60 days of the order granting improvement period.

4. No previous improvement period has been granted, or respondent demonstrates by clear and convincing evidence that a substantial change of circumstances has occurred and that respondent is now likely to fully participate in a further improvement period.

5. The order requires Department to prepare and submit a family case plan that complies with West Virginia Code § 49-4-408.

6. Improvement period can be no longer than six months, unless later extended as set forth below. W. Va. Code § 49-4-610(2),(3); Rule 37.

C. Other Matters

1. The Department may be ordered to pay expenses associated with any improvement period services when respondent is unable to bear such expenses. W. Va. Code §§ 49-4-610(4)(A) and 49-4-108.

2. With respect to any improvement period, respondent is required to execute a release of all medical information regarding that respondent. W. Va. Code § 49-4-610(4)(B).

3. With respect to a post-adjudicatory improvement period or a disposition improvement period, the court may extend such improvement period for a period not to exceed three months upon finding that respondent has substantially complied with the terms of the improvement period; that continuation will not substantially impair the ability of the Department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child. W. Va. Code § 49-4-610(6).

4. No combination of improvement periods or extensions should result in a child remaining in foster care for more than 15 months of the most recent 22 months unless the court finds compelling circumstances that it is in the child's best interests to extend this time limit. W. Va. Code § 49-4-610(9).

5. Any party may move to revoke an improvement period. W. Va. Code § 49-4-610(7).

6. Any hearing scheduled for the end of the improvement period shall be held as close in time possible at the end of the improvement period, and it shall be held no later than 30 days after the conclusion or termination of the improvement period. W. Va. Code § 49-4-610(8)(B).

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-4-108; 49-4-404; 49-4-405; 49-4-408; 49-4-610

RULES

Rule 23, Rule 37, Rule 38

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VII. Improvement Periods

X. Child and Family Case Plans

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XII. Improvement Periods

PERMANENCY HEARING CHECKLIST

A. Notice and Procedure

1. Has notice of at least five judicial days been provided to any parents whose rights have not been terminated, any foster parent, preadoptive parent or relative who provides care for the child, any party, the child's attorney and the child, if the child is 12 years of age or older? Rule 36a; W. Va. Code § 49-4-608.

2. Has the Department filed a report that details its efforts to place the child in a permanent home and has the report been provided to any parent whose rights have not been terminated, other parties, the child's guardians, foster parents, any preadoptive parent, any relative providing care for the child, the child's attorney and the child if he or she is of 12 years of age or older?

3. If the child is 12 years of age or older, is he or she present or has his or her presence been waived by the child's attorney at the child's request or because the child would suffer emotional harm?

4. Are any of the following persons, in addition to any parties, present: any foster parent, any preadoptive parent or any relative providing care for the child?

B. Discuss

1. Has the court found that the Department is not required to make reasonable efforts to preserve the family? See W. Va. Code § 49-4-608(a); Rule 36a. For a list of circumstances in which the Department is not required to make reasonable efforts to preserve the family, see West Virginia Code §§ 49-4-604(b)(7); 49-4-605. If so, has the permanency hearing been conducted within 30 days of such a finding?

2. If the Department was required to make reasonable efforts to preserve the family, has 12 months elapsed since the Department received physical custody of the child? W.Va. Code §§ 49-4-608(b);[4] 49-4-110.

3. If an initial permanency hearing has been conducted, has 12 months elapsed while the child has remained in the physical or legal custody of the Department? W. Va. Code § 49-4-608(b).

4. What is the appropriate permanent placement for the child and the likely date for the achievement of permanency? Rule 36a.

5. Under what conditions should the child's commitment to the Department continue? W. Va. Code § 49-4-608(b).

6. What efforts are necessary to provide a child with a permanent home? W. Va. Code § 49-4-608(b).

7. Has the Department made reasonable efforts to finalize the permanency plan for the child in a timely manner? W. Va. Code § 49-4-608(e), Rule 42.

8. Identify any services the child needs. W.Va. Code § 49-4-608(e).

9. If the child will be placed in an out-of-state placement, is such a placement in the child's best interest? Is there an in-state facility or program that would meet the child's needs? W. Va. Code § 49-4-608(d).

10. If a child has reached 14 years of age, what services does the child need to make the transition from foster care to

[4] Rule 36a incorporated the slightly longer federal standard for the scheduling of a permanency hearing. See 42 U.S.C. § 675(c)(5). If a court meets the standard for a permanency hearing established by West Virginia Code § 49-4-608, the court will also meet the federal timeline for conducting a permanency hearing set forth in Rule 36a.

independent living? W. Va. Code § 49-4-608(c);Rule 28(c)(8); Rule 42(c)(5)

11. If a youth is aged 17 or older, has a personalized transition plan been developed? Rules 28(c)(8).

C. Actions

1. Schedule next permanent placement review. Rule 36a(c).

2. Mark and admit any reports and exhibits.

3. Enter order within ten days that addresses the subjects noted above. W. Va. Code § 49-4-608(e), Rule 41 and Rule 42.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-4-110; 49-4-604(b)(7); 49-4-605; 49-4-608

RULES

Rule 28, Rule 36a, Rule 39, Rule 40, Rule 41, Rule 42, Rule 43

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XII. Permanent Placement

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XV. Placement with a Parent

XVIII. Achievement of Permanency

XIX. Children's Right to Continued Association

PERMANENT PLACEMENT REVIEW CHECKLIST

A. Notice and Procedure

1. Has 15-day notice been provided to the parties, counsel, and other persons entitled to notice and the right to be heard? Rule 39(c).

2. Has the permanency hearing been conducted, with a permanency plan for the child determined? W. Va. Code § 49-4-608; Rule 36a.

3. Has the Department and the MDT prepared and filed with the court a progress report describing the efforts to implement the permanency plan and any obstacles to permanent placement? Rule 40; W. Va. Code § 49-4-608(b).

4. Were copies of the progress reports provided to the parties and others ten days in advance of the review conference? Rule 40.

5. Are there any progress reports or statements from other persons, including the parties, CASA, or any service providers, and if so, have such reports or statements been provided in advance to all parties? Rule 40.

B. Discuss

1. Has permanent placement been achieved? If so, dismissal of the case is proper. Rule 42(b).

2. Have reasonable efforts been made to finalize permanency plan in effect and secure a permanent placement, including all items set forth in Rule 41(a)?

3. What changes should be made to the child's case plan to effect a permanent placement? Rule 42(c)(1).

4. What other changes should be made, or actions taken, to accomplish permanent placement? Rule 42(c)(2-7).

5. If a youth is aged 14 or older, have services been identified to assist the youth with transition to adulthood? If a youth is aged 17 or older, has a personalized transition plan been developed? Rules 28(c)(8) and 42(c)(5).

6. Will permanent placement be achieved within 12 months of the final disposition order? If not, what extraordinary reasons justify delay? Rule 43.

7. Is the youth a transitioning adult as defined in West Virginia Code § 49-1-202 and subject to the review requirements of West Virginia Code § 49-4-110?

8. Should the annual permanency hearing be scheduled concurrently with the next permanent placement review? See W. Va. Code §§ 49-4-608; 49-4-110.

C. Actions

1. If no permanent placement yet achieved, set date for next review conference (within three months). Rules 39 and 42(c)(8).

2. Mark and admit any reports and exhibits.

3. Enter order within ten days regarding whether permanent placement has been achieved, and making findings of fact and conclusions of law in support thereof. Rule 42.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-1-202; 49-4-110; 49-4-608

RULES

Rule 28, Rule 36a, Rule 39, Rule 40, Rule 41, Rule 42, Rule 43

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TITLE IV-E FINDINGS CHECKLISTS

Contrary to Welfare or Best Interests (CW)

A. When Required

1. *First* order that sanctions child's removal (even temporarily) from family home.

2. Any return to out-of-home placement after a "trial home visit" (e.g. improvement period) exceeding the time period deemed appropriate by the court, would be considered a new removal requiring CW findings.

3. A removal has *not* occurred when an order removes legal custody from parents but child remains in home with agency discretion for removal. At the time of any subsequent actual removal from the home, another hearing and order with CW findings would be necessary. See Rule 16(d).

B. What Required

1. Court must find on a case-specific basis whether:

a) remaining in the home would be contrary to the welfare of the child, and if so, why; or

b) out-of-home placement is in the child's best interest, and if so, why.

2. CW finding must be supported by specific facts/reasons summarized in order:

a) by court's own wording; or

b) by selecting applicable items from a detailed checklist; or

c) by cross-reference to matters in the petition or in a report submitted to the court.

C. Comments

1. First removal order must contain the required CW findings, even if initial placement is not IV-E eligible.

2. Absence of appropriate findings in first removal order makes child ineligible for IV-E funding throughout entire custody period.

a) Only acceptable substitute would be hearing transcript showing findings were made.

b) *Nunc pro tunc* orders not acceptable substitute.

Best Practice *Include CW findings in every order making an out-of-home placement of the child.*

Reasonable Efforts to Prevent Removal (RE-PR)

A. When Required

1. *Within 60 days* of child's removal from home.

2. Any return to out-of-home placement after a "trial home visit" (e.g. improvement period) exceeding the time period deemed appropriate by the court, would be considered a new removal requiring RE-PR findings.

3. A removal has *not* occurred when an order removes legal custody from parents but child remains in home with agency discretion for removal. At the time of any subsequent actual removal from the home (or within 60 days thereafter) another hearing and order with RE-PR findings would be necessary. See Rule 16(d).

B. What Required

1. Court must find on a case-specific basis:

   a) whether reasonable efforts were made to prevent the child's initial removal from the home; or

   b) that due to an emergency situation or imminent risk involving the safety or well-being of the child, it is reasonable under present circumstances to make no effort to maintain the child in the home; or

   c) that reasonable efforts were not required in child abuse or neglect case due to aggravated circumstances, commission of specified crimes, the parent is required to register as a sex offender under state or federal law or prior involuntary termination of parental rights regarding a sibling. See W. Va. Code § 49-4-604(b)(7).

2. RE-PR finding must be supported by specific facts/reasons summarized in order:

   a) by court's own wording; or

   b) by selecting applicable items from a detailed checklist; or

   c) by cross-reference to matters in the petition or in a report submitted to the court.

C. Comments

1. Even though the RE-PR determination may be in any order within 60 days following initial removal, the findings must relate to efforts prior to the actual removal.

2. If reasonable efforts information is unavailable at the time of initial removal order, make sure a follow-up order with these findings is made within 60 days.

3. Absence of appropriate findings in either first removal order or another order within 60 days makes child ineligible for IV-E funding throughout entire custody period.

Best Practice *Include RE-PR findings in every order making an out-of-home*

a) Only acceptable substitute would be hearing transcript showing findings were made.

b) *Nunc pro tunc* orders not acceptable substitute.

Reasonable Efforts to Finalize Permanency in a Timely Manner (RE-FP)

A. When Required

1. *Within 12 months* of the date the child is "considered to have entered foster care" *and* at least once every 12 months thereafter. For the purpose of calculating the initial 12-month period under **federal** law, a child is considered to have entered foster care either 60 days following the child's removal from home, or on the date the court made a finding that the child was abused or neglected, whichever date comes first. If the court makes this finding at a permanency hearing scheduled according to West Virginia Code § 49-4-604(b)(7), one year after receipt of physical custody of a child, it will automatically meet the federal standard.

2. If the court determines at any stage of the case that reasonable efforts to return the child home are not required due to aggravated circumstances, commission of a crime, a requirement to register as a sex offender under state or federal law, or prior sibling TPR [W. Va. Code § 49-4-604(b)(7)], a permanency hearing must be held *within 30 days* of that determination, unless permanency hearing requirements are fulfilled at the same hearing where the no-reasonable-efforts-to-reunify determination was made.

Note: If the court makes this finding at any stage of the proceeding, then the initial permanency hearing must be held within 30 days of entry of the order containing that finding. Rule 36a.

B. What Required

1. Court must find on a case-specific basis:

   a) whether reasonable efforts have been made to finalize the permanency plan in a timely manner (reunification if possible, or adoption, legal guardianship, or placement with a non-abusive parent or other fit and willing relative).

2. RE-FP finding must be supported by specific facts/reasons summarized in order:

   a) by court's own wording; or

   b) by selecting applicable items from a detailed checklist; or

   c) by cross-reference to matters in a report submitted to the court.

3. Court must document a compelling reason for rejecting the ASFA-preferred permanency options (reunification, adoption, legal guardianship, placement with a non-abusive parent or other fit and willing relative) before accepting any other planned permanent living arrangement, such as independent living or long-term foster care. [Examples appear in the Comments below.]

C. Comments

1. If a court orders a placement with a specific provider, without *bona fide* consideration of the agency's recommendation regarding a different placement, the court has assumed the State agency's placement responsibility, and the child may be disallowed IV-E funding for that placement. This does not mean the court must always concur with the agency's recommendation in order for the child's placement to be eligible for IV-E funding. As long as the court hears the relevant testimony, works with the parties and agency, and makes findings in arriving at what the court determines the appropriate placement decision, IV-E funding should not be disallowed.

2. Absence of appropriate finding, reasonable efforts to finalize the permanency plan in a timely manner, within each 12-month interval will make the child ineligible for additional IV-E funding until the court makes such determination.

3. Examples of compelling reason for establishing a permanency plan other than an ASFA-preferred option:

Best Practice
Include RE-FP findings in every placement review order once the permanency plan is established.

a) Older teen who does not wish to proceed with TPR, and requests that emancipation be established as the permanency plan.

b) Parent and child with significant bond but parent unable to care for child due to physical or emotional disability and child's foster parents are committed to raising child and facilitating visitation with disabled parent.

Best Interests in Voluntary Placement (BI-VP)

A. When Required

1. *Within 180 days* of child's voluntary placement in foster care.

B. What Required

1. Court must find whether the continued voluntary placement is in the best interests of the child.

C. Comments

1. Absence of appropriate finding within the 180-day initial period will make the placement ineligible for additional federal financial participation for foster care expenditures.

Best Practice *Include BI-VP finding in first quarterly judicial review order.*

CHECKLIST: INFANT AND TODDLER CARE*

A. Physical Health

1. Has the child received a comprehensive health assessment since entering foster care?

2. Are the child's immunizations complete and up-to-date for his or her age?

3. Has the child received a hearing and vision screen?

4. Has the child been screened for lead exposure?

5. Has the child received regular dental services?

6. Has the child been screened for communicable diseases?

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7. Does the child have a "medical home" where he or she can receive coordinated, comprehensive, continuous health care?

B. Developmental Health

1. Has the child received a development evaluation by a provider with experience in child development?

2. Are the child and his or her family receiving the necessary early intervention services, e.g., speech therapy, occupational therapy, educational interventions, family support?

C. Mental Health

1. Has the child received a mental health screening, assessment, or evaluation?

2. Is the child receiving necessary infant mental health services?

D. Educational/Childcare Setting

1. Is the child enrolled in a high-quality early childhood program?

2. Is the early childhood program knowledgeable about the needs of children in the child welfare system?

E. Placement

1. Is the child placed with caregivers knowledgeable about the social and emotional needs of infants and toddlers in out-of-home placements, especially young children who have been abused, exposed to violence, or neglected?

2. Do the caregivers have access to information and support related to the child's unique needs?

3. Are the foster parents able to identify problem behaviors in the child and seek appropriate services?

4. Are all efforts being made to keep the child in one consistent placement?

CHECKLIST: INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

1. Treat Interstate Compact on the Placement of Children (ICPC) cases as concurrent planning cases. W. Va. Code §§ 49-7-101, *et seq*. For example, direct the DHHR to pursue the ICPC process even when seeking to reunite the child and the parent.

2. Enter foster care orders immediately upon conclusion of placement hearings. The order must be included with the ICPC package.

3. Direct lawyers and CASA to promptly inform the court when interstate movement (e.g., placement with out-of-state relatives) is a possibility.

4. Direct the DHHR to give potential placement resources forms to the parents and other parties at the beginning of the court process, so they can provide required information for the agency to consider. Have these forms available at court as well.

5. Enter detailed ICPC orders once it is determined that interstate placement should be pursued.

   a. Determine if the case is a Regulation 7 (priority placement) case and, if so, immediately enter the order. If timelines are not met in Regulation 7 cases, take action by contacting the appropriate judicial officer in the receiving state.

   b. Set timelines for action by the DHHR office and by the state ICPC office (such as strict timelines for when DHHR caseworker must submit the ICPC packet to the West Virginia ICPC office).

   c. Establish a report-back mechanism so you know when actions have occurred. For example, identify a responsible party - prosecutor, caseworker, lawyer for child/parent - to check on ICPC progress at least 7 days prior to hearings and have that party file a report with the court, copying all parties/counsel.

   d. Schedule hearings for updates on progress of the ICPC no more than 30 days after it is determined that interstate placement should be pursued to:

      i. Determine status of home study by receiving state.

      ii. Determine education/medical/financial needs for child.

6. When ICPC progress slows, determine the cause and seek a solution.

a. Speak with the local caseworker and counsel for the parties in open court.

b. With the consent of all parties and counsel, or in an open process where they can participate:

i. Call your state ICPC office.

ii. Call the receiving state ICPC office.

iii. Call a local judge in the other state where child is going seek his/her help either informally (e.g., by calling local agency to inquire about reason for delay) or formally through available UCCJEA methods (see 8 below).

7. Obtain the contact information regarding 6b. above from the Supreme Court website for the receiving state, from the Conference of State Court Administrators ICPC contact list:

(http://cosca.ncsc.dni.us/statecourtpointsofcontact.html), or from the National Council of Juvenile and Family Court Judges (http://www.ncjfcj.org).

8. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies to child abuse and neglect proceedings in this state (W. Va. Code § 48-20-102(d)). Before calling a judge in the receiving state, check to verify that the receiving state also has UCCJEA (or UCCJA), and that the receiving state's version of the law applies to abuse and neglect cases. (Check most current Table of Jurisdictions at Part 1 of W. Va. Code, Chap. 48, art. 20, or Uniform Law Commission website at http://www.uniformlaws.org).

a. Make sure the judge in the other state understands that the UCCJEA (or UCCJA) applies.

b. Discuss the portions of the UCCJEA that apply to assistance one court may provide to the other and propose a method to get the placement delay resolved. See W. Va. Code § 48-20-112.

c. Also reference, if necessary, the federal Safe and Timely Interstate Placement of Foster Children Act (effective July 3, 2006) and the requirement that the home study must be completed by the receiving state in 60 days.

CROSS-REFERENCES

CODE

West Virginia Code §§ 49-7-101, *et seq.*; 48-20-111(a); 48-20-112(a)

RULES

Rule 14 (telephone conferencing)

Trial Court Rule 12.04 (fax filing)

Trial Court Rule 14.02 (videoconferencing)

ICPC Regulations

SPECIAL PROCEDURES

XI. Interstate Placements Proceedings

CHECKLIST: EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE*

I. GENERAL EDUCATION INFORMATION

A. Enrollment

1. Is the child or youth enrolled in school?

   -At which school is the child or youth enrolled?

   -In what type of school setting is the child or youth enrolled (e.g., specialized school)?

2. How long has the child or youth been attending his/her current school?

   -Where is this school located in relation to the child's or youth's foster care placement?

   -Were efforts made to continue school placement, where feasible?

* *Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed*, published by the National Council of Juvenile and Family Court Judges, Reno, Nevada, © 2005. Reproduced with permission from the National Council of Juvenile and Family Court Judges, Reno, Nevada.

3. If currently not in a school setting, what educational services is the child or youth receiving and from whom?

-Is the child or youth receiving homebound or home-schooled educational services?

-If Yes: Who is responsible for providing educational materials and what information is available about their quality?

-If Yes: How frequently are educational sessions taking place?

❒ What is the duration of each session? (e.g., how many hours?)

B. Provision of Supplies

1. Does the child or youth have appropriate clothing to attend school?

2. Does the child or youth have the necessary supplies and equipment (e.g., pens, notebooks, musical instrument) to be successful in school?

C. Transportation

1. How is the child or youth getting to and from school?

2. What entity (e.g., school, child welfare agency) is responsible for providing transportation?

D. Attendance

1. Is the child or youth regularly attending school?

2. Has the child or youth been expelled, suspended or excluded from school this year/ever?

-If Yes: How many times?

-Have proper due process procedures been followed for the expulsions, suspensions or exclusions from school?

-What was the nature/reason for the child's or youth's most recent expulsion, suspension or exclusion from school?

-How many days of school will the child or youth miss as a result of being expelled, suspended or excluded from school?

-If currently not attending school, what educational services is the child or youth receiving and from whom?

3. How many days of school has the child or youth missed this year?

-What is the reason for these absences?

-What steps have been taken to address these absences?

-Has the child or youth received any truancies, and if so, for how many days?

-Has the child or youth been tardy, and if so, for how many times?

E. Performance Level

1. When did the child or youth last receive an educational evaluation or assessment?

-How current is this educational evaluation or assessment?

-How comprehensive is this assessment?

2. At which grade level is this child or youth currently performing? [Is the child or youth academically on target?]

-Is this the appropriate grade level at which the child or youth should be functioning?

❒ If No: What is the appropriate grade level for this child or youth?

❒ Is there a specified plan in place to help this child or youth reach that level?

3. What is this child's or youth's current grade point average?

-If below average, what efforts are being made to address this issue?

4. Is the child or youth receiving any tutoring or other academic supportive services?

-If Yes: In which subjects?

II. TRACKING EDUCATION INFORMATION

1. Does this child or youth have a responsible adult serving as an educational advocate?

   -If Yes: Who is this adult?

   ❒ How long has this adult been advocating for the child's or youth's educational needs?

   ❒ How often does this adult meet with the child or youth?

   ❒ Does this adult attend scheduled meetings on behalf of the child or youth?

   -Is this adult effective as an advocate?

2. If there is no designated educational advocate, who ensures that the child's or youth's educational needs are being met?

   -Who is making sure that the child or youth is attending school?

   -Who gathers and communicates information about the child's or youth's educational history and needs?

   -Who is responsible for educational decision-making for the child or youth?

   -Who monitors the child's or youth's educational progress on an ongoing basis?

   -Who is notified by the school if the child or youth is absent (i.e., foster parent, social worker)?

   -Who could be appointed to advocate on behalf of the child or youth if his or her educational needs are not met?

III. CHANGE IN PLACEMENT/CHANGE IN SCHOOL

1. Has the child or youth experienced a change in schools as a result of a change in his or her foster care placement?

   -If Yes: How many times has this occurred?

   -What information, if any, has been provided to the child's or youth's new school about his or her needs?

-Did this change in foster care placement result in the child or youth missing any school?

❒ If Yes: How many days of school did the child or youth miss?

❒ Have any of these absences resulted in a truancy petition?

2. Were efforts made to maintain the child or youth in his or her original school despite foster care placement change?

IV. HEALTH FACTORS IMPACTING EDUCATION

A. Physical Health

1. Does the child or youth have any *physical* issues that impair his or her ability to learn, interact appropriately, or attend school regularly (e.g., hearing impairment, visual impairment)?

-If Yes: What is this physical issue?

❒ How is this physical issue impacting the child's or youth's education?

❒ How is this need being addressed?

B. Mental Health

1. Does the child or youth have any *mental health* issues that impair his or her ability to learn, interact appropriately, or attend school regularly?

-If Yes, what is this mental health issue?

❒ How is this mental health issue impacting the child's or youth's education?

❒ How is this need being addressed?

2. Is the child or youth currently being prescribed any psychotropic medications?

-If Yes: Which medications have been prescribed?

❒ Has the need for the child or youth to be taking this medication been clearly directly explained to him or her?

❒ How will this medication effect the child's or youth's educational experience?

C. Emotional Issues

1. Does the child or youth have any *emotional* issues that impair his or her ability to learn, interact appropriately, or attend school regularly?

-If Yes: What is this emotional issue?

❒ How is this emotional issue impacting the child's or youth's education?

❒ How is this need being addressed?

2. Is the child or youth experiencing any difficulty interacting with other children or youth at school (e.g., Does the child or youth have a network of friends? Has he or she experienced any difficulty with bullying?)

-If Yes: What is being done to address this issue?

D. Special Education and Related Services Under IDEA and Section 504

1. If the child or youth has a physical, mental health or emotional disability that impacts learning, has this child or youth (birth to age 21) been evaluated for Special Education/Section 504 eligibility and services?

-If No: Who will make a referral for evaluation or assessment?

-If Yes: What are the results of such an assessment?

❒ Have the assessment results been shared with the appropriate individuals at the school?

2. Does the child or youth have an appointed surrogate pursuant to IDEA (e.g., child's or youth's birth parent, someone else meeting the IDEA definition of parent, or an appointed surrogate parent)?

-If No: Who is the person that can best speak on behalf of the educational needs of the child or youth?

-Has the court used its authority to appoint a surrogate for the child or youth?

-Has the child's or youth's education decision-maker been informed of all information in the assessment and does that individual understand the results?

3. Does this child or youth have an Individualized Education Plan (IEP)?

-If Yes: Is the child's or youth's parent or caretaker cooperating in giving IEP information to the appropriate stakeholders or signing releases?

-Is this plan meeting the child's or youth's needs?

-Is the child's or youth's educational decision-maker fully participating in developing the IEP and do they agree with the plan?

4. Does this child or youth have a Section 504 Plan?

-If Yes: Is this plan meeting his or her needs?

-Is there an advocate for the child or youth participating in meetings and development of this plan?

V. EXTRACURRICULAR ACTIVITIES AND TALENTS

1. What are some identifiable areas in which the child or youth is excelling at school?

2. Is this child or youth involved in any extracurricular activities?

-If Yes: Which activities is the child or youth involved in?

❒ Are efforts being made to allow this child or youth to continue in his or her extracurricular activities (e.g., provision of transportation, additional equipment, etc.)?

3. Have any of the child's or youth's talents been identified?

-If Yes: What are these talents?

❒What efforts are being made to encourage the child or youth to pursue these talents?

VI. TRANSITIONING

1. Does the youth have an independent living plan?

-If Yes: Did the youth participate in developing this plan?

-Does this plan reflect the youth's goals?

-If Yes: Does the plan include participation in Chafee independent living services?

-Does this plan include vocational or post-secondary educational goals and preparation for the youth?

2. Is the youth receiving assistance in applying for post-secondary schooling or vocational training?

3. Is the youth being provided with information and assistance in applying for financial aid, including federally-funded Education and Training Vouchers (see Chafee Foster Care Independence Program)?

4. If the youth has an IEP, does it address transition issues?

-If Yes: What does this transition plan entail?

-Did the youth participate in developing the transition plan?

-Is this transition plan coordinated with the youth's independent living plan?

Practice Tip: When appropriate, consider addressing these questions directly to the children and youth.

See Rules 28, 41 and 42.

CHAPTER 3:
OVERVIEW OF CHILD ABUSE AND NEGLECT PROCEEDINGS

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I. INTRODUCTION

The guiding purpose of child abuse and neglect laws is to provide a safe, stable, and permanent home for abused and neglected children. W. Va. Code § 49-1-105. In furtherance of this purpose, the Rules of Procedure for Child Abuse and Neglect Proceedings (hereinafter "the Rules" or "Rule ____.") are intended to provide: 1) a fair and timely disposition of child abuse and neglect cases; 2) judicial oversight of case planning; 3) a coordinated decision-making process; 4) a reduction of unnecessary delays in case management; and 5) encouragement of involvement of all parties in the litigation as well as the involvement of all community agencies and resource personnel providing services to any party.

Child abuse and neglect proceedings are divided into five main stages:

1. **Petition**: The child abuse and neglect proceeding generally commences with the filing of a petition alleging abuse and neglect. An emergency removal of the child may precede the petition;

2. **Preliminary hearing**: The preliminary hearing is typically the first hearing held in a child abuse and neglect proceeding. The court will consider whether it should commit (or continue, if an emergency removal occurred) the child to the temporary custody of the Department of Health and Human Resources ("the Department") or some responsible person; and may consider, if requested, whether to grant a pre-adjudicatory improvement period for the parents or custodians;

3. **Adjudicatory hearing**: At the adjudicatory hearing the court determines whether the child was abused or neglected based upon the allegations in the petition. If abuse or neglect is found, the court may commit (or continue if an emergency removal occurred) the child to the temporary custody to the Department or a responsible person; and may consider a request for a post-adjudicatory improvement period for the parents or custodians;

See Special Procedures Section X. for a discussion of pre-petition proceedings relating to child abuse and neglect matters.

4. **Disposition hearing**: At the disposition hearing, the court determines the proper disposition of a child who has been adjudged abused and neglected. The court may find that any previous improvement period has been successful and dismiss the petition, the court may grant a request for a dispositional improvement period; or the court may terminate parental rights and begin implementing a permanency plan that does not involve reunification;

5. **Permanency Hearing**: The purpose of the permanency hearing is to determine the permanent placement and plan for the child; and

6. **Permanent Placement Review**: The court will continue to regularly monitor the child's progress with quarterly reviews until the child is permanently placed.

Child abuse and neglect cases have priority over all civil proceedings, except for domestic violence proceedings and trials already in progress. W. Va. Code § 49-4-601(j). Upon the filing of a petition before the circuit court, a hearing must be docketed immediately. W. Va. Code § 49-4-601. Under no circumstances shall an abuse and neglect proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other related proceeding, including, but not limited to, criminal proceedings arising from the allegations of abuse or neglect. Rule 5.

With regard to the procedure for abuse and neglect cases, the West Virginia Supreme "has insisted that the directives of applicable rules and legislative enactments must be carefully identified, respected, and incorporated within our court system." *In re Edward B.*, 558 S.E.2d 620, 631 (W. Va. 2001). Furthermore, "[t]he Rules of Procedure for Child Abuse and Neglect Proceedings and the related statues detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children." *Id.*

II. JURISDICTION

It is well settled that jurisdiction for abuse and neglect proceedings lies in the circuit courts. Syl. Pt. 3, *State ex rel. Paul B. v. Hill*, 496 S.E.2d 198 (W. Va. 1997). While a case is pending, the circuit court retains exclusive jurisdiction over the child's placement. Rule 6. The court also retains jurisdiction over subsequent requests for modification, including any changes in permanent placement or requests for visitation. The two circumstances in which a circuit court would not retain jurisdiction over subsequent placements of a child include the following: 1) the case is dismissed for failure to state a claim under Chapter 49; or 2) the child's legal

and physical custody is returned to the child's cohabitating parents and the court had not entered an order regarding visitation or child support. In those circumstances, any future child custody, visitation or child support action may be brought in family court. Rule 6.

III. EMERGENCY CUSTODY

A. Pre-Petition Removal

If a child in the presence of a child protective services worker is in imminent danger to the physical well-being of the child (as defined in W. Va. Code § 49-1-201), and if the worker has probable cause to believe the child will suffer additional abuse or neglect or will be removed from the county before petition can be filed, the worker may take the child into his or her custody prior to filing a petition. W. Va. Code § 49-4-303. If this pre-petition action is taken, the worker must "forthwith" appear before a circuit judge or a juvenile referee (a magistrate appointed by the circuit court) and apply for an order ratifying the emergency custody.

The application should be made to the judge or referee in the county where custody was taken. If neither a judge nor a referee can be located, the worker may apply to a judge or referee in an adjoining county. The application must set forth facts sufficient to support a probable cause finding. In the event the emergency taking is ratified by a juvenile referee, the referee must obtain oral confirmation from the circuit court or an adjoining circuit court, which must then enter an order of confirmation on the next judicial day.

If the court or referee ratifies custody, the child may remain with the Department no longer than two judicial days unless a petition is filed and the court awards temporary custody as discussed below. W. Va. Code § 49-4-303.

B. Post-Petition Removal

Rule 16 establishes procedural protections that address circumstances when the Department, without a court order, takes physical custody of a child while a child abuse and neglect case is pending. Even if the Department has been previously granted legal custody of the child, it must immediately notify the court when it takes physical custody of (or removes) the child without a court order. In turn, the court must conduct a hearing within ten days to determine whether there is imminent danger to the physical well-being of the child and whether there is no reasonably available alternative to removal of the child. Rule 16(d).

C. Required Findings for Removal Order

Any court order that authorizes the removal of the child from his or her home must include case-specific findings concerning the following:

1. There is reasonable cause to believe that the child is in imminent danger;

2. Continuation in the home is contrary to the welfare of the child;

3. Whether the Department made reasonable efforts to preserve the family or that an emergency situation made such efforts unreasonable or impossible; and

4. What efforts, if any, should be made to return the child to his or her home. Rule 16(e).

IV. FILING A PETITION

A. Petitioners

Either the Department or a reputable person may file a petition based upon a belief that a child is abused or neglected. W. Va. Code § 49-4-601(a). The petition must be verified by a credible person who has knowledge of the facts. W. Va. Code § 49-4-601; Rule 17(a).

B. Co-Petitioners

Two or more parties, including the Department and a non-abusing parent, may consent to bring a petition as co-petitioners against an allegedly abusive and neglectful parent. Rule 17(a). Rule 25a(e) of the Rules for Domestic Violence Proceedings indicates that a petitioner in a domestic violence protective order proceeding may also appear as a co-petitioner in a child abuse and neglect case, as long as both the petitioner and the Department agree. Although Rule 25a(e) identifies a petitioner in a domestic violence proceeding as a possible co-petitioner, this rule provides that it should not be construed to require a petitioner in a domestic violence case to appear as a co-petitioner in a child abuse and neglect case. Similarly, Rule 25a(e) further provides that it should not be construed to prevent a petitioner in a domestic violence case from filing an abuse and neglect petition if the Department does not do so.

Similar to Rule 25a(e) of the Rules for Domestic Violence Proceedings, Rule 13(b) of the Rules for Minor Guardianship Proceedings provides that a petitioner in a minor guardianship case may be allowed to appear as a co-petitioner in an abuse and neglect case, if both the Department and the minor guardianship petitioner agree. However, the minor guardianship

petitioner may, but is not required to, appear as a co-petitioner with the Department.

When co-petitioners bring a petition, each party shall indicate which of the allegations that he or she is verifying. When a co-petitioner is a parent, he or she shall be appointed counsel who is separate from the prosecuting attorney. Rule 17(a).

After an initial abuse and neglect petition is filed, the Department, a parent or other reputable person may move to be joined as a co-petitioner. Rule 17(a). If allegations of abuse and neglect arise against a co-petitioner while a case is pending, the court may amend the petition and realign the parties. Rule 19(c).

C. Venue

Either a reputable person or the Department may file an abuse and neglect petition in the county where the child normally resides. W. Va. Code § 49-4-601(a); Rule 4a. If the Department is the petitioner, the petition may be filed where the abuse and/or neglect occurred or where the custodial respondent or other respondents reside. However, a party may not file petitions in more than one county based upon the same set of facts. W. Va. Code § 49-4-601(a); Rule 4a.

D. Contents of the Petition

A child abuse and neglect case is formally commenced with the filing of a verified petition. Rule 17(a). The petition must contain the following:

1. **Specific allegations of misconduct:** The petition should allege how the misconduct comes within the statutory definition of abuse and/or neglect. Rule 18(a), (c); W. Va. Code § 49-4-601(b); see also W. Va. Code § 49-1-201 (definitions relating to child abuse and neglect). In addition to the statutory references, the petition should allege specific conduct, including the time and place of the misconduct or whether the person responsible for the care of the child is incapacitated. Rule 18(c); W. Va. Code § 49-4-601(b). The petition should also contain a description of any supportive services already provided by the State to remedy the circumstances. W. Va. Code § 49-4-601(b); Rule 18(c);

2. **Description of children:** The petition should also contain a description of all the children in the home or temporary care of the offending parents or custodians, including children who are not alleged to be abused or neglected. W. Va. Code § 49-4-602(a); Rule 18(b). This information should include, the name, age, sex, and the current location of the children. The petition need not include the

location if disclosing the location would endanger the children or seriously risk disruption of the current placement following an emergency removal;

3. **The relief sought:** The petition should state the relief sought, such as temporary custody (W. Va. Code § 49-4-601) and any disposition permitted by West Virginia Code § 49-4-604, including the termination of parental rights. Rule 18(d); and

4. **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA):** The petition or attached affidavit should contain the information required by the UCCJEA. W. Va. Code § 48-20-209; Rule 18(e).

This information required by the UCCJEA includes the children's current residence, the children's residences for the last five years, and the names and current addresses for persons with whom the children have lived for the last five years. Additionally, the petition should include information, if known, about any court proceeding that concerns custody, visitation, any domestic violence proceedings affecting the children, termination of parental rights and adoption of the children. Further, the petition should identify any person, including any known address, who is not a party to the proceeding but has physical custody of the children or who claims legal rights to custody or visitation. W. Va. Code § 48-20-209(a). If the disclosure of any of this required information would jeopardize the safety of a party or a child, the court may seal the information in the court file upon the submission of an affidavit. W. Va. Code § 48-20-209(e).

The court must ensure that the facts in the petition are sufficiently specific; and the sufficiency of each petition should be judged individually. *State v. Scritchfield*, 280 S.E.2d 315 (W. Va. 1981) (holding that a petition is insufficient when it only alleges one fact: that the mother had been a mental patient from time to time). Mere conclusions alone are insufficient. One reason for the specificity requirement is to provide notice to the offending parents or custodians, thus, allowing them an opportunity to defend the factual allegations. See *Moore v. Munchmeyer*, 197 S.E.2d 648 (W. Va. 1973).

E. Amendments to Petition

The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment. Rule 19(a). If the petition is amended after the conclusion of a preliminary hearing in which custody has been temporarily transferred to the Department or a responsible person, another preliminary hearing is not required. Rule 19(d). If new allegations of abuse and/or neglect arise after the final adjudicatory hearing, the

allegations should be included in an amended petition, as opposed to filing another petition in a new case. When a petition is amended in this manner, the adjudicatory hearing must be re-opened for the purpose of hearing evidence on the new allegations. Rule 19(b).

F. Initial Order

The initial order entered upon the filing of a petition must address:

1. First Hearing Date

The court must set an initial hearing date when the petition is filed. W. Va. Code § 49-4-601; Rule 20. If the court orders a temporary placement at the time of the filing of the petition, a preliminary hearing must be initiated within ten days. W. Va. Code § 49-4-602(a); Rule 22. Even if a transfer of custody is not made at the time the petition is filed, the court may set a preliminary hearing if facts alleged in the petition indicate existing imminent danger. Rule 20; W. Va. Code § 49-4-602(b). In any event, the court must give the respondents at least five days actual notice of the preliminary hearing. Rule 20; W. Va. Code § 49-4-602(b). If a preliminary hearing is not held, the adjudicatory hearing should be set to commence within 30 days of the filing of the petition. Rule 25. The court may grant a continuance for a reasonable period of time upon a showing of good cause, provided that the reasons for finding good cause are stated in the order. Rule 7.

2. Appointment of Counsel

The initial order must include appointment of counsel for the child. W. Va. Code § 49-4-601(f). The parents, legally established custodians or persons standing in *loco parentis* to the child also have a right to be represented by counsel in any child abuse and neglect proceeding. The order should provide, consistent with the statute, that the appointed representation will only continue after the first hearing if the represented party submits a financial affidavit showing an inability to pay for services of counsel. W. Va. Code § 49-4-601(f).

Counsel for other parties should only be appointed upon request and upon the filing of a qualifying financial affidavit. W.Va. Code § 49-4-601(f).

In no circumstance shall a lawyer represent both the child and any of the parents or custodians. A lawyer may represent multiple parents or custodians only if the parties consent to the multiple representations after full disclosure and consultation by the lawyer regarding possible conflicts. The lawyer must also assure the court

that his or her professional judgment will not be impaired during the representation of multiple clients. However, a parent who is a co-petitioner is entitled to his or her own attorney. One lawyer may represent multiple children in the same matter. W. Va. Code § 49-4-601(f).

Pursuant to West Virginia Code § 49-4-601(a) and Rule 17, an individual may serve as a co-petitioner with the Department, provided that both parties consent. When a parent has been named as a co-petitioner with the Department, he or she is entitled to the appointment of his or her own counsel, separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

Counsel appointed for any of the parties must complete at least eight hours of CLE training per each two-year reporting period on child abuse and neglect procedure and practice. Any attorney appointed to represent a child must first complete training on representing children that has been approved by the Supreme Court Administrative Office. If no attorney is available who has completed the required training, the court may appoint a competent attorney who has demonstrated knowledge of child welfare law. W. Va. Code § 49-4-601(g).

3. Appointment of CASA

In the areas of the State where a Court-Appointed Special Advocate (CASA) Program is functioning, the court may appoint a CASA representative to advocate for the child. If a CASA representative is appointed, the court should provide him or her with a copy of the petition and the notice of the first hearing. Rule 20. The CASA representative shall by such appointment have access to information and court filings, receive notice of hearings and copies of orders, and be afforded the right to be heard. Rules 3(o) and 52.

4. Temporary Custody

The court may order the temporary transfer of custody to the Department or a responsible person based solely on the facts alleged in the petition. W. Va. Code § 49-4-602. The transfer of custody may only be ordered if the Court makes the following specific findings:

a. **Imminent danger**: The court must find that there exists imminent danger to the physical well-being of the child (See W. Va. Code § 49-1-201); *and*

b. **No reasonable alternatives**: The court must also find that no reasonable alternatives to removal exist. Some reasonable alternatives that the court may consider are medical, psychological, psychiatric, family preservation, or homemaking services in the child's present custody setting.

When the court makes a determination granting temporary custody based on the petition, it must not allow placement of the child in the household of the alleged abusing person, unless there is a judicial order precluding the offending person from residing in or visiting the home. A preliminary hearing must be initiated within ten days of the continuation (see Preliminary Hearing Section below) or transfer of out-of-home custody. Rule 22. Even if the allegations of abuse or neglect do not pertain to some of the children in the home, the court should also remove those children if the court finds they are in imminent danger and there are no reasonable alternatives to removal. W. Va. Code § 49-4-602(a).

When the court orders the temporary change of custody of a child based on the facts alleged in the petition, the order must also contain findings:

a. That continuation in the home is contrary to the best interest of the child, and why; and

b. Whether or not the Department made reasonable efforts to prevent the placement, or that an emergency situation exists making such efforts unreasonable or impossible, or that reasonable efforts were not required due to certain aggravating circumstances specified by statute. See W. Va. Code §§ 49-4-105; 49-4-602(d).

The order may also contain a direction to the Department or any other person to become involved in the process in order to facilitate the reunification of the family. W. Va. Code § 49-4-602(a).

5. Visitation While Case is Pending

If the court transfers custody of the children in the initial order, it may grant or deny visitation or other contact in a manner consistent with the child's best interest and well-being. The person requesting visitation or other contact, such as telephone or video calls, e-mail or other communication, shall inform the court of her or his relationship with the child and the amount of previous contact with the child. If the court orders supervised visitation, the court should consider the child's age, condition, and whether the surroundings are a safe, dignified and otherwise suitable place for visitation. When siblings

For a discussion of post-termination visitation, see Overview Section XIII. Post-Termination Visitation.

are placed separately, visitation between siblings should continue and a plan for regular contact should be implemented, unless the court finds that the visitation and contact is not in the child's best interests. Rule 15.

In addition to visitation that is requested pursuant to Rule 15, the circuit court has jurisdiction to address requests for grandparent visitation if an abuse and neglect petition concerning the same child or children is pending. W. Va. Code §§ 48-10-401(c) and 402(d). Otherwise, petitions or motions for grandparent visitation fall within the family court's jurisdiction.

G. Answer

An adult respondent must file and serve a verified answer upon the petitioner and his or her counsel no later than ten days after being personally served with the petition. Rule 17(b). A respondent who is served by publication or other substituted service shall file his or her answer within the time allowed for such substituted service. Although a respondent is required to file an answer, the petition shall not be taken as confessed. Rule 17(a). It is not necessary, however, to continue a preliminary hearing when an answer has not been filed or served. Rule 17(b).

V. PRELIMINARY HEARING

A. When Held

If the court orders the child or children to be temporarily removed from parental custody at the time the petition is filed, a preliminary hearing must be initiated within ten days. W. Va. Code § 49-4-602; Rule 22(a). If a transfer of custody is not ordered at the time the petition is filed, the court *may* schedule a preliminary hearing if facts alleged in the petition indicate imminent danger to a child. W. Va. Code § 49-4-602(b).

B. Notice

Notice of the preliminary hearing date, time, and place must be served upon on the following parties and persons entitled to notice and a right to be heard: known parents, any other custodian, any foster or preadoptive parent, any relative providing care for the child, the Department, and any CASA representative who has been appointed. Rules 3(o) and 20. Notice at least five days in advance of the hearing is required. Rule 20. The computation of the time periods shall be in accordance with Rule 6(a) of the West Virginia Rules of Civil Procedure. Rule 7.

The respondents should be served in person if such service is readily obtained. If personal service is not reasonably obtainable, then a

respondent may be served by certified mail, addressee only, return receipt requested directed to the last known address. In either case, service should include the notice of hearing and a copy of the petition. If the party cannot be served by personal service or certified mail, the party may be served by publication (Class II legal advertisement). W. Va. Code § 49-4-601(e).

C. Temporary Custody

In general, the court should consider at the preliminary hearing whether to order (or continue) a temporary transfer of custody. If the court finds that the child is in imminent danger at the preliminary hearing, it may order temporary custody of the child to the Department or to another responsible person. W. Va. Code § 49-4-602(b). At the conclusion of the preliminary hearing, the court must determine the following:

1. Whether there is reasonable cause to believe that the child is in imminent danger;

2. Whether continuation in the home is contrary to the welfare of the child, and the reasons for this determination;

3. (a) Whether the Department made reasonable efforts to preserve the family and to prevent the removal of the child (and what efforts were made); or (b) Because an emergency situation existed, such efforts were unreasonable or impossible; or (c) That reasonable efforts were not required due to aggravating circumstances. W. Va. Code §§ 49-4-105; 49-4-602(d);

4. Whether the Department made reasonable accommodations in accordance with the Americans with Disabilities Act to disabled parents to allow them meaningful access to reunification and family preservation services. W. Va. Code § 49-4-602(b); and

5. What efforts, if appropriate, should be made by the Department to facilitate the child's return to the home. W. Va. Code § 49-4-602(b); Rule 3(g). (See also Special Procedures Chapter 4.)

The court may transfer the temporary custody of the child for up to 60 days (or longer when an improvement period is granted). W. Va. Code § 49-4-602(b).

D. Waiver or Stipulation of Preliminary Hearing

An adult respondent may waive his or her right to a preliminary hearing or stipulate to certain matters set forth in the petition, such as whether the child

was in imminent danger. Before a court may accept such a waiver or stipulation, it must determine that the parties and persons entitled to notice and a right to be heard understand and voluntarily consent to the waiver or stipulation. Additionally, the court must conclude that the waiver or stipulation meets the purpose of the governing rules and statutes and is in the child's best interests. The court must resolve any objection to a waiver or stipulation raised by a party or a person entitled to notice and an opportunity to be heard. The preliminary hearing order must include the waiver or any specific stipulations. Rule 22(c).

E. Other Matters

The court may order an improvement period consistent with West Virginia Code § 49-4-610(1) (pre-adjudicatory improvement period). The court may also require a party to pay child support. (See Special Procedures Chapter 4.) The court must require the parents to complete necessary financial forms to determine whether they are entitled to appointed counsel, the amount of any child support obligation, and Title IV-D and IV-E eligibility. Rule 17(c)(5). The circuit court may not transfer or remand the case or a portion of it to the family court for the entry of a support order. Syl. Pt. 3, *DHHR v. Smith*, 624 S.E.2d 917 (W. Va. 2005). Unless waived by the parties, the court shall make a transcript of the proceeding. The rules of evidence apply to all hearings in child abuse and neglect cases, including preliminary hearings. W. Va. Code § 49-4-601(k).

VI. MULTIDISCIPLINARY TREATMENT TEAMS

A. Convening MDTs

A multidisciplinary treatment team (MDT) must be convened within 30 days after the petition is filed. Rule 51; W. Va. Code § 49-4-405. Rule 51 refers to the court causing an MDT to be convened, and West Virginia Code § 49-4-405 refers to the Department convening an MDT. The practical way to interpret these two provisions is that the Department case manager should convene the MDT. However, the court should provide any necessary assistance or oversight to ensure that an MDT is convened. For example, the court could include the dates for MDT meetings in an order. In addition, any case manager for a child or family may obtain an order from the court to schedule a meeting and to direct attendance at a meeting. W. Va. Code § 49-4-403(b).

B. Multidisciplinary Treatment Team Members

The MDT shall include the following individuals:

1. The child or family's case manager in the Department;

2. The child's parents or guardians;

3. Any co-petitioner;

4. Any adult respondent;

5. The attorneys representing any of the parties;

6. The child, unless the team determines that the child's participation is inappropriate (Rule 8(d));

7. The child's counsel or guardian *ad litem*;

8. The prosecuting attorney, or his or her designee;

9. A member of a child advocacy center (If a child has been processed through one of the center's programs, a representative from the center shall be included; otherwise, a representative is included when appropriate);

10. An appropriate school official;

11. Any other agency, person or professional who may be helpful to the MDT's efforts, such as any CASA representative, a domestic violence service provider or any other service providers; and

12. Foster parents, preadoptive parents, or custodial relatives providing care for the child. Rules 3(o) and 51; W. Va. Code § 49-4-405.

If a party's parental rights have been terminated, that party and his or her counsel, unless otherwise ordered by the court, should not be given notice of any MDT meeting and do not have the right to participate in an MDT meeting. W. Va. Code § 49-4-405(b).

Members may participate by telephone or video conferencing. W. Va. Code § 49-4-403(b). Each team director must keep records of attendance and case discussions for each meeting. W. Va. Code § 49-4-407. The Department may designate a person, other than the case manager, to facilitate a treatment team meeting.

C. Use Immunity for Statements

To facilitate the development of case plans for children and families, the Legislature has provided use immunity for subsequent criminal prosecutions, with the exception of prosecutions for perjury or false

swearing, if a respondent or co-petitioner admits any underlying allegations of abuse or neglect in a multidisciplinary treatment team meeting. W. Va. Code § 49-4-405(e). This statutory provision was designed to address the Supreme Court's observation that the immunity provided to adult respondents for court-ordered examinations under various statutes would **not** extend to statements made during MDT meetings. *In re Daniel D.*, 562 S.E.2d 147, 159 (W. Va. 2002). Subsection (e) has, therefore, modified *Daniel D.* with regard to statements made during MDT meetings.

D. Purpose of Multidisciplinary Treatment Teams

The purpose of the MDT is to assess, plan, implement, and monitor a comprehensive, individualized service plan for children in abuse and neglect proceedings. W. Va. Code § 49-4-405. See also W. Va. Code § 49-1-207. The MDT will be involved throughout the circuit court proceedings until permanency is achieved for the child, and it should assist the court with quarterly status review hearings. W. Va. Code § 49-4-110. The duties of the multidisciplinary treatment team shall not be abrogated by an adoption review committee or other administrative process of the Department. Rule 51(c). MDT recommendations and reports are most often reviewed by the court at status conferences held during improvement periods, at disposition, and at permanent placement review conferences.

If the MDT provides the court with a recommended service plan prior to disposition (W. Va. Code § 49-4-403(b)), the court must review the service plan to determine if its implementation is in the child's best interests. If the court decides not to adopt the plan or the members cannot agree on a plan, it must hold a hearing within ten days of such determination to hear from the MDT regarding its rationale for a proposed plan or any objections. If the court does not accept the plan, it must make specific written findings as to why the MDT's recommended service plan was not adopted. W. Va. Code § 49-4-404. An MDT recommendation (and any resulting hearing under the circumstances just discussed) is not required for any temporary out-of-home placement in an emergency circumstance or for assessment purposes. W. Va. Code § 49-4-412. See also Overview Section X. Child and Family Case Plans.

VII. IMPROVEMENT PERIODS

A court may order an improvement period during the proceeding. W. Va. Code § 49-4-610. The purpose of an improvement period is to give a respondent the opportunity to rectify the circumstances that gave rise to the child abuse or neglect proceeding. Improvement periods may be custodial or non-custodial. However, if the child was removed from his or her home because of imminent danger, the child should remain in an out-of-home placement "until the circumstances which constitute the imminent danger have ceased to exist or the alleged abusing person has been precluded

from residing in or visiting the home." Syllabus, in part, *In the Interest of Renae Ebony W.*, 452 S.E.2d 737 (W. Va. 1994). See also Syl. Pt. 2, *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988).

When any improvement period is granted, the burden of initiation and completion of all its terms rests with the respondent seeking the improvement period. The court may, however, direct the Department to pay expenses associated with the services provided if the respondent is unable to bear the costs. W. Va. Code § 49-4-610(4). The respondent will generally be required to execute a release of all medical information, to permit access to such records by the Department and counsel. W. Va. Code § 49-4-610(4). Finally, the Department is required to monitor the progress of the respondent during the improvement period, and report to the court any failures to comply. If such failure is substantiated, the court should forthwith terminate the improvement period. W. Va. Code § 49-4-610(7).

Although the Court may grant different types of improvement periods and extensions as discussed below, any combination of improvement periods should not result in a child remaining in foster care more than 15 of the most recent 22 months. W. Va. Code § 49-4-610(9). The reason for this limitation is to ensure compliance with federal guidelines established by the Adoption and Safe Families Act. However, a court may allow this time limit to be extended if it finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to do so. W. Va. Code § 49-4-610(9). See also W. Va. Code § 49-4-605.

A. Pre-adjudicatory Improvement Periods

At any time between the filing of the petition and an adjudication, the court may grant a respondent a pre-adjudicatory improvement period. The improvement period may only be granted after the respondent files a written motion requesting the improvement period and upon the demonstration by the respondent, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. Further, the court must set forth on the record the terms of the improvement period. The improvement period may last no longer than three months.

Any order granting an improvement period must provide, in addition to those items mentioned above:

1. That the Department submit a family case plan within 30 days; and

2. That a status conference be held within 60 days; or

3. That the Department submit a written progress report within 60 days, in which case a status conference must be held within 90 days. W. Va. Code §§ 49-4-610(1); 49-4-110; Rule 23.

The MDT must attend the status conference and report as to progress and developments in the case. The court may also require or accept reports or statements from other persons. The court may, at any time prior to its completion, revoke the improvement period upon the motion of any party if the respondent has failed to comply with its terms or if the parties show an inability to remediate the circumstances that gave rise to the abuse and neglect. Rule 23; W. Va. Code § 49-4-610(7).

B. Post-adjudicatory Improvement Periods

The court may order an improvement period after a final adjudicatory hearing provided that the findings required for a pre-adjudicatory improvement period (see above) are made, and that the order contains the same provisions as those required for a pre-adjudicatory improvement period. Additionally, the court must find that the respondent has not previously been granted an improvement period, or that since the initial improvement period there has been a substantial change in circumstances that would render it likely that the respondent will participate in a further improvement period. W. Va. Code § 49-4-610(2); Rule 37.

The post-adjudicatory improvement period may be for up to six months. An extension of up to three additional months may be granted by the court based upon findings that: the respondent has substantially complied with the improvement period; that continuation will not substantially impair the ability of the Department to permanently place the child; and that an extension is in the best interest of the child. W. Va. Code § 49-4-610(2) and (6).

During a post-adjudicatory improvement period, the Department may proceed with reasonable efforts to place the child for adoption or with a legal guardian or to find other permanent placement. Rule 37. The development of a concurrent plan is considered to be in a child's best interests. Syl. Pt. 5, *In re Billy Joe M.*, 521 S.E.2d 173 (W. Va. 1999).

A hearing is to be held at the end of an improvement period, and it must be conducted no more than 30 days after the conclusion or termination of an improvement period. W. Va. Code § 49-4-610(8).

C. Disposition Improvement Periods

The court may grant an improvement period as a disposition. The required findings, order provisions, and time frames are identical to a post-adjudicatory improvement period. W. Va. Code § 49-4-610(3). Within 30

days after the end of the improvement period, the court must conduct a hearing to determine the final disposition of the case. Rule 38; W. Va. Code § 49-4-610(8).

D. Timing

The hearings scheduled in relation to an improvement period may only be continued for good cause. The party seeking the continuance must file a written motion and serve the motion on all parties. If the court grants such a continuance, the order must state the future date when the hearing will be held. W. Va. Code § 49-4-610(8)(A). The hearing held at the end of the improvement period should be held as close to the end of the period as possible. In no circumstances should the hearing at the end of the improvement period be held more than 30 days after the termination of the improvement period. W. Va. Code § 49-4-610(8)(B); Rule 38.

VIII. QUARTERLY STATUS REVIEW HEARINGS

West Virginia Code § 49-4-110[5] requires a circuit court to conduct status review conferences for each child in foster care on a quarterly basis commencing three months from the date a child is placed the Department's custody. The purpose of the hearing is to review the following issues: the safety of the child, whether continued placement is necessary and appropriate, compliance with the case plan, the progress towards remedying the conditions of abuse and neglect, and the likely date for reunification, placement in an adoptive home, in a legal guardianship, or other appropriate permanent placement. W. Va. Code § 49-4-110(a). Although the court is required to conduct these reviews, a court may conduct them in conjunction with other required hearings, such as a status review during an improvement period or a permanent placement review conference. W. Va. Code § 49-4-110(d); Rule 54. See also W. Va. Code §§ 49-4-610(1)-(3); Rules 23, 37 and 39.

This quarterly review requirement applies to both children and to "transitioning adults." Pertinent to abuse and neglect proceedings, the term "transitioning adult" means individuals who have reached the age of 18 but are under 21 years of age, and have entered into a contract with the Department to continue in an educational, training or treatment program which was initiated prior to the individual's 18th birthday. W. Va. Code § 49-1-202; Rule 54. Although the statute (W. Va. Code § 49-4-110(b)) refers to a transitioning adult who remains in foster care, the incorporating reference to the definition in Section 49-1-202 makes it clear that it applies to a transitioning adult who is in the legal and/or physical custody of the

[5] Although this statute, West Virginia Code § 49-4-110, applies to children, juveniles or transitioning adults who are in the Department's custody as a result of an abuse and neglect case or a juvenile case, the discussion above focuses on abuse and neglect cases.

Department at the time he or she turns 18, and, for example, is participating in a residential treatment program or is attending school under an independent living arrangement. The court's duty to conduct such reviews will end when permanency is achieved or when the individual turns 21.

IX. ADJUDICATORY HEARING

The purpose of the adjudicatory hearing is to allow the parties to present evidence to support or refute the allegations of abuse and neglect.

All parties must be provided a meaningful opportunity to be heard. This includes the right to present and cross-examine witnesses. Unless waived, a transcript shall be made available to all the parties. The rules of evidence apply to final adjudicatory hearings. W. Va. Code § 49-4-601(h) and (k). Foster parents, preadoptive parents, and relative caregivers shall also be afforded a meaningful opportunity to be heard.

At the conclusion of the hearing, the court must determine whether the child is abused or neglected as defined by West Virginia Code § 49-1-201. If applicable, the court may find that a parent, guardian, or custodian of the child is a battered parent or is a non-abusing parent. W. Va. Code §§ 49-1-201; 49-4-601(i). The court's findings must be based on clear and convincing proof that the conditions supporting the petition existed at the time the petition was filed. W. Va. Code § 49-4-601(i); Rule 25. *See also Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982) (Due process requires clear and convincing evidence before termination of parental rights). After an adjudicatory hearing, a parent or custodian may appeal an adverse ruling. W. Va. Code § 49-4-601(k).

A. Hearing Time Frames

If the child was previously placed in the temporary custody of the Department or a responsible person without an improvement period having been awarded to a respondent, the hearing must be held within 30 days of the temporary custody order entered following the preliminary hearing. If a pre-adjudicatory improvement period was granted, the hearing must be held within 30 days after the end of the improvement period. W. Va. Code § 49-4-601(j); Rule 25. If no temporary custody was ordered, the hearing must be held within 30 days after the filing of the petition. Rule 25.

B. Order

Upon conclusion of the adjudicatory hearing, the court must enter an order of adjudication containing findings of fact and conclusions of law. The order must be entered within ten days of the conclusion of the hearing. Rule 27. Provided that the court found that child was an abused or neglected child, the order must require the Department to compile the child's case plan,

which includes a permanency plan. W. Va. Code § 49-4-604(a). The order should also include any provisions for an improvement period, if applicable.

C. Stipulated Adjudication and Uncontested Petitions

On those occasions where the respondent does not contest the petition or the parties agree upon a stipulated adjudication, the court may enter an adjudication order without taking evidence. Any stipulated or uncontested adjudication order must include:

1. Agreed-upon facts that support the court's involvement, including the respondent's conduct, condition, or problems; and

2. A statement of the respondent's problems to be addressed at the final disposition hearing. Rule 26(a).

The court must ensure that the parties fully understand the consequences and the content of the stipulated adjudication, and must find that the parties have voluntarily consented to the stipulation. The court must further find that the stipulation or uncontested adjudication is in the best interest of the child. Rule 26(b).

X. CHILD AND FAMILY CASE PLANS

A case plan includes comprehensive information about a child and his or her family and should also include plans for addressing the conditions of abuse and neglect. As a matter of primary importance, a case plan should address the safety of the child and the effects of abuse and neglect on the child. For example, a case plan should explain the terms of any safety plan if a child remains at home or should explain how an out-of-home placement assures a child's safety. It also must include a permanency plan and concurrent plan for the child. If the child requires services, such as therapy, a plan for providing the services should be included in the case plan. A case plan, if the Department is required to make reasonable efforts to preserve the family, must include a plan for addressing the adult respondents' role in the conditions of abuse and neglect. For that reason, a treatment plan for adult respondents must be included in a family case plan. In addition to these issues, a case plan should summarize important information about a child or his or her family. For example, it should include information about the child's health, any special needs and relatives who were contacted as potential placements. Finally, a case plan should also detail the care and development of a child. For example, it should address the child's education, any visitation plan for the child, any recommended evaluations and a transition plan, if the child is 16 years of age or older. Case plans, their contents and the times that they must be filed with the court are governed by state and federal law. 42 U.S.C. § 675; W. Va. Code §§ 49-4-604; 49-4-610; 49-4-408; Rules 23, 28 and 37.

The West Virginia Supreme Court and the Department have adopted a form for case plans that includes all information that must be included in a case plan. This form should be completed and submitted to the court at the times required by law. Rule 28.

Although the relevant rules and statutes refer to family and child case plans, these types of case plans are similar and, ideally, should contain much of the same information. The primary difference between a child and family case plan arises when reunification of the child is **not** the permanency plan for the child. If reunification is not the permanency plan for the child, the section of the plan that emphasizes treatments for and expectations of adult respondents will be omitted. As discussed below, the times for submission of child and family case plans are different.

A. Contents of Case Plans

1. **General requirements.** The following requirements should be included in all case plans.

a. A statement of necessary changes that will correct problems that led to Department intervention and a timetable for the achievement of the identified changes;

b. A description of the type of services that will assist the family in correcting the identified problems, along with an explanation of the appropriateness and availability of suggested services; and

c. The permanency plan and concurrent permanency plan for the child, which is designed to achieve timely permanency in the least restrictive setting available. Timelines for implementing the permanency plan must be included. If the permanency plan is another planned permanent living arrangement (APPLA), the Department must document the efforts it has made to place a child permanently with a parent, relative, guardianship or adoptive placement.

2. **Placement of the child.** Both child and family case plans should provide detailed information about the placement of the child. The following information must be incorporated into either type of plan:

a. The terms of a safety plan or services provided to the family if the child has remained in his or her home;

b. A description of any recommended out-of-home placement, which details the distance from a child's home and whether the placement is the least restrictive, i.e. most family-like one available;

c. A description of the efforts made by the Department to prevent placement or an explanation as to why such efforts were not viable;

d. A description of the efforts the Department made to keep the child enrolled in the school he or she attended at the time of removal when it selected a particular out-of-home placement for a child. Details should show that the Department coordinated with local educational agencies concerning this goal, including consultation with local school authorities concerning reasonable transportation;

e. The location of any siblings, the reason if the siblings are separated, and steps required to unite them if possible and plans for sibling visitation;

f. A description of friends and relatives who were contacted about providing a suitable and safe permanent placement for the child;

g. The steps taken to ensure that a foster family follows the "reasonable prudent parent standard," and has allowed the child regular opportunities to engage in age or developmentally appropriate activities; and

h. Any plan for child's visitation with the adult respondents and other contact with the child.

3. **Treatment plan for adult respondents.** A family case plan must include the following information that primarily addresses corrective actions for adult respondents:

a. A description of services for the child, parents, and foster parents or relative caregivers that will assist the family in remedying the identified problems, including an explanation of the appropriateness and availability of suggested services. Rule 28(a)(2);

b. The case plan should detail reasonable accommodations under the Americans with Disabilities Act provided to parents with disabilities that allows them meaningful access to reunification and family preservation services;

c. A description of behavioral changes that must be evidenced by the respondents to correct the identified problems. Rule 28(a)(3); and

d. The ability of parents to contribute financially to placement.

The court should see that the case plan can be easily understood by the participants accountable under the plan. In addition, the court shall inform the participants of the consequences likely to follow from their failure to meet any of the goals listed in the case plan. The plan may be modified with court approval as appropriate during the course of its implementation. W. Va. Code § 49-4-408(a)-(b).

4. **Information related to the care and education of the child.** In addition to the treatment of adult respondents and considerations about placement, case plans should include specific information about a child's health and education. Of particular note, case plans should contain the following information:

a. Any special needs of the child and how they will be met in placement;

b. A description of the educational placement of the child, including a consideration of continued attendance at the school in which the child was enrolled before removal or efforts to ensure that educational records have been transferred to any new school;

5. **Information related to transition into adulthood.** For all children who have reached 16, case plans must include information about transition planning and services.

a. For a child who is age 16, services that will assist with transition into adulthood must be identified;

b. A child who is age 17 is entitled to immediate assistance with the development of a personalized transition plan. It must include specific options for housing, health insurance, education, local opportunities for mentors, continuing support services, work force support and employment services; and

c. A child who is age 17 and who also has special needs is entitled to an adult services worker on his or her MDT team. The MDT should coordinate with other transition planning teams, such as individualized education planning (IEP) teams.

6. **When termination of parental rights is requested**.

a. A description of the efforts made by the Department to prevent placement or an explanation as to why offering services was not a viable option;

b. A description of efforts made towards reunification or why these efforts should not be made; and

c. Any objections by any party to the case plan.

B. Participants in the Development of Case Plans

Although the Department has the primary responsibility for the preparation and filing of case plans, parents, their counsel, a child who is capable of expressing his or her preferences, the child's counsel, relative caregivers, foster parents and other multidisciplinary treatment team members should assist with the development and preparation of the case plan. W. Va. Code §§ 49-4-405; 49-4-408; Rules 23, 28 and 37.

C. Filing of Case Plans

1. **Family Case Plan:** A family case plan must be filed with the court within 30 days after an improvement period is granted. W. Va. Code § 49-4-610(1)(D), (2)(E) and (3)(E); Rules 23(a) and 37. It should be served on all parties and persons who are entitled to notice and a right to be heard.

2. **Child Case Plan:** A child's case plan must be provided to parties, their counsel and persons entitled to notice and the right to be heard at least five judicial days before the disposition hearing. Rule 29. The time for the submission of a child case plan is sometimes confusing because a possible disposition is an improvement period. A practical way to avoid the duplication of efforts would be for the multidisciplinary treatment team to prepare a case plan that includes the components of a family case plan when it is anticipated that a dispositional improvement period will be granted. Alternatively, the adult respondents could waive the right to the submission of a case plan prior to disposition.

3. **Modifications:** Once a case plan has been filed, it is not necessary to file another copy of the case plan at each review hearing. Updated information may be filed with the court in the form of a court summary or progress report. The West Virginia Supreme Court and the Department have adopted a progress report which can summarize the status or progress of a case. A revised or modified case plan, however, should be filed with the court.

D. Objections to Case Plans

A party may object to the child's case plan at the disposition hearing. In each case, the court must enter an order:

1. Approving the plan;

2. Ordering compliance with all or part of the plan;

3. Modifying the plan in accordance with the evidence presented at the hearing; or

4. Rejecting the plan and ordering the Department to submit a revised plan within 30 days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within 45 days. Rule 34.

XI. DISPOSITION HEARING

A. Timing

The court shall begin the disposition hearing within 45 days of the entry of the adjudicatory order if no post-adjudicatory improvement period has been granted, or within 30 days after the post-adjudicatory improvement period ends. W. Va. Code § 49-4-610(8).[6]

The parties may choose to have an accelerated disposition hearing. In order to proceed with an accelerated disposition hearing, the following requirements must be met: 1) the parties must agree to the accelerated hearing; 2) the child case plan must have been completed and provided to the court and the parties, unless the parties have waived the right to the filing of child's case plan before disposition; and 3) notice of the disposition hearing was either provided or was waived by the parties. Rule 32.

B. Disposition

At the disposition hearing, the court must give the parties an opportunity to be heard. The rules of evidence apply in the hearing, and the respondents shall be given the opportunity to present and cross-examine witnesses. W. Va. Code § 49-4-601. At the conclusion of the hearing, the court must make findings of fact and conclusions of law on the record or in writing. According to West Virginia Code § 49-4-604(b)(1)-(6), the court must give precedence to dispositions in the following sequence:

1. Dismiss the petition;

[6] It is anticipated that Rule 32, which addresses the time-frame for a disposition hearing, will be amended to reflect the general statutory requirement that any hearings at the end of an improvement period are to be held within 30 days of the termination of the improvement period. See W. Va. Code § 49-4-610(8). The anticipated amendment will make Rule 32 consistent with this statute, as well as with Rule 25, which governs the timing of adjudicatory hearings, and Rule 38, which governs the timing of final disposition hearings.

2. Dismiss the petition *and* refer the child, the abusing parent, and/or battered parent to a community agency for assistance;

3. Return the child to the home under the supervision of the Department;

4. Order terms of supervision;

5. Commit the child to the temporary custody of the Department, a licensed private welfare agency or a suitable person who may be appointed guardian by the court; or

6. Terminate parental rights with the option of placing the child in the sole permanent custody of a non-abusing parent, including a battered parent.

Alternatively, under appropriate circumstances, the court may grant a dispositional improvement period prior to making a final disposition in accordance with the earlier-discussed options. W. Va. Code § 49-4-610(3). (See Section VII. C. above.)

C. Order

The court must enter an order within ten days of the conclusion of the hearing. The order must set forth findings of fact and conclusions of law. Rule 36(a). The court should include the following, if applicable, in the dispositional order:

1. The date and time for the permanency hearing, if scheduling would be appropriate;

2. The date and time for the first permanent placement review conference or review of an improvement period;

3. The terms of visitation;

4. Services provided to the child and the family;

5. Restraining orders controlling the conduct of any party that may frustrate the disposition order;

6. Corrective actions that any parties must take to alleviate problems;

7. Conditions regarding the placement of the child, including any special needs the child may have;

8. Steps to unite the child with siblings and/or steps to maintain contact between siblings; and

9. The terms and conditions of the child's case plan or family case plan. Rule 36(b), (c).

D. Improvement Period

The court may order an improvement period in lieu of making a final disposition at the dispositional hearing. An improvement period ordered at the dispositional hearing may not exceed six months, with a 3-month extension being permissible upon findings of substantial compliance; continuation will not significantly impair achievement of permanent placement; and that the extension is in the child's best interest. If the court orders the improvement period, it should hold a final disposition hearing within 30 days after the improvement period ends. W. Va. Code § 49-4-610. If the court finds that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected, the court may not order an improvement period. Syl. Pt. 3, *In re Darla B.*, 331 S.E.2d 868 (W. Va. 1985).

E. Temporary Custody

The court may order as a disposition that the child be committed to the temporary custody of the Department, a private child welfare agency, or a responsible person. W. Va. Code § 49-4-604(b)(5). When ordering this type of disposition, the court may not, however, delay the achievement of permanency for a period that exceeds the 12-month standard set by Rule 43 except in extraordinary circumstances. See Syl. Pt. 6, *In re Cecil T.*, 717 S.E.2d 873 (W. Va. 2011).

If the court orders temporary custody, and this is the first removal or a subsequent removal after an attempted reunification, it must include the following in its order:

1. Continuation in the home is contrary to the welfare of the child, and the reasons why;

2. Whether the Department made reasonable efforts to prevent the placement, and what those reasonable efforts were, or that an emergency situation existed making efforts unreasonable or impossible, or that such reasonable efforts were not required due to aggravating circumstances. (See also Special Procedures Chapter 4.);

3. Whether the Department has provided reasonable accommodations, as required by the Americans with Disabilities Act,

to parents with disabilities so that they have meaningful access to reunification and family preservation services;

4. The circumstances under which the temporary custody shall continue, and in examining these circumstances, the court should consider whether the child should:

a. Be continued in foster care for a specified period;

b. Be considered for adoption;

c. Be considered for legal guardianship;

d. Be considered for permanent placement with a fit and willing relative; or

e. Be placed in another permanent living arrangement if there are compelling reasons not to follow one of the above options;

5. An order for financial support, if appropriate, from the parents if the child is transferred to the custody of the Department; and

6. An order requiring services for the child.

F. Uncontested Termination of Parental Rights

1. Uncontested Termination

A natural parent may, in some circumstances, fail to contest the termination of his or her parental rights. If a parent is present at a disposition hearing but does not contest the termination of his or her parental rights, the court should determine whether the parent understands the consequences of the termination of parental rights, whether the parent is aware of less drastic alternatives to termination, and whether the parent has been informed of the right to a hearing and to representation. Rule 35(a)(1).

If a parent fails to appear at a termination hearing, the petitioner must make a *prima facie* showing that there is a legal basis for terminating parental rights. In addition, the court must determine whether the parents were properly notified of the hearing. Rule 35(a)(2).

2. Relinquishments

The statute governing relinquishments, West Virginia Code § 49-4-607, indicates that a parent must relinquish his or her parental rights in writing. Similarly, Rule 35(a)(3) or (4) also refers to relinquishing parental rights in writing. The West Virginia

Supreme Court has recognized, however, that a parent may orally relinquish parental rights under Rule 35(a)(1), if he or she is present in court. *In re Tessla M.*, 566 S.E.2d 221 (W. Va. 2002). Although an oral relinquishment in court is permissible, it is best practice to require a parent to sign a written relinquishment.

If a parent is present and has signed or signs a relinquishment during a disposition hearing, the court must determine whether the parent understands the consequences of relinquishing his or her parental rights. The court should determine whether the parent understands the possibility of less drastic alternatives, whether the parent was informed of the right to a disposition hearing and the right to counsel at a dispositional hearing. Rule 35(a)(3). In addition, the court must determine whether the parent was subject to either fraud or duress when he or she signed the relinquishment. W. Va. Code § 49-4-607.

If a parent has signed a relinquishment but is not present at the disposition hearing, the court must determine whether the document complies with statutory requirements, i.e. whether the document has been acknowledged and whether circumstances in which the parent signed the relinquishment were free from fraud and duress. Rule 35(a)(4); W. Va. Code § 49-4-607. The court must also determine whether the parent was both thoroughly advised and understood the consequences of signing a relinquishment. Further, the court must determine whether the parent was made aware of the possibility of less drastic alternatives, the right to a disposition hearing and the right to counsel at a disposition hearing. Rule 35(a)(4).

In some circumstances, the Department or other party may object to a parent's voluntary relinquishment of his or her parental rights. The common reason for such an objection is that the parent would not be subject to a mandatory child abuse and neglect petition under West Virginia Code § 49-4-605(a) for a later born child. However, the West Virginia Supreme Court has established that the circuit court has the discretion to accept a voluntary relinquishment or to reject it and proceed with a hearing on the issue of involuntary termination. Syl. Pt. 4, *In re James G.*, 566 S.E.2d 226 (W. Va. 2002).

3. Relinquishments as Evidence of Abuse and Neglect

At times, a parent may opt to voluntarily relinquish his or her parental rights before a court has conducted or completed an adjudicatory or dispositional hearing. In those circumstances, a court may treat the relinquishment as the evidentiary basis for a finding of abuse and neglect. The court is not required to hear other evidence. W. Va. Code § 49-4-607. This particular provision of West Virginia Code

§ 49-4-607 is a codification of Syllabus Point 4 of *In re Marley M.*, 745 S.E.2d 572 (W. Va. 2013), which allows a court to find that a child was abused or neglected based solely upon a relinquishment. As explained in *Marley M.*, a parent's silence or failure to contest allegations by the submission of a voluntary relinquishment may serve as the evidentiary basis for a finding of abuse or neglect, and no further evidence would need to be presented to the court.

4. Subsequent Challenges to a Relinquishment

After a parent has signed a relinquishment and it has been accepted by the court, a parent may subsequently challenge a relinquishment based upon a showing of fraud or duress. W. Va. Code § 49-4-607. A court may conduct a hearing to determine whether the circumstances were, in fact, free from fraud or duress. Syl. Pt. 3, *State ex rel. Rose L. v. Pancake*, 544 S.E.2d 403 (W. Va. 2001). Whether the court conducts such a hearing is within its sound discretion. *In re Cesar L.*, 654 S.E.2d 373 (W. Va. 2007).

As explained by Justice Davis in her concurring opinion in *Rose L.*, a parent who attempts to challenge a relinquishment faces an extremely high threshold. *Rose L.*, 544 S.E.2d at 408. As a starting point, Justice Davis observed that duress "means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress[.]" *Rose L.*, 544 S.E.2d at 408 (citing Syl. Pt. 2, *Wooten v. Wallace*, 351 S.E.2d 72 (W. Va. 1986)). In addition, she noted that the elements of fraud include the following:

> 1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. *Rose L.*, 544 S.E.2d at 408 (citing Syl. Pt. 1, *Lengyel v. Lint*, 280 S.E.2d 66 (W. Va. 1981)).

Finally, Justice Davis aptly pointed out that: "Importantly, the inquiry does not end even if a parent satisfies that burden. Ultimately, lower courts must always return to the polar star principle: the best interests of the child." *Rose L.*, 544 S.E.2d at 408. A court must, therefore, consider a child's best interests when it determines whether to set aside a relinquishment, even when the parent has shown that fraud or duress was used to obtain the parent's agreement to relinquish parental rights.

G. Contested Termination of Parental Rights

The court may determine at the dispositional hearing that parental or custodial rights should be terminated. To support such a determination, the court must find that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that the welfare of the child necessitates termination of the parental or custodial rights. W. Va. Code § 49-4-604(b)(6). The statute provides that there is "no reasonable likelihood that the conditions of neglect and abuse can be substantially corrected" when the abusing adult has demonstrated an inability to solve the problems leading to the abuse or neglect on their own or with help. W. Va. Code § 49-4-604(c). This code section provides examples of circumstances that support this determination:

> 1. The abusing adult has an addiction to alcohol or controlled substances that seriously impairs parenting skills and the abusing adult has not responded to the recommended treatment;
>
> 2. The abusing adult has willfully refused to participate in the development of a reasonable family case plan;
>
> 3. The abusing adult has not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to prevent the abuse and neglect of the child, as evidenced by the continuation or insubstantial diminution of the conditions of abuse or neglect, such that the conditions that threatened the welfare of the child have not diminished in a substantial way;
>
> 4. The abusing parent has abandoned the child;
>
> 5. The abusing adult has repeatedly seriously injured the child physically or emotionally, or has engaged in sexual abuse such that the degree of family stress and potential for further abuse are so great that the use of resources to resolve or mitigate the family problems has been precluded;
>
> 6. The battered parent's parenting skills have been seriously impaired and said person has refused or is presently unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with a recommended treatment plan.

Of course, this list is not exhaustive, and there are other circumstances that can lead the court to find that termination of parental rights is necessary. Furthermore, the court should generally consider the following factors when deciding whether parental rights should be terminated:

1. The child's need for continuity of caretakers;

2. The amount of time needed to integrate the child into a stable, permanent home; and

3. Other factors relating to the child's safety, well-being, and permanency the court considers necessary and proper. W. Va. Code § 49-4-604(b)(6)(A).

If the child is age 14 or older or is of an age of discretion as determined by the court, the child's wishes shall be considered. W. Va. Code § 49-4-604(b)(6)(C). See *In the Interest of Jessica G.*, 697 S.E.2d 53 (W. Va. 2010). If the court terminates parental rights, the court may commit the child to the sole custody of the non-abusing parent, including a battered parent, or to the permanent custody of the Department. W. Va. Code § 49-4-604(b)(6).

If the termination involves the first removal of the child from the home (or follows an extended improvement period in the home) the contrary-to-welfare and reasonable efforts to prevent placement findings must be made. If removal occurred earlier, reasonable efforts findings regarding finalizing the permanency plan are likely due. (See Special Procedures Chapter 4.)

H. Mandatory Petitions for Termination of Parental Rights

In some circumstances established by statute, the Department is required to seek the termination of parental rights. W. Va. Code § 49-4-605. These circumstances include when a child has been in foster care for 15 of the most recent 22 months. The beginning date for entry into foster care is defined as the earlier of the following dates: 1) the date of the first judicial finding that the child was subject to abuse or neglect; or 2) 60 days after the child was removed from his or her home. The second circumstance is when a court determines that a child has been abandoned, tortured, sexually abused or chronically abused. Further, the Department is required to seek termination if a court finds that a parent has committed any of the following acts: 1) the murder or voluntary manslaughter of another of his or her children, another child in the household or the other parent of his or her children; 2) has attempted or conspired to commit such a murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; 3) has been an accessory before the fact or after the fact of either of these crimes; or 4) has committed unlawful or malicious wounding resulting in serious bodily injury to the child, another of his or her children, another child in the household or to the other parent of his or her children. Finally, the Department is required to seek the termination of parental rights if the parent's parental rights to another child have been involuntarily terminated. W. Va. Code § 49-4-605(a).

Despite these statutory mandates, subsection (b) of West Virginia Code § 49-4-605 establishes situations in which the Department is relieved of its obligation to request the termination of parental rights. First, the Department may opt not to request termination if the child has been placed with a relative by a court order. Secondly, the Department is not required to seek termination of parental rights if the child's case plan documents a compelling reason not to do so that includes but is not limited to: the child's age and preference regarding termination, the child's placement in the Department's custody as a result of a juvenile proceeding (Part VII of Article 4 of Chapter 49 of the West Virginia Code) or the child's best interests. Finally, the Department does not have to seek termination if it was required to provide reasonable efforts to reunify a family, but has not done so.

The statutory mandate is placed upon the Department to request termination of parental rights. The court, however, has the option to determine whether parental rights should, in fact, be terminated. With regard to a similar, but earlier version of the statute, the West Virginia Supreme Court held that: "Although the requirement that such a petition be filed does not mandate termination in all circumstances, the Legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syl. Pt. 2, in part, *In the Matter of Glen B., Jr.*, 518 S.E.2d 863 (W. Va. 1999). In cases of prior involuntary terminations, the Court held that: "prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syl. Pt. 3, in part, *Glen B., Jr.*, 518 S.E.2d 863.

The relevant statute is now W. Va. Code 49-4-605(a).

XII. PERMANENT PLACEMENT

A. Jurisdiction

The presiding circuit court has exclusive authority or jurisdiction to determine the permanent placement of a particular child. Rule 36(e). The permanent placement of a child shall not be disrupted or delayed by an administrative process or other determination by the Department, such as an adoption review committee or a grievance procedure. *Id.*; W. Va. Code § 49-4-606(a).

In addition to an initial determination of permanency, the circuit court retains jurisdiction over any subsequent request for the modification of the permanent placement of a child. See Rules 6, 45(b) and 46. The two circumstances in which a circuit court would **not** retain jurisdiction over subsequent placements includes: 1) a case in which an abuse and neglect petition is dismissed for failure to state a claim under Chapter 49; or 2) the court returns a child to the custody of his or her cohabiting parents and does

not establish terms of visitation or child support. Rule 6. In the cases of a disruption or dissolution of a permanent placement, the circuit court of origin will retain jurisdiction to determine any subsequent placement for a child. Rule 45. Similarly, the circuit court retains jurisdiction over any proceeding involving the restoration of parental rights. W. Va. Code § 49-4-606(c).

B. Permanency Hearing

The purpose of the permanency hearing is to determine the appropriate plan for achieving permanent placement for a child or a "transitioning adult."[7] Rule 36a; W. Va. Code § 49-4-110(c). Included in such a determination is a finding as to whether the child shall remain in the Department's custody, the efforts that must be made to place a child in a permanent home, and the likely date for achieving permanent placement. W. Va. Code §§ 49-4-608(b); 49-4-110(a).

The scheduling of a permanency hearing is dependent upon the court's finding as to whether the Department is required to make reasonable efforts to preserve the family. Rule 36a; W. Va. Code § 49-4-608. If the court finds that the Department is **not** required to make reasonable efforts to preserve the family, then the permanency hearing must be held within 30 days of the order that makes this finding. Such a finding arises in cases involving aggravated circumstances.[8] W. Va. Code § 49-4-604(b)(7); see also W. Va. Code § 49-4-602(d). Rather than hold a separate hearing, the court can satisfy the permanency hearing requirement (i.e. determine the permanent plan for the child) at the same hearing in which the determination is made that reasonable efforts to reunify the family are not required. 45 C.F.R. § 1356.21(h)(2).

Alternatively, absent a finding that the Department is not required to make reasonable efforts to preserve the family, then a court is required by West Virginia Code § 49-4-608(b) to conduct a permanency hearing within 12 months after the Department has obtained physical custody of a child if the child has not been placed in one of the following types of placements: an adoptive home, with a natural parent, a legal guardianship, or permanent placement with a fit and willing relative. One issue to note is that under this state statute, the time period is one to two months shorter than the federal standard that specifies when a permanency hearing shall be conducted. Rule 36a mirrors the federal time standard for a permanency hearing, and

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[7] A "transitioning adult" is defined as an individual who has reached 18 years of age but is under 21 years of age, was adjudicated as an abused or neglected child and has entered into a contract with the Department to continue in an educational, training or treatment program which was initiated prior to the 18th birthday. W. Va. Code § 49-1-202.

[8] The term "aggravated circumstances" is a shorthand reference in this Benchbook for all circumstances covered by subsections (A) through (D) of West Virginia Code § 49-4-604(b)(7).

both the federal statute and this rule provide that a permanency hearing must be conducted within 12 months of a child's entry into foster care. See also W. Va. Code § 49-4-110 (Requiring a permanency hearing within 12 months of the entry into foster care.) The date the "child entered foster care" is defined as the earlier of: (i) the date of the first judicial finding that the child has been subject to abuse or neglect; or (ii) 60 days after the date on which the child was removed from the home. Rule 36a(b); 42 U.S.C. § 675(5)(F). If a court conducts a permanency hearing according to the 12-month period after receiving physical custody of a child as required by West Virginia Code § 49-4-608(b), then the court would necessarily be in compliance with the slightly longer federal standard.

Another question arises with regard to the requirement of a permanency hearing. The language of the state statute refers to the placement of a child in an "adoptive" home as a situation in which a permanency hearing would no longer be required. Under a literal reading of the statute, it would seem to obviate the need for a permanency hearing if a child has been placed in an adoptive home but an adoption had not yet been finalized.[9] However, the other permanency options identified in the statute connote that the placement has been finalized by its reference to placement with a natural parent, in a legal guardianship, or permanently placing a child with a fit and willing relative. In addition, the definition of "permanent placement" with regard to adoption indicates that permanency has been achieved "when the child has been adopted," thereby indicating that the adoption has been finalized. Rule 3(n). Further, permanent placement reviews are required until permanency is actually achieved. See Rules 39-42. A permanency hearing should, therefore, be conducted if a child has been placed in an adoptive home, but the adoption has not been finalized and it has been 12 months since the Department obtained custody. In other words, to meet the apparent intent of the state statute (and comply with the federal time standard) the phrase placement "in an adoptive home" in West Virginia Code § 49-4-608 should be read to negate the permanency hearing requirement only when an adoption has been finalized.

One other issue is implicated by West Virginia Code § 49-4-608(b) because it does not refer to the federally recognized permanency option of another planned permanent living arrangement (APPLA). The federal Adoption and Safe Families Act (ASFA) recognizes APPLA as a permanency option in limited circumstances. Although not mentioned in the above-discussed state statute, the state rules also recognize APPLA as a permanent placement. Rule 3(n)(3). It is the least preferred permanency outcome, but APPLA can be utilized when there is a demonstrated compelling reason why none of the four preferred permanency options are practical or in the

[9] Since an adoption cannot be finalized until a child has lived in an adoptive home for six months, this situation would arise fairly frequently. See W. Va. Code § 48-22-701.

child's best interest.[10] Therefore, even though not mentioned in West Virginia Code § 49-4-608(b), permanent placement through an APPLA plan (with a truly stable and supported outcome), would obviate the requirement for a permanency hearing since permanency has been achieved.

A court is required to conduct additional permanency hearings every 12 months after the initial permanency hearing for each child who remains in the legal or physical custody of the Department. This requirement will continue until a child is placed in one of the following permanent placements: in an adoptive home; returned to a natural parent, placed in a legal guardianship or permanently placed with a fit and willing relative. W. Va. Code §§ 49-4-608; 49-4-110. As discussed above, achieving permanency through an APPLA would similarly negate the need for any additional permanency hearings.

When a permanency hearing is scheduled, notice must be given to the following persons: the child's attorney; the child, if he or she is 12 years or older; the child's parents (and counsel); the child's guardians; the child's foster parents; any preadoptive parent or any custodial relative of the child; any other person entitled to notice and the right to be heard; and any other person, in the court's discretion, directed to receive notice. W. Va. Code § 49-4-608(b). Any parent whose rights have been terminated (and their counsel) would not be given notice. Rule 39(c) (final sentence). See also Rule 3(o). If a child is age 12 or older, he or she has the right to attend a permanency hearing. This right may be waived by the child's attorney at the child's request or if the child is younger than 12 years of age and would suffer emotional harm. W. Va. Code § 49-4-608(b).

C. Permanent Placement Review

The court, with the assistance of the MDT, must continue to monitor implementation of the permanency plan. After a permanency hearing order has been entered, a permanent placement review hearing must be held at least once every three months until permanency is achieved. Counsel for the parties (except terminated parents) and interested persons entitled to notice and the right to be heard should be given at least 15 days notice of the review. The review must actually be held and may not be conducted merely with the entry of an agreed order. Rule 39; W. Va. Code § 49-4-110.

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[10] The ASFA regulations, at 45 C.F.R. § 1356.219(h), provide three examples of compelling reasons that could support a determination that an APPLA is an appropriate permanency outcome:

(i) an older teen who specifically requests that emancipation be established as his/her permanency plan;

(ii) the case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and facilitate visitation with the disabled parent; or

(iii) the Tribe has identified an APPLA for the child.

The best practice is to schedule the next review at the conclusion of the current review hearing.

At least ten days before each review, the MDT and the Department must provide the court and parties with a progress report describing efforts to implement permanent placement. Additionally, the court may accept progress reports or statements from other persons, including the parties, service providers, and CASA. Rule 40.

During the review, to the extent applicable to the permanency plan, the court should consider:

1. The extent to which problems that have given rise to the child abuse or neglect proceedings have been remedied;

2. Services or assistance provided to the family since the last hearing, and services and review conferences needed in the future;

3. Reasonable accommodations provided in accordance with the Americans with Disabilities Act to parents with disabilities to allow them meaningful access to reunification and family preservation services;

4. Compliance by the adult respondent and the Department with the case plan and previous court orders and recommendations;

5. Any recommended changes in court orders;

6. The extent to which the adult respondent contributes financially to the placement of the child, and his or her ability to contribute;

7. The appropriateness of the current placement of the child, including its distance from the child's home and whether it is it is the most family-like setting;

8. The appropriateness of the current educational placement and the Department's efforts to keep the child enrolled in the same school he or she was attending at the time of removal, including the Department's coordination with local education agencies about arrangements for reasonable travel or enrollment of the child in a new school;

9. A summary of visitation and any recommended changes;

10. Whether the child's special needs were or were not met while in placement, as well as whether the child has had regular opportunities to engage in age or developmentally appropriate normal childhood activities;

11. The location of siblings and the steps being taken to unite them and/or maintain regular contact with them;

12. For children aged 14 or older, the specific services aimed at transitioning the child into adulthood;

13. For children aged 17 or over, a personalized transition plan for a child that includes specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, workforce support and employment services;

14. If a child is aged 17 or over and has special needs, he or she is entitled to the appointment of an adult services worker to the MDT, who, in turn, will coordinate with other transition teams, such as IEP teams; and

15. If the child's permanent placement is APPLA, the efforts that were made to place a child permanently with a parent, relative, guardianship or adoptive placement; the child's preferred permanency option, and steps taken by any foster family to allow the child the opportunity to engage in normal childhood activities. Rule 41(a).

During the permanent placement review conferences, the MDT should make recommendations regarding future placement issues for the child. Some of the information that should accompany various recommendations proposed at the review conference is:

1. **If a return to the home is recommended:** (a) steps necessary to make return possible and to minimize the disruptive effects of a return; (b) the dangers that may face the child after a return; and (c) reunification services necessary to minimize danger to the child;

2. **If return to the home is not recommended:** (a) whether adoption is recommended; if so, (b) the steps needed to effectuate the termination of parental rights; and (c) the time needed to achieve such measures;

3. **If neither return nor placement for adoption is recommended:** (a) a discussion of guardianship or permanent custody with a responsible individual; and (b) if recommended, a discussion of (i) the rights and responsibilities of the biological parents and the custodial parents or guardians, and (ii) a timetable for establishing legal guardianship or permanent custody;

4. **If continued foster care with specific foster parents is recommended:** an explanation of why foster care continues to be

appropriate for the child. Additional topics that should be addressed are a discussion of permanently placing the child in foster care, including, (i) a proposed timetable, (ii) terms of the foster care agreement, (iii) the continuing rights and responsibilities of the biological parents, and an explanation of why foster care continues to be appropriate for a child;

5. **If placement in a group home or institution is recommended:** (a) why treatment outside a family setting is necessary, including expert diagnoses and recommendations; (b) why less restrictive, family settings are not practical; and (c) why placement with specially trained foster parents is not practical;

6. **If emancipation or independent living is recommended for children over 16 years old:** (a) why foster care is no longer appropriate; (b) the skills needed by the child to prepare for adulthood; and (c) a description of the ongoing support and services to be provided by the department;

7. A concurrent alternative permanency plan; and

8. Any other matter relevant to implement the child's permanency plan. Rule 41(a)(14)(A)-(H).

D. Preferences for Permanency Plans

Note: West Virginia Code § 49-4-111, discussed below, applies to foster care as well as adoptive placements. The discussion in this paragraph is, however, limited to adoptive placements.

When establishing a permanency plan, West Virginia Code § 49-4-111 sets forth a preference for placing a child in an adoptive home with his or her siblings. See also Syl. Pt. 4, *In re Shanee Carol B.*, 550 S.E.2d 636 (W. Va. 2001). When a child becomes eligible for adoption and his or her siblings have already been placed in an adoptive home, the Department is required to notify the adoptive parents that the child is eligible for adoption. W. Va. Code § 49-4-111(d). The purpose of providing notice is to determine whether the adoptive parents want to seek custody of the child. If the adoptive parents are willing to do so, the Department must determine whether the adoptive parents are fit and whether the placement of the child is in the best interests of the child and his or her siblings. W. Va. Code § 49-4-111(d). To maintain the separation of siblings, the Department must show, by clear and convincing evidence, that the siblings should remain separated. Syl. Pt. 4, *Shanee Carol B.*, *supra*.

Similar to sibling placements, West Virginia Code § 49-4-114(a)(3) establishes a preference for placing a child for adoption with his or her

grandparents if parental rights have been terminated. See also Syl. Pts. 4 and 5, *Napoleon S. v. Walker*, 617 S.E.2d 801 (W. Va. 2005). This code section presumptively establishes that it is in the child's best interests to be adopted by his or her grandparents. However, the preference is not absolute. If a court determines that placement with grandparents is not in a child's best interests, it is not required to choose the grandparents over another placement that serves a child's best interest. *Napoleon S. v. Walker, supra; In re Elizabeth F.*, 696 S.E.2d 296 (W. Va. 2010); *In re Hunter H.*, 715 S.E.2d 397 (W. Va. 2011); *In re Aaron H.*, 735 S.E.2d 274 (W. Va. 2012).

Federal law requires the Department to *consider* the placement of a child with relatives as opposed to non-relatives. 42 U.S.C. § 671(a)(19). However, similar to the sibling and grandparent preferences established by West Virginia statutes, this preference is not absolute and does not override another placement that is in a child's best interests. See *Kristopher O. v. Mazzone*, 706 S.E.2d 381 (W. Va. 2011).

E. Permanent Placement Review Orders

The court shall enter an order within ten days of the review conference, stating whether permanent placement has been achieved. Rule 42(a). The court shall include findings of fact and conclusions of law supporting its determination. If the court finds that permanent placement has not been achieved, the court shall include in the order the issues discussed at the review conference, including the following:

1. Changes in the child's case plan the court deems necessary to achieve permanent placement, with accompanying findings of fact;

2. Changes in visitation and other parental involvement;

3. Changes in services to be provided to the parties and the child;

4. Changes to the educational plan for the child to further the child's educational stability;

5. Steps to assist a child aged 14 or older to develop a transition plan;

6. Restraining orders controlling any conduct of parties likely to frustrate the order;

7. Additional action to be taken by parties involved in order to achieve permanent placement;

8. If the identified permanency plan is APPLA, the court should ask the child about his or her desired permanent placement. The court should then determine whether APPLA is the best permanency plan for the child and should also review the Department's efforts to place the child permanently with a parent, relative, guardian or an adoptive placement. The court must find a compelling reason why it is not in the child's best interests to place the child in one of the other types of permanency placements;

9. Findings as to whether the Department has made reasonable efforts to finalize the permanency plan in a timely manner. (See Special Procedures Chapter 4, Section VI.); and

10. A date and time for the next permanent placement review conference. Rule 42(c).

If the court issues an order that permanent placement has been achieved, the case may be dismissed from the docket. Rule 42(b).

F. Timeframe for Achievement of Permanency

Permanent placement is to be achieved within 12 months of the final disposition order unless there are extraordinary reasons to justify the delay. If permanent placement is delayed beyond 12 months post-disposition, the court should place specific findings of the extraordinary reasons justifying the delay on the record. Rule 43.

XIII. POST-TERMINATION VISITATION

Note: Rule 15 applies to visitation both prior to and subsequent to termination of parental rights. This section, however, is limited to post-termination visitation. For a discussion of pre-termination visitation during a case, see Overview Section IV. F.

Rule 15 establishes general procedures for visitation between a child and any person, including parents, with whom the child has developed a close emotional bond. When the court terminates parental rights, the effect of the ruling is to prohibit visitation between the child and the parent and between the child and grandparents. Post-termination visitation should only be allowed if the court finds that the child consents and post-termination is in the child's best interests. When considering post-termination visitation, the court must determine whether it would interfere with the child's case plan and whether it is in the child's best interests.

The Supreme Court has held that a court may grant post-termination visitation between a parent and child based upon a child's right to continued association. Syl. Pt. 5, *In re Christina L.*, 460 S.E.2d 692 (W. Va. 1995);

In re Katie S., 479 S.E.2d 589 (W. Va. 1996). A request for post-termination visitation should be brought by a written motion that has been properly noticed for hearing. Syl. Pt. 5, *In re Marley M.*, 745 S.E.2d 572 (W. Va. 2013). Although a court should consider evidence and arguments of counsel with regard to the factors set forth in Syllabus Point 5 of *Christina L.*, a court may forego such a process if the circumstances make the consideration of further evidence "manifestly unnecessary." *Id.*

When determining whether to grant post-termination visitation, the trial court must consider whether there is a close emotional bond between the parent and child. The Court has recognized that it takes several years to develop a close emotional bond and, therefore, post-termination visitation would normally be granted only in cases involving older children. See *In re Alyssa W.*, 619 S.E.2d 220 (W. Va. 2005). If the child is of appropriate age and maturity, the court should also consider the child's wishes. As stated above, in all cases where it is permitted, the court must find that the visitation would be in the child's best interests and must not interfere with the child's case plan. Syl. Pt. 5, *Christina L.*, 460 S.E.2d 692; Rule 15.

If a child is not placed with his or her siblings, the court may provide for continued visitation or contact between siblings. Syl. Pt. 4, *James M. v. Maynard*, 408 S.E.2d 400 (W. Va. 1991). Rule 15 establishes a presumption for continued contact between siblings by requiring that such visitation and contact shall continue unless it is not in the best interests of the child and his or her siblings.

Questions of grandparent visitation are subject to Rule 15 and the Grandparent Visitation Act, codified at West Virginia Code §§ 48-10-101, *et seq.* As an initial matter, motions or petitions for grandparent visitation must be addressed in circuit court while an abuse and neglect case is pending. W. Va. Code § 48-10-402(d).

Once a circuit court has terminated the parental rights of the parent through whom the grandparents are related to the child, Rule 15 establishes that the termination order has the presumptive effect of prohibiting contact and visitation between the child and the grandparents. However, the circuit court may allow visitation if the child consents, and it is in the child's best interests to have continued contact. The court should consider the factors set forth in West Virginia Code § 48-10-502 when determining whether to grant grandparent visitation. See *In re Samantha S.*, 667 S.E.2d 573 (W. Va. 2008); *In re Grandparent Visitation of Cathy L.R.M. v. Mark Brent R.*, 617 S.E.2d 866 (W. Va. 2005).

Post-adoption visitation between a child and his or her grandparents is initially dependent on whether the adoptive parents are stepparents, grandparents or other relatives of the child. If a child is adopted by a non-relative, then the Grandparent Visitation Act does not allow for grandparent

visitation, and a prior grandparent visitation order is automatically vacated. Syl. Pt. 3, *In re Hunter H.*, 744 S.E.2d 228 (W. Va. 2013). Additionally, a grandparent may not file a grandparent visitation petition when a child has been adopted by a non-relative. If a relative has adopted a child, then post-adoption visitation may be granted after the court considers the factors set forth in West Virginia Code §§ 48-10-501 and -502. However, the West Virginia Supreme Court, however, has recognized that "significant weight" must be accorded to the preference of the adoptive parents. *Cathy L.R.M.*, 617 S.E.2d at 875.

Consistent with other types of visitation, the Supreme Court has recognized that a court may award continued visitation to foster parents if a child has developed a close relationship with them. Syl. Pt. 11, *In re Jonathan G.*, 482 S.E.2d 893 (W. Va. 1996); *In the Matter of Zachary William R.*, 509 S.E.2d 897 (W. Va. 1998). To award visitation between a child and foster parents, the circuit court must find that continued contact is in the child's best interests.

XIV. MODIFICATION OR SUPPLEMENTATION OF COURT ORDERS

A. Modification of Orders

Modification or supplementation of court orders is governed by Rule 46, which addresses the modification of any abuse and neglect court order, including a disposition order, and West Virginia Code § 49-4-606 which addresses the modification of disposition orders only. The following persons may file a motion to modify or supplement a court order: a child; a child's parents (whose parental rights have not been terminated); a child's custodian; or the Department. To modify a court order, a party must show, by clear and convincing evidence, that the proposed modification is in the child's best interests. Rule 46, however, excludes child support orders from this evidentiary requirement and allows such orders to be modified upon a showing of a substantial change in circumstances as provided by the statute governing the modification of child support orders, West Virginia Code § 48-11-105.

B. Modification of Dispositional Orders

For sound policy reasons, the modification of a dispositional order is more restrictive than other types of orders. Rule 46; W. Va. Code § 49-4-606. In a parenthetical, Rule 46 provides that only parents whose rights have **not** been terminated may move to modify or supplement an order in an abuse and neglect case. In addition to the parenthetical in Rule 46, the Supreme Court has recognized that a person whose parental rights have been terminated no longer has the status of parent to the child and lacks standing to request modification of an order after his or her parental rights have been terminated. Syl. Pts. 4 and 5, *In re Cesar L.*, 654 S.E.2d 373 (W. Va. 2007).

It is, therefore, settled that a person whose parental rights have been terminated does not have standing to move to modify a dispositional order.

Not only are there limits on who has standing to request relief, there are also limits as to when such relief may be requested. A court may not modify a dispositional order that terminated parental rights after a child has been adopted.

When a party seeks to modify a dispositional order, he or she should make a motion to the court. In turn, the court should conduct a hearing on the motion. W. Va. Code § 49-4-606(a).

C. Dissolution or Disruption of Permanent Placement

If a case has been dismissed and a child is removed from a permanent placement or the custodians of the child relinquish their rights to the child, the matter should be brought to the attention of the circuit court of origin, the Department and the child's counsel. The Department is required to convene a multidisciplinary treatment team meeting within 30 days of notice of the disruption. In turn, the circuit court of origin is required to schedule a permanency hearing within 60 days of the report. Notice should be given to any appropriate parties and persons entitled to notice and the right to be heard. Rule 45; W. Va. Code § 49-4-606(b).

D. Restoration of Parental Rights

West Virginia Code § 49-4-606 has established a procedure for the restoration of parental or custodial rights or the placement of a child with a person whose parental or custodial rights have been terminated, provided that a child has not been adopted. W. Va. Code § 49-4-606(c). However, the only parties that may request this relief are the Department or the child. A person whose parental or custodial rights have been terminated is not authorized to request the restoration of his or her custodial or parental rights. As a basis for awarding this relief, the court must find, by clear and convincing evidence, that there has been a material change of circumstances and that the placement of the child with such an individual and/or the restoration of the individual's custodial or parental rights is in the child's best interests.

XV. APPEALS AND PETITIONS FOR EXTRAORDINARY RELIEF

A. Procedure for Appeals

After any adverse judgment at the adjudicatory hearing, the court shall inquire whether the parents or custodians want to appeal the decision. W. Va. Code § 49-4-601(k). The court should transcribe the response by the parents; however, a negative response will not constitute a waiver of the

right to appeal if the parents later change their mind. The appeal may pertain to the court's determination of child abuse or neglect at the conclusion of the adjudicatory hearing. W. Va. Code § 49-4-601(k). In this regard, an appeal after an adverse finding at adjudication is a permissible interlocutory appeal.

A party may also appeal a ruling after a final disposition hearing. For example, the Department may appeal an order that provides for reunification. As another example, a parent may appeal the termination of his or her parental rights. Dependent upon his or her position regarding the child's best interests, a guardian *ad litem* could appeal an order that provides for termination of parental rights or provides for reunification.

As with other appeals, a party appealing a judgment must file a notice of appeal within 30 days of the judgment. See W. Va. R.A.P. 11; W. Va. RPCANP 49. A motion to modify a judgment does not operate to toll the time for initiating an appeal.

Effective January 1, 2016, attorneys for respondents in abuse and neglect cases are subject to Rule 10(c), a rule that governs an attorney's responsibilities when an attorney lacks a good faith belief that an appeal is warranted. In those situations, the attorney is required to discuss the relative merits of an appeal with the client and must file an appeal if the client insists. In Rule 10(c)(10)(b), it is acknowledged that an attorney may be compelled ethically to dissociate himself or herself from the contentions of a brief. In those circumstances, the attorney must preface the brief with a statement indicating that brief has been filed according to Rule 10(c)(10)(b). When an attorney is ethically compelled to disassociate himself or herself from assignments of error that the client wants to be raised, the attorney must file a motion requesting leave for the client to file a *pro se* brief that includes the errors that the client wants to address on appeal. Counsel should not, however, argue against the client's interests.

Since abuse and neglect cases are civil cases, the appellant is required to pay the $200 filing fee when the notice of appeal is presented to the Supreme Court, unless the party is entitled to a waiver of the fee. W. Va. Code § 59-1-13. In those circumstances, the party should file the appointed counsel affidavit that was approved in circuit court or present an affidavit for approval by the West Virginia Supreme Court when the notice of appeal is filed.

In addition to information that must be included in all cases on appeal, the notice of appeal requires a party in an abuse and neglect case to provide particular information to the Supreme Court. As an attachment to a notice of appeal, a petitioner must include a list of the names, ages and parents' names of all minor children, a brief description of the current status of parental rights of each parent at the time of the filing of the notice of appeal,

a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case. See W. Va. R.A.P. Appendix A.

Appeals in abuse and neglect cases are accelerated under a shorter-than-normal period for perfecting the appeal. The petitioner's brief and required appendices must be filed with the Supreme Court Clerk within 60 days of the judgment. W. Va. R.A.P. 11; W. Va. RPCANP 49. The circuit court from which the appeal is taken may, however, extend the time period for perfecting the appeal for an additional period that does not exceed two months. To extend this time period, the notice of appeal and required attachments must have been timely filed. The party requesting such an extension should file a written motion with the circuit court and must also file a copy with the Supreme Court Clerk. Any order ruling on the motion must be provided to the Supreme Court Clerk. W. Va. R.A.P. 11(f); W. Va. RPCANP 49. Alternatively, a party may request an extension of the time period by filing a written motion with the Supreme Court Clerk. When requesting an extension from the Supreme Court, a party must follow the procedure established by Rule 29 of the Rules of Appellate Procedure. W. Va. R.A.P. 11(f); W. Va. RPCANP 49. The same 60-day timeframe applies to motions seeking to extend the appeal period filed with the Supreme Court.

Subsection (f) of Rule 11 allows a party to request leave to file a late appeal from the Supreme Court even if a party did not file a notice of appeal. A party, however, may only obtain this relief in extraordinary circumstances. This relief may only be obtained in the West Virginia Supreme Court, not the circuit court.

Under Rule 11(i), the parties are required to include a section in their brief that indicates the current status of the children, the permanency plan for the children, and the current status of parental rights.

According to Rule 11(j) if oral argument is scheduled, the parties are required to provide a written statement that provides any changes or updates to any circumstances set forth in the brief no less than one week before oral argument or within such other time specified in the Court's order. As explained in the Clerk's Notes, the requirement to update the Court on any change of circumstances addressed in the briefs has been placed in a separate subsection in order to highlight the importance of this requirement.

B. Appellate Duties of Guardian *Ad Litem*

Guardians *ad litem* are extremely important to the appellate process and are required to take an active role in any appeal. Even when a guardian *ad litem* did not initiate the appeal, he or she is required to file a responsive brief. The brief may be a summary response in appropriate cases.

W. Va. R.A.P. 11(h). A guardian *ad litem* must also appear at any oral argument scheduled in the case, unless the Court specifically orders otherwise. In addition, the Supreme Court, has, in case law, repeatedly emphasized the importance of the role of guardians *ad litem* in the appellate process. See Syl. Pt. 3, *Matter of Scottie D.*, 406 S.E.2d 214 (W. Va. 1991); Syl. Pts. 4 & 5, *In re Jeffrey R. L.*, 435 S.E.2d 162 (W. Va. 1993); *State v. Michael M.*, 504 S.E.2d 177, n. 11 (W. Va. 1998); *Kristopher O. v. Mazzone*, 706 S.E.2d 381, n. 4 (W. Va. 2011).

The West Virginia Supreme Court has squarely addressed the importance of a guardian *ad litem's* role in the appellate process. In a 2015 case, the Court entered two successive orders, each with a rule to show cause, to require a guardian *ad litem* to show why she should not be held in contempt for failing to file response briefs. *In re A.N.*, Nos. 15-0182 and 15-0208 (W. Va. Supreme Court, September 30, 2015) (memorandum decision). Ultimately, the Court found the guardian *ad litem* in contempt for failing to comply with the scheduling orders, referred the matter to the Office of Disciplinary Counsel and directed that the attorney would not be eligible for guardian *ad litem* and other court appointments until the disciplinary action would be concluded. See Chapter 5, Section VIII for a complete discussion of case law addressing a guardian *ad litem's* appellate duties.

C. Stays

The filing of an appeal does not automatically stay the proceedings or orders of the circuit court in abuse and neglect cases. Rule 50 of the Rules of Procedure for Child Abuse and Neglect Proceedings indicates that a party, upon a showing of good cause, may properly seek a stay of a judgment in an abuse and neglect case in the circuit court. Alternatively, a party may seek a stay from the West Virginia Supreme Court pursuant to Rule 28 of the Rules of Appellate Procedure. Under Rule 28, however, a stay must first be sought in the circuit court. If the stay is denied in circuit court or the applicant believes the relief afforded is insufficient, the applicant can then pursue a stay with the Supreme Court. W. Va. R.A.P. 28(b).

When a party requests a stay from the Supreme Court, he or she must file a written motion requesting relief. The motion must provide the reasons assigned by the circuit court for denying the stay or other relief sought. W. Va. R.A.P. 28(b). The motion should also explain the reasons for a stay, address the effect of a stay on the circuit court's ability to plan for a child, and address the effect of the stay on the child's best interests. W. Va. RPCANP 50. Although Rule 50 does not expressly require a party to file a written motion when seeking a stay in circuit court, it certainly is best practice to do so. Further, a party who seeks a stay in circuit court should base such a motion on the same issues that must be addressed in the Supreme Court: the reasons for the stay, the court's ability to plan for the child if a stay is entered, and the child's best interests.

D. Transcripts

West Virginia Code § 49-4-601(k) provides that a transcript must be furnished to indigent persons without cost. (See also W. Va. Code § 51-7-8). Section IX. 5. of the Manual for Official Court Reporters of the West Virginia Judiciary (Administrative Office of the Supreme Court of Appeals), promulgated October 30, 1984, amended December 13, 2010 ("Official Court Reporter Manual"), provides: "Transcripts of child abuse and neglect proceedings will be paid only if requested under the guidelines of an indigent criminal appeal." Accordingly, the Supreme Court Administrative Director's Office will pay transcription fees for preparation of an original and one copy of a transcript requested by an indigent party in an abuse and neglect case for purposes of appeal to the Supreme Court when the requirements are met.

Effective January 1, 2016, petitioners in abuse and neglect cases will need to submit transcripts when the Court will be reviewing disputed evidentiary or testimonial issues. Before the effective date of the amendments to Rule 11, parties would submit briefs without transcripts in abuse and neglect appeals. Parties to an abuse and neglect case are subject to Rule 9 which governs transcript requests.

When a petitioner is requesting transcripts, the petitioner must complete the Appellate Transcript Request Form and attach it to the notice of appeal. The petitioner must provide a copy of the Appellate Transcript Request form and required attachments to each court reporter that transcribed a hearing for which a transcript is sought. The scheduling order issued by the Supreme Court will indicate whether a transcript will be prepared, the extent of any transcript and the due date for it. W. Va. R.A.P. 11(d). To obtain a transcript without cost, a party must provide proof of indigency by submitting an affidavit of indigency or attaching the order appointing counsel to the transcript request form. See W. Va. R.A.P. 9(b) and R.A.P. Appendix A – *Appellate Transcript Request Form*.

E. Petitions for Extraordinary Writs

In addition to seeking appellate relief; a party to an abuse and neglect case may seek relief from the West Virginia Supreme Court by filing a petition for an extraordinary writ. For example, the West Virginia Supreme Court has recognized that a writ of prohibition may be used to challenge improvement periods that are of a greater duration than allowed by statute. Syl. Pt. 2, *State ex rel. Amy M. v. Kaufman*, 470 S.E.2d 205 (W. Va. 1996). In another circumstance, the extraordinary writ process was used by the DHHR to challenge a circuit court order requiring the agency to reunify a child with his parents, although the West Virginia Supreme Court declined the relief sought in this particular case. *State ex rel. DHHR v. Fox*, 624 S.E.2d 834 (W. Va. 2005). As a third example, a petition for a writ of mandamus was

granted that required the DHHR to pay for therapy for an abused or neglected child, but only at the Medicaid rate. *State ex rel. Aaron M. v. DHHR*, 571 S.E.2d 142 (W. Va. 2001). A final example is *State ex rel. WVDHHR v. Yoder*, 703 S.E.2d 292 (W. Va. 2010). In this case, the Supreme Court granted the writ of prohibition sought by the DHHR and the guardian *ad litem,* preventing the return of the child to the mother under a dispositional improvement period.

As is true for any type of case, a petition for extraordinary relief should not be used as a substitute for an appeal. See Syl. Pt. 1, *Crawford v. Taylor*, 75 S.E.2d 370 (W. Va. 1953). When considering whether to file a petition for writ of prohibition, the well-recognized factors warranting such relief should be weighed. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E2d 12 (W. Va. 1996). In situations involving the possible filing of a petition for writ of mandamus, the three necessary elements should be present: 1) a clear legal right of the petitioner to the relief sought; 2) a legal duty of the respondent to do the thing sought to be compelled; and 3) the absence of another adequate remedy. *State ex rel. DHHR ex rel. Chastity D. v. Hill*, 532 S.E.2d 358 (W. Va. 2000).

It should also be noted that the West Virginia Supreme Court has recognized, in dicta, that a former foster parent could seek an extraordinary remedy, such as a writ of mandamus or a habeas corpus. *In re Michael Ray T.*, 525 S.E.2d 315 (W. Va. 1999). In this case, the former foster parents of three children sought to intervene in the children's case after the children had been removed from their care. Holding that intervention could be allowed for current foster parents but not for former foster parents, the Court noted that former foster parents were not devoid of a remedy. Rather, the Court noted that they could seek relief by filing a petition for an extraordinary writ.

Rule 16 of the Rules of Appellate Procedure governs the procedure for filing petitions for extraordinary writs in any case, and it contains no specialized procedures for abuse and neglect cases. As a matter of common sense, however, a party who seeks extraordinary relief with regard to an abuse and neglect case should, if appropriate, include information concerning the current status of the minor children, plans for permanent placement, and the current status of parental rights. See W. Va. R.A.P. 11(i). If the case is scheduled for oral argument, the parties should inform the Court of any change of circumstances addressed in the briefs within one week of the oral argument or at any other time established by the Court. W. Va. R.A.P. 11(j).

CHAPTER 4:
SPECIAL PROCEDURES AND TOPICS FOR CHILD ABUSE AND NEGLECT CASES

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I. PRINCIPAL ABUSE AND NEGLECT DEFINITIONS

West Virginia Code § 49-1-201 sets forth comprehensive definitions that pertain to all child abuse and neglect proceedings under Chapter 49 of the Code.

A. Abuse

The definition of "abuse" or an "abused child" includes knowing and intentional injuries, as well as situations in which a parent knowingly allows another person to injure a child. The types of injuries include physical injuries, as well as emotional and mental injuries. Abuse may also include sexual abuse, sexual exploitation or the sale or attempted sale of a child. It may further include domestic violence as defined by West Virginia Code § 48-27-202 and injuries inflicted as a result of excessive corporal punishment. W. Va. Code § 49-1-201.

One particular definition – when a parent knowingly allows another person to inflict physical, mental or emotional injury upon the child – has been the subject of significant litigation. This type of abuse occurs when a parent does not physically abuse a child but knowingly fails to take protective action in the face of abuse by another person. Syl. Pt. 2, *In the Matter of Scottie D.*, 406 S.E.2d 214 (W. Va. 1991). This type of abuse also occurs when a parent or guardian, knowing that the abuse occurred, takes no

action to identify the abuser. Syl. Pt. 8, *W. Va. DHHR v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996). These cases typically involve medical evidence that contradicts the parent's or custodian's explanations about the child's injuries.

This type of abuse is commonly referred to as "failure to protect," and a parent is often referred to as a "non-protecting parent." These common terms are, however, misnomers because this type of abuse does not occur because a child was subject to abuse and a parent simply did not prevent the abuse. Rather, the parent must know of the abuse and allow it by either failing to take any protective action or by aiding or protecting the abuser.

As noted previously, the definition of an "abused child" includes acts that would constitute domestic violence under West Virginia Code § 48-27-202 in the definition of child abuse. W. Va. Code § 49-1-201. The statute also includes a definition for a "battered parent" as one who has not "condoned the abuse and neglect and has not been able to stop the abuse or neglect of the child or children due to being the victim of domestic violence . . .. " W.Va. Code § 49-1-201. This provision recognizes that a victim of domestic violence may, dependent upon the facts of the case, not be considered to have knowingly allowed an abuser to inflict a physical, mental or emotional injury upon a child. The statute, therefore, makes a distinction between the commonly misused term of "failure to protect" from the statutory definition of abuse which occurs only when a parent knowingly allows abuse against a child.

Providing guidance about this definition of child abuse, the Supreme Court has held that the termination of a "non-protecting" parent's rights for this type of abuse is "usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, in part, *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988). In *Betty J.W.*, the circuit court terminated a father's parental rights after he sexually abused his seventeen-year-old daughter and terminated the mother's rights for failure to protect. The Supreme Court, however, reversed the termination of the mother's rights because the mother, a victim of domestic violence, reported the sexual abuse as soon as she could get away from her husband. The Supreme Court also noted that the mother had interceded when the father had attempted to sexually assault his daughter. In turn, the father beat the mother and threatened her with a knife. Based upon these facts, the Supreme Court concluded that the mother did not "knowingly" allow the abuse.

B. Neglect

A child is neglected when his or her physical or mental health is threatened by a refusal, failure or inability of the parent, guardian or custodian to supply the child with food, clothing, shelter, supervision, medical care or education.

However, the failure or inability of the parent, guardian or custodian must not arise primarily from the adult's lack of financial means. A child is also subject to neglect if the child's parent or custodian has disappeared or is absent, and as a result, the child is without food, clothing, shelter, medical care, education or supervision. W. Va. Code § 49-1-201.

C. Imminent Danger

The definition of imminent danger to the physical well-being of the child involves emergency situations that threaten the welfare or life of the child. Imminent danger is present if there is reasonable cause to believe that a child in the home has been sexually abused or exploited. It may also include non-accidental trauma. Additionally, imminent danger may involve a combination of physical signs and other signs that indicate a pattern of abuse and that may be medically diagnosed as battered child syndrome. Further, it includes circumstances involving nutritional deprivation, inadequate treatment of serious illness or disease, substantial emotional injury inflicted by a parent, guardian or custodian or the sale or attempted sale of a child by a parent, guardian or custodian. Finally, imminent danger encompasses situations in which substance abuse by a parent, guardian or custodian impairs that person's parenting skills to the extent that there is an imminent risk to the child's health or safety. W. Va. Code § 49-1-201.

II. RESPONSIBLE AGENCIES, OFFICERS AND PERSONS

A brief explanation of the statutory duties of the Department of Health and Human Services with regard to child welfare follows. Additionally, a brief description of duties and educational obligations for persons who work with children and families is also included.

A. Cooperation with United States Department of Health and Human Services

The West Virginia DHHR is the designated state agency that is required to cooperate with the United States Department of Health and Human Services for the purposes of extending and improving child welfare services, complying with applicable federal regulations and receiving and extending federal funds for child welfare services. W. Va. Code § 49-1-106(b).

B. Department of Health and Human Resources: Responsibilities for Protection and Care of Children

West Virginia Code §§ 49-2-101, *et seq.* sets forth the responsibilities of the Department for the care of abused and neglected children who are committed to its care for custody or guardianship. Care may be provided through: 1) foster homes; 2) licensed child welfare agencies; and 3) state institutions. West Virginia Code § 49-2-101 specifies the Department's

responsibilities for child custody and care upon voluntary parental or guardian placement, from courts exercising juvenile jurisdiction and from law-enforcement officers in emergency situations. As part of its duties related to child abuse and neglect, West Virginia Code § 49-2-813 requires the Department to maintain a statewide child abuse and neglect statistical index of all substantiated allegations of child abuse or neglect.

In addition to its responsibilities for the care of children who are placed in its custody, the Department also has the duty to provide services to children and families in order to prevent unnecessary placements. See Part II, Article 2 of Chapter 49 of the West Virginia Code. Consistent with this duty, the Department is required to provide services designed to preserve the family in cases where the removal of child is considered. However, such services are not required when a child is in imminent danger of serious bodily or emotional injury. W. Va. Code § 49-2-202.

Not only does the Department have the duty to avoid the unnecessary removal of children from their home, the Department also has the duty to facilitate the placement of children in permanent homes when they cannot be reunified with their family. Consistent with this duty, the Department is required to seek the termination of parental rights in specified instances. W. Va. Code § 49-4-605. In addition, the Department is required to make reasonable efforts to achieve timely permanency for children subject to child abuse and neglect proceedings. W. Va. Code § 49-4-608; Rule 36a. As part of its duty to achieve permanency for children, the Department is authorized to enter into contracts for subsidized adoptions and legal guardianships. W. Va. Code § 49-4-112.

C. Duties of Department: Licensing for Child Welfare Agencies

The Legislature has specified the responsibilities of the Department for the licensing, approving and registering of child care facilities and child welfare agencies in the State. W. Va. Code §§ 49-2-101, *et seq.* Applicable State regulations include Title 78, Series 2-- "Child Placing Agencies Licensure," and Title 78, Series 3-- "Minimum Licensing Requirements for Residential Childcare and Treatment Facilities for Children and Transitioning Adults in West Virginia."

D. Duties of Prosecuting Attorneys

Every prosecuting attorney has the following duties with regard to the abuse and neglect of children: 1) fully and promptly cooperate with persons seeking relief in suspected instances, including co-petitioners; 2) promptly prepare applications and petitions for relief; and 3) investigate reported cases for possible criminal activity and report to the grand jury at least annually in this regard. W. Va. Code § 49-4-502. The prosecuting attorney shall provide legal services to the Department. W. Va. Code § 49-4-501.

Any disputes that arise between a prosecuting attorney and the Department regarding proposed action that is believed to place a child at imminent risk are subject to the mediation provisions set forth in West Virginia Code § 49-4-501. As recognized by the West Virginia Supreme Court, the Department is the client of the prosecuting attorney in a county, and the relationship between the Department and a county prosecutor is a pure attorney-client relationship. See Syl. Pt. 4, *State ex rel. Diva P. v. Kaufman*, 490 S.E.2d 642 (W. Va. 1997); Syl. Pt. 3, *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012). In addition, every prosecuting attorney has the duty to establish a multidisciplinary investigative team for their county, which is responsible for coordinating and cooperating in the investigation of all civil and criminal allegations of abuse and neglect. W. Va. Code § 49-4-402. See also W. Va. Code § 7-4-5.

E. Department of Health and Human Resources: Multidisciplinary Treatment Teams

The Department is responsible for establishing a multidisciplinary treatment team process in every county (or in contiguous counties), which shall be responsible for addressing, planning and implementing comprehensive, individualized service plans for children who are victims of abuse and neglect. W. Va. Code § 49-4-403. See Overview Section VI. Multidisciplinary Treatment Teams for a complete explanation of multidisciplinary treatment teams in child abuse and neglect cases.

F. Duties of Child Protective Services

Under West Virginia Code § 49-2-802, the Department shall establish or designate a Child Protective Services Office for every county. The local office shall be responsible for: 1) investigating all reports of child abuse or neglect pursuant to the time standards and investigatory procedures specified in this statute; 2) providing, directing or coordinating appropriate and timely delivery of services to any child suspected or known to be abused or neglected (and services to the child's family); and, 3) initiating appropriate legal proceedings. (See also West Virginia Code § 49-4-303(2) relating to emergency custody by child protective service workers.)

G. Mandatory Reporting of Suspected Abuse or Neglect

Certain types of persons are established as mandatory reporters of child abuse or neglect. West Virginia Code § 49-2-803(a) requires medical, dental and mental health professionals, school personnel, social workers, childcare workers, clergy, law-enforcement officers, humane officers, and judicial officers to report any suspected child abuse or neglect. In addition, personnel (whether volunteer or not) of an entity that provides organized activities for children are identified as mandatory reporters. Further, commercial film or photographic print processors have been designated as

mandatory reporters. If a person is a mandatory reporter and he or she is also a staff member or volunteer of an organization that provides organized activities for children, he or she is also required to notify the person in charge of the entity of the suspected abuse or neglect. In turn, the person in charge of the entity may supplement the report or make an additional report. The Department has been required to implement a procedure to inform these mandatory reporters whether an investigation of the suspected abuse or neglect has been initiated and when an investigation has been completed. W. Va. Code § 49-2-804.

Persons who are identified as mandatory reporters have the statutorily established duty to report information to the Department when they have *reasonable cause* to suspect child abuse or neglect or if they observe conditions that are likely to result in abuse and neglect to a child. The person should report the suspected abuse and neglect immediately, but no later than 48 hours after observing or receiving the applicable information. If the reporter believes that the child has suffered serious physical abuse or sexual abuse or sexual assault, he or she should also report the matter to the State Police and any other law-enforcement agency with jurisdiction. W. Va. Code § 49-2-803(a).

In addition to abuse or neglect of a child, suspected sexual assault or sexual abuse of a child triggers heightened reporting duties. W. Va. § 49-2-803(b). As an initial matter, the duty to report applies to any person over age 18. According to subsection (b), a person is subject to the duty to report any sexual abuse or sexual assault of a child if he or she either receives a disclosure from a credible witness or observes the sexual assault or abuse of the child. The report must be made no later than 48 hours after obtaining the information, and it must be made to the DHHR and the State Police or any law enforcement agency who has jurisdiction to investigate the allegations. A person who is under a duty to report sexual abuse or sexual assault of a child may delay making a report if the person has a good faith belief that reporting the allegations to law enforcement would expose the reporter, the subject child, the reporter's children or other children in the subject child's household to an increased threat of serious bodily injury. In these circumstances, the reporter must take steps to remove themselves or the affected children from the threat of additional harm and must report the matter to law enforcement as soon as practicable after the harm has been reduced. Once a law enforcement agency receives this report, the agency is required to report the matter to the Department. W. Va. Code § 49-2-803(b).

School teachers and other school personnel are also under a heightened duty to report suspected sexual abuse of a child. W. Va. Code § 49-2-803(c). This duty arises when a teacher or other personnel receives an objectively credible disclosure from a witness, or if he or she personally observes sexual contact, sexual intercourse or sexual intrusion of a child on

school premises, school buses or on other transportation used in furtherance of a school purpose. School personnel are required to report the matter within 24 hours to law enforcement. They are relieved of the duty to report the matter if they inform a principal, assistant principal or other similar person in charge. In turn, the principal, assistant principal or other school official is required to report the matter to law enforcement within 24 hours.

Although the reporting requirement is fairly stringent, the first proviso in the statute indicates that a teacher or other school official is not required to report *consensual* sexual contact, intercourse or intrusion occurring *between students* if the conduct would **not** otherwise constitute any of the following crimes: first degree sexual assault (§ 61-8B-3); third degree sexual assault (§ 61-8B-5); first degree sexual abuse (§ 61-8B-7); and third degree sexual abuse (§ 61-8B-9).[11] A school official must, therefore, report incidents occurring between students if the actions could constitute any of those specified Article 8B offenses. Sections four (second degree sexual assault) and eight (second degree sexual abuse) were excluded from the list of identified offenses in the proviso, presumably because the offenses involve victims who by virtue of being physically helpless, mentally incapacitated or mentally defective are incapable of consent. In other words, a school teacher or other school official would **not** be relieved of the duty to report sexual contact, sexual assault or sexual abuse between students if one of the students could be considered physically helpless, mentally incapacitated or mentally defective. W. Va. Code § 49-2-803(c).

As noted in subsection (e), the reporting requirements apply to personnel in public or private schools. In addition, the reporting requirements apply to conduct that may occur between students or between a student and a school teacher or other personnel. When a law enforcement agency receives this type of report, it, in turn, must inform the affected student's parents, guardians or custodians within 24 hours.

H. Education and Training Obligations

Various statutory provisions mandate specific education or training for those persons most involved with prevention and intervention in situations of child abuse and neglect. West Virginia Code § 18-5-15c (County boards of

[11] The first proviso in subsection (c) actually references sections three, five and nine of Article 8 of Chapter 61. Presumably, the proviso was intended to refer to Article 8B offenses; i.e. sexual assault or sexual abuse. The reference to Article 8 is problematic in that section three of Article 8 has been repealed and sections five and seven refer to offenses associated with prostitution. It can be concluded, therefore, that intent of the statute was to refer to Article 8B offenses.

education to provide pupils, parents and school personnel with training programs in prevention of child abuse and neglect); West Virginia Code § 48-27-1103 (Mandatory training for law-enforcement officers relating to response to calls involving family violence); West Virginia Code § 48-27-1104 (Mandatory education on family violence for circuit court judges, family court judges, and magistrates); West Virginia Code § 61-8-9a (Curriculum on parenting skills to avoid child abuse required for secondary-level grades in all State schools).

Counsel appointed for any of the parties in abuse and neglect cases must complete at least eight hours of CLE training per each two-year reporting period on child abuse and neglect procedure and practice. After July 1, 2013, any attorney appointed to represent a child must first complete training on representing children that has been approved by the Supreme Court Administrative Office. If no attorney is available who has completed the required training, the court may appoint a competent attorney who has demonstrated knowledge of child welfare law. W. Va. Code § 49-4-601(g).

III. WEST VIRGINIA SAFETY ASSESSMENT AND MANAGEMENT SYSTEM (SAMS)

A. Background

The Bureau for Children and Families of the West Virginia Department of Health and Human Resources (BCF) recognized a need to change the way it provided child protective services to the children and families of West Virginia. This change occurred due to internal case reviews, poor results in reviews conducted by the federal government and the Department's goal to provide protection to West Virginia's children.

The BCF, along with Action for Child Protection, Inc., designed a child protective services assessment model for West Virginia. Action for Child Protection, Inc. operates the National Resource Center for Child Protective Services (NRCCPS) on behalf of the Children's Bureau, Administration for Children and Families (ACF), U.S. Department of Health and Human Services. The NRCCPS provides training and technical assistance to help State, local, Tribal and other publicly administered or supported child welfare agencies to achieve safety, permanency, and well-being for children and families. This model is based on nationally recognized best practices in child protective services. The purpose of implementing the model is to have a more precise way to respond to children threatened with harm and to engage families in the child protective services process.

This model is an integrated safety assessment system called the West Virginia Safety Assessment and Management System (SAMS). SAMS includes four different assessments that evaluate whether a child is safe.

All SAMS assessment processes have been implemented statewide. A description of each assessment follows.

B. Summary of CPS Assessment Processes

1. Intake Assessment

During the initial assessment or Intake Assessment, a child protective services worker will gather relevant information to determine if a child is abused or neglected or threatened with abuse and neglect, as defined by West Virginia Code § 49-1-201. During the Intake Assessment, the worker will attempt to gather information about maltreatment or harm that has already occurred and other family dynamics that are likely to result in harm to a child. If any child in the home has been abused or neglected, or is subject to conditions where abuse or neglect is likely to occur, the family will be subject to a Family Functioning Assessment. When families do not receive a Family Functioning Assessment, the CPS worker may make appropriate referrals to community resources.

2. Family Functioning Assessment (FFA)

The Family Functioning Assessment (FFA) seeks to engage families and evaluate them to determine if any child in the home is in need of protection. Throughout the FFA, the child protective services worker will gather relevant information to determine if a child has been harmed, or if a child is likely to be harmed or is in "impending danger." If a child is in impending danger, the Department will open an "ongoing" case for services. Additionally, a Protective Capacities Family Assessment will be completed.

3. Protective Capacities Family Assessment (PCFA)

The results of a PCFA are very relevant to an abuse and neglect case because the PCFA will determine the terms of a either the child or family case plan. In turn, the case plan should increase child safety by enhancing the protective capacities of a caregiver. The purpose of the treatment plan, therefore, is to eliminate or reduce impending danger to the point where a family can provide a safe environment for a child.

The protective capacities of a parent or caregiver include behavioral, cognitive and emotional characteristics that are directly associated with a person's ability to adequately protect his or her children. They are "strengths" that are specifically associated with a person's ability to perform effectively as a caregiver or parent and to provide a safe environment for the child. Ongoing CPS social workers, caregivers

and multidisciplinary teams should formulate treatment plans that enhance the protective capacities of a parent or caregiver. By doing so, the likelihood of harm to a child should be significantly decreased.

4. Family Case Plan Evaluation

The Family Case Plan Evaluation is a formal decision-making process, which requires involvement from caregivers, children, any service providers, any safety service providers and any other members of the multidisciplinary treatment team. The purpose of the Family Case Plan Evaluation is to measure progress toward achieving the goals of the family case plan, to re-evaluate the status of the threat of harm or impending danger, to re-evaluate the status of the children's needs, and to provide information to the multidisciplinary treatment team. The evaluation should help the treatment team make recommendations to the court concerning the continued necessity for out-of-home placement or concerning any changes to the permanency plan. In order for the Family Case Plan Evaluation to be effective, the goals of the PCFA must have been appropriate.

C. Information Relevant to the Court's Decisions

SAMS is designed to improve the quality of information that is provided to the court. In turn, the improved information should assist the court when it must make the following types of decisions: 1) whether a child should be removed from his or her home; 2) whether a child can be safely returned home; 3) whether the parent is making progress on treatment goals that enhance a child's safety; or 4) whether the permanency plan should be changed because of inadequate progress.

D. Evaluation or Assessment Based on Safety

Perhaps most importantly, SAMS is designed to assist a parent so that he or she is providing a safe environment, as opposed to evaluating whether a parent is simply complying with directives from a caseworker. There are instances in which a parent or caregiver attends parenting classes, has clean drug screens, maintains employment, or attends mental health counseling, and yet has not made the changes necessary to provide a safe home for his or her child.

The purpose of the PCFA, therefore, is to engage the parent in developing goals that, when achieved, would demonstrate that the parent is able to safely care for his or her child. The goals of the PCFA should clearly illustrate the essential characteristics or necessary changes a parent or caregiver must make in order to be able to provide a safe environment for his or her children. Services will then be used to assist the parent in

meeting the necessary goals. *Services are a means to meet a goal; services must never be the goal or the focus of CPS intervention.* After goal development with the family, CPS intervention will focus on engaging the caregivers in meeting the goals and monitoring progress. This emphasis will allow CPS workers to report whether caregivers are making the changes necessary to provide a safe home for their child.

Because SAMS focuses on changes associated with a parent's behaviors, attitudes and emotions, it is likely that some adult respondents will not be successful in a case, even though they have complied with directives and participated in various services. Alternatively, CPS workers may recommend that a child be returned home even if the parent has not complied with all of the requirements associated with a service. In either situation, the CPS social worker should be able to explain to the court, in detail, the reasons for recommendations at various stages of an abuse and neglect case.

E. Basis for Custody

Although the SAMS assessment process involves the completion of four different assessments, it does not foreclose CPS from taking emergency custody of a child and filing petitions in which it seeks the custody of children because of circumstances involving imminent danger. At any point in CPS's involvement with a family, it may file a petition to obtain custody of a child when imminent danger is present. Circumstances in which CPS may seek custody of a child include, but are not limited to, the following:

1. When a report of suspected abuse or neglect has been received and the parents refuse to allow access to the children to be interviewed;

2. The child is unsafe due to a threat of harm and there are no available or appropriate in-home safety responses that would allow the child to safely remain in the home;

3. The child is in imminent danger and there are no appropriate or available safety responses that would allow the child to remain in the home safely;

4. The parent(s) has committed an act which meets the definition of aggravated circumstances or other situations as defined in West Virginia Code § 49-4-602(d); or

5. The child is unsafe due to a threat of harm, an in-home safety plan controls the threat, but the parents have demonstrated that they are incapable of or unwilling to take the actions necessary to reduce the threat to their child so that safety does not have to be controlled by external means.

IV. MEDICAL AND MENTAL EXAMINATIONS

A. Procedure for Court-Ordered Medical and Mental Examinations

West Virginia Code § 49-4-603 specifies the procedure and conditions for court-ordered mental and medical examinations of a child or other parties in abuse and neglect proceedings. The case of *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002) provides substantial guidance on questions of immunity from criminal prosecution for statements made during the course of court-ordered examinations in child abuse and neglect case. See also Syl. Pt. 3, *State v. James R.*, 422 S.E.2d 521 (W. Va. 1992). The procedures involved with a court-ordered mental or medical examination follow.

1. At any time during the proceedings, an attorney for a child or attorney for other parties may move for, or the court may order *sua sponte*, an examination by a physician, psychologist or psychiatrist, and require testimony from such expert.

2. The court cannot terminate parental/custodial rights solely for refusal to submit to an examination, nor may the court hold such person in contempt for such failure or refusal.

3. The expert (physician, psychologist or psychiatrist) may testify as to any conclusions reached from hospital, medical, psychological or laboratory records, provided they are produced at the hearing.

4. The State will be responsible for payment if the child, parent or custodian is indigent. (With regard to the payment of expert fees, see the discussion below.)

5. No evidence acquired as the result of such examination of any parent/custodian may be used against such person in subsequent criminal proceedings.

B. Medical Examination of a Child Before Petition Is Filed

1. Subsection (b) of West Virginia Code § 49-4-603 allows any person[12] with authority to file an abuse or neglect petition to apply to the circuit judge or juvenile referee for a medical examination before an abuse or neglect proceeding has been initiated if there is probable cause to believe that evidence of abuse or neglect may be found by such an examination.

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[12] Either a reputable person or representative from the Department may file an abuse and neglect petition. W. Va. Code § 49-4-601(a).

2. Upon the presentation of sufficient evidence, the judge or referee may order law-enforcement to take the child into custody for the examination. If a referee finds that a child must be subject to an examination, he or she must obtain oral confirmation from a judge in his or her circuit or in an adjoining circuit. In turn, the judge, on the next judicial day, must enter an order confirming the referee's order.

3. A CPS worker, the child's parents, guardians or custodians may accompany the law enforcement officer to the examination.

4. At the end of the examination, the law enforcement officer may return the child to the custody of his or her parent, guardian or custodian. Alternatively, the officer may retain custody of the child or place the child in the custody of the Department until the end of the next judicial day. At that time, the child must be returned to his parent, guardian or custodian unless an abuse and neglect petition has been filed and custody has been transferred to the Department. W. Va. Code § 49-4-603(b).

C. Court-Ordered Examination By Other Experts

In addition to the medical and mental examinations authorized by West Virginia Code § 49-4-603, the court may order parties to undergo examinations by experts who are not physicians, psychologists, or psychiatrists and may enter a protective order with regard to W. Va. Code § 57-2-3, a statute that provides use immunity for statements made "upon a legal examination." *Daniel D.*, 562 S.E.2d 147. A person is entitled to have the court establish the protections afforded by West Virginia Code § 57-2-3 in a protective order.

D. Payment for Court-Ordered Medical and Mental Examinations

The authority for the establishment of expert witness fees is governed by a combination of statutes, rules and caselaw. In a mandamus action addressing the payment of expert witness fees, the Supreme Court concluded that a circuit court retains the ultimate authority to determine compensation for expert witnesses in abuse and neglect cases. *Hewitt v. DHHR,* 575 S.E.2d 308 (W. Va. 2002). *Hewitt* did not, however, resolve who is responsible for payment of expert witnesses in abuse and neglect cases.

In the case of *In re Chevie V.,* 700 S.E.2d 815 (W. Va. 2010), the Court reviewed relevant cases and the amalgam of statutes and rules that govern this issue. After an initial review of the applicable authority, the Court determined that the question presented was a matter of first impression.

In *Chevie V.*, the Court held that the circuit court had the discretion to require the Department to pay the expert witness pursuant to West Virginia Code § 49-7-33, the statute that, at that time, allowed the Department to establish a fee schedule according to the Medicaid rate. However, the Court also held that the Department would not be liable for payment at the rate of the expert witness fee schedule established by the Public Defender Corporation. Rather, the Department would be liable for payment pursuant to its own fee schedule.

As part of the 2015 West Virginia Child Welfare Act, the applicable statute is now found in West Virginia Code § 49-4-108.

It should be noted that the Supreme Court determined that Trial Court Rules 27.01 and 27.02 did not govern payment in *Chevie V.* because the circuit court did not appoint the expert. Rather, the circuit court simply approved a request by the mother's attorney to hire an expert. Under Trial Court Rules 27.01 and 27.02, the Department is liable for payment for an expert witness's report writing, consultation or other preparation, and the Supreme Court's Administrative Office is liable for an expert's fees and expenses related to appearing and testifying. It can be concluded, however, that the payment provisions in Trial Court Rules 27.01 and 27.02 would apply when a circuit court appoints an expert in an abuse and neglect case.

It should also be noted that the Court analyzed Trial Court Rule 35.05(b) and West Virginia Code § 29-21-13a(e), provisions that require the Public Defender Corporation to pay expert witness fees in eligible proceedings. In *Chevie V.*, the Supreme Court held that the provisions were general and that the more specific provisions in West Virginia Code § 49-7-33 were dispositive of the issue. For a complete discussion of *Chevie V.,* see Caselaw Digest, Section II, J. Advance Approval of Expert Fees.

The relevant statute is now found at West Virginia Code § 49-4-108.

V. CRIMINAL OFFENSES INVOLVING ABUSE AND NEGLECT OF CHILDREN

Beyond the protections afforded generally to all persons under the criminal statutes, various provisions are specifically designed to deter and punish offenses against children, and provide special protection to child-victims of crimes.

A. Criminal Offenses Against Children

West Virginia Code §§ 61-8D-1, *et seq.* defines the various conduct generally constituting criminal offenses of child abuse and neglect that are committed by parents, guardians, custodians or persons in a position of trust to a child. Additional specific criminal offenses involving abuse or neglect of children are principally found in West Virginia Code §§ 61-8C-1, *et seq.* (Filming of Sexually Explicit Conduct of Minors), West Virginia Code §§ 61-8A-1, *et seq.* (Preparation, Distribution or Exhibition of Obscene Matter to Minors) and West Virginia Code § 49-4-901 (Contributing to Delinquency or Neglect of a Child).

B. Protections for Child Victims of Crime

A number of statutes provide specific protections for child-victims relating to the investigation, trial, sentencing, and release of persons charged and convicted of criminal offenses against children. West Virginia Code § 15-2-15 (Establishment of a State Police Child Abuse and Neglect Investigations Unit); West Virginia Code § 61-8-13; 61-8B-14; and 61-8C-5 (Limits on interviews of children 11 years old or less); West Virginia Code §§ 62-6B-1, *et seq.* (Closed-circuit testimony of child victims testifying in criminal matters involving charges of sexual assault/abuse); West Virginia Code § 61-11A-3(d) (Victim impact statement in a presentence report involving specified offenses against a child may include a statement from a therapist providing treatment to the child-victim as to recommendations regarding the effect that possible disposition may have on child); West Virginia Code § 61-11A-8 (Notification to child-victim's parent upon release of convicted person from correctional facility); West Virginia Code § 62-1C-17a (Bail in situations of child abuse); West Virginia Code § 62-1C-17c (Bail in cases of crimes between family or household members); West Virginia Code § 62-11A-1(g) (Protections afforded children from those convicted of child offenses who are granted work-release privileges); West Virginia Code § 62-11B-6(d) (Protections afforded victims from those who are granted home confinement); West Virginia Code §§ 62-12-7 & 7a (Pre-sentence investigations and reports involving offenses against children); West Virginia Code § 62-12-9(a)(4) (Protections afforded children from those convicted of child offenses who are released on probation); West Virginia Code § 62-12-17(a)(4) (Protections afforded children from those convicted of child offenses who are released on parole); West Virginia Code § 62-12-26 (Protections afforded children from those convicted of sexually violent offenses against children and who are serving a period of supervised release); West Virginia Code § 15-2C-2 (Relating to Central Abuse Registry identifying persons convicted of crimes involving abuse and neglect); and West Virginia Code §§ 15-13-1, *et seq.* (Requiring persons convicted of child abuse or neglect crimes to register with the State Police).

C. Additional Finding Upon Conviction

Various statutory provisions also mandate that upon a conviction of person for a crime against a child, when the person has any custodial, visitation or other parental rights to the child, the court shall make a finding that the convicted person is an "abusing parent" within the meaning of the abuse and neglect provisions of Chapter 49 of the Code. West Virginia Code § 61-8-12(e) (Incest); West Virginia Code § 61-8B-11a (Sexual Offenses); West Virginia Code § 61-8D-9 (Child Abuse); see also West Virginia Code § 49-4-609. The court is authorized to take further action as allowed by Part VI, Article 4 of Chapter 49.

VI. CONTRARY-TO-WELFARE AND REASONABLE EFFORTS FINDINGS

A. Background

The requirement that any removal of a child be based upon a judicial finding that continuation of the child in the home is contrary of the welfare of the child was the first of the existing protections afforded to children and their families by the federal foster care program. The contrary-to-welfare requirement has been in effect since the inception of the federal program in 1961. The additional requirement that states make reasonable efforts to prevent placement and reunify families was introduced into child welfare proceedings in 1980 under the Federal Adoption Assistance and Child Welfare Act. Both the contrary-to-welfare and reasonable efforts requirements have continued as core concepts in American child welfare practices. More recently, the Federal Adoption and Safe Families Act of 1997 (and implementing regulations) refined and expanded these concepts. In addition to the reasonable efforts required to prevent removal and to reunify families, federal law also now requires states to demonstrate reasonable efforts to finalize the permanency plan in a timely manner once the child is temporarily placed in foster care.

The contrary-to-welfare and reasonable efforts requirements must be reflected in judicial findings, which must be both timely and specific. Once a child is removed from the home (temporarily or permanently), the State is eligible for 3-to-1 federal matching funds under Title IV-E of the Social Security Act for the duration of the child's stay in foster care. If a child's removal from home is not based on a judicial determination that it was contrary to the child's welfare to remain in the home, the State is ineligible for Title IV-E funding for the entire foster care episode subsequent to that removal.[13] When findings of reasonable efforts to prevent removal are negative, insufficient, late or missing, the loss of eligibility for federal foster care matching funds will also be for the duration of the child's stay in foster care. If emergency circumstances support the conclusion that it was reasonable to make no efforts to prevent removal under the particular facts, this determination must be adequately and timely stated in the court's order. Later in the case, when findings of reasonable efforts to finalize a child's permanency plan are negative, insufficient, late or missing, the State will be

[13] In circumstances involving a child placed in foster care as the result of a voluntary placement agreement, within the first 180 days of the placement there must be a judicial determination to the effect that the continued placement is in the best interests of the child. Without this finding, the child's placement will no longer be eligible for federal funding once the 6-month deadline has passed.

ineligible for federal matching funds for the child until there are positive and sufficient findings addressing this area of critical concern.

B. Required Judicial Findings

1. Contrary to Welfare

A child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. 45 C.F.R. § 1356.21(c). The judicial determination need not necessarily use the exact terminology of the statute or regulation, so long as the language conveys that the court has determined that it would be contrary to the welfare of the child to remain at home or that placement would be in the child's best interest.

2. Reasonable Efforts to Prevent Removal

Unless an exception applies, when a child is removed from the home, the court must make findings as to whether the State made reasonable efforts to maintain the family and prevent the unnecessary removal of a child, and to make it possible for the child to safely return home (after a temporary placement necessary to ensure immediate safety). 42 U.S.C. § 671(a)(15)(B) and (D); 45 C.F.R. § 1356.21(b). As stated above regarding contrary to welfare findings, exact terminology is not necessary, but the language of the order must convey that the court has determined that reasonable efforts have been made or were not required.

3. Reasonable Efforts to Finalize Permanency Plan

Consistent with 42 U.S.C. § 671(a)(15)(C), the State must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan in a timely manner. This finding must be made without regard to the type of permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a relative, or placement in another planned permanent living arrangement). Federal law recognizes concurrent planning as part of reasonable efforts to finalize the permanency plan. 42 U.S.C. § 671(a)(15)(F); 45 C.F.R. § 1356.21(b)(4).

4. New Findings

If a trial home visit (e.g. improvement period) exceeds six months without court authorization, or exceeds the time period the court has

deemed appropriate, and the child is subsequently returned to foster care, that must be considered a new placement and Title IV-E eligibility re-established. Accordingly, the judicial determinations regarding contrary to welfare and reasonable efforts would again be required. 45 C.F.R. § 1356.21(e).

C. Determinations that Reasonable Efforts Not Required

The State is not required to make efforts to prevent placement or reunify the family where such efforts will endanger a child's health or safety. Federal law states that "in determining reasonable efforts to be made with respect to a child . . . and in making such efforts, the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A). In addition, reasonable efforts to preserve the family are not required if a court finds that the parent has: subjected the child or another child to aggravated circumstances (as defined in State law – such as abandonment, torture, chronic abuse, and sexual abuse); committed certain serious criminal acts against the child, against another child, or the other parent; the parental rights of a sibling have been terminated involuntarily; or has been required by law to register as a sex offender. W. Va. Code § 49-4-604(b)(7); see also 42 U.S.C. § 671(a)(15)(D); 45 C.F.R. § 1356.21(b)(3). Finally, even if none of the specific circumstances applies, courts may exercise discretion, in individual cases, to protect the health and safety or children. 42 U.S.C. § 678. As discussed in the federal commentary accompanying the promulgation of the final regulations:

> [T]he statute should not be construed to support unwarranted attempts to preserve families. Rather, when reasonable efforts are required, the State agency and the courts must determine the level of effort that is reasonable, based on safety considerations and the circumstances of the family. Sometimes, based on its assessment of a family, the State agency determines that it is reasonable to make no effort to maintain the child in the home or to reunify the child and family. In such circumstances, if the court determines that the agency's assessment of the family is accurate and its actions were appropriate, the court should find that the agency's efforts in such cases were reasonable, not that reasonable efforts were not required. 65 Fed. Reg. 4053 (Jan. 25, 2000).

D. Timing of Required Findings

The timing of each of the required findings is specific to the particular events occurring in a case. The "removal" date and the different procedural stages in the case are generally the key factors in identifying the deadlines

applicable to a case. There are three different deadlines for judicial findings that strictly govern eligibility for federal foster care matching funds.

1. Contrary to Welfare

The Title IV-E regulations provide that findings to the effect that continuation of the child in the home would be contrary to the child's welfare must be made in the **first** court order sanctioning or authorizing the child's removal (even temporarily) from the home. If this determination is not made in the first order pertaining to removal, the child is not eligible for Title IV-E foster care funds for the duration of that stay in foster care. 45 C.F.R. § 1356.21(c). Although removal could occur at any stage of the proceedings, orders which most often involve the first removal include: (i) Order Ratifying Emergency Custody; (ii) Initial Order Following Petition (ten-day temporary custody); (iii) Order Following Preliminary Hearing; or (iv) Disposition Order.

2. Reasonable Efforts to Prevent Removal

The judicial findings regarding reasonable efforts by the Department to prevent placement (or that such efforts were not required under the particular circumstances) must be made within 60 days following the removal of the child from home. If this determination is not made within this time period, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. 45 C.F.R. § 1356.21(b)(1). In most cases, the best practice is to make this finding at the time of the initial removal (along with the contrary to welfare finding). Otherwise, this finding may be inadvertently omitted during the 60-day time frame.

3. Reasonable Efforts to Finalize Permanent Placement

Findings by the court as to whether the Department has made reasonable efforts to finalize the child's permanency plan must be made within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter. If the determination is not made, the child becomes ineligible for Title VI-E payments at the end of the month in which the finding should have been made and remains ineligible until such a judicial determination is made. 45 C.F.R. § 1356.21(b)(2). A child is "considered to have entered foster care" on the date the court found that the child was abused or neglected, or 60 days following the child's actual removal from home, which ever comes first. 45 C.F.R. § 1355.20.

The permanency hearing requirement generally follows the same 12-month timeframe as the findings regarding reasonable efforts to finalize the permanency plan. 42 U.S.C. § 675(5)(C). There is an exception to this timeframe when a court determines at any stage of the proceedings that reasonable efforts to return the child home are not required; then the permanency hearing must be held within 30 days of that determination. 45 C.F.R. § 1356.21(h)(2). (See Chapter 3, Section XII for a more detailed discussion of permanency hearing requirements.) However, the permanency hearing requirement is not a Title IV-E eligibility criterion. If a permanency hearing is not timely conducted under the applicable (12-month or 30-day) timeframe, the child does not become ineligible for Title IV-E funding. The pertinent concern for Title IV-E purposes is the finding at least once every 12 months that the Department made reasonable efforts to finalize the child's permanency plan. The best practice to follow in this regard is to make the reasonable-efforts-to-finalize findings in every hearing (and accompanying order) after the permanency plan is established as part of the child's case plan. See W. Va. Code § 49-4-604(a). This will be more than sufficient to satisfy the 12-month timeframe for such findings.

E. Documentation of Judicial Findings

The judicial determinations regarding contrary to welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in a timely manner, (and any determinations that reasonable efforts are not required), must be "explicitly documented" and "made on a case-by-case basis" in the pertinent court orders. 45 C.F.R. § 1356.21(d). Regulation commentary acknowledges the administrative burdens imposed by explicit and case-by-case findings, and suggests a number of ways to provide detailed findings, including: (i) descriptions in the court order findings; (ii) language in the court order that specifically cross-references detailed statements in an agency or other report submitted to the court; (iii) language of the court order that cross-references to facts in a sustained petition; or (iv) checking off items from a detailed checklist. 65 Fed. Reg. 4056.

If the contrary to welfare or reasonable efforts determinations are not included in the required court orders, a transcript of the court hearing in which the findings were made is the only acceptable substitute. 45 C.F.R. § 1356.21(d)(1). Neither affidavits from hearing participants nor *nunc pro tunc* orders are accepted. 45 C.F.R. § 1356.21(d)(2).

F. West Virginia Statutes

Although receipt of Title IV-E funding in cases involving out-of-home placement is dependent upon compliance with the federal requirements,

several West Virginia statutes assist with compliance by inclusion of the contrary to welfare and reasonable efforts requirements.

First, the initial order granting temporary (ten-day) custody calls for both contrary to welfare and reasonable efforts to prevent removal findings. W. Va. Code §§ 49-4-105; 49-4-602. When appropriate, the petition should provide detail about supportive services that the Department or others provided to remedy the circumstances. W. Va. Code § 49-4-601(b); Rule 18(c). This information should assist the court with its findings concerning reasonable efforts to prevent removal.

Secondly, if temporary custody is granted during a preliminary hearing, the contrary to welfare and reasonable efforts to prevent removal findings are similarly required. W. Va. Code §§ 49-4-105; 49-4-602(b). Upon consideration of temporary custody pursuant to either West Virginia Code § 49-4-602(a) or (b), the circumstances when the court may find that the State was not required to make efforts to prevent removal are specified. W. Va. Code § 49-4-602(d); see also W. Va. Code § 49-4-105. These situations generally involve aggravated circumstances.

Third, if an order at the disposition stage involves temporary custody, the contrary to welfare and reasonable efforts to prevent removal findings are required. W. Va. Code §§ 49-4-105; 49-4-604(b)(5). Fourth, both types of findings are likewise required in any disposition involving termination of parental rights. W. Va. Code § 49-4-604(b)(6). Finally, the circumstances are set out as to when reasonable efforts to preserve the family are not required before out-of-home placement at the disposition stage. W. Va. Code § 49-4-604(b)(7).

When a court conducts permanency hearings, West Virginia Code § 49-4-608(b) requires a court to determine whether the Department has made reasonable efforts to finalize the permanency plan. See also W. Va. Code § 49-4-110(c). A permanency hearing must be conducted within 12 months of the time that the Department obtained physical custody of a child, provided that the Department was required to make reasonable efforts to preserve the family. If a court finds that the Department is not required to make reasonable efforts to preserve the family, then the permanency hearing must be conducted within 30 days of the entry of the court order that includes this finding. W. Va. Code § 49-4-608.

The Rules of Procedure for Child Abuse and Neglect Proceedings have incorporated the reasonable efforts to finalize placement determination in the court review process. See, e.g., Rules 41(a) and 42(a). Additionally, Rule 28, the rule governing the child's case plan, indicates that the permanency plan and concurrent plan should be designed to achieve timely permanency in the least restrictive setting available. Further, Rule 43 indicates that permanency should be achieved within 12 months of the final

disposition order. These statutes and rules, therefore, require the court to make findings as to whether the Department has made reasonable efforts to finalize the permanency plan in a timely manner and should assist with meeting federal requirements.

G. Common Court Order Language Problems in Abuse and Neglect Cases

The following are some common problems with Title IV-E findings in court orders in abuse and neglect cases.

1. The complete absence of "contrary to welfare of child" or "best interest of child" findings in the initial removal order.

2. The order notes that the petitioner alleges in the petition that it would be contrary to the welfare of the child to remain in the home and that the Department has made reasonable efforts to prevent the need for the removal. While noting these allegations does not hurt, *there must be a finding by the court* as to these two issues – contrary to welfare of the child and reasonable efforts to prevent removal.

3. Finding that it is in the best interest of someone or something other than the child to remove the child from the home, i.e., that it is in the best interest of society to remove the child from the home.

4. Finding that there is "no other reasonable alternative to removal of the child" instead of whether or not the Department made reasonable efforts to prevent removal or whether or not reasonable efforts were possible.

5. Giving the Department legal custody, but allowing the child to remain in the home while giving the Department permission to remove the child at their discretion. It is, of course, inconsistent to find that it is contrary to the welfare of the child to remain in the home, but at the same time allowing the child to remain in the home. Therefore, if the Department is given custody, but the child is permitted to remain in the home with the authority of the Department to remove the child, there must be another hearing (simultaneous with removal) where there are findings on the issues of "contrary to welfare of the child" and "reasonable efforts." See Rule 16(d) and (e).

6. Any reference to reasonable efforts being left out of the initial removal order. Reasonable efforts findings should be in the initial order; it is often very hard to get a follow-up order with a reasonable efforts statement within the required 60-day limit.

7. A general reference to the State code requirements to substantiate findings. The findings as to contrary to the welfare of the child and reasonable efforts must be case specific.

VII. CHILD SUPPORT

A. Establishment of Support

It is generally established that the court should address child support when a child is placed in the custody of Department or the custodial or decision-making responsibility for the child is altered. Rule 16a; W. Va. Code § 49-4-801. It is within the sole jurisdiction of the circuit court to establish a child support obligation. Syl. Pt. 3, *DHHR v. Smith,* 624 S.E.2d 917 (W. Va. 2005). The case may not be transferred or remanded to the family court for assessment of the child support obligation. Rules 16a and 17(c)(5). In general, the provisions of Part VIII, Article 4 of Chapter 49 should be construed as consistent with the relevant articles of Chapter 48 of the West Virginia Code. The primary authority governing child support is found in Article 13 of Chapter 48.

When a child is removed from his or her home, the circuit court is required to issue a support order payable by the child's mother. W. Va. Code § 49-4-801(c). If a child's legal father has been determined, then the court shall enter a support order payable by the child's legal father. If the child's legal father has not been determined, the court should address paternity. Upon the establishment of the paternity of the child, the court should enter a support order payable by the legal father. When the court enters an order addressing child support, copies of the order should be provided to the Bureau for Child Support Enforcement.

Although the statute indicates that a court "shall" enter a support order if a child is removed from the home, the court has the discretion, as allowed by the statute, to vary the amount established by the child support guidelines. See W. Va. Code § 48-13-702. In addition to the allowances established in Chapter 48, the court may enter a support order that departs from the guidelines in the following instances: 1) deviation from the guidelines may assist the parent to successfully complete an improvement period; 2) it is in the child's best interests to issue a zero child support order; and/or 3) the parent has no gross income. W. Va. Code § 49-4-801(e).

If there is a pre-existing child support order in effect, for example a prior family court order, the support obligation will automatically continue until the abuse and neglect court issues a superseding order. W. Va. Code § 49-4-802(a). If a child is returned to the physical custody of a parent, the support obligation automatically ceases. Even if an order terminating the obligation is not entered, a parent cannot be held responsible for the payment of child support for a time period in which the parent has physical

custody of the child. W. Va. Code § 49-4-802(b). If a child abuse and neglect case is dismissed for failure to prove the allegations, any support provision is considered void ab initio. W. Va. Code § 49-4-802(c).

B. Calculation of Support

At the initial hearing in a child abuse or neglect proceeding, the circuit court must require the parents to complete financial statements forms to determine the amount of any child support obligation. Rule 17(c)(5). When establishing a support order, the circuit court must apply the Guidelines for Child Support found in West Virginia Code §§ 48-13-101, *et seq.*, unless the court makes specific findings that the use of the Guidelines is inappropriate. Rule 16a(b); W. Va. Code § 48-13-702. West Virginia Code § 49-4-801(e) establishes additional reasons for deviating from the Child Support Guidelines. These reasons include the following: 1) deviation from the guidelines may assist the parent to successfully complete an improvement period; 2) it is in the child's best interests to issue a zero child support order; and/or 3) the parent has no gross income.

The child support award should be based on the combined gross monthly income of both parents using the table found in West Virginia Code § 48-13-301. West Virginia Code § 48-1-205 provides that, under some circumstances, the court may attribute income to a responsible party who is unemployed or underemployed. If necessary, the court may order the withholding of support from the wages of the person liable for support.

The lowest combined monthly gross income on the table in West Virginia Code § 48-13-301 is $550 per month. When the income of the respondent(s) is below this amount, the court may set the child support obligation at $50 per month or other discretionary amount based upon the resources, living expenses and other child support obligations of the respondent(s).

If a court determines that it should not impose a support obligation, it should impose a zero support obligation. Imposing a zero support obligation assists the BCSE with its statutorily mandated obligation to collect child support.

C. Modification

Once a circuit court has established a child support obligation, either by establishing an initial support obligation or modifying an existing support obligation, the circuit court may not remand the case to family court for future modification or enforcement proceedings. Syl. Pt. 5, *J.L.*, 763 S.E.2d 654. Modifications of a support order may be made by the court on the motion of any party if there is a substantial change in circumstances. Rule 16a; W. Va. Code § 48-11-105. A substantial change in circumstances

includes situations in which there would be a child support obligation that is more than 15% different than the current obligation. An order modifying a support obligation must also follow the Guidelines for Child Support, unless the court specifically finds that the guidelines should not apply. *J.L.*, 763 S.E.2d at 661. Rules 16a and 46; W. Va. Code §§ 48-11-105; 49-4-801(e). The standard of proof for modifying a support order is the preponderance of evidence. Rule 46.

D. Enforcement of Support Orders

Once a circuit court establishes a child support obligation, it retains jurisdiction over the enforcement of the support order pursuant to Rule 6.[14] Syl. Pt. 4, *In the Interest of J.L.*, 763 S.E.2d 654 (W. Va. 2014). Under Rule 16a(d), the circuit court cannot transfer or remand the case to the family court for subsequent enforcement proceedings. Support orders may be enforced through any of the methods established by Chapters 38 and 48 of the West Virginia Code.

If a parent fails to pay child support, the BCSE may bring a contempt action. In addition, the DHHR's Bureau for Children and Families may initiate contempt proceedings. Further, the child's physical custodian, the child's guardian *ad litem* or the prosecuting attorney may pursue contempt proceedings for the parents' failure to pay child support. W. Va. Code § 49-4-803(b).

E. Post-Termination Child Support

Once a circuit court enters a support order, the support obligation will automatically continue beyond the termination of parental rights unless the court expressly terminates the support obligation in an order. W. Va. Code § 49-4-802(d). See also Syl. Pt. 2, *In re Ryan B.*, 686 S.E.2d 601 (W. Va. 2009); Syl. Pt. 7, *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003). This requirement applies to terminations that occur as a result of a voluntary relinquishment or an adverse judicial determination. *Ryan B.* The circuit court, however, retains jurisdiction to prospectively modify a post-termination child support order. Syl. Pt. 8, *Stephen Tyler R*.

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[14] Since Rule 6 was the basis for the Court's holding in *J.L.*, the exception established by Rule 6, when a circuit court returns a child to his or her cohabitating parents without entering a visitation or support order that Alters the relationship of the parents, would serve as the one situation in which a circuit court would not retain jurisdiction over a future child support matter between the parents.

F. Other Support Matters

The court may also consider addressing medical support for the child pursuant to West Virginia Code § 48-12-102, and the inclusion of the language required by West Virginia Code § 48-11-102 in the order establishing child support.

VIII. PARTICIPATION OF THE CHILD IN HEARINGS AND MULTIDISCIPLINARY TREATMENT TEAM MEETINGS

Note: A child's attendance at hearings or multidisciplinary treatment team meetings is distinct from testimony which is governed by subsections (a) through (c) of Rule 8 and Rule 9.

Rule 8(d) provides that a child may attend hearings or parts of hearings unless the court determines that such attendance is inappropriate. Similarly, a child may participate in multidisciplinary treatment team meetings unless the team finds it is inappropriate. See also W. Va. Code § 49-4-405(b) (providing that a child may attend a multidisciplinary treatment team meeting if the team determines that the child's attendance is appropriate). Factors that should be considered are the child's preferences and developmental maturity. Certainly, the guardian *ad litem's* recommendation should be given weigh t in making this decision. See generally Appendix A, *Jeffrey R. L.*, 435 S.E.2d 162 (W. Va. 1993).

If a child is 14 years of age or older or is otherwise of an age of discretion, the court is required to consider the child's wishes concerning the termination of parental rights. W. Va. Code § 49-4-604(b)(6)(C). Noting this statutory requirement, the Supreme Court has held that a child's preferences about the termination of parental rights should be considered when the child is of an age of discretion. *In the Interest of Jessica G.*, 697 S.E.2d 53 (W. Va. 2010); *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012).

The permanency hearing is another juncture at which a child's input or attendance is crucial. As established by West Virginia Code § 49-4-608(b), a child who is 12 years of age or older is entitled to notice of the permanency hearing. Also, a child who is 12 years of age or older has the right to be present at the permanency hearing. This right may, however, be waived by the child's attorney at the child's request. The child's attorney may waive the child's right to be present if the child is younger than 12 years old and would suffer emotional harm.

With regard to the implementation of a permanency plan, a child who is 12 years of age or older must consent to an adoption. W. Va. Code § 48-22-301(f). Further, the West Virginia Supreme Court has recognized that a child's preferences regarding placement with a particular parent

should be considered. *In re Frances J.A.S.*, 584 S.E.2d 492 (W. Va. 2003); *In the Matter of Bryanna H.*, 695 S.E.2d 889 (W. Va. 2010).

IX. INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act ("ICWA") was enacted by Congress in 1978. (codified at 25 U.S.C. §§ 1901, *et seq*.) ICWA was enacted to address the congressional findings that there is an "alarmingly high percentage" of Indian families broken up by the "often unwarranted" removal of children by non-tribal agencies; and that an alarmingly high percentage of the children are placed in non-Indian foster and adoptive homes.

Accordingly, Congress has stated its intention to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families. ICWA establishes minimum federal standards for the removal of Indian children from their families. Additionally, the Act imposes several criteria to better assure the placement of any removed child in foster-adoptive homes which will reflect the unique values of Indian culture. 25 U.S.C. §§ 1901 and 1902.

A. When ICWA Applies

The Indian Child Welfare Act applies in abuse and neglect proceedings when an "Indian child" is removed from his or her parent or Indian custodian for placement in a home or institution (including foster care) in circumstances when the parent or custodian cannot have the child returned upon demand. 25 U.S.C. § 1903(1).

An "Indian child" is defined as:

- An unmarried person under the age of 18 who is:
- a member of a federally-recognized Indian tribe; **OR**
- the biological child of a member of a federally-recognized Indian tribe; **and**
- The child is eligible for membership in any federally-recognized Indian tribe. 25 U.S.C. § 1903(4).

B. Jurisdiction

Upon finding that ICWA applies to an abuse and neglect proceeding, a determination should be made as to whether there is exclusive tribal jurisdiction or whether the circuit court may retain jurisdiction over the case subject to the other ICWA provisions.

Exclusive Tribal Jurisdiction

The child's Indian tribe has exclusive jurisdiction over the proceeding if the child resides in or is domiciled in the reservation of the tribe **or** when the child is a ward of the tribal court. 25 U.S.C. § 1911(a).

However, the circuit court may order the temporary removal of an Indian child who resides in or is domiciled on a reservation but temporarily located elsewhere if such removal is necessary to prevent imminent physical harm to a child. 25 U.S.C. § 1922.

In cases where there is no exclusive tribal jurisdiction, the circuit court must transfer the case to the tribal court if requested to do so by one of the child's parents, the tribe, or the child's Indian custodian (as defined by 25 U.S.C. § 1903(6)). The circuit court may refuse to transfer the case to the tribal court if:

- The circuit court finds good cause not to transfer the case; **or**
- One of the child's parents objects to the transfer; **or**
- The tribal court declines to accept jurisdiction.

C. Notice Requirements

In cases where there is no exclusive tribal jurisdiction, the petitioner in the circuit court proceeding must provide written notice to the Indian child's parent or Indian custodian, and the child's tribe. The notice must be served by certified mail, return receipt requested and must include a statement that the notified party has a right to intervene in the proceedings. If the identity or location of the parent or custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior. The proceeding cannot proceed until at least ten days have passed after receipt of notice. Even after such ten days has passed, the parent, custodian, or tribe, must be granted an additional 20 days to prepare for the proceeding if a request is made for such additional time. 25 U.S.C. § 1912.

D. Other ICWA Provisions

1. Placement

a. *Foster Care*

No foster care placement may be ordered in an ICWA case without a finding that continued custody of the child by the parent or Indian custodian is likely to result in serious

emotional or physical harm to the child. The finding must be supported by:

- Clear and convincing evidence; including
- Testimony of a qualified expert witness.

25 U.S.C. § 1912(e).

If a parent or Indian custodian consents to foster care placement, the consent can be revoked at any time and the child must be returned to the parent or Indian custodian. 25 U.S.C. § 1913(b).

Furthermore, any consent by a parent or Indian custodian to a foster care placement or to termination of parental rights must be made in writing and placed on the court's record, and the court must certify that the terms and consequences of the consent were fully explained in detail and were understood by the parent or custodian. 25 U.S.C. § 1913.

b. *Termination*

As with any out-of-home placement, prior to terminating a parent's rights, the court must find that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child. The finding must be supported by:

- Evidence beyond a reasonable doubt; including
- Testimony of a qualified expert witness.

25 U.S.C. § 1912(f).

2. Remedial Services

Prior to the removal of an Indian child from his or her home, and prior to termination of a parent's rights, the court must be satisfied that "active" efforts have been made to prevent breakup of the Indian family and that the efforts have been unsuccessful. 25 U.S.C. § 1912(d).

3. Placement Criteria

An Indian child placed in foster care must be placed in the least restrictive setting which most closely approximates a family and in which his or her special needs must be met. The child must also be

placed with reasonable proximity to his or her home, and placement preferences must be given, in the absence of good cause, with:

- A member of the child's extended family;
- A licensed foster home approved or specified by the Indian child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by the tribe or operated by an Indian organization.

Presumably, the above-stated preferences must be applied in the order in which they are listed unless the tribe specifies otherwise. ICWA further requires that the standards to be applied in meeting the preference requirements must be the "prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(b), (c) and (d).

E. Remedy for Violations

A parent, Indian custodian, and the tribe may petition the court to invalidate any removal or termination of an Indian child upon a showing that such action violated provisions of ICWA. 25 U.S.C. § 1914.

F. Additional Information

Further information, including ICWA checklists, may be obtained from:

National Council of Juvenile & Family Court Judges

P. O. Box 8970
Reno, NV 89507
(775) 784-6012
www.ncjfcj.org

X. PRE-PETITION PROCEEDINGS RELATING TO CHILD ABUSE AND NEGLECT

Although only circuit courts have jurisdiction to handle child abuse and neglect cases, allegations and information regarding child maltreatment sometimes arise in other types of cases properly before the family courts. In limited circumstances, explained below, a family court judge may order the Department to take emergency custody of a child. In addition, a referral

and investigative process has been established by the following rules: Rules 48 and 48a, Rules of Practice and Procedure for Family Court (RFC); Rules 16a and 25a, Rules of Practice and Procedure for Domestic Violence Civil Proceedings (RDVCP); Rule 13, Rules for Minor Guardianship Proceedings; and Rule 3a, Rules of Procedure for Child Abuse and Neglect Proceedings (RPCANP). All of these rules are commonly referred to as the "overlap" rules. They outline specialized procedures that may be invoked when abuse and neglect allegations arise in certain types of family court cases.

A. Family Court: Temporary Emergency Custody Orders

In addition to the referral and investigative process explained below, a family court judge is authorized to order the Department to take temporary emergency custody of a child in specific circumstances. W. Va. Code § 49-4-302. For a child to be subject to this type of limited emergency custody order, he or she must be in the physical custody of a party to an action or proceeding before family court. By clear and convincing evidence, the family court judge must find that there is imminent danger to the physical well-being of a child; that the child is not subject to a case pending in circuit court that involves allegations of abuse and neglect and that there are no reasonably available alternatives to emergency custody. W. Va. Code § 49-4-302(a). Unless an abuse and neglect petition is later filed, the period of emergency custody may not exceed 96 hours. W.Va. Code § 49-4-302(f)(1).

As contemplated by the statute, the family court should enter a written order, and it must include case-specific findings that explain the basis for emergency custody. Once the order is issued, it must be transmitted to the Department, the circuit court and prosecuting attorney. When the Department receives this type of emergency custody order, it is required to assist the family court judge with placement of the child.

The statute establishes a preference for placing a child with an appropriate relative. W. Va. Code § 49-4-302(g)(1). A worker who assumes custody of a child as a result of a family court order is required to notify the following persons: any parents, grandparents, guardians or custodians of the child, provided that they are known or can be reasonably located. The worker is authorized to disclose the basis for the temporary custody order to these relatives. If none of these persons can be located or contacted, the worker should notify the child's closest relative, if possible, and explain the reasons for the emergency custody order. If an appropriate relative or neighbor of the child is willing to care for the child, the worker should place the child in that person's care or custody. Although foster care is not specifically mentioned in the statute, it certainly would be an option if no relative or neighbor could assume custody. If there are no other reasonably available alternatives, the Department may place the child in an emergency shelter.

When a circuit court receives an emergency custody order from family court, it is required to enter an administrative order that directs the Department to submit an investigative report to both the family and circuit courts within 96 hours from the time the child is placed in the Department's custody. The report must indicate whether the Department will file a child abuse and neglect petition based upon its investigation. W. Va. Code § 49-4-302(e).

An order of temporary emergency custody issued by a family court can only last 96 hours, if no further action is taken. Otherwise, it will expire by operation of law at the end of this 96-hour time period. If the Department files a child abuse and neglect petition, the temporary custody order will automatically be extended until a preliminary hearing is conducted in the circuit court, unless the circuit court orders otherwise. W. Va. Code § 49-4-302(f).

B. Administrative Proceedings Arising from Domestic Relations or Domestic Violence Cases

During the course of a domestic relations case involving issues of custody or visitation of minor children, a family court may obtain information giving reasonable cause to suspect that a child (or children) has been abused or neglected. Similarly, allegations in a domestic violence proceeding may give rise to such reasonable suspicions of child maltreatment. In these circumstances, the family court, in writing, must immediately report the suspected abuse or neglect to the Child Protective Services (CPS) Office in the county where the family court case is pending.[15] When the written referral is sent to CPS, a copy is also transmitted by the family court to the circuit court in the county where the family court case is pending. See Rule 48(b), RFC; Rules 16a and 25a(a), RDVCP. In each circuit, the chief circuit judge should determine if the copies of the CPS referral letters should all be directed to the chief judge, to another designated circuit judge, or handled on a rotational basis. A copy of the referral letter is also to be placed, under seal, in the family court case file by the circuit clerk.

Upon receiving a written referral from a family court, the circuit court is required to promptly issue and have served an administrative order in the name of and regarding the affected child or children. The administrative order will direct CPS to investigate the suspected child maltreatment and submit a report to the circuit court; or appear at a scheduled hearing to show cause why the investigative report has not been submitted. The circuit court's administrative order should schedule the hearing for a date not to exceed 45 days. The time interval may be substantially shortened if the

[15] This written referral procedure is in addition to any oral communication made by the family court to the state child protective services agency pursuant to its duty as a mandatory reporter. Rule 48(b), RFC; Rule 16a, RDVCP.

court determines that the information in the family court's written referral presents reason to believe a child may be in imminent danger. Rule 3a(a), RPCANP; Rule 25a(a), RDVCP.

When CPS believes the circuit court of another county is a more appropriate venue for the administrative proceedings, it may file a motion to transfer the administrative proceedings to another county. Rule 3a(e), RPCANP; Rule 25a(f), RDVCP. Such a motion must be filed within ten days following the service of an administrative order directing CPS to conduct an investigation. The court should grant the motion unless it finds that the basis for the motion is clearly unreasonable under the circumstances. Any transfer of the administrative proceedings to another circuit court will not affect the forty-five day time period required by Rule 3a(e) of the Rules of Procedure for Child Abuse and Neglect Proceedings.

Once the circuit court provides the circuit clerk the *Administrative Order Directing Investigation and Report*, a "JAA" number will be assigned and placed on the order (along with the family court case number from the case from which the written referral originated). The clerk should then fax or mail copies of the order to the prosecuting attorney, the county supervisor of the local CPS office, and the family court that made the written referral. Rule 3a(c). Because these administrative proceedings involve child abuse and neglect matters, the court file should be handled as confidential records similar to Chapter 49 cases. Likewise, hearings on these administrative orders are to be closed to the general public; except that any person whom the court determines to have a legitimate interest in the matter may attend. If the family court case that gave rise to the referral and order requiring investigation was a domestic violence case, involved staff from a domestic violence agency is entitled to attend administrative order hearings to the same extent of access to domestic violence hearings. Rule 3a(d).

These administrative proceedings will typically be short-lived cases. In most of these administrative cases, CPS will investigate and either file its investigative report with the circuit court or will file an abuse and neglect petition, thereby starting a new "JA" case. The filing of the investigative report or abuse and neglect petition will usually occur before the scheduled hearing date, but could occur at the hearing. If an abuse and neglect petition has been filed, or upon review of the investigative report the circuit court concludes that CPS is not under any obligation to file a petition, the court should file an *Administrative Order of Closure* to conclude the case.

C. Mandamus Proceedings Following the Filing of an Investigative Report

Another possible outcome for an administrative case could occur when CPS files an investigative report finding no necessity to file an abuse and neglect

petition. Upon review of the Department's report and the written referral from family court, the circuit court may believe that the information reasonably suggests that CPS has a statutory obligation to file an abuse and neglect petition. Rule 3a(b), RPCANP; see also Rule 25a(b), RDVCP. In this instance, the court should issue a *Mandamus Show Cause Order* which treats the written referral from family court as a mandamus petition in the name of the child or children. By its terms, the mandamus show cause order closes the "JAA" case and opens a new mandamus proceeding, setting a prompt hearing on the question of whether the Department has a clear legal duty to file an abuse and neglect petition.

The Department's mandatory duty to file an abuse and neglect petition can arise in one of two ways. First, under the particular circumstances the Department may have a nondiscretionary duty to file a petition pursuant to the provisions of West Virginia Code § 49-4-605. Secondly, in other situations where the decision to file is within the Department's discretion, a duty to file can arise if the court finds "aggravated circumstances" and that the Department acted arbitrarily and capriciously in deciding not to file an abuse and neglect petition. Rule 3a(b). The term "aggravated circumstances" includes, but is not limited to, child abandonment or when a parent subjects a child to torture, chronic abuse or sexual abuse. W. Va. Code § 49-4-602(d)(1).

D. Contempt Proceedings Relating to Pre-Petition Investigations

The third (and least likely) path for an administrative case would be when CPS does not file an investigative report or abuse/neglect petition within the timeframe set in the administrative order. The circuit court should then issue a *Contempt Show Cause Order Regarding Prior Order Directing Investigation and Report*. The contempt matter would be addressed as part of the administrative case, with the same "JAA" case number. The administrative case would not be closed until the contempt issue is fully resolved.

Contempt proceedings could also arise in the course of a pre-petition mandamus case. If a circuit court issues an order determining that CPS has a mandatory duty to file an abuse/neglect petition and CPS does not do so, the court may issue a *Contempt Show Cause Order for Failure to File an Abuse and Neglect Petition*. These contempt proceedings would remain part of the mandamus case, and all orders and other filings should bear the same "JAM" number. The mandamus case would remain open until the contempt matter is fully resolved.

E. Removal of Family Court Minor Guardianship Cases to Circuit Court

Under West Virginia Code § 44-10-3, a petition seeking appointment of a guardian for a minor may be filed and heard in either family court or circuit court. If a minor guardianship petition is filed in family court and the judge learns that the basis of the petition, in whole or in part, is child abuse or neglect allegations, the family court must remove the case to circuit court. Rule 48a(a), Rules of Practice and Procedure for Family Court; Rule 13(a), Rules of Minor Guardianship Proceedings. If the allegations of abuse or neglect are apparent from the petition seeking guardianship, the family court may issue the removal order prior to any hearing. If the family court first becomes aware of allegations or information regarding possible abuse or neglect during a hearing, the family court may appoint a temporary guardian if necessary, but otherwise must continue the hearing and remove the case to circuit court for further hearing to be conducted within ten days.

Upon receiving the removal order from family court, the circuit clerk should immediately provide a copy to the circuit court. Rule 48a(a), Rules of Practice and Procedure for Family Court; Rule 13(a), Rules of Minor Guardianship Proceedings. Upon receiving the removal order, the circuit court must schedule a hearing to be conducted within ten days of the removal from family court, and see that CPS is given a notice of hearing and a copy of the petition. The petitioner and other parties must also be provided written notice of the circuit court hearing. Depending upon local practices or rules, the circuit clerk may be responsible for sending the notices to CPS and the parties. Once a case is removed to circuit court, the case or any portion of it may not be remanded to family court.

At the circuit court hearing on the guardianship petition, allegations of abuse and neglect must be sustained by clear and convincing evidence. If the court deems it necessary or appropriate, the administrative and mandamus proceedings under Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings relating to child maltreatment investigations may be utilized when addressing the matters raised by the guardianship petition. See Rule 48a(b), Rules of Practice and Procedure for Family Court; Rule 13(b), Rules of Minor Guardianship Proceedings. If Rule 3a proceedings are initiated by the court, the hearing on the guardianship petition would necessarily be continued. During the pendency of these matters, however, a temporary guardianship order may be needed in some cases to protect the child's safety and welfare.

If the Department files a child abuse and neglect petition as the result of the Rule 3a proceedings, the petitioner may be named as a co-petitioner, provided that the parties agree. Rule 3(b), Rules of Minor Guardianship Proceedings. However, Rule 3(b) expressly indicates that it should not be interpreted so as to require the guardianship petitioner to appear as a co-

petitioner. In addition, Rule 3(b) indicates that a minor guardianship petitioner should not be foreclosed from filing an abuse and neglect petition even though the Department shows cause that it should not be required to file an abuse and neglect petition during the course of the Rule 3a proceedings.

If an abuse and neglect petition is filed, the circuit court in which such petition is pending may order the transfer of any other proceeding, except for a criminal or delinquency case, that arises from the same facts as the petition or addresses whether abuse or neglect occurred. The transfer provision applies to other cases pending in another circuit court, family court or magistrate court.

XI. INTERSTATE PLACEMENT PROCEEDINGS

The interstate placement of children is often fraught with delays that are difficult to address because cooperation between two states typically raises a number of jurisdictional and bureaucratic issues. However, through judicial leadership and the use of existing statutes and rules, the court can eliminate or diminish most of these delays. The court should also consider seeking the informal assistance of the courts in other states to ensure timely placement of children.

A. The Interstate Compact on the Placement of Children

West Virginia enacted the Interstate Compact on the Placement of Children (ICPC) in 1975 (W. Va. Code §§ 49-7-101, *et seq.*). The ICPC is designed to facilitate cooperation among states in the placement of children into homes and facilities across state boundaries. The stated purpose of the ICPC is to maximize opportunities to place children in appropriate settings, to facilitate clear communication between agencies in the sending and receiving states, and to ensure that appropriate arrangements for the care of children are made.

The compact is comprised of ten articles and ten regulations. The compact sets forth cooperative terms designed to facilitate the placement of a child across state borders. Article 1 emphasizes that each child requiring placement "shall receive the maximum opportunity to be placed in a suitable environment," and that the receiving states should have appropriate authority to assess the adequacy of potential placements within their borders. Article 2 defines terms, while Article 3 sets the conditions for placement and Article 4 prescribes penalties for illegal placements. Article 5 settles questions of jurisdiction, while Article 6 provides ground rules for placing delinquent children into out-of-state institutions. Article 7 defines the responsibilities of the state compact administrator, specifically to coordinate all activities under this compact. Articles 8, 9 and 10 focus on

the limitations of the compact, mechanisms for adjusting the terms, and the means for enacting or terminating participation in the compact.

When a child is in the custody of the state, state officials may seek to place that child in the physical custody of a person or facility in another state. In order to make this request, the sending state needs to provide sufficient documentation for the receiving state to assess the appropriateness of the potential placement. Should the receiving state determine that the placement is inappropriate, the sending state may not place the child in that proposed placement. When the receiving state does deem the placement appropriate, the sending state retains legal jurisdiction over the case and the receiving state agrees to provide any necessary supervisory services. The compact indicates that there may be penalties for failing to abide by these terms, but these sanctions are vague and practically unenforceable.

The ICPC process initiates with a written request by a local sending agency (such as CPS) to make a placement of the child in a different state. The written request is part of an ICPC Packet that includes: (1) a standardized Interstate Compact Placement Request Form (ICPA 100A); (2) a cover letter delineating the details and circumstances of this case; (3) a medical/financial plan that addresses the child's material and health needs; and (4) all pertinent legal documents necessary to document custody and circumstances. The local agency sends the packet to the state office where it is reviewed for completeness and then forwarded to the corresponding state office in the receiving state. The receiving state office reviews the packet for completeness before forwarding it on to the appropriate local personnel where the placement has been requested. The ICPC procedure, as applied in child abuse and neglect cases, contains roughly eight processes:

1. The ICPC packet is prepared by the local agency in the sending state and forwards it to the state compact administrator;

2. Sending state compact administrator forwards the packet to receiving state administrator;

3. Receiving state administrator forwards the packet to appropriate local agency for action (typically a home study);

4. The local agency completes the request and prepares a report with a recommendation on the placement;

5. Receiving state administrator reviews the report and makes a determination to approve or deny the placement request;

6. The placement decision along with the report from the local agency is sent to the sending state administrator;

7. If the placement is denied, the process ends and other (concurrent) permanency plans need to be completed. If the placement is approved, the sending state must decide whether to utilize the placement within six months; and

8. Receiving state automatically closes the case if an approved placement is not made within six months of approval.

Delays can be encountered at the onset, for instance, in gathering the necessary documents (court orders, immunization records, Social Security cards, etc.). Then, the process may encounter delays in the second stage as the packet must be funneled through the sending state's centralized office. Third, the sending state forwards the referral to the receiving state's centralized office where it is processed. Only then is the referral sent on to the local child welfare agency where the sending state would like to make a placement.

Because there are numerous stages in which delays may occur in the interstate placement process, it should be kept in mind that the court is entitled to inquire, and should inquire, about the status of a case delayed in other state. The court's inquiry could include: informal communication with a presiding judge in the jurisdiction in which the placement is to occur (perhaps the local judge would assist in removing barriers to placement, such as a delayed home study); order the Department to make direct inquiry of their counterparts in the receiving state to ascertain the cause for delay and potential remedies; invoke the Uniform Child Custody Jurisdiction and Enforcement Act (see below) and request the that a judge in the other jurisdiction conduct proceedings there to enforce compliance with ASFA timeframes and ICPC provisions and regulations. Judicial leadership by the court in the sending state to promote the expeditious completion of interstate placement of children is key to avoiding delays commonly encountered in the two-state process.

B. The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (W. Va. Code §§ 48-20-101, *et seq.*) is designed to aid in the resolution of interstate jurisdictional disputes and to ensure cooperation between states in the handling of child custody cases. The UCCJEA has provisions that permit the taking of testimony in other states and, among other measures, authorizes West Virginia courts to request that courts of other states hold evidentiary hearings for West Virginia cases. West Virginia Code § 48-20-111(a) provides that "a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state." Subsection (b) of this statute specifies that testimony may be by telephone, audiovisual

means, or other electronic means. Additionally, West Virginia Code § 48-20-112(a) allows West Virginia courts to request courts in another state to:

> (1) Hold an evidentiary hearing;
>
> (2) Order a person to produce or give evidence pursuant to procedures of that state;
>
> (3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
>
> (4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and
>
> (5) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

This provision could be used creatively by the court to compel the appearance of a non-cooperating agency representative in the receiving state to explain his or her actions, or lack thereof. For example, if the home study process is being delayed in the receiving state, a court of this state could ask the local court in the receiving state to conduct a proceeding to determine the cause for delay, and to compel the appearance of non-cooperating individuals. Likewise, a court of this state could request the court in the receiving state to compel witnesses in the receiving state to appear in the West Virginia proceeding via videoconferencing. The UCCJEA even permits a court to assess costs relating to out-of-state hearings (e.g., travel, videoconferencing expenses, etc.) against a party. (See W. Va. Code § 48-20-112(c)). Although the UCCJEA does not seem to be frequently used to ensure the timely interstate placement of children, the provisions of the act certainly authorize the court to reach across state lines to break through placement barriers.

C. Rules that Facilitate Interstate Participation in Abuse and Neglect Proceedings

Video conferencing (West Virginia Trial Court Rule 14.02).

Filing via FAX (West Virginia Trial Court Rule 12.04).

Use of telephonic practices (R. Pro. Child Abuse and Neglect Proceedings – Rule 14).

XII. TRANSITION PLANNING FOR OLDER YOUTH

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections Act"). One of its significant purposes was to address problems faced by older youth in foster care as they transition into adulthood. May Shin, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America's Older Foster Youth*, 9 Hastings Race & Poverty L.J. 133 (2012). Specific issues faced by youth who turn 18 while in foster care include problems finding steady employment, obtaining education and life skills, managing finances, obtaining and keeping stable housing, avoiding incarceration, and supporting their physical and mental health. 9 Hastings Race & Poverty L.J. at 136. In an attempt to remedy these problems, the Fostering Connections Act amended various provisions of Title IV-E of the Social Security Act.

As an initial matter, 42 U.S.C. § 675(8)(B) was amended to allow states to provide financial support to youth who have reached the age of 18 but who have not reached age 21, so long as they are engaged in approved educational or employment activities or are incapable of doing so because of a medical condition. 42 U.S.C. § 675(8)(B). Also, youth who receive financial support are subject to the same case review requirements as other foster children. 42 U.S.C. § 675(5). Another provision requires states to assist youth with the development of a personalized transition plan 90 days before they turn 18. 42 U.S.C. § 675(5)(H). These provisions are designed to improve educational and employment outcomes for youth who turn 18 while they are in foster care.

West Virginia has adopted statutes and rules in order to implement these important provisions of the Fostering Connections Act. The Legislature has adopted the term "transitioning adult" for youth who have reached age 18 but who are under 21 years of age. W. Va. Code § 49-1-202. To meet the requirements of this provision, the youth must also have been adjudicated as an abused or neglected child or must have been in the Department's custody when he or she turned 18.[16] Further, the youth must need assistance with an educational, training or treatment program that was

[16] In addition to children who are in the Department's custody because of an abuse and neglect case, the term, "transitioning adult," applies to youth who are in the Department's custody as a result of juvenile proceedings, including status offender cases. A youth meets the definition of the term so long as he or she was in the Department's custody when turning 18 -- the term is not limited to youth who were adjudicated as abused or neglected children. In subparagraph (A), the term expressly includes youths who committed a delinquent act before turning 18 and who require supervision and care to complete an education or treatment program initiated before turning 18. W. Va. Code § 49-1-202.

initiated before the youth's eighteenth birthday. Transitioning adults are subject to the same requirements for both permanency and review hearings as other foster children who are under 18. W. Va. Code § 49-4-110.

In order to promote a successful transition, a case plan is required to specify services that a child, aged 14 or older, should receive to assist with the transition to adulthood. Rule 28(b)(8). Once a child has turned 17 while in the Department's custody or as soon as a child who has reached age 17 is joined as a party to an abuse and neglect case, the Department must provide the child with support and assistance to develop a personalized transition plan. The time at which a transition plan must be established under Rule 28 is more stringent than the 90-day period before a youth's eighteenth birthday required by the Fostering Connections Act. Under Rule 28, the plan must include specific options for housing, health insurance, education, local opportunities for mentors, continuing support services, work force support and employment services. If a child has turned 17 and has special needs, the child is entitled to the appointment of an adult services worker to coordinate the activities of the MDT with other transition planning teams, such as an IEP team.

To assist with the transition to adulthood, the Department has implemented the Youth Transitioning Policy that requires caseworkers to complete certain steps once a child in foster care turns 14. The Casey Life Skills Assessment is a tool that is used to engage teenagers with the process of developing adult life skills. As a method to meet the requirements of the Fostering Connections Act, the Department has developed a "WV Older Youth Transition Plan." In addition to developing transition plans, caseworkers should make referrals to the MODIFY Program (formerly "Chafee Program"). Some additional steps in the Department's Youth Transitioning Policy include assisting youth with obtaining a credit report, assisting youth with applying for Social Security Disability when appropriate, addressing educational and career plans in an MDT, and scheduling medical, dental, optometric and mental health appointments before a child turns 18. These steps and others are more fully explained in the Youth Transitioning Policy.

The Youth Transitioning Policy and Plan can be found in the BCF section of the DHHR website under the Foster Adoptive Care Home Page.

CHAPTER 5:
CHILD ABUSE AND NEGLECT CASELAW DIGEST

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I. CHILD ABUSE AND NEGLECT: GENERAL PRINCIPLES AND DEFINITIONS

A. Primary Goal in Abuse and Neglect Cases

Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 3, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 2, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714 (1997); Syl. Pt. 2, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 4, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 1, *In re Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002); Syl. Pt. 1, *State ex rel. West Virginia Dept. of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009); Syl. Pt. 2, *In re Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009); Syl. Pt. 3, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

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

In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993)

In any child welfare case, the best interests of the child are foremost in cases involving the termination of parental rights. All parental rights in child custody matters are subordinate to the interests of the innocent child.

In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)

In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988)

In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989)

Ortner v. Pritt, 187 W. Va. 494, 419 S.E.2d 907 (1992)

In the Matter of Taylor B., 201 W. Va. 60, 491 S.E.2d 607 (1997)

"Contrary to the assertion of James B., civil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." 491 S.E.2d at 613.

B. When Criminal Investigations and Proceedings are Pending

Jennifer A. v. Burgess, No. 21009 (W. Va. Supreme Court unpublished order entered May 15, 1992)

Abuse and neglect proceedings should be instituted even though criminal investigations and proceedings are pending.

In re B.C., 233 W. Va. 130, 755 S.E.2d 664 (2014)

"[C]ivil abuse and neglect proceedings are to be treated as separate and apart from criminal proceedings arising from abuse and neglect." 755 S.E.2d at 673. The focus of an abuse and neglect case is the safety and well being of child.

C. Abused Child - Neglected Child Defined

Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S.*, 197 W. Va. 456, 475 S.E.2d 548 (1996) (per curiam); Syl. Pt. 1, *State ex rel. Diva P. v. Kaufman,* 200 W. Va. 555, 490 S.E.2d 642 (1997)

W. Va. Code § 49-1-201

An "abused child" is defined in W. Va. Code § 49-1-3, as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" In addition, W. Va. Code § 49-1-3, defines a "neglected child" as a child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]"

Syl. Pt. 1, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 4, *In re Katelyn T.*, 225 W. Va. 264, 692 S.E.2d 307 (2010)

Implicit in the definition of an abused child under W. Va. Code § 49-1-3 is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.

Syl. Pt. 3, *In re Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988); Syl. Pt. 1, *In re Christina L.,* 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 2, *In re Jeffrey R.L.,* 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 1, *In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995); Syl. Pt. 1, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991); Syl. Pt. 2, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

W. Va. Code § 49-1-3(a), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)

W. Va. Code § 49-1-201

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

In re Lilith H., 231 W. Va. 170, 744 S.E.2d 280 (2013)

In this case a physical altercation arose between two men -- the grandfather and the father of the children who were ultimately subject to the abuse and neglect petition. During the altercation, the children's mother intervened and struck the grandfather. The children also observed the altercation. Based on this single occurrence, the children were adjudicated as abused and neglected children. The father was adjudicated because he engaged in domestic violence, and the mother was adjudicated because she failed to protect her children. Reversing the circuit court, the Supreme Court found that the single occurrence of domestic violence and the fact that the children witnessed it was insufficient to establish abuse and neglect under the provisions of West Virginia Code § 49-1-3(a) that define an "abused child" as one whose parent "knowingly allows another person" to inflict physical, mental or emotional injury to the child.

D. Meaning of Term "Knowingly"

Syl. Pt. 7, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

The term "knowingly" as used in W. Va. Code § 49-1-3(a)(1) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

E. "Imminent Danger" Defined

In the Matter of Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989)

"Imminent danger" defined to include lack of cooperation to provide adequate food and shelter.

F. Parental Rights and Limitations

Syl. Pt. 1, *In the Matter of Ronald Lee Willis,* 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 6, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 2, *In re Carolyn Jean T.*, 181 W. Va. 383, 382 S.E.2d 577 (1989); Syl. Pt. 1, *W. Va. DHS v. Tammy B.*, 180 W. Va. 295, 376 S.E.2d 309 (1988); Syl. Pt. 1, *In the Interest of Betty J.W.,* 179 W. Va. 605, 371 S.E.2d 326 (1988)

In the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the W. Va. and U.S. Constitutions.

Syl. Pt. 5, *In the Matter of Ronald Lee Willis,* 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 1, *State v. Jessica M.*, 191 W. Va. 302, 445 S.E.2d 243 (1994); Syl. Pt. 3, *In re Carolyn Jean T.*, 181 W. Va. 383, 382 S.E.2d 577 (1989); Syl. Pt. 1, *State v. C.N.S.,* 173 W. Va. 651, 319 S.E.2d 775 (1984)

Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with childcare.

G. Governing Rules and Procedures

1. Chapter 49 of the West Virginia Code

Syl. Pt. 2, *In the Matter of Lindsey C.,* 196 W. Va. 395, 473 S.E.2d 110 (1995)

W. Va. Code §§ 49-1-101, et seq.

The procedure in abuse and neglect cases is governed by provisions internal to W. Va. Code §§ 49-1-1, *et seq.*, and such other procedural requirements of the Code or general law as obtain. Except for Rules 5(b), 5(e) and 80, the West Virginia Rules of Civil Procedure for Trial Courts of Record are not applicable to such cases.

2. Rules of Procedure for Child Abuse and Neglect Proceedings

In re Edward B., 210 W. Va. 621, 558 S.E.2d 620 (2001)

"The Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process

rights of the parents as well as the rights of the innocent children." 558 S.E.2d at 621.

3. Rules of Evidence

In the Interest of Jonathan P., 182 W. Va. 302, 387 S.E.2d 537, n. 6 (1989) (noting that it was not error for the Court to hear inadmissible evidence because a judge is "fully competent to disregard inadmissible evidence.")
Syl. Pt. 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)

W. Va. Code § 49-6-2(c), requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

W. Va. Code § 49-4-601(i)

Syl. Pt. 8, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

II. ROLE OF CIRCUIT COURT – GENERALLY

A. Jurisdiction

Syl. Pt. 3, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198, (1997); Syl. Pt. 2, *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001)

A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code §§ 49-6-1, *et seq*.

W. Va. Code §§ 49-4-601, et seq.

B. Jurisdiction -- Interstate Custody Issues

W. Va. DHHR ex rel. Hisman v. Angela D., 203 W. Va. 335, 507 S.E.2d 698 (1998)

Based upon express language in the UCCJA, the Court recognized that the UCCJA (now titled UCCJEA and codified at W. Va. Code §§ 48-20-101, *et seq.*) applies to abuse and neglect proceedings.

In re Tyler D., 213 W. Va. 149, 578 S.E.2d 343 (2003) (per curiam)

After the circuit court reunified the respondent mother and children and dismissed the petition, the respondent mother moved to Maryland where the Allegheny County Department of Social Services obtained legal custody of the children based on alleged abuse and neglect. Although proceedings were ongoing in Maryland, the West Virginia DHHR and the guardian ad litem appealed the dismissal of the petition to the West Virginia Supreme Court.

On appeal, the Supreme Court recognized that the UCCJEA and the Parental Kidnapping Prevention Act applied to abuse and neglect cases. Finding that Maryland was the proper forum to assume jurisdiction, the Supreme Court instructed the circuit court to inform the Maryland court of the West Virginia proceedings. Additionally, the Supreme Court reversed the dismissal of the West Virginia petition and addressed the remaining issues, so that the circuit court would have guidance for future proceedings if Maryland deferred jurisdiction to West Virginia.

C. Jurisdiction – Child Support

Note: For a more complete discussion of these cases, see Caselaw Digest Section VI. Child Support in Abuse and Neglect Cases. See also Special Procedures Section VII. See W. Va. Code §§ 49-4-801, et seq. for provisions governing child support.

Syl. Pt. 3, *DHHR v. Smith,* 218 W. Va. 480, 624 S.E.2d 917 (2005)

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

Syl. Pt. 4, *In re J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

Pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, when a circuit court enters an order awarding or modifying child support in an abuse and neglect case, the circuit court retains jurisdiction over such child support order.

Syl. Pt. 5, *In re J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

Pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

D. High Priority for Court's Attention

Syl. Pt. 1, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 5, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 2, *State ex rel. West Virginia Dept. of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009); Syl. Pt. 4, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

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

Syl. Pt. 5, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 5, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 3, *State ex rel. W. Va. DHHR v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009)

W. Va. Code § 49-4-601(j)

The clear import of the statute [W. Va. Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

E. Time Standards for Processing Abuse and Neglect Cases

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)

Although the specific rules cited in this opinion have been abrogated, the admonition to follow lawful directives of the Legislature and Supreme Court is still applicable to the time standards presently in force. In this regard, the Supreme Court noted that:

> It is vital to the rule of law that legislative and appellate commands be honored. A judge is free, of course, to manage his or her own docket but, when such managerial decisions transgress appellate commands, it is incumbent upon the trial judge to avoid the further (and quite different) impression that he or she has crossed the line into disregard . . . A circuit court is not at liberty to disregard lawful directives of the Legislature and this Court simply because those directives conflict with the judge's individual notions of efficiency or docket control. In the last analysis, it is crucial to public confidence in the courts that judges be seen as enforcing the

> law and as obeying it themselves. Exactly so. This is the short of it--and there is no long of it. 470 S.E.2d at 185.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

A delay of eight months in holding evidentiary hearing and of two months in making determination of neglect were in clear contravention of directive that matters involving abuse and neglect of children take precedence over almost every other matter and that abuse and neglect proceedings must be resolved as expeditiously as possible.

W. Va. DHHR v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985)

Syl. Pt. 1, *State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

If the court adjudicates, pursuant to W. Va. Code § 49-6-2, that the child is abused or neglected, then both the DHHR and the court, no later than 60 days after the child is placed in the temporary custody of the DHHR, are to proceed with the disposition of the child in compliance with W. Va. Code § 49-6-5. West Virginia Code § 49-6-5(a) requires the DHHR to file with the court a copy of the child's case plan, including permanency plan for the child.

W. Va. Code § 49-4-601(i)

W. Va. Code § 49-4-604(a)

State ex rel. Tristen K. v. Janes, Memorandum Order, No. 35718 (W. Va. Supreme Court unpublished order entered November 17, 2010).

In this memorandum order that dismissed a petition for a writ of prohibition, the Court noted that:

> "[W]e remain troubled by the expanse of time involved in this case and feel compelled to remind the lower court of the time frames involved in abuse and neglect cases, as well as the priority that should be placed on such cases."

F. Continuances

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)

"The sacred rights of the affected children" must be considered in deciding whether to grant a continuance.

In re Kyiah P., 213 W. Va. 424, 582 S.E.2d 871 (2003)

This case involved serious allegations of abuse and neglect, as well as the respondent's prior termination of parental rights in Virginia. Although the circuit court granted one continuance on DHHR's motion, it denied a second motion and dismissed the petition when DHHR failed to produce Virginia CPS witnesses who could testify concerning the Virginia proceedings. Reversing the dismissal, the Supreme Court reasoned that the best interests of the children required the court to conduct an adjudicatory hearing and that DHHR had established good cause for a continuance.

G. Appointment of Counsel

Note: For a complete discussion of the appointment of counsel for parents and custodians, including when a parent is a co-petitioner with the Department, see Overview Section IV. F.

Syl. Pt. 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995); Syl. Pt. 2, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

H. Mandatory Procedure for Child Abuse and Neglect Cases

Syl. Pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 6, *In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005); Syl. Pt. 5, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012); Syl. Pt. 3, *In re Darrien B.*, 231 W. Va. 25, 743 S.E.2d 333 (2013); Syl. Pt. 3, *In re M.M.*, 236 W. Va. 108, 778 S.E.2d 338 (2015)

Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for

compliance with that process and entry of an appropriate dispositional order.

In re Darrien B., 231 W. Va. 25, 743 S.E.2d 333 (2013)

An abuse and neglect case was initiated after a child was diagnosed with a spiral fracture. When the CPS worker went to the home to remove a second child, she observed extremely poor conditions. During the removal, the CPS worker also discovered that the father had voluntarily relinquished his rights to a daughter in an earlier abuse and neglect case that involved substantiated allegations of sexual abuse.

After an adjudicatory hearing, an improvement period was granted, and the primary issue of concern was the condition of the home. At the conclusion of the improvement period, the circuit court conducted a disposition hearing, but did not issue a decision as to whether parental rights would be terminated. Rather, it directed the Department to continue providing services. At a review hearing conducted three months later, the court stated that it was terminating parental rights, even though the caseworker was not requesting termination. In response, counsel for the respondent mother requested the opportunity to present the testimony of a service provider and the caseworker, but the court did not allow counsel to do so. One month later, the circuit court issued a written order terminating parental rights.

On appeal, the Supreme Court found that the lower court should have allowed the mother's counsel to present the testimony of the two witnesses and remanded the case. Additionally, the Court directed that the substantiated allegations of sexual abuse against the father must be explored and addressed upon remand.

In re M.M., 236 W. Va. 108, 778 S.E.2d 338 (2015)

In preparation for disposition, the DHHR filed a case plan in which it recommended an improvement period for the adult respondents. The GAL, however, objected to an improvement period. After counsel for the adult respondents indicated their willingness to proceed, the trial court conducted two evidentiary hearings. After the hearings, the court denied the adult respondents' motions for improvement periods and terminated their parental rights.

On appeal, the adult respondents argued that the required procedures for abuse and neglect cases had been substantially frustrated and relied upon *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012) and *In re Edward B.*, 558 S.E.2d 620 (W. Va. 2001). The Court, however, distinguished the case from *Ashton M.* and *Edward B.* because counsel for the adult respondents were aware that the GAL might not agree to an

improvement period and they had prepared for the evidentiary hearings. Secondly, the Court noted that the parties had full notice of the issues and the opportunity to present evidence. Third, the Court observed that counsel did not object to proceeding with the hearing. Further, the Court pointed out that the adult respondents did not contend that they had additional witnesses or evidence to present. Therefore, the Court held that disposition process had not been substantially frustrated.

I. Required Findings of Fact and Conclusions of Law

In the Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981)

W. Va. Code § 49-4-601(i)

Findings of fact and conclusions of law required by W. Va. Code § 49-6-2(c) must be more than a bare statement couched in the language of the statute.

Syl. Pt. 4, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

W. Va. Code § 49-4-604(b)(6)

W. Va. Code § 49-4-604(b)(5)

Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an alleged neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

J. Advance Approval of Expert Fees

Note: For a discussion of the authority of the circuit court to set expert fees, see Special Procedures Section IV. B.

In re Chevie V., 226 W. Va. 363, 700 S.E.2d 815 (2010)

The question in this case, the responsibility for the payment of expert witness fees, arose when a respondent mother sought approval from the circuit court to hire an expert witness concerning marks on a child which were alleged to be caused by a lit cigarette. The mother requested approval for an expert because the DHHR planned to present expert testimony regarding the child's injuries. After the circuit court approved the request, the respondent mother hired an expert and the circuit court ordered that the expert would be paid by the Public Defender Corporation. After the expert provided services, the respondent mother's attorney sought reimbursement for the expert's fees. The circuit court ordered the DHHR to pay the fee and upheld its ruling when the DHHR later sought to modify the ruling. The

DHHR then sought appellate relief from the order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

As a starting point for its analysis, the Supreme Court reviewed an earlier opinion, *Hewitt v. DHHR,* 575 S.E.2d 308 (W. Va. 2002), that concluded that a circuit court has the ultimate authority to direct payment of expert witness fees in abuse and neglect cases. The Supreme Court did not accept the DHHR's position in *Hewitt* that it has exclusive authority for the payment of expert witness fees pursuant to West Virginia Code § 49-7-33, a statute that allows the DHHR to pay for health care services at the Medicaid rate when such rates are available.

W. Va. Code § 49-4-108

As a basis for assigning payment responsibility to the DHHR, the circuit court had relied on West Virginia Code § 49-6-4 and Trial Court Rules 27.01 and 27.02, provisions that govern payment when a court appoints an expert. The Supreme Court, however, concluded that these rules and statute were not dispositive of the issue because the circuit court had not appointed the expert. Rather, it had simply approved the respondent mother's request to hire an expert witness who would present testimony on her behalf.

W. Va. Code § 49-4-603

As a basis to oppose responsibility for payment, the DHHR argued that the Public Defender Corporation was the responsible entity based upon West Virginia Code § 29-21-13a(e) and Trial Court Rule 35.05(b), provisions that require the Public Defender Corporation to pay expert witness fees in eligible proceedings. However, the Supreme Court held that these provisions were general and the more specific provisions of West Virginia Code § 49-7-33 were dispositive of the issue.

With regard to the provisions of West Virginia Code § 49-7-33, the Court concluded that the statute allows the circuit court the discretion to require the DHHR to pay fees for an expert witness in an abuse and neglect or juvenile case. The Court noted that the statute states that the court "may" require the DHHR to pay for "professional services" that include "'evaluation, report preparation, consultation and preparation of expert testimony' by an expert witness." 700 S.E.2d at 824. Based upon this reasoning, the Court affirmed the circuit court's order that required the DHHR to pay the fees for the expert witness.

The Court, however, reversed the circuit court insofar as it required the DHHR to pay the expert witness fee according to the schedule established by the Public Defender Corporation. The Court concluded that the relevant statute (then codified at West Virginia Code § 49-7-33) established that the DHHR has the sole authority to set the fee schedule for professional services provided in abuse and neglect and juvenile cases. The Court remanded the case to the circuit court to allow the DHHR to

establish the fee schedule for the payment of the expert. In two new syllabus points, the Court held that:

Syl. Pt. 5: Pursuant to the plain language of W. Va. Code § 49-7-33, a circuit court "may ... order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

W. Va. Code § 49-4-108

Syl. Pt. 6: When a circuit court orders the West Virginia Department of Health and Human Resources to pay for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33, the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

Hewitt v. DHHR, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Although West Virginia Code § 49-7-33 allows the DHHR to pay for health services and expert witnesses in juvenile and abuse and neglect cases at the Medicaid rate, if available, the Court has not held that the DHHR has the "exclusive authority" to set expert witness fees. Rather, the Court has found that "a circuit court still remains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect cases." 575 S.E.2d at 313.

III. THE OVERLAP OF CHILD ABUSE AND NEGLECT IN FAMILY COURT AND CIRCUIT COURT

A. Judicial Officers' Duty to Report Suspected Child Abuse and Neglect

Syl. Pt. 6, *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993)

Under W. Va. Code § 49-6A-2, it is mandatory for any circuit judge, family law master, or magistrate having reasonable cause to suspect abuse or neglect to immediately report the same to the Division of Human Services of the Department of Health and Human Resources.

W. Va. Code § 49-2-803(a)

Syl. Pt. 8, *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006)

When any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to W. Va. Code § 49-6A-2 and, if applicable, Rule 48 of the Rules of Practice and Procedure for Family Court.

W. Va. Code § 49-2-803(a)

B. Investigations Ordered by a Family Court Pursuant to West Virginia Code § 48-9-301

State ex rel. West Virginia Department of Health and Human Resources v. Ruckman, 223 W. Va. 368, 674 S.E.2d 229 (2009)

In an ongoing custody dispute, a father asked the family court to end the requirement of supervised visitation. There were no current allegations of child abuse or neglect; however, based on the history of the case, the family court decided not to alter the custodial arrangement without further investigation. The family court ordered DHHR, who was previously involved with the family, to conduct an investigation regarding the potential harm to the children should the visits be unsupervised; and further, ordered DHHR to supervise visitation between the father and the children while the investigation was pending.

DHHR sought a writ of prohibition in circuit court claiming the family court exceeded its authority by ordering DHHR to investigate when there were no current allegations of abuse or neglect, and by ordering DHHR to supervise the visits outside of a child abuse and neglect proceeding. The circuit court found that pursuant to W. Va. Code § 48-9-301, the family court had the authority to order an investigation by DHHR. With regard to the second issue, the circuit court found that supervised visitation could not be ordered until the family court had a hearing and made the requisite findings of fact as commanded by *Mary D. v. Watt*, 438 S.E.2d 521 (W. Va. 1992). The circuit court did not, however, find that DHHR could not be ordered to supervise visitation in a domestic relations case if the requisite findings were made. DHHR appealed.

With regard to court ordered investigations pursuant to W. Va. Code § 48-9-301, the West Virginia Supreme Court held:

Syl. Pt. 3: In a circumstance where mandatory reporting of abuse or neglect pursuant to West Virginia Code § 49-6A-2 and Rule 48 of the Rules of Practice and Procedure for Family Court is not implicated, a family court judge has discretion pursuant to West Virginia Code § 48-9-301(a) to order an investigation to assess the potential of exposing a child to harm should a custodial decision such as ordering unsupervised visitation be made.

W. Va. Code § 49-2-803

Syl. Pt. 4: The West Virginia Department of Health and Human Resources falls within the classification in West Virginia Code § 48-9-301(a) of "professional social service organization experienced in counseling children and families" which in the course of a child custody proceeding a family or circuit court may order to conduct an investigation and report to the court.

However, the Supreme Court found that court ordered investigations by DHHR should not be a routine matter in family court, holding:

Syl. Pt. 5: Family court judges ordering an investigation pursuant to West Virginia Code § 48-9-301(a) should make every effort to determine the best available options for obtaining the information needed in a timely manner in each case and should only resort to ordering DHHR to perform an investigation and report to the family court when extraordinary circumstances exist.

Factors bearing on whether DHHR, as opposed to another entity, should be ordered to conduct an investigation pursuant to West Virginia Code § 48-9-501, include but are not necessarily limited to: DHHR's previous involvement and knowledge of the safety issues involved, the financial resources of the family, and the resources available in the lower court's circuit.

C. Proactive Role of Circuit Judges in Resolving Abuse and Neglect Cases

In re Skyelan H., 219 W. Va. 661, 639 S.E.2d 753 (2006)

The guardian ad litem moved the circuit court to stay its dismissal order based on new medical evidence that suggested three of the children in the respondent's care had been sexually abused. The circuit court denied the motion and the guardian ad litem appealed.

The Supreme Court reversed the dismissal order based on the evidence submitted by the parties during oral argument. The Court underscored the proactive role of circuit courts should take in resolving abuse and neglect cases when it stated:

> We are, however, troubled by the additional evidence submitted into the record after the circuit court's decision. After entry of the court's dismissal order, the guardian *ad litem* proffered to the court evidence suggesting that three of the children may have been victims of sexual abuse. While the evidence, standing alone, proves nothing, the circuit court should have taken a more proactive role in compelling a further investigation of the evidence. In other words, we

> believe that the circuit court was empowered to demand that the DHHR **investigate** and report to the circuit court whether the evidence could or should be the basis of further action to protect the interest of the children. *See, e.g., Rules of Procedure for Child Abuse and Neglect Proceedings,* Rule 3a; *Rules of Practice and Procedure for Domestic Violence Civil Proceedings*, Rule 25a. 639 S.E.2d at 755. (emphasis in original).

In re Randy H., 220 W. Va. 122, 640 S.E.2d 185 (2006)

Similar to its analysis in *Skyelan H.*, the Supreme Court emphasized the proactive role of judges in promptly and fairly resolving child abuse or neglect cases. Recognizing the important role of judges, the Court relied upon the procedural rules which are commonly referred to as the "overlap" rules. In a new syllabus point, the Court held that:

Syl. Pt. 5: To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

D. Minor Guardianship Proceedings

Syl. Pt. 7, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008)

Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

W. Va. Code § 49-1-201

E. Collateral Estoppel/*Res Judicata*

Syl. Pt. 6, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014)

A petition for a domestic violence protective order under *W.Va. Code* § 48-27-101, *et seq.*, and a petition alleging abuse and/or neglect under *W.Va. Code* § 49-6-1, *et seq.*, may be filed upon the same facts without consequences under the doctrine of *res judicata* or the doctrine of collateral estoppel.

W. Va. Code §§ 49-4-601, et seq.

As an initial method to address allegations of abuse, a mother filed a domestic violence petition on her child's behalf against the father. At a final hearing, the family court denied the domestic violence protective order. After the circuit court affirmed the family court ruling, the mother filed an abuse and neglect case against the father based on similar allegations.

While the abuse and neglect case was pending, the father grabbed the child during an exchange and fractured the child's wrist. The mother sought and received a domestic violence protective order on her son's behalf. In response to the incident, the DHHR also moved to intervene in the abuse and neglect case to provide supportive services to the family. Approximately one month later, the mother amended the abuse and neglect petition to include the incident involving the fracture of the child's arm. Misdemeanor criminal charges were also initiated against the father.

The father's attorney moved to dismiss both the original and amended abuse and neglect petitions, on the basis of *res judicata* and/or collateral estoppel. The circuit court agreed with this argument and dismissed the abuse and neglect case.

On appeal, the Supreme Court found that, although a reputable person may file an abuse and neglect petition, the real party in interest in an abuse and neglect case is the State of West Virginia through the DHHR. In domestic violence cases, the Court found that the party in interest may be one of the following: "(1) a person individually seeking relief from domestic violence; (2) an adult person seeking relief from domestic violence on behalf of a family or household member, such as a minor child; or (3) a person who is being abused, threatened or harassed because they witnessed or reported domestic violence." 755 S.E.2d at 672. Since the real party in interest in each type of case is different from the other, the Court held that a domestic violence petition and/or abuse and neglect petition based on the same set of facts would not implicate the doctrines of collateral estoppel or *res judicata*.

As an additional basis for reversal, the Supreme Court discussed the difference in the types of remedies available in each type of proceeding. The Court observed that: "A domestic violence action is intended solely as a short-term, temporary response to domestic violence; an abuse and neglect action is designed to craft long-term solutions to both violence and neglect in the household." 755 S.E.2d at 673. Finally, the Court found that the circuit court erred in finding that the mother had the opportunity to litigate

her allegations in the criminal case. The Court, therefore, reversed and remanded the case for further proceedings.

IV. PARTIES TO AN ABUSE AND NEGLECT PETITION

A. Who May File an Abuse and Neglect Petition

Note: Chapter 49 of the West Virginia Code and Rule 17(a) indicate that an individual, upon the mutual consent of the parties, may serve as a co-petitioner with the DHHR. See Overview Section IV.

State ex rel. Paul B. v. Hill, 201 W. Va. 248, 496 S.E.2d 198 (1997)

W. Va. Code § 49-4-601(a)

Not only the DHHR has "standing" to file an abuse/neglect petition, any "reputable person" with knowledge of the facts may. W. Va. Code § 49-6-1(a).

In re Emily G., 224 W. Va. 390, 686 S.E.2d 41 (2009)

When an abuse and neglect petition was brought by a child's grandparents and was dismissed without a hearing, the Supreme Court held that West Virginia Code § 49-6-1 requires the Department to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the Department was to be joined as an intervenor.

W. Va. Code § 49-4-601

Syl. Pt. 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 4, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

"[T]he Department of Health and Human Resources has a duty to join or participate in proceedings to terminate parental rights . . .."

Syl. Pt. 5, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014)

While a civil abuse and neglect action pursuant to *W.Va. Code* § 49-6-1 [2005] may be initiated by either the West Virginia Department of Health and Human Resources or "a reputable person," the action is pursued solely on behalf of the State of West Virginia in its role as *parens patriae*.

This case involved a situation in which a mother initially filed a domestic violence petition against the child's father on the child's behalf that was ultimately denied by the family court. After the circuit court affirmed the dismissal, the mother filed an abuse and neglect petition against the father. While the abuse and neglect case was pending, the father grabbed the child and fractured the child's wrist at an exchange required by the parenting plan. In response, the mother filed a second domestic violence petition which was granted by the family court.

Discussing West Virginia Code § 49-6-1, the Court found that, although an abuse and neglect petition may be filed by a reputable person, "An abuse and neglect petition is prosecuted on behalf of one party, and only one party: the State of West Virginia, in its role as *parens patriae*." 755 S.E.2d at 671. The Court explained that the Legislature has designated the DHHR as the State's representative to prosecute child abuse and neglect petitions. The Court also observed that the ability to file an abuse and neglect does not indicate that the "reputable person" would necessarily have an interest in the proceeding or that the case was pursued on behalf of the reputable person. This reasoning, in turn, was the Court's basis for holding that *res judicata* or collateral estoppel would not bar abuse and neglect cases and domestic violence petitions based upon the same set of facts.

W. Va. Code § 49-4-601

B. Custodian or Parent

Syl. Pt. 4, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

Child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her children, even though that child is not parent's natural or adopted child.

C. Non-Custodial Parents Can Be Found Abusive and/or Neglectful

Syl. Pt. 1, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Christine Tiara W.*, 198 W. Va. 266, 479 S.E.2d 927 (1996)

When the Department of Health and Human Services finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code § 49-6-1(a). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W. Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

See W. Va. Code § 49-4-608(b)

Syl. Pt. 6, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

When the DHHR seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code § 49-6-1.

W. Va. Code § 49-4-601

D. Foster Parents in Abuse and Neglect Cases

1. Foster Parents' Participation - Subject to the Court's Discretion

Syl. Pt. 1, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996)

The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

2. Foster Parents' Participation in Permanency Hearing

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

After a young child had been continuously placed in a foster home for 22 months and all parental rights had been terminated, the DHHR sought and obtained an order to move the child to the home of a paternal aunt. The DHHR based this custody change upon its adoption policy that mandated placement with a blood relative over persons unrelated to a child. The foster parents attempted to attend the permanency hearing and present a motion to intervene, but were instructed to leave.

Finding that the circuit court exceeded its legitimate powers and issuing a writ of prohibition, the Supreme Court pointed out that the statute governing permanency hearings grants the right to notice and an opportunity to be heard to foster parents, pre-adoptive parents and relatives who are providing care to a child. Additionally, the Supreme Court noted that the circuit court erred because the foster parents had not even been considered as a permanent placement even though the child had lived with them for 22 months and they were not even allowed to present evidence concerning the child's best interests. Further, the Supreme Court pointed out that the DHHR should have developed a concurrent permanency plan for the child and could have considered the aunt as a possible placement at the beginning of the case.

3. Former Foster Parents

In re Michael Ray T., 206 W. Va. 434, 525 S.E.2d 315 (1999)

Syl. Pt. 4: Former foster parents do not have standing to intervene in abuse and neglect proceedings involving their former foster children.

Syl. Pt. 5: A circuit court may, in its sound discretion, permit former foster parents to present evidence regarding their former foster children to assist the court in assessing the best interests of such children subject to an abuse and neglect proceeding.

In any event, we do want to emphasize that, while the [former foster parents] do not have a right of intervention in the underlying abuse and neglect proceedings, they may not be completely devoid of remedies should they desire to pursue this matter further. Such alternative remedies at their disposal may include the extraordinary remedies of mandamus, as alluded to in the circuit court's order, and habeas corpus. . . . As both of these proceedings would be external to the underlying abuse and neglect proceedings, there exists a lesser likelihood of unnecessary and disruptive procedural delay. 525 S.E.2d at 324.

4. Right to Appeal

In re Harley C., 203 W. Va. 594, 509 S.E.2d 875 (1998)

Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.

E. Abuse and Neglect Proceedings Not Applicable to School Teachers

W. Va. DHS v. Boley, 178 W. Va. 179, 358 S.E.2d 438 (1987)

Statutory provisions relating to child abuse and neglect are not applicable to remove or discipline a teacher who allegedly abused student; removal or disciplinary procedures are properly accomplished under provisions of teacher disciplinary statute.

V. CHILD ABUSE AND NEGLECT PETITION

A. Emergency Custody

Syl. Pt. 1, *In the Matter of Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989)

W. Va. Code § 49-4-602

W. Va. Code § 49-6-3, authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by the Department of Human Services when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child.

B. Allegations of Abandonment

Syl. Pt. 1, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Christine Tiara W.*, 198 W. Va. 266, 479 S.E.2d 927 (1996)

When the DHHS finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code § 49-6-1(a). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W. Va. 740, 248 S.E.2d 318 (1978) holds that a noncustodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

W. Va. Code § 49-4-601

Syl. Pt. 6, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

When the DHHR seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code § 49-6-1.

C. Plea Bargain - No Dismissal of Petition

Syl. Pt. 2, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 4, *State ex rel. Lowe v. Knight*, 209 W. Va. 134, 544 S.E.2d 61 (2000)

A civil child abuse and neglect petition instituted by the DHHR pursuant to W. Va. Code §§ 49-6-1, *et seq.*, is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

W. Va. Code §§ 49-4-601, et seq.

D. Duty to File Petition - Prior Termination Involving Sibling

Syl. Pt. 1, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 1, *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code § 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a

W. Va. Code § 49-4-605(a)(3)

petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any siblings of that child.

Syl. Pt. 2, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 2, *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in W. Va. Code § 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in W. Va. Code § 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in W. Va. Code § 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.

W. Va. Code § 49-4-601

W. Va. Code § 49-4-602

E. Non-Emergency Abuse and Neglect Petition

State ex rel. Virginia M. v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996)

The Court noted that "West Virginia Code 49-6-1(a) provides the appropriate procedures for resolving non-emergency abuse or neglect situations . . .."

F. Amendments to Petition

Note: Rule 19 provides additional guidance concerning the amendment of petitions.

State v. Julie G., 201 W. Va. 764, 500 S.E.2d 877 (1997)

After a lengthy pre-adjudicatory improvement period, the circuit court found that the child did not meet the definition of an abused and neglected child as established by West Virginia Code § 49-1-3. In making this finding, the circuit court disregarded evidence that was discovered during the pre-adjudicatory improvement period because such evidence did not relate back to conditions that existed at the time the petition was filed. Reversing the circuit court, the Supreme Court explained that the petition should have been amended so that the circuit court could have properly considered evidence that was discovered after the original petition was filed. Clarifying the procedure for proper consideration of such evidence, the Court held that:

W. Va. Code § 49-1-201

Syl. Pt. 2, in part: Evidence regarding a parent's pre-adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to

Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

Providing further guidance concerning the procedure for amending a child abuse and neglect petition, the Court held that:

Syl. Pt. 4: Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

Syl. Pt. 5, *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006); Syl. Pt. 6, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

The DHHR filed a child abuse and neglect petition after two children, ages four and six, were hospitalized because their eight-year-old sister gave them prescription medication. The person watching the children when this incident occurred was a registered sex offender. Hospital personnel noted that the children had a lice infestation, that the six-year old girl had a yeast infection, had bruising on her inner thigh, and acted as if she had been sexually abused. They also noted that the sex offender was acting affectionately towards the oldest child, a sixteen-year-old girl, in the waiting area.

During the course of the proceedings, the respondent mother corrected certain physical conditions in the residence. However, it became apparent the respondent mother associated with two other sex offenders. Although this information was known to the DHHR, it did not present any evidence on these issues. Ultimately, counsel for the respondent requested dismissal of the case, and the DHHR agreed. Over the objections of the guardians *ad litem*, the circuit court dismissed the petition.

Finding that the circuit court should have taken a more proactive role regarding this evidence, the Court stated that: "[T]he circuit court had the authority to compel the DHHR to further investigate these allegations and had a duty to make findings of fact and conclusions of law regarding those allegations." 640 S.E.2d at 190. Concerning the additional evidence that was not included in the allegations of the original petition, the Court held that a circuit court has the inherent authority to compel the Department to amend a petition to encompass additional allegations of abuse or neglect.

In re Summer D., 222 W. Va. 219, 664 S.E.2d 104 (2008)

Although this case involved two unmarried parents who resided together, the record was developed primarily with regard to the mother. After the mother's improvement period was terminated, the guardian ad litem requested that the petition be amended to include allegations regarding the father. The circuit court denied the motion and ordered the parties to develop a plan to reunify the child with her father.

On appeal, the Court found that the record concerning the father's parenting skills had not been sufficiently developed. The Court further noted that the record contained sufficient evidence to conclude that additional abuse or neglect by the father would be imminent, but the allegations were not encompassed in the original petition. Based upon these conclusions, the Court held that the circuit court erred when it denied the guardian ad litem's motion to amend the petition.

In re Lilith H., 231 W. Va. 170, 744 S.E.2d 280 (2013)

The DHHR filed an abuse and neglect petition after a father and grandfather engaged in a physical altercation that was witnessed by the minor children. The mother also intervened and struck the grandfather. Although a police officer and a caseworker observed the extremely poor conditions in the home, the petition was never amended to include these allegations. After the initial adjudicatory hearing, the guardian *ad litem* requested that the petition be amended. The circuit court incorrectly ruled that the petition could not be amended because the adjudicatory hearing had already been conducted. In spite of this ruling, the parties agreed that the condition of the home could be considered at disposition.

On appeal, the Supreme Court held that it was plain error when the circuit court terminated parental rights based upon allegations and issues which had never been the subject of adjudication. In addition, the Court noted that it was troubled that the record was devoid of any reference to the condition of the home and the proper care and treatment of the children, even though the caseworker had testified at the preliminary hearing that these issues were serious enough to include in the petition. The Court

found that the failure to amend the petition, along with insufficient evidence at adjudication and disposition, constituted reversible error.

VI. CHILD SUPPORT IN ABUSE AND NEGLECT CASES

A. Jurisdiction for Child Support in Abuse and Neglect Cases

DHHR v. Smith, 218 W. Va. 480, 624 S.E.2d 917 (2005); See also Syl. Pt. 3, *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 (2009)

Note: Rule 16a incorporated the holding of Smith in the Rules of Procedure for Child Abuse and Neglect Proceedings. In addition, West Virginia Code §§ 49-4-801, et seq. has established procedures governing child support in abuse and neglect cases.

In this case involving certified questions concerning child support in abuse and neglect cases, the West Virginia Supreme Court held that a circuit court, not a family court, has jurisdiction to set child support in a child abuse and neglect case or other proceeding brought pursuant to Chapter 49 of the West Virginia Code, most typically juvenile status offense or delinquency cases. It further held that the entry of a support order is mandatory when an order is entered that alters the custodial responsibility for a child or commits the child to the custody of DHHR. In *Smith*, the Court expressly recognized that altering custodial responsibility may include transferring custody to one parent or placing the child in the custody of a third party, such as a relative. Finally, the Court held that the child support guidelines set forth in West Virginia Code §§ 48-13-101, *et seq.* apply to child support obligations in child abuse and neglect cases.

Syl. Pt. 3: When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the West Virginia Code, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.

In re J.L., 234 W. Va. 116, 763 S.E.2d 654 (2014).

Syl. Pt. 4: When a circuit judge enters an order on an abuse or neglect petition filed pursuant to Chapter 49 of the West Virginia Code, and in so doing alters the custodial and decision-making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, W. Va. Code § 49-7-5 requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

W. Va. Code §§ 49-4-801, et seq.

Syl. Pt. 5: Any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the West Virginia

Code must use the Guidelines for Child Support Awards found in W. Va. Code §§ 48-13-101, *et seq.*

B. Modification or Enforcement of Child Support in Abuse and Neglect Cases

Syl. Pt. 5, *In re J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

Pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

The parents of a child were divorced in 2005, and custody of the child was placed with the mother. The father was required to pay child support, but substantial arrearages accrued ($13,130.53). In response, the BCSE initiated contempt proceedings in family court in 2011. While the contempt proceedings were pending, the DHHR initiated a child abuse and neglect petition based on allegations that the father had committed domestic violence in the child's presence and that the mother had failed to shield the child from it. In turn, the family court dismissed the contempt proceedings because it determined that Rule 6[17] of the Rules of Procedure for Child Abuse and Neglect Proceedings prohibited it from addressing the child support contempt petition.

At the conclusion of the abuse and neglect case, the circuit court terminated the father's parental rights, modified his child support obligation and reduced payments on the arrearage to $50 per month. When the father again fell behind on his support obligation, the mother, *pro se*, filed a contempt petition in the abuse and neglect case. The circuit court found the father to be in contempt, issued a capias and remanded the case to family court for enforcement of the support order entered by the circuit court. In response, the BCSE appealed the remand of the case to family court.

On appeal, the Supreme Court first observed that family courts are courts of limited jurisdiction, while circuit courts are courts of general

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[17] The relevant part of Rule 6 states as follows: "The court retains exclusive jurisdiction over placement of the child while the case is pending, as well as over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation, except that (1) if the petition is dismissed for failure to state a claim under Chapter 49 of the W. Va. Code, or (2) if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both of his/her cohabitating parents without any visitation or child support provisions, then any future child custody, visitation, and/or child support proceedings between the parents may be brought in family court."

jurisdiction. The Court also noted that circuit courts have exclusive jurisdiction over child abuse and neglect cases, and that this jurisdiction includes the authority to decide child support issues. The Court went on to find that the establishment of child support is an integral part of an abuse and neglect case. The Court further recognized that, under Rule 6, the circuit court has continuing exclusive jurisdiction over matters, i.e. visitation or support, that might ordinarily lie within the jurisdiction of family court. The Court finally stated that Rule 16a(d) makes it "patently clear" that the circuit court could not transfer abuse and neglect matters to family court. Accordingly, the Supreme Court adopted Syllabus Point 5 in which it held that enforcement or modification of a circuit court child support order in an abuse and neglect case must be addressed by the circuit court and may not be remanded to family court.

C. Child Support Following a Termination or Voluntary Relinquishment of Parental Rights

In re Stephen Tyler R., 213 W. Va. 725, 584 S.E.2d 581 (2003)

The circuit court terminated the respondent father's parental rights, but required him to continue paying child support. On appeal, the respondent father argued that the child support requirement was fundamentally unfair because he could not visit his son. Rejecting this argument, the Court reasoned that W. Va. Code § 49-6-5(a)(6) allowed the circuit court to terminate parental rights and/or responsibilities. Finding that child support is a parental responsibility, the Court held:

W. Va. Code § 49-4-604(b)(6)

See also W. Va. Code § 49-4-802(d)

Syl. Pt. 7: Pursuant to the plain language of W. Va. Code § 49-6-5(a)(6), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.

As further grounds to challenge the decision, the respondent father argued that the support obligation would be inequitable if the child were later adopted. Addressing this concern, the Court held that:

Syl. Pt. 8: A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6, amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

W. Va. Code § 49-4-606

In re Ryan B., 224 W. Va. 461, 686 S.E.2d 601 (2009)

In these consolidated appeals, the Supreme Court addressed whether a parent who voluntarily relinquishes his or her parental rights can be required to make child support payments after his or her rights are permanently severed. The Court also addressed whether the imposition of a child support obligation is mandatory under West Virginia Code § 49-7-5 when a circuit court enters an order accepting a voluntary relinquishment or involuntarily terminating a parent's rights. With regard to the first issue, the parents whose rights were terminated argued that the Legislature's modification of West Virginia Code § 49-6-5(a)(6) overruled *In re Stephen Tyler R.* and consequently, precluded a circuit court from ordering a parent to pay child support after his or her rights are terminated. The Supreme Court held:

See W. Va. Code §§ 49-4-801, et seq.

W. Va. Code § 49-4-604(b)(6)

Syl. Pt. 1: The Legislature's 2006 amendment of *W. Va. Code,* § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support.

Syl. Pt. 2: A circuit court terminating a parent's parental rights pursuant to *W. Va. Code,* § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W. Va. Code,* § 48-13-101, et. seq. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the *Guidelines* pursuant to *W. Va. Code,* § 48-13-702.

See also W. Va. Code §§ 49-4-801, et seq.

VII. PRELIMINARY HEARING

A. Notice Requirements

n. 18, *In the Matter of George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)

The Court noted that Rule 20 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides for actual notice of at least five days prior to the preliminary hearing.

B. Time Standard for Preliminary Hearing

n. 20, *In the Matter of George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)

The Court noted that Rule 22 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides that a preliminary hearing on emergency custody shall be conducted within 10 days after the continuation or transfer of custody is ordered as provided by W. Va. Code § 49-6-3(a).

W. Va. Code § 49-4-602(b)

C. Prima Facie Case

State ex rel. Virginia M. v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996) (per curiam)

As an initial matter, the Court noted that "West Virginia Code § 49-6-3(a) gives a court the authority to order a grant of temporary custody only 'if it finds that: (1) there exists imminent danger to the physical well-being of the child; and (2) there are no reasonably available alternatives to the removal of the child . . .. '" 475 S.E.2d at 552. The Court observed that this case was more like a custody dispute between a mother and a grandmother, rather than a typical abuse and neglect case. The Court held that the circuit court was clearly wrong in granting emergency custody to the grandmother because the petition did not allege imminent danger. Rather, the allegations only involved the mother's failure to contribute financially to the child's care.

W. Va. Code § 49-4-602(a)

VIII. RIGHT TO COUNSEL/DUTIES AND ROLES

A. Guardians *Ad Litem* for Children

Appendix A, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993)

Note: Adopted in 2014, Appendix A to the Rules of Procedure for Child Abuse and Neglect Proceedings includes the Guidelines for Children's Guardian Ad Litem in Child Abuse and Neglect Cases. These Guidelines were based substantially upon Appendix A of In re Jeffrey R.L.

GUIDELINES FOR GUARDIANS *AD LITEM* IN ABUSE AND NEGLECT CASES

Initial Stages of Representation

1. Notify promptly the child and any caretaker of the child of the appointment of counsel and the means by which counsel can be contacted.

2. Contact the caseworker and review the caseworker's file and all relevant information.

3. Contact and interview persons such as older children, caseworkers, and caretakers who may have information with respect to the child and obtain names and addresses of hospital personnel, physicians, teachers, law enforcement, and other persons who may have pertinent information regarding the child and interview them.

4. Absent extraordinary circumstances and the child is three or under:

a. If the child is in the care of someone other than the respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs and visit the child in the caretaker's home, making observations of the child or

b. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the respondent(s) concerning the child's care and the type of services the child needs and visit the child in his/her home, making observations of the child. If refused, ask for assistance of the court.

5. Absent extraordinary circumstances and the client is over three:

a. If the child is in the care of someone other than respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs.

b. If the child is in the care of someone other than the respondent(s), conduct interviews with the child in a manner and environment appropriate to the child's age and maturity to obtain facts concerning the alleged abuse or neglect and to determine the child's wishes and needs regarding temporary visitation and/or placement.

c. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the child out of the presence of the respondent(s) in a manner and environment appropriate to the child's age and maturity. It is essential that the guardian *ad litem* understand that the interview is for the purpose of gathering information not influencing information. If refused, ask the assistance of the court.

6. Provide to the child, his or her parents, and any caretaker notice of the petition and all subsequent motions.

7. Maintain contact with the child throughout the case and assure that s/he is receiving counseling, tutoring, or any other services needed to provide as much stability and continuity as possible under the circumstances.

Preparation for and Representation at Adjudicatory and Dispositional Hearing

8. Pursue the discovery of evidence, formal and informal.

9. File timely and appropriate written motions such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.

10. Evaluate any available improvement periods and actively assist in the formulation of an improvement period, where appropriate, and service plans.

11. Monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring monthly updates or status reports from agencies involved with the family.

12. Participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in a legally acceptable and emotionally neutral setting.

13. Maintain adequate records of documents filed in the case and of conversations with the client and potential witnesses.

14. Ensure that the child is not exposed to excessive interviews with the potential dangers inherent therein. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature of the examination requested and the intrusiveness; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination; and (6) the evidence already available for the defendant's use.

15. Ensure that a child who is court ordered to be interviewed by a psychologist or psychiatrist is interviewed in the presence of the guardian *ad litem* attorney unless the court, after consulting the

child's guardian *ad litem,* believes that the interview is best conducted without the guardian *ad litem.*

16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.

17. Review any predispositional report prepared for the court prior to the dispositional hearing and be prepared to submit another if the report is not consistent with all other appropriate evidence.

18. Apprise the court of the child's wishes.

19. Explain to the child, in terms the child can understand, the disposition.

20. Advocate a gradual transition period, in a manner intended to foster emotional adjustment whenever a child is to be removed from the custody of anyone with whom s/he has formed an important attachment.

21. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests and an appropriate order is entitled to preserve the rights of siblings to continued contact.

22. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports.

Post-Dispositional Representation

23. Inform the child of his/her right to appeal.

24. Exercise the appellate rights of the child, if under the reasonable judgment of the guardian *ad litem,* an appeal is necessary.

25. File a motion for modification of the dispositional order if a change of circumstances occurs for the child which warrants a modification or represent the child if said motion for modification is filed by any other party.

26. Continue to represent the child until such time as the child is adopted, placed in a permanent home, or the case is dismissed after an improvement period.

Syl. Pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 3, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 4, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)

W. Va. Code § 49-4-601(f)

Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code § 49-6-2(a) mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the W. Va. Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the W. Va. Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.

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

This *per curiam* opinion involved two successive abuse and neglect petitions in which it was alleged that the adult respondent sexually abused his stepdaughter. Since the stepdaughter turned eighteen during the appeal, the opinion primarily addressed the effect of the proceedings on two younger children. The circuit court dismissed the first petition because of contradictory testimony between two witnesses. After the stepdaughter reported another incident of sexual abuse, a second petition was filed. The circuit court conducted an abbreviated hearing on the second petition and denied the guardian ad litem's motion for a forensic examination for the two younger children. It later dismissed the petition.

The Supreme Court reversed the dismissal of the second petition because the denial of the motion for the forensic examination prevented the guardian ad litem from developing evidence relevant to the allegations. The Supreme Court further held that the failure to conduct an adjudicatory hearing prevented the guardian ad litem from litigating the allegations of abuse and from articulating concerns about the welfare of the two younger children.

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984)

A child who is the alleged victim of sexual abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of his or her counsel unless counsel waives that right on behalf of the child. When an issue regarding a child's capacity to testify that he/she was a victim of abuse or neglect is presented, the Court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview to inquire into the child's capacity to be a competent witness. "However, the Court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court

and the guardian ad litem agree that the interview is best conducted in that manner." Although the guardian ad litem must give permission for such an interview, the trial court may refuse to allow the child to be a witness in the absence of an unimpeded interview with a child psychiatrist or psychologist who can then give some assurance of competency.

Syl. Pt. 5, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991)

The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.

In re Skyelan H., 219 W. Va. 661, 639 S.E.2d 753 (2006)

The circuit court entered a final order dismissing a petition because it found DHHR had failed to prove the children were abused or neglected by clear and convincing evidence. Following entry of the final order, the guardian ad litem for the children proffered new evidence to the circuit court in the form of medical records that suggested three of the respondent's four children may have been sexually abused. The guardian moved for a stay of the dismissal order based on this new evidence. The court denied the motion and the guardian ad litem appealed. In a *per curiam* opinion, the Supreme Court reversed and remanded the case with directions that the circuit court give full consideration to the allegations raised by the guardian ad litem.

In re Christina W., 219 W. Va. 678, 639 S.E.2d 770 (2006)

This case presented the issue of whether or not a guardian ad litem owes a duty of confidentiality to the child he or she represents such that the guardian may not reveal the child's revelations of abuse to the court if the child has requested they remain confidential. In resolving this issue, the Court discussed the dual role of a guardian ad litem for children in abuse and neglect cases, which is reflected in the following syllabus points of the Court:

Syl. Pt. 3: Because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation.

Syl. Pt. 4: While a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].

n. 14, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

With regard to the appointment of attorneys to represent children in such actions, it is a better practice for courts to attempt to appoint attorneys who have demonstrated interest in such sensitive matters and who will be committed to achieving a result which will serve the best interest of the child. Furthermore, effectively representing children in abuse and neglect cases frequently requires far more than just legal ability. As courts have increasingly been thrust into the arena of social issues, it has become clear that lawyers and judges must deal with the human dimension of such problems. This requires the willingness and ability to communicate with parents, social workers, physicians, psychiatrists, psychologists and counselors, teachers, and -- most importantly -- children.

B. Appellate Duties of Guardians *Ad Litem*

Syl. Pt. 3, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991)

In a proceeding to terminate parental rights pursuant to W. Va. Code §§ 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W. Va. Code § 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. *This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary*. (emphasis added).

See W. Va. Code §§ 49-4-601, et seq.

W. Va. Code § 49-4-601(f)

In re B.L., Nos. 14-0660, 14-0714 (W. Va. Supreme Ct., June 10, 2015) (memorandum decision); 2015 WL 3631681

This case arose when the Supreme Court issued a rule to show cause against a guardian *ad litem* for failing to comply with scheduling orders in two abuse and neglect cases. Specifically, the guardian *ad litem* did not file response briefs and later filed extremely abbreviated summary responses. In turn, the Court issued a rule to show cause because of the lawyer's failure to file timely briefs and the poor quality of the summary responses. As a possible sanction, the Court had considered ordering that the lawyer would not be eligible for future GAL appointments.

As a response to the rule to show cause, the guardian *ad litem* filed an initial response brief and two supplemental response briefs. She also explained her failure to comply with the scheduling orders because of medical issues and an over-focus on a felony case. In addition, she submitted evidence that supported the generally high quality of her work as a guardian *ad litem*. Ultimately, the Court did not find this guardian *ad litem* in contempt. This opinion is, however, an extremely important reminder that the Supreme Court expects a high degree of professionalism for attorneys

who represent children in child abuse and neglect cases and that it will issue sanctions in appropriate cases.

In re A.N., Nos. 15-0182, 15-0208 (W. Va. Supreme Ct., September 30, 2015) (memorandum decision); 2015 WL 5738019

This decision addressed a guardian *ad litem's* failure to comply with scheduling orders issued by the Supreme Court. When the guardian *ad litem* first failed to file response briefs as scheduled, the Court issued Notices of Intent to Sanction and Amended Scheduling Orders. However, the guardian *ad litem* still did not file the required response briefs. Because of this failure, the Court issued a rule to show cause. The guardian *ad litem* ultimately filed response briefs the day before oral argument on the rule to show cause.

In its decision, the Court noted that the guardian *ad litem* had failed to take responsibility for the untimely filings. Instead, the guardian *ad litem* had argued that she had decided not to file response briefs as a means to protest the alleged shortcomings of the DHHR and its failure to follow federal guidelines. She also asserted that staffing problems in her office had caused her to be unaware of the deadlines for filing response briefs. The Court, however, did not find the guardian *ad litem's* responses sufficient to avoid sanctions, and, therefore, found the attorney in contempt for willful violations of the Court's orders. The Court directed the Clerk to refer the matter to the Office of Disciplinary Counsel and directed that she would not be eligible for further guardian *ad litem* appointments or other court appointments until the conclusion of the disciplinary action.

C. Custodian or Parent

Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984)

A custodian, like a parent, has a statutory right to be represented in any abuse or neglect proceeding concerning the child. This includes a meaningful opportunity to be heard, and the opportunity to testify and to present and cross examine witnesses.

D. Guardians *Ad Litem* for Parents

1. Involuntary Hospitalization for Mental Illness

In the Matter of Lindsey C., 196 W. Va. 395, 473 S.E.2d 110 (1996)

The Court reversed an order terminating parental rights for a mother who was hospitalized for mental illness in another state during the pendency of the proceedings and for whom no guardian ad litem was appointed. In the following syllabus points, the Court provided guidance concerning the

appointment of attorneys and guardians ad litem, and service on parents who are hospitalized for mental illnesses.

Syl. Pt. 3: In abuse and neglect proceedings the appointment of a guardian ad litem is required for adult respondents who are involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent.

Syl. Pt. 4: It is error to enter a decree terminating parental rights after a suggestion of involuntary hospitalization for mental illness of the affected parent or custodian without first having appointed a guardian ad litem for such parent or custodian.

Syl. Pt. 5: A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or by mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based.

Syl. Pt. 6: In abuse and neglect cases, service of original process on a guardian ad litem appointed for a parent or custodian involuntarily hospitalized for mental illness whose legal capacity has not been terminated by law cannot be substituted in lieu of service on the hospitalized parent or custodian where the parental rights of such person may be terminated under the process to be served.

Syl. Pt. 9: If the appointment of a guardian ad litem is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of guardian ad litem, with the attendant duties of protecting the interests of the persons for whom such counsel is appointed guardian ad litem and the attendant duty on the court to see to the protection of such person's interests until and unless it later appears that such person's circumstances do not require the continued protection of a guardian ad litem or that the two functions cannot be performed by the same attorney.

Concerning a dual-status appointment as counsel and guardian ad litem, although conflicts in this dual role are typically rare, three particular areas of potential conflict in the roles of guardian ad litem and counsel, including cases involving counsel and guardians ad litem for children, are as follows: (1) when the best interests of the ward and the ward's wishes are not identical, (2) when a privileged communication is made, and the attorney's duty to protect that communication conflicts with his or her duty as guardian, and (3) when a court would require a guardian ad litem to

actually testify in a case, a function that counsel ordinarily should not perform.

The practice of dual appointments is recommended, but if such conflict arises, dual status of counsel should be terminated and a second attorney appointed as guardian ad litem.

2. Incarcerated Adults

n. 4, *Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990)

In footnote 4, the Court noted that the incarcerated father's rights were protected by a guardian ad litem even though the father was not present at a hearing terminating his rights.

E. Duties of County Prosecutor and DHHR

In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996)

DHHR, as a party to this case (usually by its agent, an individual child protective services worker), has the right and responsibility to advocate whatever position it determines proper under the law and in the best interest of the child. However, DHHR also has the duty to follow the court's directives in working on the case from the perspective of the delivery of social services. In a case, such as this, where DHHR refuses to comply with court directives, a circuit court may appoint an agency independent of DHHR to assist in case management. DHHR, however, as the circuit court clearly recognized by virtue of its directive that DHHR remain a party, was not absolved of its statutory duties to Jonathan G. despite its removal as the case manager.

Syl. Pt. 4, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 1, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *In re Ashton M.*, 228 W. Va. 584, 723 S.E.2d 409 (2012)

In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W. Va. Code § 49-6-10, that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all the legal and ethical principles that govern the attorney-client relationship, in

W. Va. Code § 49-4-502

general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

Syl. Pt. 5, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals' appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

See also *DHHR v. Clark*, 209 W. Va. 102, 543 S.E.2d 659 (2000) (discussing investigative duties and powers of DHHR).

In re Emily G., 224 W. Va. 390, 686 S.E.2d 41 (2009)

When an abuse and neglect petition was brought by a child's grandparents and was dismissed without a hearing, the Supreme Court held that West Virginia Code § 49-6-1 requires the Department to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the Department was to be granted intervenor status.

W. Va. Code § 49-4-601

Syl. Pt. 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 4, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

"[T]he Department of Health and Human Resources has a duty to join or participate in proceedings to terminate parental rights . . .."

F. All Counsel Must Have Opportunity to Advocate

Syl. Pt. 5, *In re Mark M., III*, 201 W. Va. 265, 496 S.E.2d 215 (1997), Syl. Pt. 3, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

W. Va. Code § 49-4-601(h)

IX. PROCEDURAL PROTECTIONS FOR CHILDREN

A. Meaning and Purpose of Child Case Plan

State ex rel. S.C. v. Chafin, 191 W. Va. 184, 444 S.E.2d 62 (1994)

W. Va. Code § 49-4-604(a)

West Virginia Code § 49-6-5(a) defines the child case plan as a written document which includes, where applicable, the requirements of the family case plan set forth in W. Va. Code § 49-6D-3, as well as the additional requirements set forth in W. Va. Code § 49-6-5(a).

W. Va. Code § 49-4-408

Syl. Pt. 4: The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit.

B. Concurrent Planning

In re Billy Joe M., 206 W. Va. 1, 521 S.E.2d 173 (1999)

Syl. Pt. 5: Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.

Syl. Pt. 6: A permanency plan for abused and neglected children designating their permanent placement should generally be established prior to a determination of whether post-termination visitation is appropriate.

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

In this case, the child resided with her foster parents from birth until she was 22 months old. After a permanency hearing, in which the foster parents were not allowed to participate, the circuit court found that the child should be placed with her paternal aunt based upon a DHHR policy that preferred the placement of the child with a blood relative. At the time of the appeal, the child had lived with her aunt for ten months. The Court stated that the DHHR should have used concurrent planning in order to provide the child with resolution and permanency. Further, it observed that the DHHR should have contacted the aunt at the outset of the case, had it believed that the child should have been placed with a relative.

C. West Virginia Procedures for Child Witnesses in Abuse and Neglect Cases

In re J.S., 233 W. Va. 394, 758 S.E.2d 747 (2014)

The family in this case involved a mother, a father, the mother's niece who had been placed with the mother in a previous guardianship case, the

father's son from a prior relationship and the mother and father's infant son. The allegations against the father involved his sexual abuse of the niece and his sexual abuse of his son on one occasion. The allegations against the mother involved her failure to heed warnings from the DHHR concerning the father's risk to the children's safety.

> The primary evidence offered in support of the allegations were the videotaped forensic interviews of the niece and the father's son and handwritten notes from interviews. Other evidence included a letter from the niece to the mother in which she detailed both the sexual abuse and the father's threats if she were to disclose the sexual abuse. Records from the niece's therapy were also admitted. The children did not testify in the abuse and neglect case, and the focus of the opinion was the admission of the videotaped interviews.
>
> As an initial basis for appeal, the adult respondents argued that they were denied due process because they were not afforded the opportunity to confront the children and cross-examine them. The Court, however, pointed out that: "The fundamental requirement of procedural due process in a civil proceeding is 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *J.S.*, 758 S.E.2d at 756. The Court went on to explain that: "What would constitute due process in this case must be determined by weighing the competing interests of the children, the parents and the State." *Id.* Finding that the parents had been afforded due process, the Court noted that the parents had been provided proper notice of the allegations, they had been appointed counsel, they had the opportunity to review evidence in advance of its presentation and to offer rebuttal the evidence.
>
> Secondly, the adult respondents argued that the presentation of videotaped interviews, as opposed to confrontation and cross-examination, failed to minimize the risk of an erroneous finding. The Court, however, rejected this argument because the adult respondents failed to specify how confrontation and cross-examination would have contributed to the fact-finding process.
>
> Third, the adult respondents argued that Rule 8(a), the rule that places limits on the testimony of children, violated the right to confrontation and cross-examination established by the relevant statutes in Chapter 49. See W. Va. Code § 49-4-601(h).[18] Analyzing

[18]The relevant part of subsection (h) states as follows: "[T]he party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W. Va. Code § 49-4-601(h).

the arguments, the Court observed that the respondents had equated the statutory right to confront and cross-examine established in Chapter 49 with the rule established by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The Court, however, found that abuse and neglect cases are civil, not criminal and, therefore, the *Crawford* rule does not apply.

With regard to whether Rule 8(a) conflicts with the statutory right to confront and cross-examine, the Court held that Rule 8(a), as a procedural rule, would determine whether a child should testify or not, because the Court has the constitutional authority to adopt procedural rules. See W. Va. Const., article VIII, § 3. In a new syllabus point, the Court held that:

W. Va. Code § 49-4-601(h)

> In a child abuse and neglect civil proceeding held pursuant to West Virginia Code § 49-6-2 (2009), a party does not have a procedural due process right to confront and cross-examine a child. Under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, there is a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony. The circuit court shall exclude this testimony if it finds the potential psychological harm to the child outweighs the necessity of the child's testimony. Syl. Pt. 7, *J.S.*, 758 S.E.2d 747.

The residual provisions of the hearsay rule is now found in W. Va. R. Evid. 807.

The Court further addressed the admissibility of the videotaped interviews under the West Virginia Rules of Evidence, specifically the residual or catch-all provisions established by West Virginia Rules of Evidence 803(24) and 804(b)(5). Analyzing this issue, the Court noted that five general factors must be met in order to be admissible under these provisions. *State v. Smith*, 358 S.E.2d 188 (W. Va. 1987). Applying this test, the Court found that the evidence appeared to be reliable and that the adult respondents did not attack the interview techniques or trustworthiness of the children's statements. Secondly, the Court observed that the evidence was probative as to the question of the sexual abuse. Third, the Court found that the circuit court did not abuse its discretion in determining that the evidence was more probative than other evidence and there were sufficient guarantees of trustworthiness to be reliable. Under the fourth element, the Court concluded that the interests of justice would be served by the admission of the interviews. And fifth, the Court pointed out that the DHHR had provided notice of the evidence and that the adult respondents had been provided with the opportunity to meet the evidence. For these reasons, the Court affirmed the admission of the evidence and the termination of parental rights.

In re Joseph A., 199 W. Va. 438, 485 S.E.2d 176 (1997)

In an appeal challenging the termination of parental rights, the respondent father contended that the trial court erred by excluding him from his minor son's *in camera* testimony. His attorney, however, was present during the minor's testimony. Affirming the circuit court, the Supreme Court held that:

> W.Va. Code, 49-6-2(c) (1996), provides parties having custodial or parental rights the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present during the testimony of a child witness and is given the opportunity to fully cross-examine the witness. Syl. Pt. 3, *Joseph A.*, 485 S.E.2d 176.

W. Va. Code § 49-4-601*(h)*

At the time that *Joseph A.* was decided, the Rules of Procedure for Child Abuse and Neglect Proceedings had been approved but were not in effect. The Court, however, noted that:

> Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings controls the procedure for taking testimony from children in abuse and neglect proceedings in future cases. Syl. Pt. 4, *Joseph A.*, 485 S.E.2d 176.

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984); *State v. Stacy*, 179 W. Va. 686, 371 S.E.2d 614 (1988)

A child who is the alleged victim of abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of his or her counsel unless counsel waives that right on behalf of the child. When a child's capacity to testify that he/she was the victim of abuse or neglect is present, the Court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview to inquire into the child's capacity to be a competent witness. However, the Court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court and the guardian ad litem agree that the interview is best conducted in that manner. The guardian ad litem must give permission, however, the trial court may refuse to allow the child to be a witness in the absence of an impeded interview with a child psychiatrist or psychologist who can then give some assurance of competency.

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

This appeal involved the dismissal of two successive petitions that were supported by the testimony of a teenage girl. In her testimony supporting the first petition, the teenager did not testify about a specific

incident of sexual abuse. Later when she was in foster care, the teenager disclosed the details of the incident that formed the basis of the second petition. The circuit court, however, dismissed the second petition because she had not testified about the incident during a hearing on the first petition. Reversing the circuit court, the Supreme Court noted that:

> Such failure does not render her testimony inherently incredible, and it should not have been the sole basis, as appears from the record, for the lower court's decision to dismiss the second petition. It may have provided the court with a legitimate basis for more rigorous investigation of the allegations, but Elizabeth's credibility, as an alleged child sexual assault victim, should not have been totally devalued by her failure to assert all abusive events during the initial hearing. 617 S.E.2d at 556.

In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)

In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988)

In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)

D. Children as Witnesses in Criminal Cases

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990)

On a writ of certiorari in a criminal case, the defendant challenged a Maryland procedure which allowed a child sexual abuse victim to testify via one-way closed circuit television on the basis that it violated her Sixth Amendment right of confrontation. Upholding the Maryland procedure, the United States Supreme Court held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." 497 U.S. at 855, 110 S. Ct. at 3169.

Providing further guidance concerning the necessity of using closed-circuit testimony, the Court noted that trial courts must make the following findings to warrant the use of this technology. First, the trial court must hear evidence and find that the use of closed circuit testimony is necessary to protect the child's welfare. Secondly, the trial court must find that the child would be traumatized by testifying in the presence of the defendant, as opposed to being traumatized by the courtroom in general. Third, the trial court must find that the child's distress or emotional upset must be more than mere nervousness or excitement.

Lomholt v. Iowa, 327 F.3d 748 (8th Cir. 2003)

In this federal habeas corpus proceeding, the defendant challenged the use of closed circuit testimony on the basis that the factual determinations related to the necessity of this testimony were unreasonable and that the Iowa courts unreasonably applied *Maryland v. Craig*, *supra*. The Iowa trial court based its findings on the unchallenged testimony of one expert who had conducted numerous counseling sessions with the two victims.

On appeal, the Eighth Circuit noted that the expert concluded that testifying in the defendant's presence would be traumatic and would impair the victims' ability to communicate. The Eighth Circuit reasoned that *Craig* did not require the specific finding that the victim is afraid of the defendant, but rather that *Craig* required a finding of emotional distress that would impede communication. Additionally, the Eighth Circuit found that the findings were case specific even though the expert testified that all child sex abuse victims would experience trauma if they testified in the abuser's presence. Based upon this reasoning, the Eighth Circuit held that the Iowa courts' factual findings relating to the necessity for closed circuit testimony were not unreasonable and that the Iowa courts did not unreasonably apply the holding of *Craig* to the facts in this case.

Ault v. Waid, 654 F. Supp. 2d 465 (N.D.W.Va. 2009)

In a federal habeas corpus case, the court found that the defendant's right to confrontation was not violated when the West Virginia circuit court allowed a child sexual abuse victim to testify via closed-circuit television as authorized by West Virginia Code §§ 62-6B-1, *et seq.* Although there were some minor deviations from the statutory procedure, the district court concluded that the defense either agreed to the deviations or that they had no effect on the defendant's right to confrontation.

E. Children Born During Proceedings

In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993)

In light of finding that four older children were neglected, the trial court did not abuse its discretion in placing mother's unborn child in protective custody so that child would come under auspices of DHHR once born.

In re Tracy C., 205 W. Va. 602, 519 S.E.2d 885 (1999)

The Court found that the circuit court erred by denying the guardian ad litem's motion to join a child born during the pendency of the proceedings, as well as the child's father.

F. Court Appointed Special Advocates – CASA

n. 5, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004)

Rule 52 of this Court's Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a Court-Appointed Special Advocate (CASA) who has the authority in abuse and neglect cases to independently review the record and advocate the best interests of the child.

See also *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910, n. 2 (2010).

X. PROCEDURAL PROTECTIONS FOR PARENTS

A. Appointment of Counsel

Note: For a complete discussion of the appointment of counsel, including when a parent is a co-petitioner with the Department, see Overview Section IV. F.

Syl. Pt. 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995); Syl. Pt. 2, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

B. Notice Requirements

In re Travis W., 206 W. Va. 478, 525 S.E.2d 669 (1999)

Syl. Pt. 2: Circuit courts must comply with Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect by providing notice of the date, time, and place of the disposition hearing to all parties, their counsel, and the CASA representative, if one was appointed.

The Court expressly stated that: "The end result of this case will doubtless be the same regardless of whether or not the court provides notice of and holds a disposition hearing. *However, neither this Court nor circuit courts can simply ignore mandatory procedural requirements*." 525 S.E.2d at 677 (emphasis added).

In re Emily G., 224 W. Va. 390, 686 S.E.2d 41 (2009)

W. Va. Code *§ 49-4-601*(e)

Under West Virginia Code § 49-6-1(b), the Department of Health and Human Resources is to be provided notice of all child abuse and neglect proceedings brought in circuit court. The purpose of providing notice to the Department is to allow it to fulfill its statutory duty to participate in abuse and neglect proceedings and to provide services to remedy the situation that is detrimental to the child. See also Syl. Pt. 2, *In re George Glenn B., Jr.*, 532 S.E.2d 64 (W. Va. 2000).

C. Right to Notice of Accusations

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984)

A parent accused of sexual abuse by his minor child has a constitutional right to know what his child accuses him of in order to prepare his defense.

D. Mandatory Procedure for Abuse and Neglect Cases

Syl. Pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

In re Emily G., 224 W. Va. 390, 686 S.E.2d 41 (2009)

On October 25, 2006, approximately two months after the birth of Emily G., her parents assigned temporary guardianship of her to her maternal grandparents in a family court proceeding. The guardianship proceeding continued in the family court for the next 21 months, and a guardian ad litem was appointed to protect Emily's interests. Emily's father made several attempts to regain custody; however, court records indicate that the parents' relationship was fraught with domestic violence. Thus, Emily remained in her grandparents' care.

On May 8, 2008, the guardian ad litem made numerous recommendations to the family court aimed at protecting Emily's interests and improving the parenting abilities of her parents. Included was a recommendation for the commencement of abuse and neglect proceedings if the parents failed to fulfill the conditions imposed by the family court. On July 8, 2008, the family court entered a final order giving the maternal grandparents "sole care custody and control" of Emily. Supervised visitation was awarded to both parents. Two months later, the maternal grandparents filed a child abuse and neglect petition in the circuit court seeking the termination of the parents' rights. The circuit court, without holding a hearing or appointing counsel, dismissed the petition finding that the petition did not allege facts sufficient to come within the statutory definition of child abuse and neglect. The grandparents appealed.

Citing procedural error, the Supreme Court vacated the circuit court's order and remanded the case for further proceedings. The Court found that when a petition is filed pursuant to Chapter 49 of the West Virginia Code, a circuit court is required to hold a hearing and appoint counsel for the child. The Supreme Court also noted that under the applicable statute, notice of abuse and neglect proceedings is to be provided to the Department. The purpose of providing notice to the Department is so that it can fulfill its statutory duty established by Chapter 49 of the West Virginia Code to join in and participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. The Court directed that, upon remand, the Department should be granted intervenor status so that it would fulfill its statutory duty.

E. Right to Participate in Hearings

Syl. Pt. 3, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

W. Va. Code § 49-4-601(h)

W. Va. Code § 49-6-2(c) provides parties having custodial or parental rights the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present during the testimony of a child witness and is given the opportunity to fully cross-examine the witness.

F. Hearing Attendance by Incarcerated Parent

1. Subject to Court's Discretion

Syl. Pt. 10, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 2, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003)

Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.

Syl. Pt. 11, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 3, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003).

In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

2. Incarcerated Parent Must Notify Court

Syl. Pt. 4, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003).

In order to activate the procedural protections enunciated in syllabus points 10 and 11 of *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000), an incarcerated parent who is a respondent to an abuse and neglect proceeding must inform the circuit court in which such case is pending that he/she is incarcerated and request the court's permission to attend the hearing(s) scheduled therein. Once the circuit court has been so notified, by the respondent parent individually or by the respondent parent's counsel, the determination of whether to permit the incarcerated parent to attend such hearing(s) rests in the court's sound discretion.

G. Involuntary Sterilization

In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993)

The Court held that an order requiring the DHHR to assist a person with an involuntary sterilization could not be upheld.

XI. ABUSE AND NEGLECT PROCEEDINGS AND THE RIGHT TO REMAIN SILENT

A. Silence as Affirmative Evidence

Syl. Pt. 2, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 2, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 2, *In re K.P.*, 235 W. Va. 221, 772 S.E.2d 914 (2015)

Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

In re K.P., 235 W. Va. 221, 772 S.E.2d 914 (2015)

Note: A complete discussion of this case is found in Caselaw Digest XIII. A.

In this case, the Department alleged that the stepfather had engaged in sexual misconduct against his 13-year old stepdaughter. Also facing criminal charges for the allegations, the stepfather elected not to testify at the adjudicatory hearing. The trial court found that the stepfather's silence could not be used against him and at the adjudicatory phase of the case. Rather, the trial court reasoned that silence could only be used against an adult respondent at disposition. On appeal, the Supreme Court found that the cases of *DHHR ex rel. Wright v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996) and *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002) squarely addressed this issue and that the stepfather's silence in the face of the allegations could be used as evidence of his culpability. Accordingly, the Court found that the trial court's analysis was plainly wrong and reversed the trial court on this issue.

B. Right to Remain Silent

W. Va. DHHR v. Doris S., 197 W. Va. 489, 475 S.E.2d 865 (1996)

In footnote 22, the Court listed the protections afforded to respondents who are facing both criminal charges and abuse and neglect proceedings. It should be noted that *In re Daniel D.* provides further guidance with regard to the right to remain silent and the use of statements made in an abuse and neglect proceeding.

Citing to statutory provisions that prevent the use of information outside of an abuse and neglect case, the Court noted that:

> Such a parent or guardian may be invoking his/her right to remain silent pursuant to the Fifth Amendment because that individual also may be facing criminal charges arising out of the abuse and neglect of the child. The rights of the criminally accused are sufficiently protected, however, by the following statutory provisions: 1) West Virginia Code § 49-6-4(a) which allows medical and mental examinations of the child or other parties involved in an abuse and neglect proceeding provides that "[n]o evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person;" 2) West Virginia Code § 49-7-1 provides that "[a]ll records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released ...[;]" and 3) West Virginia Code § 57-2-3 provides that "[i]n a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."

W. Va. Code § 49-4-603(a)

W. Va. Code § 49-5-101

In re Aaron Thomas M., 212 W. Va. 604, 575 S.E.2d 214 (2002) (per curiam)

When a respondent objected to a question about drug use based upon her right to remain silent, the trial court purported to grant her use immunity. On the advice of counsel, the respondent waived her right against self-incrimination and answered the question. The circuit court terminated the respondent's parental rights as a disposition.

On appeal, the respondent argued that the circuit court erred because it lacked authority to grant use immunity. Although the Supreme Court agreed that the circuit court could not grant use immunity, it found that the respondent invited any error when defense counsel approved the

waiver of her right against self-incrimination. Providing further reasoning for affirming the termination of her parental rights, the Court noted that the respondent's silence could have been used as affirmative evidence of culpability and that her statement merely confirmed other evidence about her drug use.

C. Medical and Mental Examinations - Subsequent Criminal Proceedings

Syl. Pt. 3, *State v. James R., II,* 188 W. Va. 44, 422 S.E.2d 521 (1992); Syl. Pt. 6, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W. Va. Code § 49-6-4(a).

W. Va. Code § 49-4-603(a)

Syl. Pt. 7, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

W. Va. Code § 49-4-603

West Virginia Code § 49-6-4 was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

D. Confidentiality of Statements Obtained During a Court-Ordered Examination

1. Statute Affords No Meaningful Protection of Confidentiality

Syl. Pt. 3, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

W. Va. Code § 49-5-101

West Virginia Code § 49-7-1 provides no meaningful protection of confidentiality or privilege for statements made by an accused in an abuse and neglect proceeding and is, in fact, designed to facilitate the dissemination of information to those charged with the public duty of prosecuting those who may be or are accused of criminal conduct.

2. Court-Ordered Examination by Experts Who are not Physicians, Psychologists, or Psychiatrists

Syl. Pt. 8, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

If a trial court, in the course of an abuse and neglect proceeding, requires by its order that an accused submit to an examination by a person proposed by any party as an expert who is neither a *physician, psychologist or psychiatrist*, such an examination is conducted under warrant of law and is, accordingly, subject to the prohibitions of West Virginia Code § 57-2-3. To the extent that our holding in *State ex rel. Wright v. Stucky*, 205 W. Va. 171, 517 S.E.2d 36 (1999), conflicts with our holding here regarding the protections afforded by West Virginia Code § 57-2-3, *Stucky* is hereby modified to exclude from its holding court-ordered examinations in abuse and neglect proceedings.

In *State ex rel. Wright v. Stucky*, *supra*, the Supreme Court held that W. Va. Code § 57-2-3 does not provide "use immunity." Therefore, the defendants, subject to both civil and criminal cases after an alleged assault, could not be ordered by the circuit court to answer deposition questions after the defendants asserted a fifth amendment privilege.

As noted, the Supreme Court expressly excluded abuse and neglect cases from the holding of *Wright v. Stucky*. However, the Court limited the protections afforded by *In re Daniel D.* to *court-ordered* examinations, not to investigations before a petition is filed, not to other contact with DHHR workers, and not to MDTs.

3. Protective Order

Syl. Pt. 9, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

In an abuse and neglect proceeding, an accused required by court order to undergo an examination by an expert who is neither a physician, psychologist, or psychiatrist is entitled to have the trial court's determinations regarding the protections afforded by West Virginia Code § 57-2-3 set forth in a protective order for further reference.

XII. IMPROVEMENT PERIODS

A. Burden of Proof

In re Charity H., 215 W. Va. 208, 599 S.E.2d 631 (2004)

W. Va. Code § 49-4-610

With regard to West Virginia Code § 49-6-12, the statute governing improvement periods, the Court noted "that entitlement to an improvement period is conditional upon the ability of the parent/respondent to demonstrate 'by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period . . ..'" 599 S.E.2d at 638. Further, the Court emphatically stated that: "Both statutory and case law emphasize that a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. Where an improvement

period would jeopardize the best interests of the child, for instance, an improvement period will not be granted." 599 S.E.2d at 639.

B. Multidisciplinary Treatment Teams

E.H. v. Matin, 201 W. Va. 463, 498 S.E.2d 35 (1997)

Syl. Pt. 2: Multidisciplinary treatment teams must assess, plan, and implement service plans pursuant to W. Va. Code § 49-5D-3.

W. Va. Code § 49-4-403

Syl. Pt. 3: The language of W. Va. Code § 49-5D-3 is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.

Syl. Pt. 5: Circuit courts may specify direct placements of juveniles in out-of-state facilities only: (1) if in accord with the plan(s) of the juvenile's multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific findings of fact, following an evidentiary hearing, that the plan(s) of the juvenile's multidisciplinary treatment team is inadequate to meet the child's needs.

In re Edward B., 210 W. Va. 621, 558 S.E.2d 620 (2001)

W. Va. Code §§ 49-4-401-411

The Court noted that: "Pursuant to Rule 51 of the Rules of Procedure for Child Abuse and Neglect Proceedings, a multidisciplinary treatment team, as defined in West Virginia Code §§ 49-5D-1 to -7, is to be convened for each abuse and neglect case within thirty days of its filing, consisting of the parties and representatives of agencies who may be able to help in the particular situation." 558 S.E.2d at 632. In *Edward B.*, the Court noted that the multidisciplinary team was not convened and relied, in part, on this failure to reverse the circuit court.

C. Goals of Improvement Periods and Family Case Plans

In the Interest of Renae Ebony W., 192 W. Va. 421, 452 S.E.2d 737 (1994)

The goal [of improvement periods and family case plans] should be the development of a program designed to assist the parents in dealing with any problems which interfere with the ability to be an effective parent, and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the DHS and the court should attempt to facilitate the parent's success, but wherein the parent must

understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

D. Formulation of Improvement Period and Family Case Plan

Syl. Pt. 3, State ex rel. W. Va. DHS v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987); Syl. Pt. 9, State ex rel. Diva P. v. Kaufman, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 3, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 2, In re Elizabeth Jo "Beth" H., 192 W. Va. 656, 453 S.E.2d 639 (1994); Syl. Pt. 3, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 2, In re Faith C., 226 W. Va. 188, 699 S.E.2d 730 (2010)

W. Va. Code § 49-4-604

Under W. Va. Code § 49-6-2(b), when an improvement period is authorized, then the court by order shall require the DHS to prepare a family case plan pursuant to W. Va. Code § 49-6D-3.

W. Va. Code § 49-4-408

In re Elizabeth Jo "Beth" H., 192 W. Va. 656, 453 S.E.2d 639 (1994) (per curiam)

W. Va. Code § 49-4-408*(a)*

W. Va. Code § 49-6D-3(b) further requires "the family case plan . . . shall be furnished to the court within thirty days after the entry of the order referring the case to the department[.]"

Syl. Pt. 4, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, In re Edward B., 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 5, In re Jonathan G., 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 4, In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 4, In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, In re Elizabeth Jo "Beth" H., 192 W. Va. 656, 453 S.E.2d 639 (1994); Syl. Pt. 4, Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 3, In re Faith C., 226 W. Va. 188, 699 S.E.2d 730 (2010)

In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Syl. Pt. 5, State ex rel. W. Va. DHS v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987); Syl. Pt. 3, In re Edward B., 210 W. Va. 621, 558 S.E.2d 620 (2001)

The purpose of the family case plan as set out in W. Va. Code § 49-6D-3(a) is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.

In the Interest of Jamie Nicole H., 205 W. Va. 176, 517 S.E.2d 41 (1999)

Since the procedural mechanisms for objecting to and modifying a family case plan are clearly in place, a parent cannot wait until the improvement period has lapsed to raise objections to the conditions imposed on him/her. The rules of procedure which govern abuse and neglect proceedings clearly require that a party seeking to modify a family case plan must act promptly and inform the court as soon as possible of the need for modification.

In re Desarae M., 214 W. Va. 657, 591 S.E.2d 215 (2003) (per curiam)

The trial court granted the appellant an improvement period, but no formal family case plan was ever prepared. The trial court did, however, list goals and requirements for the improvement period on the record. At the conclusion of the improvement period, the trial court terminated the appellant's parental rights.

Holding that the failure to formulate a family case plan was reversible error, the Supreme Court recognized that the relevant statute requires the preparation of a family case plan when the trial court grants an improvement period. The Court further explained the significance of a family case plan as follows:

> A formal family case plan, as mandated by West Virginia Code § 49-6D-3(a), is not only for the benefit and information of the parent seeking improvement; it is equally beneficial and necessary for the caseworkers and other assistive personnel. Without a family case plan, the individuals seeking to assist a parent are limited in their ability to formulate distinct goals, methods of achieving such goals, or means by which success will be judged. 591 S.E.2d at 220.

W. Va. Code § 49-4-408

E. Statutory Limits

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Statutory limits on improvement periods are mandatory and there comes a time for decision despite genuine emotional bonds. Children deserve resolution and permanency in their lives. Statutorily unauthorized extensions of improvement periods and procedural delays can be so protracted as to violate clear statutory constitutional and common law mandates.

In re Emily B., 208 W. Va. 325, 540 S.E.2d 542 (2000)

Syl. Pt. 5: The commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period.

Syl. Pt. 6: At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirement provided by W. Va. Code § 49-6-2, W. Va. Code § 49-6-5, and W. Va. Code § 49-6-12.

W. Va. Code §§ 49-4-602, 604 and 610

F. Court Must Make Ruling on Improvement Period

In re Thaxton, 172 W. Va. 429, 307 S.E.2d 465 (1983) (per curiam)

A motion for improvement period was made but never formally ruled upon. However, as a practical matter an improvement period did occur as the mother and the Department entered into a voluntary agreement, subsequent to the motion. Mother agreed to obtain housing, attend parenting classes, and visit her children. She failed to meet the conditions and circuit court terminated her parental rights. This Court reversed, holding that the trial court never ruled on the motion for improvement period, and that when an improvement period is denied the court must state the compelling circumstances warranting the denial.

G. Prohibition Available to Challenge Improvement Periods

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Prohibition is available to abused and/or neglect children to restrain courts from granting improvement periods of greater extent and duration than permitted under governing statutes.

James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)

State ex rel. DHHR v. Yoder, 226 W. Va. 520, 703 S.E.2d 292 (2010)

State ex rel. W. Va. DHHR v. Sims, 230 W. Va. 542, 741 S.E.2d 100 (2013) (per curiam)

In this case, the respondent parents were unsuccessful during a pre-adjudicatory improvement period, entered into a stipulated adjudication and were granted a post-adjudicatory improvement period. The DHHR and the guardian *ad litem* challenged the second improvement period by petitioning for a writ of prohibition. In its analysis, the Supreme Court concluded that the circuit court did not lack jurisdiction to grant the post-adjudicatory improvement period. The Supreme Court also concluded that it could not find that the challenged circuit court ruling was erroneous as a matter of law. Therefore, the Supreme Court denied the petition for a writ of prohibition.

H. Responsibility for Initiation and Completion of Terms

In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996)

The respondent's argument concerning the stoppage of services by the Department after the children were removed was based on the assumption that the Department, and not the mother, had the responsibility for initiating contact after the children were removed. The Court found, however, that the parents or custodians have the responsibility to initiate and complete all the terms of the improvement period. Citing to the statute governing improvement periods, the Court noted that while the Department, in some circumstances, must make reasonable efforts to reunify a family, a parent has the responsibility to initiate and complete the terms of an improvement period. See W. Va. Code § 49-4-610(4). Therefore, the Court affirmed the termination of parental rights.

n. 14, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

The Court pointed out that the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child. *See In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 182, 191 (1996); *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 259, 470 S.E.2d 205, 213 (1996).

I. Grounds for Denial of Improvement Period

1. No Reasonable Likelihood that Conditions of Neglect or Abuse Could be Corrected

State v. C.N.S., 173 W. Va. 651, 319 S.E.2d 775 (1984)

This case involved four children, ages 2 months to 3 1/2 years old. Although there was no evidence of deliberate misconduct or malicious neglect, the parents were so intellectually, socially, and culturally lacking in parenting ability in both physical and emotional levels, the circuit court finding that there was no reasonable likelihood that conditions of neglect or abuse could be substantially corrected in the near future was justified.

An important factor justifying denial of the improvement period was the lengthy pattern of the parent's failure to improve despite concerted efforts of the Department to provide services and assistance.

In the Interest of Kaitlyn P., 225 W. Va. 123, 690 S.E.2d 131 (2010)

A child who had been previously adjudicated as an abused and neglected child presented at the emergency room with a spiral fracture to his right femur. The DHHR obtained emergency custody of him and his four siblings. The DHHR presented medical evidence at the adjudicatory hearing that established the injury was due to non-accidental trauma. The parents did not present evidence to the contrary; and further, they did not identify the perpetrator or acknowledge the child had been abused. The circuit court found the children were abused. Over the objections of the DHHR, the circuit court granted the parents' motions for a six month post-adjudicatory improvement period. The DHHR and the guardian *ad litem* appealed.

The Supreme Court reversed the circuit court's order granting an improvement period to the parents. The Court found that in order to establish they were likely to participate in an improvement period the parents were required to acknowledge that the child had been abused. The parents did not make this important initial acknowledgment, and therefore, they did not satisfy the requirements of the statute governing improvement periods.

W. Va. Code § 49-4-610

In re M.M., 236 W. Va. 108, 778 S.E.2d 338 (2015)

This case involved the severe emotional and, arguably, physical abuse of four children. The DHHR removed the children on an emergency basis after the parents, at a youth basketball game, cursed at one of their sons, pulled him, slung him into a wall and knocked his head against a door multiple times.[19] Because the petition did not allege imminent danger, three of the four children returned home before adjudication. As a result of two

[19] The parents were also charged with domestic assault and battery for this incident.

of the children's *in camera* testimony at adjudication, the court ordered the removal of all of the children from the home.

Before disposition, the DHHR had initially agreed to an improvement period. In her report, the GAL had originally indicated that she was leaning against an improvement period. At the outset of the disposition hearing, the GAL stated that she was opposed to an improvement period. Counsel for the respondents, however, indicated that they were prepared to proceed with an evidentiary hearing. After hearing extensive testimony, the circuit court denied the respondents' motions for improvement periods. The circuit court relied upon: 1) the respondents' past history of abuse; 2) the older boys' *in camera* testimony; 3) the parent educator's testimony; 4) psychological evaluations showing that the mother had a "guarded" prognosis and that the father had a "very guarded" prognosis; and 5) the court's assessment of the respondents' credibility.

Discussing relevant law, the Court noted that respondent parents are not unconditionally entitled to improvement periods and that they must show that they should be afforded the opportunity to remedy the abusive or neglectful conditions. The Court also noted that a parent may show compliance with aspects of a case plan but fail to improve their attitude and approach to parenting. The Court expressly stated that: "Fully participating in an improvement period necessarily requires implementing the parenting skills that are being taught through services." 778 S.E.2d at 345.

Reviewing the record in the instant case, the Court concluded that the trial court properly determined that the abusive situation would not be easily corrected and was not likely to improve. The Court referred to facts involving the provision of services several years earlier that did not reduce and prevent further abuse. Therefore, the Court affirmed the termination of parental rights.

As another basis for appeal, the adult respondents argued that the requisite procedures for child abuse and neglect cases had been substantially frustrated because the DHHR had initially submitted a case plan that recommended an improvement period. The Court, however, rejected this argument because counsel for the respondents knew that the GAL might not agree with the improvement period and they also indicated their willingness to proceed. Further, the Court noted that the respondents had the opportunity to present evidence at two hearings. The Court, therefore, affirmed the circuit court.

2. Abandonment by Parent

James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)

A writ of prohibition was brought against the circuit court judge seeking relief from a court order which granted the father's motion for an in-home improvement period in Ohio and further ordered that two of the children, Timothy M. and James M. be immediately surrendered to their father, with the remaining two siblings to be surrendered within 30 days. The father had abandoned the wife and children (then ages 3, 2, and 1, with a fourth child on the way) in December, 1988, and did not become involved in the children's lives again until January, 1991. The natural mother was unable and or unwilling to care for them despite a great deal of assistance and intervention for more than two years after the abandonment. The children were placed in foster care by DHHR based on physical abuse and medical neglect. There was also evidence that two of the children had been sexually abused by their father.

Granting the writ of prohibition, the Court held that abandonment of a child by a parent constitutes compelling circumstances sufficient to justify the denial of an improvement period.

J. Non-Custodial Improvement Periods

In the Interest of Renae Ebony W., 192 W. Va. 421, 452 S.E.2d 737 (1994)

The infant, Renae Ebony W., through an emergency removal by DHHR, was taken from her parents' custody. The circuit court ratified the emergency removal, but returned the child to the parents for a three month in-home improvement period..0..In a syllabus point, the Court held that:

> Where a child is initially removed from the custody of his or her parents pursuant to W. Va. Code § 49-6-3, and where such emergency taking is subsequently ratified on the basis of a finding of imminent danger, the child shall remain in the temporary legal and physical custody of the State or some responsible relative within the meaning of W. Va. Code § 49-6-3 and out of the alleged abusive home during the improvement period until the circumstances which constitute the imminent danger have ceased to exist, or the alleged abusing person has been precluded from residing in or visiting the home. 452 S.E.2d 737.

W. Va. Code § 49-4-602

In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988)

Mother against whom, with father, a neglect petition was filed should have been granted an improvement period without custody of her five minor children before termination of her parental rights; record did not support conclusion that she had knowingly allowed father's sexual abuse, mother's perceived inability to break from the pattern of abuse was part of the

"battered woman's syndrome," and there was no showing that any improvement plan had been developed which mother had failed to follow.

K. Termination by Court of Improvement Period

Syl. Pt. 2, *In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993); Syl. Pt. 6, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

See W. Va. Code § 49-4-610 for the statutory requirements for improvement periods.

Neither W. Va. Code § 49-6-2(b) nor W. Va. Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the time frame has expired if the court is not satisfied that the defendant is making the necessary progress.

In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995)

If a respondent refuses to participate in services designed to remediate the circumstances giving rise to the abuse and neglect, such as participation in individual counseling, then an improvement period will be considered "for naught." Therefore, a "circuit court always has the authority to terminate an improvement period if there is evidence that the parent is not following the conditions prescribed or is failing to make improvement." 461 S.E.2d at 142.

L. Conclusion of Improvement Period

Syl. Pt. 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 7, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 2, *In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995); Syl. Pt. 10, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 5, *In re B.B.*, 224 W. Va. 647, 687 S.E.2d 746 (2009); Syl. Pt. 6, *In the Matter of Bryanna H.*, 225 W. Va. 659, 695 S.E.2d 899 (2010); Syl. Pt. 4, *In re Faith C.*, 226 W. Va. 188, 699 S.E.2d 730 (2010); *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011); Syl. Pt. 2, *In re C.M.*, 235 W. Va. 16, 770 S.E.2d 516 (2015)

At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

In re C.M., 235 W. Va. 16, 770 S.E.2d 516 (2015)

The pivotal issue in this case was whether the mother had successfully completed her improvement period. As a basis to find that the mother was *not* successful, the trial court relied upon the mother's decision to enter a substance abuse treatment program in another county, as opposed to attending treatment in the county where the abuse and neglect case was pending. For this reason, the court found that the mother had frustrated the goal of reunification and had not made her children her first priority. Accordingly, the mother's parental rights were terminated.

Reversing the circuit court, the Supreme Court noted that the mother had satisfactorily completed both inpatient and outpatient substance abuse treatment, and had participated in therapy and twelve-step groups. The Court also noted that the mother had left an abusive relationship, had remained sober, was employed, was planning to attend college and had obtained housing. In his dissenting opinion, Justice Loughry pointed out that the children had been in the DHHR's custody 29 of the last 32 months and that the mother had been afforded with more than enough time to demonstrate her fitness as a parent.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

A circuit judge overseeing a case such as this has an immensely difficult task, for in many abuse and neglect cases there is a genuine emotional bond as well as the natural biological bond between parent and child which courts are understandably hesitant to break if there is hope of meaningful change. In most abuse and neglect cases, the parent(s) may have redeeming qualities that create such hope that they will be able to make the necessary changes to become adequate parents.

Although it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.

M. Extension of Improvement Period

Syl. Pt. 2, *In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999); Syl. Pt. 7, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

W. Va. Code § 49-4-610(6)

Pursuant to West Virginia Code § 49-6-12(g), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms

of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.

XIII. ADJUDICATORY HEARING

A. Burden of Proof of Conditions Existing at the Time of Filing the Petition

Syl. Pt. 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981); Syl. Pt. 5, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997); Syl. Pt. 1, *W. Va. DHHR v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996); Syl. Pt. 5, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 2, *In re Katelyn T.*, 225 W. Va. 264, 692 S.E.2d 307 (2010); Syl. Pt. 3, *In re F.S.*, 233 W. Va. 538, 759 S.E.2d 538 (2014); Syl. Pt. 3, *In re K.P.*, 235 W. Va. 221, 772 S.E.2d 914 (2015)

W. Va. Code § 49-4-601(i)

W. Va. Code § 49-6-2(c), requires the State Department of Welfare [now the DHS], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the DHS is obligated to meet this burden.

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

In re Walter G., 231 W. Va. 108, 743 S.E.2d 919 (2013)

The DHHR filed an abuse and neglect case after one of two twin infant boys died. A toxicology report indicated that the cause of death was the ingestion of buprenorphine (Suboxone) with diphenhydramine (Benadryl) adding to the adverse effects. The circuit court conducted a six-day adjudicatory hearing and ultimately found that that the mother had failed to provide appropriate supervision of the infant. After adjudication, the mother successfully completed an improvement period, and she was reunified with her surviving son.

On appeal, the Court conducted an extensive review of the record and found that the circuit court erred in adjudicating the mother. Specifically, the Court noted that the mother was at work at the time the infant must have ingested the drug and the caregivers were appropriate. Secondly, there was no evidence that anyone in the home was either using or abusing buprenorphine. Neither CPS, nor law enforcement had been able to determine how the infant had ingested the drug. Accordingly, the Court reversed the adjudication order.

In re F.S., 233 W. Va. 538, 759 S.E.2d 538 (2014)

This case involved a father's alleged sexual abuse of his eleven-year old daughter. At the adjudicatory hearing, the daughter's counselor testified to the girl's statements in therapy that included specific, sensory details of her father's sexual acts. On the other hand, the girl refused to testify at the father's criminal trial, and he was acquitted. At the end of the adjudicatory hearing, the circuit court found that the allegations in the petition had not been proven by clear and convincing evidence.

On appeal, the Supreme Court reviewed the evidence presented to the trial court and noted that: "the evidence is simply not crystal clear, beyond all doubt." Providing guidance on the applicable standard, the Court went on to explain that the standard of clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the fact finder a firm belief or conviction as to the allegations sought to be established." 759 S.E.2d at 777 (quoting *Brown v. Gobble*, 474 S.E.2d 489, 494 (W. Va. 1996)). The Court further stated that: "[T]he clear and convincing standard is 'intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases.'" *Id.* (citing cases).

After providing guidance on the standard of proof, the Court noted that the girl, in many interviews, had recounted sexually explicit details and sensory aspects of the abuse. For that reason, the Court concluded that the evidence met the required standard of proof, clear and convincing evidence, and remanded the case for the entry of an order adjudicating the minor children as abused children.

In re K.P., 235 W. Va. 221, 772 S.E.2d 914 (2015)

Note: A discussion of the stepfather's silence as evidence of culpability is found in Caselaw Digest Section XI. A.

This case was initiated after a 13-year-old girl, K.P., disclosed that her stepfather, had engaged in sexual misconduct against her. The initial allegations in the petition against the mother and stepfather related to the stepfather's sexual abuse and the mother's failure to protect her daughter. The DHHR later amended the petition to include allegations that the mother had committed emotional abuse against her daughter.

Over the course of multiple interviews, K.P. stated that her stepfather came into her bedroom and rubbed her back and stomach on July 1, 2013. He also rubbed her vaginal area over her clothes. He asked to lick her breasts, but she said no. He then stayed in the room for another 30 minutes and rubbed her back.

In response to this incident in July of 2013, K.P. texted a friend who told her to ask her parents for help. She tried to contact her mother and her father. Initially, she was only able to reach her stepmother, A.P., who made arrangements to come pick her up. Before K.P. left the home, the stepfather begged K.P. not to tell anyone because of the consequences to his life. After the initial disclosure, K.P. also disclosed that her stepfather had touched her in this manner on multiple occasions during the previous year. She explained that the stepfather's request to lick her breasts in July worried her and that was the reason she decided she needed to tell someone. After K.P.'s stepmother picked her up, she took K.P. to meet her father. Her mother, A.C., met up with them and berated her for disclosing what had occurred.

After the initial disclosure, a CPS worker interviewed K.P., and a detective watched the interview. During the course of the abuse and neglect case, K.P. was also subject to an interview and diagnostic testing by Dr. Adrienne Bean, a psychologist. At the adjudicatory hearing, Dr. Bean testified about the sexual abuse allegations and also testified about the fact that K.P.'s mother obsessed about K.P.'s weight and limited her food. According to K.P., her mother was more concerned that she had eaten macaroni and cheese the morning she made the disclosures as opposed to the sexual abuse allegations. Dr. Bean also indicated that she found K.P. to be truthful and that K.P. was not exhibiting symptoms typically shown by victims of sexual abuse. She, however, pointed out that K.P. could well experience them in the future.

At the adjudicatory hearing, the stepfather presented the testimony of Dr. Fremouw who performed diagnostic testing of him. Dr. Fremouw testified that the stepfather did not have the two most common characteristics of convicted sex offenders: an antisocial-psychopathic personality combined with the presence of cognitive schemas or attitudes that justify adult-child or adult forced sexual interactions. Dr. Fremouw, however, made it clear that the evaluation could not prove whether the stepfather had committed the abuse or not. The stepfather did not testify at the adjudicatory hearing.

The mother testified at the adjudicatory hearing and denied the allegations of name-calling. She explained that she restricted unhealthy food from K.P.'s diet. She testified that she knew K.P. was lying on the day of the initial disclosure by the look on her face. She also asserted that K.P. had fabricated the abuse allegations so that she could live with her father.

Dr. Amy Wilson Strange performed a parental fitness evaluation on K.P.'s mother, and she testified that the mother had a very low risk of maltreating her children or allowing another person to do so. She did admit that she knew very little about the sexual abuse allegations and all of her information concerning the allegations came from the mother.

Upon the motion of the respondent parents, K.P. was interviewed and subject to psychological testing by Dr. Bobby Miller. At the adjudicatory hearing, Dr. Miller testified that K.P. believes she can manage things better than the adults in her life, that K.P. had made simple allegations that are hard to prove or disprove and that he believed that K.P.'s actions were motivated by her grandmother's death and by her desire to live with her father. However, Dr. Miller admitted that K.P. had been consistent in recounting the allegations and there was no indication that she was untrustworthy.

After a multi-day adjudicatory hearing, the circuit court concluded that the DHHR had not, by clear and convincing evidence, proven that K.P. had been abused by either of the respondents. The circuit court also found that the stepfather's refusal to testify could not be used as evidence against him at adjudication. The circuit court then dismissed the abuse and neglect petition, and the DHHR and the GAL jointly filed the appeal.

After the Court found that the father's silence could be considered against him at the adjudicatory hearing, the Court addressed the circuit court's finding that the DHHR had not presented clear and convincing evidence that the respondents had committed abuse of K.P. With regard to this issue, the Court noted that the applicable statute does not specify the manner or mode by which the DHHR must meet its burden. See W. Va. Code § 49-4-601(j). The Court also reiterated that a victim's uncorroborated testimony may be used to prove sexual abuse. See Syl. Pt. 5, *State v. Beck*, 286 S.E.2d 234 (W. Va. 1981).

The Court noted that the respondents had argued that K.P. was motivated by her desire to live with her father. The Court, however, found the evidence in the record did not support this conclusion. With regard to the alleged inconsistencies in K.P.'s statements, the Court noted that the frequency of the sexual abuse had been described in different ways. As for the inconsistency, the Court noted that K.P.'s inability to be more specific about frequency related to the fact that the conduct had occurred over the course of a year and that the conduct had escalated during the course of the year. With regard to the characterization of the allegations as "simple" and lacking a witness or corroborating evidence, the Court found that just because K.P. had not been subject to penetration or ejaculation, it did not mean that she was lying about the type of sexual misconduct she had experienced. After thoroughly examining the record in this case, the Court held that the circuit court erred when it found that the DHHR had not proved its case by clear and convincing evidence.

As for the allegations of emotional abuse by the mother, the Court first determined that there was no evidence that the mother failed to protect her daughter because there was no evidence that she knew about the sexual abuse before K.P. initially disclosed it. The Court, however, found

that the circuit court erred when it failed to recognize that the mother's actions after the disclosure constituted emotional abuse. The Court noted that the mother took actions to prevent K.P. from reporting the abuse and claimed that the stepfather had only rubbed the girl's shoulders. Other evidence indicated that the mother told K.P. that the disclosure could ruin the stepfather's life. The Court expressly stated that: "The post-disclosure conduct of a parent, guardian, or custodian may constitute abuse and neglect." 772 S.E.2d at 926. Based upon this analysis, the Court reversed the circuit court and remanded the case for adjudication orders consistent with the opinion and to conduct post-adjudication proceedings and disposition.

B. Requirement of a Hearing

Syl. Pt. 2, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

W. Va. Code § 49-4-601(c)

In a child abuse and neglect [case], . . . a court . . . must hold a hearing under W.Va. Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case. Syl. Pt. 1, in part, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983)

When grandparents filed an abuse and neglect petition and the circuit court dismissed the case without a hearing, the Supreme Court held that it was error for the petition to have been dismissed without a hearing. The Supreme Court noted that West Virginia Code § 49-6-2 requires a court to conduct a hearing on an abuse and neglect petition.

W. Va. Code § 49-4-601(c)

In re D.P., 230 W. Va. 254, 737 S.E.2d 282 (2012)

This case involved a situation in which a 16 year old girl had lived with her grandmother in Pennsylvania throughout her life. During a time that she was extremely upset, she came to visit her father in West Virginia for five days. The West Virginia DHHR removed her from her father's home after allegations of abuse and neglect were reported. An MDT was convened, and all members agreed that the girl should be placed with her grandmother and the case should be dismissed. While the case was pending, the circuit court conducted several hearings, appointed the grandmother as the girl's legal guardian and ultimately dismissed the case.

The Department, even though it had originally agreed to the dismissal, objected and argued that the court should conduct a full adjudicatory hearing. On appeal, the Supreme Court affirmed the dismissal of the petition because the circuit court had provided the Department with an opportunity to be heard as required by West Virginia Code § 49-6-2(c)

W. Va. Code § 49-4-601(h)

and because the circuit court found that a full adjudication would not be in the girl's best interests. In footnote 3 of the opinion, the Court cited *In re T.W.*, 737 S.E.2d 69 (W. Va. 2012) as a contrary example.

C. Collateral Acts or Crimes and Expert Opinion Testimony

State v. Edward Charles L., Sr., 183 W. Va. 641, 398 S.E.2d 123 (1990)

The Court held that collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards children generally or a lustful disposition to specific other children provided such incidents relate reasonably close in time to the incidents giving rise to the indictment. This holding overruled the Court's prior holding in *State v. Dolin*, 347 S.E.2d 208 (W. Va. 1986) involving collateral acts.

The lower court's admission of the child's statements to the treating psychologist was upheld under W.Va.R.Evid. 803(4) (statements for the purpose of medical diagnosis or treatment) and a two-part test for admitting statements under this exception was established:

> (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and
>
> (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

The child's statements to his mother were also properly admitted under the exception found in W.Va.R.Evid. 803(24). The critical factor in upholding the admission under this exception was the fact that the children involved in this case both testified at trial, and neither the mother nor the psychologist added anything substantive to the children's testimony.

The residual exception to the hearsay rule is now set forth in W. Va. R. Evid. 807.

Finally, this Court upheld the lower court's admission of opinion testimony by a psychologist. Expert psychological testimony in cases involving incidents of child sexual abuse is permissible and an expert may state an opinion based on objective findings that the child has been sexually abused. Children who are victims of sexual abuse and assault frequently exhibit behavioral and emotional characteristics indicative of child sexual abuse victims. Such an expert may not, however, give an opinion as to whether he personally believes the child, nor may he give an opinion as to whether the sexual assault was committed by the defendant.

In the Interest of Betty J.W., 179, W. Va. 605, 371 S.E.2d 326 (1988)

W. Va. DHS v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

State v. Graham, 208 W. Va. 463, 541 S.E.2d 341 (2000)

D. Expert Testimony Regarding Statements Made by a Child During Treatment

In re the Marriage of Misty D.G., 221 W. Va. 144, 650 S.E.2d 243 (2007)

In a child custody case, the family court admitted testimony from a counselor who evaluated and treated a child because of sexual abuse allegations. The counselor testified about the child's identification of the abuser, her mother's boyfriend, and the details of the sexual abuse. Based upon the testimony, the family court ordered supervised visitation for the mother. On appeal, the circuit court held that the family court improperly allowed the counselor to testify as to the identity of the abuser and improperly allowed other family members to testify as to statements the child had made.

The Supreme Court recognized that statements a child makes to their treating therapist or counselor regarding the identity of their abuser and the nature of the abuse may be relevant to proper diagnosis and treatment. The Court held that such statements may be admitted pursuant to the hearsay exception in Rule 803(4) of the West Virginia Rules of Evidence, the rule that allows for the admission of statements for the purposes of medical diagnosis or treatment. Affirming the admission of statements made to a treating therapist, the Court held that:

> When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes. Syl. Pt. 4, *Misty D.G.*, 650 S.E.2d 243 (quoting Syl. Pt. 9, *State v. Pettrey*, 549 S.E.2d 323 (W. Va. 2001), *cert. denied*, 534 U.S. 1142 (2002)).

E. Transcript of Criminal Case

Syl. Pt. 2, in part, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 2, *State ex rel. George B. W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997)

If the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion.

F. Stipulation

W. Va. DHHR v. Brenda C., 197 W. Va. 468, 475 S.E.2d 560 (1996) (per curiam)

Parties may stipulate as to adjudication and specific factual basis therefore; however, there must be compliance with the Rules of Evidence and follow appropriate procedure.

The concurring opinion also addresses issues pertaining to the petition, notice, non-waiver of defects, adjudication, stipulations, finality of orders and termination of parental rights.

G. Abandonment as Neglect

In re Destiny Asia H., 211 W. Va. 481, 566 S.E.2d 618 (2002)

When a biological mother left her child in the care of a third party for a much longer period of time than anticipated, the circuit court held that the child was not neglected because the mother had simply transferred guardianship to another caretaker. The Supreme Court reversed and held that the child was abandoned when the mother's "stay exceeded what was contemplated and when she allowed the thread of potential contact between her and the child's actual care giver to break." 566 S.E.2d at 621.

H. Drug Use as Abuse

In re Aaron Thomas M., 212 W. Va. 604, 575 S.E.2d 214 (2002) (per curiam)

"We believe that the circuit court was not clearly erroneous in finding the children were emotionally abused by Christina L.'s repeated drug use in their presence."

I. Abuse of Another Child in the Home

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

W. Va. Code § 49-1-201

State ex rel. DHHR v. Fox, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Although there was no direct evidence of abuse against the child named in the petition, the Department contended that the child was abused because the child's brother had been allegedly killed by the child's father. Based upon extensive expert testimony, the trial court found that the child was not abused because the testimony indicated that the child's death was the result of an earlier accidental fall, not the result of Shaken Baby Impact Syndrome. After a careful review of the record, the Supreme Court concluded that the trial court's finding was not clearly wrong.

The dissenting and two concurring opinions addressed the significance of the father's entry of an *Alford* or *Kennedy* plea, "a guilty plea by a defendant who continues to protest his or her innocence," 624 S.E.2d 834, n. 4, in his criminal case. (This type of plea was recognized by the West Virginia Supreme Court in *Kennedy v. Frazier*, 357 S.E.2d 43 (W. Va. 1987), and it may be referred to as *Kennedy* plea).

The dissent indicated that the entry of an *Alford* plea to an involuntary manslaughter charge supported a conclusion of child abuse. In a concurring opinion, however, it was noted that the father's entry of an *Alford* plea allowed him the opportunity to avoid prison and thereby the chance to regain custody of his son. In the second concurring opinion, it was recognized that the entry of the plea was the result of the financial burden associated with the defense of the criminal charges.

J. Insufficient Evidence

In re Lilith H., 231 W. Va. 170, 744 S.E.2d 280 (2013)

This case involved a situation in which a grandfather and father engaged in a physical alternation with each other. The children's mother attempted to intervene, but ultimately struck the grandfather. Also, the children witnessed the fight. The circuit court adjudicated the father because he engaged in domestic violence in the presence of the children and the mother because she failed to protect them. However, the Supreme Court held that the one isolated occurrence of domestic violence could not serve as a basis for adjudication of the father. Similarly, the Court held that there was an insufficient basis to find that the mother had "knowingly allowed" the father to commit abuse or neglect.

XIV. DISPOSITIONAL HEARING

A. Adjudication is a Prerequisite

Syl. Pt. 1, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983); Syl. Pt. 2, *W. Va. DHHR v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996); Syl. Pt. 1, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 1, *In re Kasey M.*, 228 W. Va. 221, 719 S.E.2d 389 (2011)(per curiam); Syl. Pt. 3, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

W. Va. Code § 49-4-604

W. Va. Code § 49-4-601*(i)*

In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code § 49-6-5, it must hold a hearing under W. Va. Code § 49-6-2, and determine "whether the child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

In re Kristopher E., 212 W. Va. 393, 572 S.E.2d 916 (2002) (per curiam)

In this per curiam opinion involving extraordinary facts, the Court found that the circuit court's finding of abuse and neglect was clearly erroneous. The Court also held that a circuit court could accept a voluntary surrender agreement without reaching the question of abuse and neglect. However, the Court did not discuss or overrule *State v. T.C.* which requires a finding of abuse or neglect before a case can continue.

In re Kasey M., 228 W. Va. 221, 719 S.E.2d 389 (2011)(per curiam)

The Supreme Court held that the circuit court erred when it transferred custody of a child from his father to his mother when the DHHR, before adjudication, voluntarily dismissed the abuse and neglect petition against the father. The Court explained that it was error to proceed to

disposition when the child had not been adjudicated as an abused or neglected child.

B. Voluntary Dispositional Plan

Syl. Pt. 2, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983); Syl. Pt. 4, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

W.Va. Code, 49-6-1, *et seq.*, does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998)

In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights.

Syl. Pt. 9, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5.

W. Va. Code § 49-4-601(i)

W. Va. Code § 49-4-604

A father, John W., resided in West Virginia with his two older children. His younger two children resided primarily with their mother, Stephanie D., in Maryland, but they visited with their father in West Virginia. An abuse and neglect petition was filed against the father, and it was based upon deplorable conditions in his home, abandonment, physical abuse and the father's sexual misconduct with one of his older daughters. Although one of the younger girls was allegedly raped by the boyfriend of one of the older girls during a visit with her father, this fact was never included in the original or amended petition.

As a defensive maneuver, the father offered to relinquish his parental rights to his older children without any admission of abuse or neglect and conditioned his relinquishment upon the absence of any further proceedings against him in the abuse and neglect case. Although the guardian ad litem

requested that the court conduct an in camera hearing to hear testimony from the older children, the circuit court did not do so. Ultimately, it accepted the father's relinquishment with regard to his older children and dismissed the younger two children from the case. In response, the mother of the younger two children filed an appeal.

After reviewing the record, the Supreme Court found that the circuit court erred by failing to conduct a full evidentiary hearing, including an in camera hearing with the older children, concerning the grievous allegations of abuse and neglect. The Court held that the offer of a voluntary relinquishment does not relieve a circuit court of its obligation to conduct adjudicatory and disposition hearings.

As additional grounds for reversal, the Court noted that the failure to conduct the required hearings was contrary to the children's best interests because the father's visitation with both sets of children remained a possibility. However, the allegations of the petition indicated that the children would be at risk if visitation were allowed to occur. The Court, therefore, concluded that it was contrary to the children's best interests for the circuit court to have failed to conduct full adjudicatory and disposition hearings. Providing guidance for further proceedings upon remand, the Court directed the circuit court to appoint a separate guardian ad litem for the younger children, as had been previously requested by the guardian ad litem. The Court further directed the DHHR to include the allegations of the rape of one of the younger children in an amended petition.

Syl. Pt. 4, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

Note: For a complete discussion of this case, see Caselaw Digest, XVII. C.

C. Mandatory to Conduct Dispositional Hearing

Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998); Syl. Pt. 8, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights.

Syl. Pt. 3, *State ex rel. W. Va. DHHR and Chastity D. v. Hill,* 207 W. Va. 358, 532 S.E.2d 358 (2000); Syl. Pt. 7, *In re T.W.,* 230 W. Va. 172, 737 S.E.2d 69 (2012)

In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

W. Va. Code § 49-4-604

D. Burden of Proof

Syl. Pt. 4, *In re K.L.*, 233 W. Va. 547, 759 S.E.2d 778 (2014)

"[T]he burden of proof in a child neglect or abuse case does not shift from the State Department of [Health and Human Resources] to the parent, guardian or custodian of the child. It remains upon the State Department of [Health and Human Resources] throughout the proceedings." Syl. Pt. 2, in part, *In the Interest of S.C.,* 168 W.Va. 366, 284 S.E.2d 867 (1981).

The petition in *K.L.* was based solely upon the mother's prior involuntary termination of parental rights to the child's older sibling. At disposition, the circuit court shifted the burden to the mother and required her to show a substantial change in circumstances since the prior involuntary termination of her parental rights. Although this issue was not presented on appeal, the Supreme Court applied the plain error doctrine and held that the mother's due process rights had been violated by shifting the burden to her. The case was remanded to the circuit court with the directive that, if the DHHR wanted to proceed on abuse or neglect allegations against the mother, it would have to include specific allegations of abuse or neglect in any amended petition. The Court observed that such allegations could include that the mother had failed to correct the circumstances of abuse and neglect that led to the prior termination of her parental rights, the standard established by Syllabus Point 5 of *In re George Glen B., Jr.*, 532 S.E.2d 64 (W. Va. 2000).

E. Controlling Standard for Disposition

Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)

In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

The respondent mother was subject to an abuse and neglect case because she was in a relationship with a registered sex offender who, in turn, sexually abused her two minor daughters. During the case, custody of the children was granted to the noncustodial father. At disposition, the circuit court placed the children with their father as the primary residential parent and granted the mother unsupervised visitation. She appealed the final disposition on the basis that she had complied with the case plan and had not been afforded enough unsupervised visitation time to prove that the abusive and neglectful conditions in her home had been corrected.

Rejecting the mother's argument, the Supreme Court recognized that completing assigned tasks in an improvement period is not the pivotal question at disposition. Rather, the Court stated that: "Indeed, the overriding consideration must be whether the issues that brought about the allegations of abuse and/or neglect have been addressed by the parent in a substantive and effective manner, and whether those conditions of abuse and/or neglect have been sufficiently remedied such that it is in the child's best interests to be returned to the parent's custody." 754 S.E.2d at 751.

The Supreme Court further observed that the circuit court had a difficult task in determining whether the mother had made sufficient improvements to justify the return of the children. The Court noted that:

> Unlike an abuse and neglect proceeding that involves a dirty home or a parent abusing drugs, where a parent's success in an improvement period can be measured in concrete terms of whether the home is clean or the parent's drug screens are negative, here, the circuit court had to assess whether the mother had internalized what the service providers endeavored to teach her during her improvement period and whether she would, in fact, protect her children by avoiding relationships with individuals in whose presence her children were placed at risk of abuse. 754 S.E.2d at 752.

F. Accelerated Disposition Hearing

Syl. Pt. 3, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999)

Pursuant to Rule 32 of the West Virginia Rules of Procedure for Child Abuse and Neglect, circuit courts may hold accelerated disposition hearings immediately following adjudication hearings if: (1) the parties agree; (2) the child's case plan which meets the requirements of W. Va. Code §§ 49-6-5 and 49-6D-3 is provided to the court or the party or parties waive the requirement that the child's case plan be submitted prior to disposition; and (3) notice is provided or waived.

W. Va. Code § 49-4-604

W. Va. Code § 49-4-408

G. Child Case Plan and Permanency Plan

State ex rel. S.C. v. Chafin, 191 W. Va. 184, 444 S.E.2d 62 (1994)

Syl. Pt. 1, in part: If, pursuant to W. Va. Code § 49-6-2, the court finds the child to be abused or neglected, then both the DHHR and the court, no later than 60 days after the child is placed in the temporary custody of the DHHR, are to proceed with the disposition of the child, in compliance with W. Va. Code § 49-6-5. West Virginia Code § 49-6-5(a) requires the DHHR to file with the court a copy of the child's case plan, including the permanency plan for the child.

W. Va. Code § 49-4-601

W. Va. Code § 49-4-604(a)

West Virginia Code § 49-6-5(a) defines a case plan as a written document which includes, where applicable, the requirements of the family case plan as set forth in W. Va. Code § 49-6D-3, as well as the additional requirements set forth in W. Va. Code § 49-6-5(a).

W. Va. Code § 49-4-408

Syl. Pt. 4, in part: The purpose of the child's case plan is the same as the family case plan except that the focus of the child's case plan is on the child rather than the family unit.

H. Modification of Dispositional Orders

In re Cesar L., 221 W. Va. 249, 654 S.E.2d 373 (2007)

A mother had been subject to prior abuse and neglect cases, and her rights to her first three children were terminated. When her fourth child was born, both she and her son tested positive for drugs. Based upon the previous involuntary termination of parental rights and the positive drug tests, the fourth child was removed from her care. During the case, she was incarcerated in Virginia for an outstanding warrant.

While incarcerated, the mother executed a voluntary relinquishment of her parental rights. Approximately seven months later, she moved to modify the dispositional order pursuant to West Virginia Code § 49-6-6. This code section allows a child, a child's parent or custodian or the DHHR to move for a modification of a dispositional order until the child has been adopted. The circuit court held that the mother lacked standing to modify the dispositional order because she could no longer be considered the

W. Va. Code § 49-4-606

child's parent. In response to this ruling, she moved to withdraw her voluntary relinquishment, but the circuit court concluded that she had failed to prove that she had been subject to fraud or duress.

On appeal, the West Virginia Supreme Court held that the mother could no longer be considered the child's parent because the voluntary relinquishment severed her parental relationship to her child. Extending this reasoning to cases of both voluntary and involuntary termination of parental rights, the Court concluded that: "[A]n involuntary termination or a voluntary relinquishment of parental rights permanently severs the parent-child relationship and relieves such person of all the rights and privileges, as well as duties and obligations, considered to be 'parental rights. . . .'"

After examining the language of the relevant statute, the West Virginia Supreme Court adopted the following syllabus points that concern voluntary relinquishments:

Syl. Pt. 3: W. Va. Code § 49-6-7 permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under circumstances free from duress and fraud."

W. Va. Code § 49-4-607

Syl. Pt. 5: A valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7, includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.

W. Va. Code § 49-1-204

With regard to cases involving both voluntary and involuntary termination of parental rights, the Supreme Court held that such a person has lost his or her status as a parent and, therefore, lacks standing to modify a dispositional order. Affirming the circuit court, the Supreme Court adopted the following syllabus points:

Syl. Pt. 1: The plain language of W. Va. Code § 49-6-6 permits a child, a child's parent or custodian, or the West Virginia Department of Health and Human Resources to move for a modification of the child's disposition where a change of circumstances warrants such a modification. However, a child's disposition may not be modified after he/she has been adopted.

W. Va. Code § 49-4-606

Syl. Pt. 2: For purposes of W. Va. Code § 49-6-6, "parent" means the biological or natural father or mother of a child; the adoptive father or mother of a child; or the legal guardian of a child.

Syl. Pt. 4: A final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a "parent" with regard to the child(ren) involved in the particular termination proceeding.

Syl. Pt. 6: A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va. Code § 49-6-6, to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.

In re S.W., 236 W. Va. 309, 779 S.E.2d 577 (2015)

The mother's substance abuse and related problems resulted in this abuse and neglect case. After initial proceedings, the trial court issued a disposition order and placed custody of S.W., a young child, with his paternal grandparents. Under this same order, the mother and the maternal grandparents were afforded liberal visitation with the child. At the permanency hearing, the trial court granted legal guardianship to the grandparents.

Approximately nine months after the permanency hearing, the mother petitioned to overturn or dissolve the legal guardianship. As grounds for her petition, the mother cited her graduation from drug court and continued sobriety for over a year. She also presented evidence of the bond between herself and the child. As a result of this evidence, the circuit court terminated the legal guardianship and ordered a transfer of custody to occur within ten days.

On appeal, the GAL and the paternal grandparents argued that the circuit court erred by terminating the legal guardianship. The DHHR joined in their position.

The Court noted that the mother's petition to terminate the legal guardianship was premised upon West Virginia Code § 49-6-6 (now codified at West Virginia Code § 49-4-606). Under this statute, there are two prerequisites for the modification of a dispositional order: 1) a material change of circumstances; and 2) the modification or alternation of the disposition must serve the best interests of the child. As part of its analysis, the Court reviewed the minor guardianship statute, West Virginia Code § 44-10-3, and Rule 46 of the West Virginia Rules of Child Abuse and Neglect, and concluded that they include the same two requirements for the modification of a guardianship: 1) a substantial change of circumstances; and 2) the child's best interests. Further, the Court noted that it had

addressed the same requirements in a case involving the termination of a family court guardianship. See *In re K.H.*, 773 S.E.2d 20 (W. Va. 2015).

After reviewing the evidence presented, the Court found that the record was insufficient to conclude that it was in S.W.'s best interests to terminate the guardianship. The Court noted that the mother had made significant improvements, but pointed out that the mother did not articulate how the termination of the guardianship would promote the child's best interests. As an example, the Court noted that the mother was unaware as to whether the child would have to change schools. The Court reversed the circuit court and remanded the case for the entry of a visitation order with the mother and maternal grandparents. The Court instructed that the contact between the child and his mother should be extensive. The Court also noted that the visitation schedule would be subject to modification as the circumstances might warrant and as the child aged.

XV. PLACEMENT WITH A PARENT

A. Reunification

In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995)

If a court should eventually determine that the child should be reunified with a parent, such change should be accomplished with a sufficient gradual transition period to enable the child to accept the change with as little upheaval as possible to his life.

If a court eventually reunifies a child with a parent, the court should "inquire into the relationship [the child] has formed with his foster parents and, if it is in his best interest, fashion a plan for continued association between the foster parents and the child. . . [A] child has a right to continued association with those to whom he has formed an emotional bond." 461 S.E.2d at 144.

B. Placement with a Nonoffending Parent

In re Frances J.A.S., 213 W.Va. 636, 584 S.E.2d 492 (2003)

In this case, there were four children named in the petition. In addition, there were three adult respondents: Melissa R. -- the mother of all four children; David R. -- the biological father of the two younger children; and Darrell S. -- the biological father of the two older children. Darrell S. had been previously married to Melissa R. Although Darrell S. did not have custody of his children prior to this case, he had maintained contact with them.

During a post-adjudicatory improvement period, the circuit court placed the two older children with their biological father, Darrell S. At the conclusion of this improvement period, Melissa R. and David R. were granted a dispositional improvement period, and physical custody of the two older children was returned to them. The circuit court ordered this custody transfer even though one of the two older children testified that she wanted to remain with her father.

On appeal, the Supreme Court reversed the ruling concerning the custody change because the circuit court had failed to make explicit findings concerning the best interests of the children. The Supreme Court noted that "simple reunification" might not be in the children's best interests and that the minor child's stated preference should be considered. The Court further instructed that the principles set forth in the opinion should be applied to the permanent placement of the children.

In the Matter of Bryanna H., 225 W. Va. 659, 695 S.E.2d 889 (2010)

This case involved a ruling by the circuit court in which it returned two children to their mother and stepfather after successful completion of improvement periods. Also successfully completing an improvement period, the biological father requested custody of the children, but the circuit court did not consider him as a possible placement. Rather, the circuit court simply restored the children to their last custodial placement before the Department filed an abuse and neglect petition. While the appeal was pending, one of the children returned to live with her father.

After reviewing the record, the Supreme Court concluded that the circuit court erred because it failed to consider placement of the children with their father. The Court remanded the case to the circuit court with directions to consider placement with the father and to review any updated information.

In re N.A., 227 W. Va. 458, 711 S.E.2d 280 (2011)

During the course of an abuse and neglect case, the appellant father was identified as the biological father of one of the four children in this case. Another man, the father of the other three children, had been originally named as the child's father on the birth certificate. Although there had been no allegations advanced against the biological father and he had been cooperative with services, the circuit court found that it was in the child's best interests to remain with his siblings and in the care of his maternal grandparents who had been identified as "psychological parents" of all four children. During the case, the circuit court had adjudicated the grandparents as abusive or neglectful caretakers of the children.

The Supreme Court held that the circuit court erred in its ruling because the appellant father, as a non-abusing, non-neglectful parent, had a right to custody of his child. Not only were there no allegations of abuse or neglect advanced against him, he and his wife were approved foster parents. Although there had been minimal evidence that he had not attended all visitations with his child, the record showed that the child's maternal grandfather had intimidated him as a means to prevent him from exercising his visitation rights. On remand, the circuit court was directed to consider whether sibling visitation or visitation with the grandparents should be established.

In re B.H., 233 W. Va. 57, 754 S.E.2d 743 (2014)

An abuse and neglect petition was filed against a mother because she had entered into a relationship with a registered sex offender who sexually abused her children. The children's father had not had contact with the children for an extended period of time because of the mother's interference with the relationship and the mother's transient lifestyle. During the case, the mother began a relationship with another sex offender and, initially, believed that the sex offender was innocent. Although the mother ultimately was successful in completing her improvement period, the circuit court named the father as the primary residential parent and granted the mother unsupervised visitation as a final disposition.

On appeal, the mother argued that she had substantially complied with the terms of her improvement period. The Supreme Court, however, found that the pivotal question at disposition is not whether a parent has completed assigned tasks, but whether the disposition is in the child's best interests. With regard to the facts of the case, the Court noted that the children's school attendance had improved, they were living in a more stable home and there were no safety concerns with the father's home. In a new syllabus point, the Court held that:

> In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child. Syl. Pt. 4, *B.H.*, 754 S.E.2d 743.

As an alternative, the mother argued that she had not been granted enough unsupervised visitations to demonstrate that she had improved. The Court, however, rejected this argument because the mother, through her own actions, had caused the delay in obtaining unsupervised visitation.

XVI. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

A. Least Restrictive Alternatives

Syl. Pt. 2, *In re R.J.M.,* 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 2, *W. Va. DHHR v. Billy Lee C.,* 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Danielle T.*, 195 W. Va. 530, 466 S.E.2d 189 (1995); Syl. Pt. 2, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004); Syl. Pt. 3, *In re Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009); Syl. Pt. 5, *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010)

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code § 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected.

W. Va. Code § 49-4-604(b)

Syl. Pt. 1, *In re R.J.M.,* 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 5, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Lacey P.,* 189 W. Va. 580, 433 S.E.2d 518 (1993); Syl. Pt. 1, *James M. v. Maynard,* 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 4, *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010); Syl. Pt. 5, *In re Kristin Y.,* 227 W. Va. 558, 712 S.E.2d 55 (2011)

As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code § 49-6-5 will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

In re Nelson B., 225 W. Va. 680, 695 S.E.2d 910 (2010)

In this case, the respondent father had a serious mental illness and, despite receiving significant assistance during an improvement period, was unable to adequately parent his son. At the conclusion of the improvement period, the circuit court declined to terminate the father's parental rights and instead approved a permanency plan that involved legal guardianship of the child by a maternal aunt and uncle.

The father appealed the ruling and argued that the circuit court failed to consider a less drastic alternative. Affirming the circuit court, the Supreme Court noted that the ruling, although difficult, afforded the father regular and meaningful contact with his son. The Supreme Court further noted that this permanency plan would allow the father to modify the role he was playing in his son's life if his mental health significantly improved in the future. The Court concluded the opinion by encouraging the circuit court to promptly rule on the pending guardianship petition.

In re Aaron Thomas M., 212 W. Va. 604, 575 S.E.2d 214 (2002)

In re Tiffany P., 215 W. Va. 622, 600 S.E.2d 334 (2004)

In re B.B., 224 W. Va. 647, 687 S.E.2d 746 (2009)

B. Standard of Proof

Syl. Pt. 6, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 3, *In re Jessica M.*, 231 W. Va. 254, 744 S.E.2d 652 (2013)

The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof.

In re Jessica M., 231 W. Va. 254, 744 S.E.2d 652 (2013)

On appeal, a mother argued that the evidence that served as a basis for the termination of her parental rights failed to meet the requisite level of proof. Apparently, the primary basis for the termination of parental rights was an alleged statement by the daughter that the mother had taught her how to masturbate. Supposedly, the child made this statement to a CPS worker during a forensic interview, but neither the CPS worker, nor the child ever testified that the child actually made this statement. In addition, the Court noted that the mother had consistently visited with her children and interacted well with them. The bond between the mother and her children was recognized by visit supervisors. The mother also engaged in parenting classes and attended all hearings. Further, a therapist testified that the mother had gained insight, both concerning her self-worth and what she needed to do to be reunified with her children. The only unfavorable evidence was presented by a CPS worker, and his allegations were uncorroborated. Therefore, the Court concluded that the disposition order must be reversed on the grounds of clear error.

C. Finding of Imminent Danger Not Required

State v. Carl B., 171 W. Va. 774, 301 S.E.2d 864 (1983) (per curiam)

The circuit court terminated parental rights after four improvement periods. The Supreme Court affirmed, holding: (1) there is no requirement that the court find that the children were in imminent danger; and (2) that immediate appointment of counsel for indigent parent in hearing following emergency taking was sufficient.

Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 399 S.E.2d 192 (1990)

Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)

D. Proof of Failure to Comply with Family Case Plan Unnecessary

Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)

In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

For a complete discussion of this case, see XIV. D and XV. B.

W. Va. DHS v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990) (per curiam)

DHS filed for temporary custody of six of the mother's eleven children alleging abuse and neglect. DHS was ordered to prepare and submit a family case plan. Following hearings on success of improvement period, the circuit court ordered termination of mother's parental right to five of the six children and ordered the child over fourteen to remain in the temporary custody of the DHS until her eighteenth birthday. The mother appealed and Supreme Court upheld the trial court's findings and conclusions, found that DHS was not required to prove its case by showing that the mother failed to comply with the family case plan, and found the trial court complied with the statutory requirements in terminating the parental rights.

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)

The court may terminate parental rights even if the Department does not prove that the parents have failed to comply with the Family Case Plan while on an improvement period.

In re Jonathan Michael D., 194 W. Va. 20, 459 S.E.2d 131 (1995)

Even though parents perform all of the tasks set forth in the family case plan filed pursuant to the granting of an improvement period, parental rights may be terminated where the parents' attitudes and beliefs did not change during the improvement period. 459 S.E.2d at 138.

Simply going through the motions to appease the DHHR is insufficient--there must be an improvement in the overall attitude and approach to parenting.

W. Va. DHS v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

E. Required Findings to Warrant Termination of Parental Rights

Syl. Pt. 4, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an alleged neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

W. Va. Code § 49-4-604 (b)(5),(6)

F. Standard for Termination of Parental Rights

Syl. Pt. 2, *In re R.J.M.,* 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 1, *In re Danielle T.*, 195 W. Va. 530, 466 S.E.2d 189 (1995); Syl. Pt. 2, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004); Syl. Pt. 6, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code § 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected.

W. Va. Code § 49-4-604(b)

G. Considering the Wishes of a Child Who Is of An Age of Discretion

In the Interest of Jessica G., 226 W. Va. 17, 697 S.E.2d 53 (2010)

Respondent father failed to meet the terms of his improvement, and DHHR petitioned the circuit court to terminate his parental rights to his 13 year-old daughter. The guardian *ad litem* argued against termination, asserting that while placement in the home was not in her best interests, the child did not want her father's rights terminated and her wishes should be considered. The circuit court granted DHHR's petition, and the father appealed, claiming that the court failed to consider his daughter's wishes as required by the relevant statute.

See W. Va. Code § 49-4-604(b)(6)

The Supreme Court vacated the circuit court's order and remanded the case for further proceedings. The Court found that given the child's age, her express wishes, and the bond that existed between her and her father, the circuit court should have determined whether termination was in her best interests. Specifically, the circuit court should have considered the child's wishes, as required by the disposition statute, before terminating her father's parental rights. On remand, the circuit court was instructed to conduct this analysis, and further, it was to determine whether permanent foster care would serve the child's best interests.

In re Ashton M., 228 W. Va. 584, 723 S.E.2d 409 (2012)

In this case, the circuit court found that a 16 year old girl had been sexually abused by her mother's boyfriend. The girl's mother refused to believe that the sexual abuse had occurred and continued to live with her boyfriend. At disposition, the mother asserted that only her custodial rights, not her parental rights should be terminated. The Department agreed with this position. The guardian ad litem indicated that she was not sure that the girl would understand the difference between the termination of parental rights versus custodial rights, but that she wished to maintain contact with her mother. On the record, the circuit court noted that it did not know the girl's wishes with regard to the termination of parental rights. Ultimately, however, it terminated the mother's parental rights and ordered post-termination visitation, in part, because terminating only the mother's custodial rights would leave the mother with standing to modify the disposition.

On appeal, the Supreme Court found that the circuit court erred because it had not followed the procedure established by Rule 34, a rule governing objections to a child's case plan, and because it had not adequately determined and considered the girl's wishes. On remand, the Supreme Court directed the circuit court to comply with Rule 34 and to

determine the girl's wishes concerning the termination of her mother's parental rights.

In her dissenting opinion, Justice Workman noted that the guardian ad litem and the mother's counsel had not considered the concept of post-termination visitation. She also noted that the guardian ad litem, even though she had not used the correct terminology, had expressed the child's wishes very clearly and that the judge's disposition, termination of parental rights with an award of post-termination visitation, had taken the girl's wishes into account. Justice Workman further noted that relevant statutory provision, West Virginia Code § 49-6-5(a)(6)(C), requires a court to consider a child's wishes, but does not control the court's ultimate decision.

W. Va. Code § 49-4-604 (b)(6) (C)

H. Adult Rights and Children Rights

In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995)

Mother appealed termination of her parental rights to her son, Jeffrey D. After reviewing the record, we reversed the termination order and remanded the case to the lower court to consider fashioning a meaningful improvement period and ultimately to determine whether it is in the best interest of Jeffrey to be returned to his mother's custody.

Regardless of the eventual disposition of the parent's rights, the reality of the child's life, including the fact that he may have lived for several years in foster care, cannot be ignored. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). Thus, how Jeffrey has fared educationally and emotionally with these foster parents and Jeffrey's own feelings and emotional attachments should be taken into consideration by the lower court." 461 S.E.2d at 142.

In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989)

The termination of parental rights was upheld in case of infant where schizophrenic mother failed to provide proper food and shelter.

The mother was not entitled to improvement period prior to termination of parental rights where the mother did not make request for improvement period until the final hearing to terminate parental rights approximately 14 months after the initial temporary custody order was entered.

In re Carolyn Jean T., 181 W. Va. 383, 382 S.E.2d 577 (1989) (per curiam)

Where the mother had been released from treatment prior to entry of final order terminating parental rights, due process would preclude termination of her parental rights because of inability or unwillingness to seek treatment for her mental illness unless the DHS put into evidence the results of the treatment which was eventually forced upon her. The case was remanded for further evidentiary development.

I. Prior Acts of Violence Against Other Children are Relevant

Syl. Pt. 8, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 7, *State ex rel. Diva P. v. Kaufman,* 200 W. Va. 555, 490 S.E.2d 642 (1997)

Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

J. Other Children in Abusive Home

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *State ex rel. Diva P. v. Kaufman,* 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, *W. Va. DHHR v. Scott C.,* 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 5, *In re Amber Leigh J.*, 216 W. Va. 266, 607 S.E.2d 372 (2004); Syl. Pt. 4, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

W. Va. Code § 49-1-201

However, the Court has refused to adopt a blanket rule that parental rights must be terminated to all the children residing in the home based merely on the finding that one child has been abused. Instead, there must be clear and convincing evidence that the child's "health or welfare is harmed or threatened" by the conditions existing in the home. The circuit court must make a specific and independent finding of fact or conclusion of law that the other siblings were abused or would be at risk of being abused in order to terminate parental rights based upon the abuse of another child in the home. Of course, evidence of the abuse of one child is certainly relevant and probative to the issue of a parent's capacity to protect other siblings from abuse or the capacity of a parent not to abuse the other children in the home.

In making its ultimate determination as to disposition of a child whose sibling has been abused, the circuit court should take into consideration both the evidence of the abuse of the other child, the possible reluctance of the sibling if returned home to notify anyone of abuse; and, the likelihood that a parent would not defend the sibling from further abuse and whether the parent is so deficient in the basic parental instinct to protect the child that determination of rights to siblings can be justified on that basis alone.

K. To Knowingly Allow Abusive Conduct

Note: This type of abuse is commonly referred to as "failure to protect," and the parent is referred to as a "nonprotecting parent." These common terms, however, do not accurately paraphrase the statutory definition. West Virginia Code § 49-1-201 defines this type of abuse as occurring when a parent, guardian or custodian "knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home . . .." The cases listed below indicate that this type of abuse involves more than a failure to protect. Rather, this type of abuse involves a scenario in which the parent knows of the abuse and allows it by either failing to take any protective action or by aiding or protecting the abuser. One of these cases, In the Interest of Betty J.W., addresses the application of this definition in a case involving domestic violence. Chapter 49 of the West Virginia Code has established a definition of a "battered parent" and expressly allows the court to consider the effect of domestic violence in abuse and neglect cases. For a discussion of this issue, see Special Procedures Section I. Principal Abuse and Neglect Definitions.

Syl. Pt. 2, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991); Syl. Pt. 6, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607(1997); Syl. Pt. 5, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 4, *In re Brianna Elizabeth M.*, 192 W. Va. 363, 452 S.E.2d 454 (1994); Syl. Pt. 4, *In re Amber Leigh J.*, 216 W. Va. 266, 607 S.E.2d 372 (2004)

W. Va. Code §§ 49-4-601, et seq.

Termination of parental rights of a parent of an abused child is authorized under W. Va. Code §§ 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W. Va. Code §§ 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 5, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 2, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 4, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

In the Matter of Taylor B., 201 W. Va. 60, 491 S.E.2d 607 (1997)

Where there is clear and convincing proof that (1) these injuries occurred in the sole presence of a parent, and (2) the explanations of both parents are contrary to the medical evidence, and (3) both parents fail to acknowledge that any abuse and neglect occurred, the circuit court is in error for failing to terminate the parental rights.

Syl. Pt. 8, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

A parent's parental rights to his/her child(ren) may be terminated: 1) where there is clear and convincing evidence that the parent knowingly allowed another person to inflict extensive physical injury upon another child residing in the same home as the parent and his/er child(ren), even though the injured child is not the parent's natural or adopted child; and 2) where there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parent, even in the face of knowledge of the abuse, has taken no action to identify the abuser.

Syl. Pt. 3, *In the Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988)

W. Va. Code § 49-1-201

W. Va. Code § 49-1-3(a), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

The circuit court terminated the parental rights of a father for sexually abusing his seventeen year old daughter. It also terminated the mother's rights for failure to protect. The Supreme Court, however, reversed the circuit court because the record did not support the conclusion that the

mother had knowingly allowed the sexual abuse. The Supreme Court relied on the fact that the mother, a domestic violence victim, had reported the abuse as soon as she could get away from her husband and had requested services, including another residence. The Supreme Court further relied on the fact that the mother had intervened when her husband attempted to sexually abuse his daughter, and her husband had beaten her and threatened her with a knife.

In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)

State v. Jessica M., 191 W. Va. 302, 445 S.E.2d 243 (1994)

L. Where Abandonment of the Child by Either or Both Biological Parents is Alleged and Proven

Syl. Pt. 3, *State ex rel. W. Va. DHHR and Chastity D. v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000)

In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

W. Va. Code § 49-4-604

M. First Degree Murder of Child's Parent

Syl. Pt. 2, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987); Syl. Pt. 2, *Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990)

A conviction of . . . murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

N. Intellectual Incapacity of Parents

Syl. Pt. 4, *In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999)

Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement. Where the charge is abuse as opposed to neglect, the obligation to provide remedial services is far less substantial.

In re Maranda T., 223 W. Va. 512, 678 S.E.2d 18 (2009)

After 14 months of services, the parental rights of the respondent mother were terminated and her request for a dispositional improvement period was denied based upon a finding that there was "no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future." Evidence elicited at the final hearing showed that the mother who had a full-scale IQ of 50 did not make sufficient improvements to her parenting skills. Further, the sum of the evidence received supported DHHR's position that the mother would need twenty-four hour a day services to make reunification between her and her special needs child possible. Finally, there was a credible concern that the mother would not protect the child from her sexually abusive father. The mother failed to acknowledge the previous instances of sexual abuse and did not appear to recognize the risk the father continued to pose to the child.

The Supreme Court found that *Billy Joe M.* does not require the DHHR to provide permanent, round the clock services to a respondent parent. Further, the Court reiterated that when there is evidence of abuse as opposed to neglect, "the obligation to provide remedial services is far less substantial."

State v. C.N.S., 173 W. Va. 651, 319 S.E.2d 775 (1984)

In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

O. Parents with Terminal Illness

Syl. Pt. 2, *In the Interest of Micah Alyn R.*, 202 W. Va. 400, 504 S.E.2d 635 (1998)

When a parent is unable to properly care for a child due to the parent's terminal illness, so that conditions which would constitute neglect of the child occur and continue to be threatened, termination of parental rights, without consent, is contrary to public policy, even though there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. In such circumstances, a circuit court should ordinarily postpone or defer any decision on termination of parental rights. However, such deference on the parental rights termination issue does not require a circuit court to postpone or defer decisions on custody or other issues properly before the court. In fact, efforts towards locating prospective adoptive parents shall be made so long as every measure is taken to foster and maintain the bond and ongoing relationship between the parent and child.

P. Parents - Failure to Acknowledge Problem *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997)

"In *Doris*, this Court stated that, for a parent to remedy the problem of abuse and neglect, the problem must first be acknowledged." 475 S.E.2d at 874. Here, the medical evidence notwithstanding, the respondents deny that any abuse or neglect occurred and have refused to sign the family case plan because of its indication that there may have been "conditions and circumstances" in the home adverse to the safety and well-being of Taylor B. Such conduct on the part of the parents, however, renders those conditions and circumstances untreatable. Even if the respondents go through parenting classes and counseling, in the absence of recognition by a parent that child abuse has occurred, the child remains at risk and it is not safe to return the child. Where the respondents do not acknowledge that any abuse or neglect has occurred, it is reversible error to fail to terminate parental rights.

W. Va. DHHR v. Doris S., 197 W. Va. 489, 475 S.E.2d 865 (1996)

Silence goes to the heart of the treatability question essential in these cases. In order to remedy a problem, it must first be acknowledged and failure to admit allegations makes the problem untreatable. It makes an improvement period an exercise in futility at child's expense.

In re Jonathan Michael D., 194 W. Va. 20, 459 S.E.2d 131 (1995)

Where a parent fails to acknowledge responsibility for the child's injuries or neglect, then the issue cannot be addressed and worked on during an improvement period. Accordingly, the parent is unable to demonstrate that a level of functioning has been improved to the point that the safety of the child could be insured. 459 S.E.2d at 135-36, 138.

In re Tonjia M., 212 W. Va. 443, 573 S.E.2d 354 (2002) (per curiam)

In a case involving sexual abuse allegations, the circuit court denied the respondent father's motion for an improvement period because he failed to admit to the sexual abuse of his daughter. The circuit court noted that counseling without an admission would be ineffective. Relying on *W. Va. DHHR v. Doris S.*, the Court affirmed the denial of the improvement period and subsequent termination of parental rights.

In re Timber M., 231 W. Va. 44, 743 S.E.2d 352 (2013) (per curiam)

An eight-year old girl told her mother that her stepfather was showing her pornographic movies, that he exposed himself to her and that he attempted to make her watch him masturbate. In response, the mother taught the girl now to make an audio recording with a cell phone and encouraged the girl to be alone with her stepfather in the hopes that she would be able to record another incident of sexual abuse. The mother and her children continued to live with the stepfather for a period of four months, during which time the mother convinced the stepfather to convey his farm to her. The facts also indicate that the mother had left the children alone with him during this time. After four months, the mother contacted law enforcement to report the sexual abuse and to report that she could not get the stepfather to leave the home. The stepfather confessed to the abuse, and the eight-year old also disclosed the abuse during a forensic interview. In turn, the Department filed an abuse and neglect petition against the mother based upon her actions -- sending her daughter to record an additional incident of abuse and leaving her children alone with their stepfather after knowing of the abuse.

The mother originally planned to stipulate to the petition, but refused to do so on the day of the adjudicatory hearing. After conducting a contested adjudicatory hearing, the circuit court denied the mother's motion for a post-adjudicatory improvement period because the mother had failed to admit to any problem. In fact, a forensic psychiatrist testified that she did not believe that her actions constituted abuse and that she actually believed that she was justified in her actions. After denying the motion for an improvement period, the court conducted a disposition hearing and terminated the mother's parental rights because she failed to recognize that she did not protect her children and that she did not have the capacity to recognize and remedy this failure. Affirming the circuit court ruling, the Supreme Court held that the mother "demonstrated an intractable unwillingness and inability to acknowledge her culpability in this matter, to accept the services offered by the Department, and to protect her children in the future." 743 S.E.2d at 365.

In re S.W., 233 W. Va. 91, 755 S.E.2d 8 (2014)(per curiam)

The respondent father had been previously convicted of the manslaughter of his infant daughter in Maryland. Throughout the criminal

and abuse and neglect cases, the father's wife, Jamie W., remained married to him.

When their second child, S.W., was born, the DHHR filed an aggravated circumstances petition based upon the prior conviction. Although the father had confessed to the offense, pled guilty in the criminal case, and served time for the offense, he did not acknowledge his responsibility in the older child's death in the course of the abuse and neglect case. Rather, he claimed that the child's death was caused by mistakes made by hospital personnel. The respondent mother also attributed the child's death to mistakes made by hospital personnel. Although the circuit court originally denied the respondent father's motion for an improvement period, the circuit court ultimately ordered the DHHR to implement a visitation plan that would result in the reunification of S.W. with his father. The circuit court relied on the fact that there was no evidence of present unfitness. During the course of the case, the circuit court also found the mother to be a nonoffending parent at the request of counsel for the DHHR and the respondent mother. The guardian *ad litem* did not object to this finding.

See W. Va. Code § 49-4-604(b)(7)

See W. Va. Code § 49-4-605

On an appeal filed by the DHHR and the guardian *ad litem*, the Supreme Court held that the circuit court committed reversible error when it did not terminate the father's parental rights. The Supreme Court relied upon both the death of the older child and the father's refusal to acknowledge the abuse that caused the death.

The Supreme Court further noted its deep concern about S.W.'s mother because she did not appear to be committed to preventing the father from having contact with the younger child, S.W. Consequently, the Court directed the DHHR to continue to monitor the case to ensure S.W.'s safety upon remand.

Q. Incarcerated Parents

Syl. Pt. 3, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011)

When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

In this case, the mother's parental rights had been terminated in a previous abuse and neglect case. The father was incarcerated for a federal firearms violation, possession of a firearm by a convicted felon. Except for a very brief period in which he had resided with his father, the child had lived with his foster parents throughout his young life. At disposition, the circuit court declined to terminate the father's parental rights and instead ordered the less restrictive alternative afforded by the relevant statute which involved placing or maintaining the child in the temporary custody of the DHHR. The circuit court did so because it would allow the father to regain custody if he could demonstrate the fitness to exercise his parental rights in the future. The circuit court also named the foster parents as guardians of the child. Both the guardian *ad litem* and the foster parents who had been granted intervenor status joined the DHHR in this appeal.

See W. Va. Code § 49-4-604(b)(5)

In its opinion, the Supreme Court reversed the circuit court and held that the incarceration of a parent could serve as a basis for the termination of parental rights and consideration should be given to the nature of the offense, the terms of confinement and the length of the incarceration. In addition, the Court noted that dicta from *In re Brian James D.*, 550 S.E.2d 73 (W. Va. 2001) was unsound because it had incorrectly summarized the holding of *State ex rel. Acton v. Flowers*, 174 S.E.2d 742 (W. Va. 1970). The Court went on to clarify that incarceration may serve as a basis to terminate parental rights and that the factors set forth in Syllabus Point Three should be considered when a circuit court determines whether to do so.

Syl. Pt. 7, *In re Emily B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. Pt. 2, *In re Brian James D.*, 209 W. Va. 537, 550 S.E.2d 73 (2001)

A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.

R. Prior Involuntary Termination of Parental Rights to a Sibling

In the Matter of George Glen B., Jr., 205 W. Va. 435, 518 S.E.2d 863 (1999)

Syl. Pt. 2: Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the statutory provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12. Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) is present.

W. Va. Code §§ 49-4-601, et seq.

W. Va. Code § 49-4-605(a)(3)

Syl. Pt. 4: When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3); prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s). See Syl. Pt. 2, *In re J.C.*, 232 W. Va. 81, 750 S.E.2d 634 (2013).

Syl. Pt. 5: Where an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions, and the court may direct the Department of Health and Human Resources to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied.

Where there was aggravated abuse, however, such as the murder or serious injury of a sibling, the court may be justified in ordering termination without the use of intervening less restrictive alternatives. See Syl. Pt. 2, *In re R.J.M.*, 266 S.E.2d 114 (W. Va. 1980).

In re George Glen B., Jr., 207 W. Va. 346, 532 S.E.2d 64 (2000)

Syl. Pt. 1: When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code § 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

W. Va. Code § 49-4-605(a)(3)

Syl. Pt. 2: While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in W. Va. Code § 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in W. Va. Code § 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in W. Va. Code § 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.

W. Va. Code § 49-4-601

W. Va. Code § 49-4-602

W. Va. Code § 49-4-601(i)

Syl. Pt. 5: The presence of one of the factors outlined in W. Va. Code § 49-6-5b(a)(3) merely lowers the threshold of evidence necessary for the termination of parental rights. W. Va. Code § 49-6-5b(a)(3) does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to W. Va. Code § 49-6-2.

In re Rebecca K.C., 213 W. Va. 230, 579 S.E.2d 718 (2003)

In this case involving a prior involuntary termination, the Supreme Court affirmed the denial of the respondent mother's motion for an improvement period and the termination of her parental rights, under the particular facts. However, the Court noted: "We emphatically reiterate that a prior termination does not mean that a parent does not have the right to 'another chance' in the form of an improvement period or otherwise." 579 S.E.2d at 723.

In re J.C., 232 W. Va. 81, 750 S.E.2d 634 (2013)

This *per curiam* opinion addressed whether a mother had remedied the circumstances which had led to the prior involuntary termination of her parental rights to three older children. As a beginning point for its analysis, the Court observed that the Department is not required to make reasonable efforts to preserve the family in cases involving the prior termination of parental rights. The Court also noted that the lower court had conducted two evidentiary hearings and had found that the prior circumstances had not been remedied. Specifically, the circuit court had expressed concern about the mother's lack of income. Apparently, the mother had sent her older children out to beg, and one of them was sexually assaulted. The

See W. Va. Code § 49-4-604(b)(7)

circuit court had also found that the mother had not resolved her drug issues, and had not participated in significant substance abuse counseling, even though the mother had presented evidence of several weeks of clean drug screens. After reviewing the record, the Supreme Court affirmed the ruling that denied the mother's request for an improvement period and terminated her parental rights because deference should be given to the circuit court findings and conclusions and because the evidence "must be examined under a reduced minimum threshold given the mother's prior involuntary termination." *J.C.*, 750 S.E.2d at 643.

S. Substance Abuse

In re Aaron Thomas M., 212 W. Va. 604, 575 S.E.2d 214 (2002)

The Supreme Court affirmed the termination of the respondent mother's parental rights because of her substance abuse and failure to comply with a reasonable family case plan and rehabilitative efforts.

In re Dejah Rose P., 216 W. Va. 514, 607 S.E.2d 843 (2004)

In this *per curiam* opinion, the Supreme Court affirmed the termination of parental rights because the respondent mother had failed to respond to treatment at least three times and the completion of her current drug treatment program was uncertain. The Court noted that "In terms of drug abuse or drug addiction, W. Va. Code § 49-6-5, contemplates an inquiry into the parent's past conduct as well as the parent's prognosis." 607 S.E.2d at 848.

W. Va. Code § 49-4-604

T. Domestic Violence

D.H.S. v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988) (per curiam)

In an appeal of a termination of parental rights, the Supreme Court noted that the children's exposure to domestic violence, as well as other factors such as sexual abuse, constituted sufficient grounds to terminate parental rights.

DHHR ex rel. Mills v. Billy Lee C., 199 W. Va. 541, 485 S.E.2d 710 (1997)

In re Erica C., 214 W. Va. 375, 589 S.E.2d 517 (2003)

In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988)

XVII. RELINQUISHMENT OF PARENTAL RIGHTS

A. Relinquishment Associated with Adoption, Not Abandonment

Syl. Pt. 4, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198 (1997)

A parent's relinquishment of his/her parental rights either in anticipation of future adoption proceedings or as a part of previously initiated adoption proceedings does not constitute abandonment for abuse and neglect purposes.

B. No Adoption During Pendency of Proceedings

Alonzo v. Jacqueline F., 191 W. Va. 248, 445 S.E.2d 189 (1994)

Syl. Pt. 1: W. Va. Code § 49-6-5(a)(6), which deals with the disposition by a court of a case involving a neglected or abused child, provides, in part: "no adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

W. Va. Code § 49-4-604(b)(6)

Syl. Pt. 2: Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

C. Voluntary Relinquishment of Parental Rights

In re James G., 211 W. Va. 339, 566 S.E.2d 226 (2002)

During a dispositional hearing, a mother attempted to voluntarily relinquish her rights to her children. The circuit court refused to accept the voluntary termination over DHHR's objection because it would force DHHR to accept a settlement, not because an involuntary termination was in the best interests of the children. Reversing the circuit court, the Supreme Court held:

Syl. Pt. 3: In the context of an abuse and neglect proceeding, a court may accept a parent's voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of W. Va. Code § 49-6-7, where applicable, and the relevant provisions of the Rules of Procedure for Abuse and Neglect Proceedings.

W. Va. Code § 49-4-607

Syl. Pt. 4: A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant

factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

In re Cesar L., 221 W. Va. 249, 654 S.E.2d 373 (2007)

Note: For a complete discussion of this case and the modification of dispositional orders, see Section XIV. H.

Seven months after a mother had voluntarily relinquished her rights to her son, she sought reunification by moving to modify the dispositional order. The circuit court held that she lacked standing to modify the dispositional order pursuant to West Virginia Code § 49-6-7 because she could no longer be considered the child's parent. She then moved to withdraw the relinquishment, but the circuit court concluded that she had failed to prove that she had been subject to fraud or duress. On appeal, the Supreme Court affirmed the circuit court and held that the mother lacked standing because she had lost her status as a parent through the voluntary relinquishment. With regard to the legal effect of a voluntary relinquishment on parental rights, the Court adopted the following syllabus points:

W. Va. Code § 49-4-607

Syl. Pt. 3: W. Va. Code § 49-6-7 permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under circumstances free from duress and fraud."

Syl. Pt. 5: A valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7, includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.

W. Va. Code § 49-1-204

Syl. Pt. 9, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012); Syl. Pt. 2, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5.

W. Va. Code § 49-4-601(i)

W. Va. Code § 49-4-604

For a complete discussion of this case, see Section XIV. B.

Syl. Pt. 4, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

At the outset of an adjudicatory hearing, a respondent mother tendered a voluntary relinquishment of her parental rights. The circuit court, therefore, did not conduct an adjudicatory or disposition hearing. On appeal, the Supreme Court addressed the effects of a voluntary relinquishment in light of the holding of *In re T.W.*, 737 S.E.2d 69 (W. Va. 2012), a case which requires a court to conduct adjudicatory and disposition hearings before accepting a voluntary relinquishment of parental rights. The Court observed that an adult respondent's silence as a response to a civil abuse and neglect petition may properly be considered as evidence of culpability. See *W. Va. DHHR ex rel. Wright v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996); *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002). Based upon this precedent, the Court held that a parent's voluntary relinquishment may serve as a basis for an adjudication order. The Court explained that its ruling "preserve[s] the utility of voluntary relinquishments during an abuse and neglect proceeding for both an accused parent and the State. All options are still on the table for an accused parent; he or she now simply faces the import of his choices." 745 S.E.2d at 581. A court may, therefore, use a voluntary relinquishment as a basis for an adjudication order without requiring the presentation of additional evidence.

D. Oral Relinquishments

In re Tessla N.M., 211 W. Va. 334, 566 S.E.2d 221 (2002)

At a review hearing, a mother *orally* relinquished her parental rights and never submitted a written relinquishment. On appeal, the mother challenged the validity of the oral relinquishment because it failed to meet the requirement that a relinquishment be written as established by West Virginia Code § 49-6-7. Reconciling West Virginia Code § 49-6-7 and Rule 35(a)(1) of West Virginia Rules of Procedure for Child Abuse and Neglect, the West Virginia Supreme Court held:

W. Va. Code § 49-4-607

Syl. Pt. 1: Pursuant to Rule 35(a)(1) of the West Virginia Rules of Procedure for Child Abuse and Neglect, an oral voluntary relinquishment of parental rights is valid if the parent who chooses to relinquish is present in court and the court determines that the parent understands the consequences of a termination of parental rights, is aware of less drastic alternatives than termination, and is informed of the right to a hearing and to representation by counsel.

Syl. Pt. 2: An oral voluntary relinquishment of parental rights made on the record in open court is valid regardless of whether the parent who chooses to terminate his or her rights executes and submits a duly acknowledged writing pursuant to W. Va. § 49-6-7.

E. Parents' Right to Revoke Relinquishment

W. Va. DHS v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985)

Where child has spent substantial period of time at the home of foster parents, pending a ruling by trial court on whether to approve minor parent's relinquishment of custody to licensed private child welfare agency or to DHS, best interest of child must be given primary importance by trial court; in such case, minor parent's right to revoke relinquishment ceases to be absolute, due to passage of unreasonable period of time.

Syl. Pt. 3, *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001)

Under the provisions of W. Va. Code § 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud.

XVIII. ACHIEVEMENT OF PERMANENCY

A. Permanency Hearing

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

Issuing a writ of prohibition, the Supreme Court held that the circuit court exceeded its legitimate powers when it refused to allow foster parents to participate in a permanency hearing for a child who had resided with them for 22 months. The Court pointed out that the notice and an opportunity to be heard at the permanency hearing to foster parents, pre-adoptive parents and relatives who are providing care for a child are entitled to notice and the opportunity to be heard with respect to the permanency hearing. See W. Va. Code § 49-4-608.

B. Time Period for Achievement of Permanency

Syl. Pt. 6, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011)

Note: Amended after the decision in Cecil T., Rule 43 provides that permanent placement of a child must be achieved within 12 months of the entry of the final disposition order unless there are extraordinary reasons justifying the delay.

The eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

Although a father was incarcerated for a conviction of a federal firearms offense, the circuit court did not terminate his parental rights and instead ordered that the father could, at an unspecified time in the future, regain custody upon a showing of parental fitness. The circuit court named the child's foster parents as his guardians, and left legal custody with the DHHR. The circuit court relied on West Virginia Code § 49-6-5(a)(5) as a less restrictive alternative to the termination of parental rights. The DHHR, the guardian *ad litem* and the foster parents who had been granted intervenor status all appealed this ruling.

W. Va. Code § 49-4-604(b)(5)

In Syllabus Point Three, the Supreme Court held that incarceration could, in fact, serve as a basis to terminate parental rights and that the nature of the offense, the terms of confinement and the length of the sentence should be considered "in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity." It, therefore, reversed the circuit court.

As an additional basis for overruling the circuit court, the Supreme Court noted that the circuit court had created the same type of timeliness problems that had been proscribed by *In re Emily*, 540 S.E.2d 542 (W. Va. 2000), a case in which the circuit court had delayed the onset of improvement periods until the mother completed a lengthy drug rehabilitation program and the father was released from incarceration. The Court expressly stated that it found "no provision anywhere in the abuse and neglect statutes giving courts discretion to create what the lower court termed a 'limbo period' where a permanency plan for an abused or neglected child may be placed on hold indefinitely." The Court further stated that the eighteen-month period for achieving permanency established by Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings is "not a mere suggestion, but a standard to which courts should faithfully and routinely adhere except in the most extraordinary or unusual circumstances." This reasoning served as the basis for the adoption of Syllabus Point 6, quoted above.

In re Kristin Y., 227 W. Va. 558, 712 S.E.2d 55 (2011)

The Supreme Court overturned a circuit court order that declined to terminate the mother's parental rights and, instead, ordered an unspecified period of temporary custody with the Department. With regard to the importance of permanency, the Court expressly stated that:

> These children are entitled to and deserve permanent placements and the opportunity to grow up in loving homes, free from the abuses heaped on them during their short lives. The circuit court's order deprives the children of the permanency they need, want, deserve and are entitled to have. 712 S.E.2d at 68.

C. Adoptive Home - Preferred Permanent Placement

State v. Michael M., 202 W. Va. 350, 504 S.E.2d 177 (1998)

Syl. Pt. 2: Where parental rights have been terminated pursuant to W. Va. Code § 49-6-5(a)(6), and it is necessary to remove the abused and/or neglected child from his or her family, an adoptive home is the preferred permanent out-of-home placement of the child.

W. Va. Code § 49-4-604(b)(6)

Syl. Pt. 3: In determining the appropriate permanent out-of-home placement of a child under W. Va. Code § 49-6-5(a)(6), the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.

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

In this *per curiam* opinion, the Supreme Court affirmed the dismissal of an intervenor who sought to be considered as an adoptive parent. The Supreme Court noted the intervenor's failure to complete a home study and a psychological evaluation, her lack of participation in the court proceedings, and the lack of a bond between her and the child.

D. Adoption By Unmarried Persons

State ex rel. Kutil v. Blake, 223 W. Va. 711, 679 S.E.2d 130 (2009)

Following the termination of the rights of both biological parents, the circuit court held a permanency review hearing to discuss the permanency plan for eleven month old B.G.C. The child's guardian ad litem renewed his "Motion to Order DHHR to Remove Child from Physical Placement in Homosexual Home and Other Injunctive Relief." DHHR, who had previously supported adoption by one or both foster parents, changed its recommendation and asked the court to remove the child because the foster parents' home was over capacity. The circuit court ordered that the child should be placed in a "traditional home" with a mother and a father. The foster parents sought a writ of prohibition in the Supreme Court to prevent the removal of B.G.C. from their home.

Addressing the respondent and GAL's assertion that there is a legislative preference in the adoption statute, the Supreme Court stated:

> Although Respondent recognized that each Petitioner may individually petition to adopt under the statute, he asserts in his brief that the "statutes indicate a preference for adoption by married couples." No statutory citation was supplied to support this position and our research reveals no such stated preference. Nor were we able to locate any legislatively assigned preference for adoption into a traditional home or any statutory definition of a traditional home for adoption purposes. As is evident from the clear language of West Virginia Code § 48-22-201, there is no prioritization among the three classifications of those eligible to adopt a child in this state. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly,* 65 S.E.2d 488 (W. Va. 1951).
>
> Notwithstanding Respondent's and GAL's suggestions to the contrary, there simply is no legislative differentiation between categories of eligible candidates for adoption under the terms of West Virginia Code § 48-22-201. Such policy determination is clearly a legislative prerogative, outside of the purview of the courts. The primary concern of courts in adoption cases is whether there is evidence that the recommended adoptive home possesses the necessary attributes to meet the individual and specific needs of the child both at present and in the future. 679 S.E.2d at 320.

E. Preferred Placement - With Siblings

Syl. Pt. 4, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001)

W. Va. Code § 49-4-111(e)

W. Va. Code § 49-2-14(e) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, and (2) placement of the child with his or her siblings is in the best interests of the children. In any proceedings brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such

determination shall be disregarded only where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children.

F. Preferred Placement – Grandparents

Syl. Pt. 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005); Syl. Pt. 2, *In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012)

W. Va. Code § 49-4-114(a)(3)

West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the Department find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

Syl. Pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005); Syl. Pt. 3, *In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012)

By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case.

Napoleon S. v. Walker, 217 W. Va. 254, 617 S.E.2d 801 (2005)

In this case, a two-month old child was physically abused by his father. Subsequent to the termination of parental rights, the paternal grandparents attempted to be considered as adoptive parents. In an administrative proceeding, the Department found that the grandparents were not suitable adoptive parents because they had difficulty acknowledging their son's culpability. The grandparents appealed to the Kanawha Circuit Court which affirmed the Department's decision. The Supreme Court, however, reversed the circuit court, and recognized the statutory preference for grandparents. With regard to this statutory preference, the Court further held that an analysis of the best interests of the child is implicitly included when the statutory preference is applied.

In re Elizabeth F., 225 W. Va. 780, 696 S.E.2d 296 (2010)

W. Va. Code § 49-4-114(a)(3)

In this *per curiam* opinion, the Supreme Court explained the parameters on the grandparent preference for an adoptive placement established by West Virginia Code § 49-3-1(a)(3). The Court expressly stated that: "[T]he adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper." 696 S.E.2d at 302. Based upon this reasoning, the Court concluded that the statutory preference is not absolute. Because the record in the case indicated that the circuit court may have treated the preference as absolute, the case was remanded for reconsideration and for a determination as to whether the proposed adoptive placement with the grandparents would serve the children's best interests.

In re Hunter H., 227 W. Va. 699, 715 S.E.2d 397 (2011)

This case involved a dispute between a young child's foster parents with whom he had been placed for three years and a maternal grandmother who had an approved home study. The child had been removed from his mother's care when he was 17 months old because of her illegal drug use and the child's exposure to domestic violence. When the DHHR first became aware of the mother's drug use, the child was placed with his maternal grandmother. After this initial placement, the DHHR learned that the grandmother's husband regularly used marijuana and alcohol and engaged in acts of domestic violence against the grandmother. To provide for the child's safety, the DHHR filed an abuse and neglect petition and named the child's biological parents, the maternal grandmother and her husband as adult respondents. At this point, the child was placed with his foster parents and remained there until the circuit court placed him with his maternal grandmother once she obtained a favorable home study.

After he was removed from her care, the child's grandmother requested a home study. She was not, however, approved because of her husband's substance abuse and acts of domestic violence. She and her husband were dismissed as respondents to the abuse and neglect case because they were no longer considered a possible placement for the child. While the abuse and neglect case was pending, the child's biological parents both relinquished their parental rights.

In response to the failed home study, the grandmother divorced her husband and ultimately requested another home study. This time, the grandmother's home study was approved.

After the home study was approved, the DHHR requested that the circuit court place Hunter H. with his maternal grandmother based upon the statutory grandparent preference set forth in West Virginia Code § 49-3-1(a)(3). The circuit court granted this request over the objections of the guardian *ad litem* and the foster parents who had been allowed to

intervene. Although they requested a stay, the circuit court ordered the child to be placed immediately with his grandmother.

Holding that the circuit court erred, the Supreme Court found that the circuit court "elevated the grandparent preference over the best interests of the child." The Supreme Court noted that the child was part of a stable, loving home and had been for three years. Also, the Court noted that an approved home study alone should not determine what is in a child's best interests. The Court further ruled that the immediate change in custody from the foster parents to the maternal grandmother was contrary to case law. Citing cases that provide for a gradual transition of custody, the Supreme Court directed the circuit court to conduct a full hearing to determine how the child should be returned to his foster parents' home.

In re Aaron H., 229 W. Va. 677, 735 S.E.2d 274 (2012)

In this *per curiam* opinion, the child's paternal grandfather claimed that the court erred by placing the child for adoption with his foster parents instead of with him in view of the statutory preference for grandparent placement. Affirming the circuit court, the Supreme Court noted that the child was 18 months old when the petition was filed and, at the time of the appeal, was almost five years old. Additionally, the Supreme Court pointed out that the grandfather had extremely limited contact with the child both before the case and while it was pending. Finally, the Court noted that the grandfather was partially at fault for the failure to complete the home study.

The Court concluded that:

> [T]he grandparent preference must be tempered by a court's consideration of the child's best interests. If on balance, the grandparent placement fails to serve the best interests of the child, the child may be placed elsewhere. 735 S.E.2d at 280.

In re L.M., 235 W. Va. 436, 774 S.E.2d 517 (2015)

This case began when a three-year old boy, L.M., was removed from his parents' custody as a result of chronic substance abuse, which included exposure to drug paraphernalia and a clandestine methamphetamine lab. The meth lab was located in the mother's trailer, a home that her parents had bought for her. Originally, L.M. was placed in foster care, but the maternal grandparents moved to intervene and also requested that he be placed in their home. Over the DHHR's objection, the court placed L.M. in the physical custody of his grandparents. The court did not, however, grant the grandparents' motion to intervene.

Shortly thereafter, L.M.'s sister, L.S., was born, and she had substantial amounts of alcohol in her system and trace amounts of

controlled substances. She was also placed in the physical custody of her grandparents. On an unannounced visit, the DHHR took photographs and discovered that the grandparents had baby items, a bassinet and baby swing, from the meth-contaminated home. The DHHR requested and was granted emergency custody of the two children, and placed them in foster care. The court conducted a full evidentiary hearing and found that the grandparents were using items from the meth-contaminated home. Testimony at the hearing indicated that meth residue on household items could result in adverse health effects. The court found that the foster care placement should continue.

During the course of the case, the court terminated the adult respondents' parental rights, and permanent placement of the children became the contested issue. The grandparents had requested a home study, which the DHHR began. Approximately seven months after the court conducted the initial hearing on the removal of the children from the grandparents' home, the court conducted another evidentiary hearing on the grandparents' motion to intervene and motion for placement of the children. Denying both motions, the circuit court based its findings on the presence of the meth-contaminated items in the grandparents' home, the grandparents' support of their adult children, who have issues with drugs and crime, and the failure to prevent interaction between the children and their biological mother. The circuit court also considered the children's need for the continuity of care and caretakers. The court ruled on the placement of the children before the grandparents' home study had been completed.

W. Va. Code § 49-4-114(a)(3)

One of the grandparents' assignments of error involved the application of the grandparent preference statute, then codified at West Virginia Code § 49-3-1(a)(3). Specifically, the grandparents argued that the court failed to apply the statutory presumption that favors placement with grandparents, and they also argued that the court erred by deciding on placement of the children before the home study had been completed.

After analyzing the language of the grandparent preference statute, the Court concluded that it imposes a mandatory duty on the Department to conduct a home study when a grandparent expresses interest in placement. In a new syllabus point, the Court held that:

> The mandatory language of W. Va. Code § 49–3–1(a)(3) requires that a home study evaluation be conducted by the West Virginia Department of Health and Human Resources to determine if any interested grandparent would be a suitable adoptive parent. Syl. Pt. 9, *In re L.M.,* 774 S.E.2d 517 (W. Va. 2015).

Although the grandparent preference statute requires the Department to conduct a home study, the Court observed that the

interpretation of the statute would not control the resolution of the case. Rather, the Court found that the best interests of the children should determine their permanent placement. Despite the statutory language requiring the Department to conduct a home study, the Court determined that the statute would not require completion of a home study if a grandparent is found to be unsuitable adoptive placement. In a second new syllabus point, the Court held that:

> While the grandparent preference statute, at W. Va. Code § 49-3-1(a)(3), places a mandatory duty on the West Virginia Department of Health and Human Resources to complete a home study before a child may be placed for adoption with an interested grandparent, "the department shall first consider the [grandparent's] suitability and willingness ... to adopt the child." There is no statutory requirement that a home study be completed in the event that the interested grandparent is found to be an unsuitable adoptive placement and that placement with such grandparent is not in the best interests of the child. Syl. Pt. 10, *In re L.M.*, 774 S.E.2d 517.

G. Psychological Parents

Syl. Pt. 6, *In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011)

A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W. Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

In addition to the mother, the maternal grandparents of the four children were subject to abuse and neglect proceedings related to their caretaking of the children. When the initial petition was filed, the circuit court only found probable cause of abuse and neglect with regard to the mother and not the grandparents. Accordingly, the circuit court placed the children in the grandparents' custody. As the case progressed, the DHHR discovered that the grandparents were allowing the mother to visit with the children at unauthorized times. Additionally, the grandparents were experiencing fairly significant health problems. Based on these facts, the circuit court ordered the removal of the children from the grandparents' home and placed them in foster care.

Approximately two months later, the grandparents requested the return of the children. The court conducted an evidentiary hearing, in part, to consider this request. It also considered testimony related to the death of a child in the home that had occurred well before the abuse and neglect proceeding had been initiated. At the hearing, the medical examiner testified that the deceased child's injuries were inconsistent with the mother's explanations but concluded that the cause of death was undetermined. Additionally, a DHHR worker testified that the grandparents had repeatedly cancelled appointments for the completion of a home study. Ultimately the home study was not approved. The DHHR worker also heard the grandfather threaten the children with a belt. The criminal background check revealed both a battery conviction and a fairly recent domestic violence conviction. Further, the children soiled their underwear regularly, and one child disclosed that his grandfather had beaten him with a broomstick. Despite this testimony, the circuit court found that the grandparents were the children's psychological parents and that they should receive an improvement period. The order further provided that the children would be returned to the grandparents' home after four weekend visitations, provided that there were no violations of the terms of the improvement period.

On appeal, the Supreme Court held that the circuit court erred because it had not considered the best interests of the children when it entered an order that would allow the children to be returned to the grandparents' custody. The Court expressly noted that: "Simply because a person is found to be a child's psychological parent, however, does not translate into the psychological parent getting custody of the child." 711 S.E.2d at 291. The Court concluded that: "Custody determinations regarding a child or children are still controlled by what is in the best interests of the child." *Id.* Based upon the facts in the record, the Supreme Court found that the circuit court had overlooked the children's best interests in reaching its decision. The Supreme Court, however, indicated that the circuit court, on remand, could consider whether visitation between the children and their grandparents should continue.

H. Relative Placements

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

This case involved a dispute about a permanency plan between the child's paternal aunt and the foster parents with whom the child had lived for 22 months. After a permanency hearing in which the foster parents were not allowed to participate, the circuit court ordered the immediate placement of the child with her paternal aunt. The DHHR relied on its adoption policy that required the placement of a child with a relative with an approved home study over a non-relative home.

The Supreme Court observed that, in West Virginia law, the only statutory preferences for placement are grandparents and the reunification of siblings, subject to a child's best interests. With regard to federal law, the Court determined that federal law does not require placement with a blood relative. Rather, federal law only requires that such placements be considered. With regard to relative placements, the Court noted that the DHHR should pursue them early in a case. The Court remanded the case and directed the circuit court to conduct another permanency hearing and to allow the foster parents to participate.

I. Custody Changes

Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 8, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 3, *Robert Darrell O. v. Theresa Ann O.*, 192 W. Va. 461, 452 S.E.2d 919 (1994)

It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

In re George Glen B., Jr., 207 W. Va. 346, 532 S.E.2d 64 (2000)

Syl. Pt. 7: When a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren).

In re N.A., 227 W. Va. 458, 711 S.E.2d 280 (2011)

Although the Court noted that gradual transition periods should generally be used to implement a change in custody, it observed that the grandparents' repeated violations of prior orders and the grandfather's use of fear and intimidation may well indicate that a gradual transition period would not be suitable.

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

When the custody of a child was abruptly changed after she had resided with her foster parents for 22 months, the Court stated that: "A child should not be treated like a sack full of potatoes picked up from a local grocery store. The law requires that there must be a gradual transition in cases such as the one before us." 706 S.E.2d at 392.

J. Subsidized Adoption and Legal Guardianship

State ex rel. Treadway v. McCoy, 189 W. Va. 210, 429 S.E.2d 492 (1993)

W. Va. Code § 49-4-112

In this case involving a custody dispute between foster parents and the child's half-sister, the Court recognized that "The Legislature has expressly encouraged foster parents who develop emotional ties to the children for whom they care to adopt these children. W. Va. Code § 49-2-17." 429 S.E.2d at 495. The Court further recognized that adoption subsidies established by West Virginia Code § 49-2-17 encourage foster parents to adopt their foster children. Although the Court expressly referred to adoption by foster parents, this statute, as amended, governs subsidies for both adoption and legal guardianships. It also establishes the conditions for a subsidy that include, but are not limited to, a significant bond between a child and his or her foster parents.

In re Adoption of Jamison Nicholas C., 219 W. Va. 729, 639 S.E.2d 821 (2006)

After his mother died, Jamison was placed in the emergency custody of the DHHR. Subsequently, he was placed in the custody of his maternal grandparents who later adopted him. While the adoption was pending, Jamison was diagnosed with ADHD and a depressive disorder. After the adoption was final, Jamison was diagnosed with Asperger's Syndrome. For over five years, he received medical assistance from the DHHR based upon the income of his adoptive parents. Once their income increased, Jamison was no longer eligible for this assistance. The adoptive parents moved the circuit court to amend the adoption order so that Jamison would receive a medical card. The circuit court granted the motion and ordered the DHHR to enter into an adoption assistance agreement with the adoptive parents.

W. Va. Code § 49-4-112

On appeal, the West Virginia Supreme Court found that the DHHR had a duty to notify the adoptive parents of available assistance, that DHHR knew or should have known that the child was a special needs child as described by West Virginia Code § 49-2-17, and that the DHHR knew of both the child and his adoptive parents. Holding that the child was eligible for a medical card, the Court adopted the following new syllabus point:

Syl. Pt. 2: Under the Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679b, and W. Va. Code § 49-2-17, the West Virginia Department of Health and Human Resources has an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of assistance for the care of a potentially special needs child in instances where the Department has responsibility for placement and care of the child or is otherwise aware of the child.

XIX. CHILDREN'S RIGHT TO CONTINUED ASSOCIATION

A. Post-Termination Visitation with Parents

Syl. Pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 7, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714, (1997); Syl. Pt. 10, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 8, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 8, *In re Emily B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. Pt. 11, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 8, *In re Charity H.*, 215 W. Va. 208, 599 S.E.2d 631 (2004); Syllabus, *In re Alyssa W.*, 217 W. Va. 707, 619 S.E.2d 220 (2005); Syl. Pt. 8, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well-being and would be in the child's best interest.

In re Alyssa W., 217 W. Va. 707, 619 S.E.2d 220 (2005)

In this case, the circuit court awarded post-termination visitation to a father with his daughter named Sierra H. who was fourteen months old at the time of removal. His parental rights were terminated because he had sexually abused his daughter's half-sister. Both girls continued to live with their mother.

Addressing whether a close emotional bond justified an award of post-termination visitation, the Court noted that "a close emotional bond generally takes several years to develop. Thus, the possibility of post-termination visitation is usually considered in cases involving children significantly older than Sierra H." 619 S.E.2d at 224. The Court further reasoned that continued visitation would be disruptive to both children's permanent placement. For these reasons, the Supreme Court reversed the award of post-termination visitation.

In re Austin G., 220 W. Va. 582, 648 S.E.2d 346 (2007)

The circuit court terminated the father's parental rights to his daughter and stepson and denied his request for post-termination visitation. Affirming the circuit court, the Supreme Court noted that the father had

failed to visit either child in the two months prior to his parental rights being terminated, both children were very young, and both children had spent more time in the care of others than they had in the father's care. The Court concluded that the father did not have a bond with either child. Further, the Court concluded that the father's failure to meaningfully participate in any of the services offered by DHHR and his failure to comply with any of the circuit court's directives demonstrated that post-termination visitation would not be in the children's best interests.

Syl. Pt. 5, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

A parent whose rights have been terminated pursuant to an abuse and neglect petition may request post-termination visitation. Such request should be brought by written motion, properly noticed for hearing, whereupon the court should hear evidence and arguments of counsel in order to consider the factors established in Syllabus Point 5, *In re Christina L.,* 194 W.Va. 446, 460 S.E.2d 692 (1995), except in the event that the court concludes the nature of the underlying circumstances renders further evidence on the issue manifestly unnecessary.

B. Continued Association with Siblings

Syl. Pt. 4, *James M. v. Maynard,* 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 9, *In re Jonathan G.,* 198 W. Va. 716, 482 S.E.2d 893 (1996), Syl. Pt. 9, *In the Matter of Brian D.,* 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, *Alonzo v. Jacqueline F.,* 191 W. Va. 248, 445 S.E.2d 189 (1994); Syl. Pt. 9, *In the Interest of Carlita B.,* 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 3, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001); Syl. Pt. 4, *In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011)

In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

C. Continued Association with Foster Parents

Syl. Pt. 11, *In re Jonathan G.,* 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 1, *In the Matter of Zachary William R.*, 203 W. Va. 616, 509 S.E.2d 897 (1998); Syl. Pt. 5, *State ex rel. Kutil v. Blake*, 223 W. Va. 711, 679 S.E.2d 310 (2009)

A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interest of the child.

D. Continued Association with Grandparents

1. Grandparent Visitation Statute, West Virginia Code §§ 48-10-101, *et seq.*

In re Hunter H., 231 W. Va. 118, 744 S.E.2d 228 (2013)

Syl. Pt. 1: The Grandparent Visitation Act, W.Va. Code § 48-10-101 et seq., is the exclusive means through which a grandparent may seek visitation with a grandchild.

Syl. Pt. 2: The best interests of the child are expressly incorporated into the Grandparent Visitation Act in W.Va. Code §§ 48-10-101, 48-10-501, and 48-10-502.

In re Samantha S., 222 W. Va. 517, 667 S.E.2d 573 (2008)

2. Preference of the Parents

In re Grandparent Visitation of Cathy L.M. v. Mark Brent R., 217 W. Va. 319, 617 S.E.2d 866 (2005)

In this *per curiam* opinion, the West Virginia Supreme Court reversed an order that granted visitation to a child's grandparents because the lower court failed to give significant weight to the adoptive parents' preference concerning visitation, one of the statutory factors that must be considered by a court. *See* W. Va. Code § 48-10-502. Relying on *Troxel v. Granville*, 530 U.S. 57 (2000), the West Virginia Supreme Court concluded that "*Troxel* instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis. It must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis." 617 S.E.2d at 874-75.

In re Samantha S., 222 W. Va. 517, 667 S.E.2d 573 (2008)

In an abuse and neglect case, the biological parents' rights were terminated and the children were ultimately placed in the physical custody of the paternal grandparents who initiated adoption proceedings. During the course of the abuse and neglect case, the maternal grandparents sought and were granted overnight, unsupervised visitation with the children over the objection of the DHHR, the guardian ad litem and the paternal grandparents. These parties opposed visitation because the children's psychologist indicated that it was a stressor that increased the children's problem behaviors. Additionally, the maternal grandparents allowed the children to talk with their mother while she was incarcerated.

Third, a grandson of the maternal grandparents exposed himself to one of the children, and the maternal grandparents would not sign a safety plan designed to protect the children. When their visitation was later terminated, the maternal grandparents did not appeal the circuit court ruling. Although the maternal grandparents' visitation was terminated after the paternal grandparents appealed the award of visitation, the Court found that the case had not been rendered moot.

Reversing the award of visitation, the Court concluded that the record established that visitation with the maternal grandparents was not in the children's best interests. Further, the Court found that the circuit court had failed to analyze any of the thirteen statutory factors in West Virginia Code § 48-10-502 that are prerequisites for grandparent visitation. The Court specifically noted that the circuit court had failed to adequately consider the effect of the visitation on the children's relationship with their adoptive parents, and any abuse performed, procured, assisted or condoned by the maternal grandparents. The Court further noted that the preference of the pre-adoptive parents (the paternal grandparents) was not given adequate weight.

In re Grandparent Visitation of A.P., 231 W. Va. 38, 743 S.E.2d 346 (2013)

This case involved a grandparent visitation dispute between a mother and a maternal grandmother. The facts indicated that the grandmother had been a significant caretaker for the first year of the child's life, but the mother terminated all visitation when the child was 11 months old. The family court awarded visitation, and the circuit court affirmed. On appeal, however, the Supreme Court noted that under *Troxel,* a fit parent's wishes must be given "special weight." The Court further noted that West Virginia Code § 48-10-702(b) creates a rebuttable presumption against awarding grandparent visitation when the parent through whom the grandparent is related has custody of the child, shares custody of the child or exercises visitation privileges with the child. Under the facts presented, the Court reversed the order that had awarded grandparent visitation.

3. Termination of Parental Rights

Syl. Pt. 2, in relevant part, *Elmer Jimmy S. v. Kenneth B.*, 199 W. Va. 263, 483 S.E.2d 846 (1997)

See W. Va. Code §§ 48-10-101, et seq.

West Virginia Code §§ 48-2B-1, *et seq.* affords circuit courts jurisdiction to consider grandparent visitation under the limited circumstances provided therein, even though the parental rights of the parent for whom the grandparent is related to the grandchild or grandchildren have been terminated.

In this case, the Court referred to, but did not rely on, Rule 15 of RPCANP and its footnote. In its applicable part, Rule 15 states that "the effect of entry of an order of termination of parental rights shall be, *inter alia*, to prohibit all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents, unless the court finds that the child consents and it is in the best interest of the child to retain a right of visitation." It should be noted, however, that adoption by a non-relative will automatically vacate a previously entered grandparent visitation order. See Syl. Pt. 3, *In re Hunter H.,* 744 S.E. 2d 228 (W. Va. 2013).

Amended in 2015, the footnote to Rule 15 indicates that it is not intended to alter the rights of grandparents set forth in West Virginia Code §§ 49-4-601, *et seq.* and West Virginia Code §§ 48-10-101, *et seq.*

4. The Effect of Adoption on Grandparent Visitation

Syl. Pt. 3, *In re Hunter H.*, 231 W. Va. 118, 744 S.E. 2d 228 (2013)

Pursuant to W.Va.Code § 48-10-902, the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

This certified question case addressed whether a grandparent could continue to receive visitation after a child was adopted by non-relatives. In this case, the parental rights of a 18-month old child were terminated. Initially, the child was placed with his maternal grandmother but was removed because of concerns about the grandmother's then-husband. After the child had resided with his foster parents for three years, the circuit court ordered immediate placement with the grandmother. This decision was reversed by the Supreme Court in *In re Hunter H.,* 715 S.E.2d 397 (W. Va. 2011), and the child was returned to the foster parents. During the six-month waiting period for the adoption, the circuit court entered an order that granted the grandmother visitation every other weekend. Subsequent to the adoption by non-relatives, the question arose as to whether the visitation should continue in light of the child's right to continued association with his biological grandmother.

As a starting basis for its analysis, the Court recognized that the Grandparent Visitation Statute, West Virginia Code §§ 48-10-101, *et seq.* is the exclusive means for seeking grandparent visitation. Based upon the express language of the statute, the Court recognized that the best interests of the child considerations are incorporated in Sections 101, 501 and 502 of the statute. Additionally, the Court observed that Section 902 "states that a grandparent's visitation rights are automatically vacated when a child is

adopted by a non-relative." The Court further noted that the Grandparent Visitation Statute does not allow a grandparent to request visitation once a child has been adopted by a non-relative. Continuing its further explanation for its decision, the Court discussed West Virginia cases, as well as caselaw from other statutes that govern grandparent visitation.

Answering the certified question, the Court adopted Syllabus Point 3 and held that an order of adoption by a non-relative automatically vacates a grandparent visitation order. It also held that the Grandparent Visitation Statute does not provide or allow a biological grandparent to seek visitation after a child has been adopted by a non-relative.

State ex rel. Brandon L. v. Moats, 209 W. Va. 752, 551 S.E.2d 674 (2001)

In this case, a stepfather adopted his stepson, and subsequently, the paternal grandparents petitioned for visitation. The Court held that a grandparent is not limited to seeking visitation prior to an adoption if the adoption is either a step-parent or other family member. In so ruling, the Court noted that the legislature had distinguished between adoptions that occur within the family and those that occur outside of the family. When adoption occurs outside a family, any prior order of grandparent visitation is vacated in accordance with the applicable statutory subsection.

Additionally, the Court held that "the West Virginia Grandparent Visitation Act, West Virginia Code § 48-2B-1 to -12 by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control over his/her child[ren] without undue interference from the state." Syl. Pt. 3, in part, *Brandon L., supra.* (Currently, West Virginia §§ 48-10-101, *et seq.* controls grandparent visitation.)

XX. APPEALS

A. Standard of Review for Abuse and Neglect Cases

Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 4, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 1, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 1, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 1, *In re Brian James D.*, 209 W. Va. 537, 550 S.E.2d 73 (2001); Syl. Pt. 1, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 1, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried

upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

1. Two-Prong Deferential Standard

Syl. Pt. 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996); Syl. Pt. 1, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714 (1997); Syllabus, *In re Brandon Lee B.*, 211 W. Va. 587, 567 S.E.2d 597 (2001)

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Syl. Pt. 1, *In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999); Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997); Syl. Pt. 1, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001)

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the

final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

2. Questions of Law -- *De Novo* Review

Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. Pt. 1, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

3. Denial of Continuance -- Reviewed on *Ad Hoc* Basis

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996)

Again, we acknowledge that the determination as to whether a denial of a continuance constitutes an abuse of discretion must be made on an *ad hoc* basis. When confronted with a motion for a continuance, the trial court may have a variety of concerns. Obviously, the reasons that the movant contemporaneously adduces in support of the request are important. Then, too, the court is likely to take into account prior postponements. Thus, the test for deciding whether the circuit court abused its discretion is not mechanical; it depends on the reasons presented to the circuit court at the time the request was made. In other words, this issue must be decided in light of the circumstances presented, focusing upon the reasons for the continuance offered to the circuit court when the request was denied. As we discuss above, there are important interests implicated other than those of the parents. In addition to the sacred rights of the affected children, there is a societal interest in providing for speedy disposition of abuse and neglect cases which exists separate from, and at times in opposition to, the parents' interest. The inability of courts to bring these matters to a prompt disposition contributes immeasurably to large backlogs of abuse and neglect cases and often prevents the courts form doing what is in the best interest of the children. The older a child becomes while waiting in the judicial system, the more difficult quality permanent placement becomes. In this context, abuse can be found in the denial of a continuance only when it can be seen as "an unreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay[.]" *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L.Ed.2d 610, 620 (1983), *quoting Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921, 931 (1964). It is in the province of the circuit court to manage its docket, and within that province, to decide what constitutes a reasonable time to be prepared to defend these type allegations. 470 S.E.2d at 189-90.

B. Transcripts

W. Va. DHHR v. Scott C., 200 W. Va. 304, 489 S.E.2d 281(1997) (per curiam)

Concerning preparation of and payment for transcripts necessary for appeal. See W. Va. Code §§ 49-6-2(e) and 51-7-8.

W. Va. Code § 49-4-601(k)

C. Writ of Mandamus Against DHHR

State ex rel. S.C. v. Chafin, 191 W. Va. 184, 444 S.E.2d 62 (1994)

The petitioner, S.C., a juvenile, sought a writ of habeas corpus and a writ of mandamus against the DHHR and the Director of Laurel Park Presley Ridge School to compel her release from the school and to require the DHHR to comply with W. Va. Code § 49-6-3, which allows the DHHR to maintain temporary custody of a child for no more than sixty days; W. Va. Code § 49-6-5(a), which requires the DHHR to file with the court the child's case plan, including the permanency plan for the child; W. Va. Code § 49-6-8(a), which requires the DHHR to file with the court a petition for review of order of disposition in accordance with the best interest of the child. The statute requires that the court retain continuing jurisdiction over cases reviewed under this section for as long as a child remains in temporary foster care.

W. Va. Code § 49-4-602

W. Va. Code § 49-4-604(a)

W. Va. Code § 49-4-608(a)

The Court held that the purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan as established by the relevant provisions of Chapter 49.

Finally, the Court held that W. Va. Code § 49-6-8(d) requires the DHHR to file a report with the circuit court in any case where any child in the temporary or permanent custody of the DHHR receives more than three placements in one year no later than thirty days after the third placement.

W. Va. Code § 49-4-608(g)

Jennifer A. v. Burgess, No. 21009 (W. Va. Supreme Court unpublished order entered May 15, 1992)

Writ of mandamus was granted directing DHHR to create and submit within ninety days guidelines for dealing with alleged sexual abuse cases involving children. Guidelines must be concise, compact and detail specific steps for child protective services worker to follow upon receipt of complaint. Recommend routine determination on need for counseling as well as a prepared checklist of completed steps. Upon completion of the guidelines, training programs are to begin. Prior to dismissal or closure of any case, recommendation is made that the case be reviewed by a child protective

services supervisor or other individual in authority as a final safeguard against closure of a meritorious case.

State ex rel. Aaron M. v. DHHR, 212 W. Va. 323, 571 S.E.2d 142 (2001)

The guardian ad litem sought a writ of mandamus to compel the DHHR to pay a therapist for an outstanding bill for the therapy of an abused and neglected child. The Court granted the writ, but required the DHHR to pay the therapist at the Medicaid rate, not at the higher rate that was billed initially. Subsequent to this decision the Legislature codified the holding of the case. In 2015, the provision was codified at West Virginia Code § 49-4-108.

Hewitt v. DHHR, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Although the applicable statute allows the DHHR to pay for health services and expert witnesses in juvenile and abuse and neglect cases at the Medicaid rate, if available, the Court has not held that the DHHR has the "exclusive authority" to set expert witness fees. Rather, the Court has found that "a circuit court still remains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect cases." 575 S.E.2d at 313. The applicable provision is codified at West Virginia Code § 49-4-108.

In re Bobby Lee B., 218 W. Va. 689, 629 S.E.2d 748 (2006)

In this case, the Supreme Court reversed the circuit court because it did not apply the payment restrictions set forth in the relevant statute for professional services in a juvenile delinquency case. Referring to *Hewitt v. DHHR*, *supra*, the Court noted that the payment restrictions in West Virginia Code § 49-7-33 apply to both abuse and neglect cases and juvenile cases.

W. Va. Code § 49-4-108

In re Chevie V., 226 W. Va. 363, 700 S.E.2d 815 (2010)

Note: For a complete discussion of this case, see Section II. J. For a discussion of the authority of the circuit court to set expert witness fees, see Special Procedures Section IV. B.

In this case involving a dispute over the payment of expert witness fees, the Court concluded that the relevant statutory provisions allowed the circuit court the discretion to require the DHHR to pay fees for an expert witness in an abuse and neglect or juvenile case. The Court noted that the statute states that the court "may" require the DHHR to pay for "professional services" that include "'evaluation, report preparation, consultation and preparation of expert testimony' by an expert witness." 700 S.E.2d at 824. Based upon this reasoning, the Court affirmed the order that required the DHHR to pay the fees for the expert witness.

The Court, however, reversed the circuit court insofar as its order required the DHHR to pay the expert witness fee according to the schedule established by the Public Defender Corporation. The Court concluded that the statute established that the DHHR has the sole authority to set the fee schedule for professional services provided in abuse and neglect and juvenile cases. The Court remanded the case to the circuit court, to allow the DHHR to establish the fee schedule for the payment of the expert. In two new syllabus points, the Court held that:

W. Va. Code § 49-4-108

Syl. Pt. 5: Pursuant to the plain language of W. Va. Code § 49-7-33, a circuit court "may ... order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

Syl. Pt. 6: When a circuit court orders the West Virginia Department of Health and Human Resources to pay for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33, the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

In re Joseph G., 214 W. Va. 365, 589 S.E.2d 507 (2003) (per curiam)

Note: This case involves an appeal, rather than a writ of mandamus. It is included in this section, however, because the issues addressed in it are most similar to the issues raised in mandamus cases against the DHHR.

This case involved a contractual dispute between the DHHR and a residential facility. The dispute concerned the payment for a child's placement once the services were determined to be no longer medically necessary and were, therefore, ineligible for Medicaid reimbursement. The child remained at the facility pursuant to a valid court order after the MDT recommended his continued placement at the facility.

The trial court ruled that the DHHR was liable for the outstanding payments because the facility was not contractually obligated to continue providing care for the child once the Medicaid eligibility for the services terminated. Affirming the trial court, the Supreme Court noted that the contract was silent concerning this situation, that a prior contract required the DHHR to pay for care in this situation, and that the facility was contractually prohibited from discharging the child without a planned alternate placement.

D. Prohibition Available

Syl. Pt. 2, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

W. Va. Code § 49-4-604(d)

Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under W. Va. Code §§ 49-6-2(b) and 49-6-5(c).

W. Va. Code § 49-4-610(3)

The State and the children's guardian ad litem sought relief from an order in which the Respondent judge ordered a post-adjudicatory improvement period for the Respondent mother. The Petitioners contended that an additional improvement period was not in the best interests of the child. We granted the Petitioners' request and prohibited the circuit court from enforcing its order granting a post-adjudicatory improvement period. We also ordered the circuit court to set this matter immediately for final disposition pursuant to W. Va. Code § 49-6-5. In granting the requested relief, we held that prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under W. Va. Code §§ 49-6-2(b) and 49-6-5(c). Further, there is clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse and neglect proceedings. W. Va. Code § 49-6-5(a) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

W. Va. Code § 49-4-604

W. Va. Code § 49-4-604(a)

Syl. Pt. 1, *Hinkle v. Black,* 164 W. Va. 112, 262 S.E.2d 744 (1979); Syl. Pt. 2, *State ex rel. Diva P. v. Kaufman,* 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 2, *State ex rel. George B.W. v. Kaufman,* 199 W. Va. 269, 483 S.E.2d 852 (1997); Syl. Pt. 1, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State ex rel. Rose L. v. Pancake, 209 W. Va. 188, 544 S.E.2d 403 (2001)

State ex rel. Lowe v. Knight, 209 W. Va. 134, 544 S.E.2d 61 (2000)

E. Appellate Actions Necessary to Protect Children

Syl. Pt. 6, *In re Timber M.*, 231 W. Va. 44, 743 S.E.2d 352 (2013)

In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child.

In response to a disclosure by her eight-year old daughter, a mother taught her daughter how to make a recording with a cell phone in the hopes of recording another incident of sexual abuse by the stepfather. After the mother learned of the sexual abuse, she continued to live with the stepfather, and at times, left her children alone with him. The circuit court terminated the mother's parental rights for her refusal to admit any wrongdoing in her response to the stepfather's sexual abuse. As a permanency plan, the circuit court placed the children with their father.

On appeal, the Court was extremely troubled because there were substantiated allegations of the father sexually abusing a stepdaughter, and criminal charges had been filed against him as a result of the allegations. Apparently, the State dismissed the criminal case without specifying any substantive reason. Reviewing the record, the Court noted that there was no indication that the victim had retracted the allegations. In addition, the father minimized the mother's culpability with regard to her response to the sexual abuse by the stepfather. Further, the record failed to explain why the Department felt that the children's placement with their father was a good idea in light of the substantiated sexual abuse allegations. Finally, the record failed to indicate whether anyone had investigated the reason for the dismissal of the sexual abuse charges against the father. For those reasons, the Court held that it could take "appropriate and necessary" action to protect a child even if issues concerning the children's placement had not been raised on appeal. Accordingly, the Court remanded the case for a determination as to whether the placement of the children with their father was appropriate.

XXI. CONTEMPT ACTIONS IN ABUSE AND NEGLECT CASES

A. Standard of Review

Syl. Pt. 1, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 1, *In re Brandon Lee H.S.*, 218 W. Va. 724, 629 S.E.2d 783 (2006) (per curiam)

In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

B. Contempt Proceedings in Abuse and Neglect Cases

In re Brandon Lee H.S., 218 W. Va. 724, 629 S.E.2d 783 (2006) (per curiam)

The guardian ad litem and counsel for the respondent father filed a contempt petition when a CPS worker was not assigned to a case. As a result, the DHHR failed to conduct visitations and provide drug-related services as ordered. At a hearing on the contempt petition, the circuit court found that the failure to assign a CPS worker was the result of severe staffing shortages in this eastern panhandle office, not the result of willful disobedience of local DHHR employees. The circuit court ordered the DHHR to take immediate steps to alleviate the staff shortage, including the use of geographic pay differentials for CPS workers.

On appeal, the DHHR argued that the circuit court erred when it addressed staff-related issues that were unrelated to the specific abuse and neglect case. The West Virginia Supreme Court, however, held that: "the trial court had the authority, subject to the limitations required in this opinion, to compel the Department to act to remedy the serious effects of the significant staff shortage at issue, specifically, in this case, and generally, in other abuse and neglect proceedings before that court." 629 S.E.2d at 788. The Court further held that the circuit court did not err when it directed the DHHR to hire additional personnel. The Court, however, reversed the provisions in the circuit court order requiring the DHHR to implement geographical pay differentials because those provisions violated the Separation of Powers doctrine set forth in the West Virginia Constitution.

In the Matter of Megan B., 224 W. Va. 450, 686 S.E.2d 590 (2006)

In this contempt proceeding, the circuit court found a sheriff in contempt when he did not assist in the removal of minor children from a home and did not serve the abuse and neglect petition and removal order

at the time directed by a juvenile referee. Reversing the circuit court, the Supreme Court held that the sheriff's actions did not constitute contempt because the underlying order did not require the sheriff to serve the order and to assist in the removal. Further, the Court observed that the sheriff could have concluded that the problem was resolved because a state trooper had volunteered to serve the order. Finally, the Court found that a finding of contempt was unwarranted because the sheriff had not violated any of his statutory duties.

XXII. CRIMINAL PROSECUTION

A. Prosecutors' Role

State v. James R., II, 188 W. Va. 44, 422 S.E.2d 521 (1992)

In this case, the Court overturned a ruling which prohibited a prosecutor from representing the State in criminal proceedings in which the prosecutor had formerly represented the State in abuse and neglect proceedings against the same person. The Court held that such prior representation was insufficient to support disqualification of the prosecutor in the criminal proceedings, particularly in light of its further holding that no evidence acquired from a parent or custodian as the result of examinations performed in the course of abuse and neglect proceedings may be used in any subsequent criminal proceedings.

Syl. Pt. 5, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals' appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

B. Medical and Mental Examinations of Victims

State v. Delaney, 187 W. Va. 212, 417 S.E.2d 903 (1992)

Affirming a six-count conviction of sexual assault, the Court rejected the defendant's argument that the trial court erred in refusing to permit the alleged child victims to be physically and psychologically examined by his experts, holding that a defendant must present evidence of a "compelling need or reason" for such examinations. The court set forth a six-part test for determining when independent examinations may be warranted: (1) the nature of the examination requested; (2) the age of the victim; (3) the potential trauma to the victim; (4) the probative value of the results of the requested examination; (5) the period of time since the alleged criminal act; and (6) the evidence already available to the defendant.

C. Expert Psychological Testimony

Syl. Pt. 7, *State v. Edward Charles L., Sr.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); Syl. Pt. 3, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995)

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

D. Testimonial Evidence

Note: The cases discussed below do not involve child abuse and neglect. However, the instruction about the admissibility of testimonial hearsay is applicable to criminal prosecutions involving child abuse and neglect.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)

In this case, the defendant was convicted of first-degree assault with a deadly weapon. At trial, the defendant's wife, a witness to the assault, did not testify because the defendant asserted a state-law marital privilege which prevents a spouse from testifying without the consent of the other spouse. The trial court, however, admitted the wife's statement to police officers because it found that the statement bore "'particularized guarantees of trustworthiness.'" *Crawford v. Washington*, 541 U.S. at 1358, 124 S. Ct. at 1358 (quoting *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980)). The mid-tier appellate court reversed the trial court, but the Washington Supreme Court held that the statement bore guarantees of trustworthiness and upheld the conviction. The U.S. Supreme Court granted certiorari to determine whether the admission of the statement violated the defendant's right to confront witnesses as provided by the Sixth Amendment to the United States Constitution.

In *Crawford*, the U.S. Supreme Court held that the defendant's right to confrontation was violated by the admission of the wife's statement to police officers. To reach its holding, the U.S. Supreme Court established a new test – whether hearsay statements are *testimonial* or *nontestimonial*. To admit the *testimonial* statement of a witness, the Court held that the witness must be unavailable and the defendant must have had a prior opportunity for cross-examination. However, *nontestimonial* statements may be admissible under state-law exceptions to a hearsay rule. Further, the Court expressly overruled *Ohio v. Roberts* which allowed for the

admission of hearsay statements if the declarant was unavailable and the statement bore "adequate 'indicia of reliability.'" *Roberts*, 448 U.S. at 66, 100 S. Ct. at 2538. The holding in *Crawford*, therefore, requires the exclusion of testimonial statements in criminal prosecutions unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness.

Although the Court established the categories of *testimonial* and *nontestimonial* statements, it declined to establish precise definitions for them. However, it provided some guidance on the parameters of these two categories. Distinguishing between testimonial and nontestimonial statements, the Court noted that: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. The Court further indicated that testimonial statements include affidavits, deposition testimony, prior testimony or confessions. With particular application to the wife's statement, the Court concluded that a prototypical example of a testimonial statement is a statement made to a police officer.

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)

Addressing two state court cases, the United States Supreme Court established a test to determine whether statements made during a 911 call or made to law enforcement at a crime scene are testimonial, and are therefore, subject to the Confrontation Clause of the Sixth Amendment to the United States Constitution. In the first case, a domestic violence victim made statements to a 911 operator that were admitted into evidence at trial. As is common in domestic violence prosecutions, the victim did not testify at trial.

In the second case, the police conducted an investigation of a domestic disturbance. When the police arrived at the scene, they interviewed the victim and the perpetrator in different rooms. As part of the investigation, the victim signed an affidavit and told the officers what had happened. As in the first case, the victim did not testify at trial. At trial, the victim's affidavit was admitted under the present sense impression to the hearsay rule, and her statements were admitted under the excited utterance exception.

As the Court began its analysis, it noted that it had previously determined that testimonial statements included "'[s]tatements taken by police officers in the course of interrogations.'" 126 S. Ct. at 2273 (quoting *Crawford*, *supra.*). The Court recognized, however, that it had not established a precise definition for the term "testimonial."

Establishing parameters to determine whether a statement is testimonial, the United States Supreme Court adopted the following test:

> Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 126 S. Ct. at 2273-74 (emphasis added).

Applying the test to the 911 call, the Court found that the purpose of the call was not to establish the facts of a past crime or occurrence that could be used to convict the defendant. Rather, the Court concluded that the purpose of the call was to request help for a present, ongoing emergency. Additionally, the information elicited by the 911 operator was for the purpose of responding to the emergency, not to learn what had previously happened. For this reason the Court held that the statements to the 911 operator were nontestimonial and were admissible under exceptions to the hearsay rule.

The Court, however, cautioned that a statement taken in response to an emergency may evolve into a statement that would properly be considered testimonial. The Court noted that the victim's responses to the operator's questions in the latter part of the 911 call could be considered testimonial. To resolve issues of this nature, the Court determined that trial courts, through an *in limine* review procedure, should determine whether statements, or portions of them, should be excluded pursuant to *Crawford* and *Davis*.

In the second case involving the police interview of a domestic violence victim, the Court held that the victim's statements were testimonial because there was no ongoing emergency. The Court found that the primary purpose of the interrogation by the officers was to determine what had already happened and whether a crime had been committed.

The Court further addressed the practical problem faced in domestic violence prosecutions, that is – that domestic violence victims often do not testify at trial. As a solution to this common problem, the Court noted that the rule of forfeiture by wrongdoing defeats confrontation claims. The Court expressly stated that: "[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." 126 S. Ct. at 2280. Although it discussed forfeiture, the Court expressly stated that it was not adopting a standard necessary to prove forfeiture. It did, however,

observe that federal courts generally require forfeiture to be proved by the preponderance of evidence.

State v. Ferguson, 216 W. Va. 420, 607 S.E.2d 526 (2004)

In this murder case, the trial court allowed the admission of hearsay statements about a prior incident between the victim and the defendant. At trial, friends of the victim testified about statements the victim had made about an incident in which the defendant threatened the victim with a knife. On appeal, the defendant argued that *Crawford* barred the admission of the statements. Affirming the trial court, the Supreme Court held that: "[W]e do not perceive that *Crawford*'*s* largely unexplored ban on 'testimonial hearsay' that has not been tested by cross-examination extends to the statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation that are issues in this case." 607 S.E.2d at 529.

State v. Mechling, 219 W. Va. 366, 633 S.E.2d 311 (2006)

In this misdemeanor domestic violence prosecution, the victim did not appear and testify at trial. The trial court, however, admitted the victim's statements to a neighbor and also to police officers.

On appeal, the West Virginia Supreme Court first discussed its prior adoption of the rule set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.E.2d 597 (1980) in the following three West Virginia cases: *State v. James Edward S.*; *State v. Mason*; and *State v. Kennedy*. The Court recognized that *Crawford* overruled the test set forth in *Roberts* that allowed admission of hearsay statements that had an "adequate 'indicia of reliability.'" In Syllabus Point 7 of this opinion, the Court overruled the three West Virginia cases that adopted the test set forth in *Roberts* to the extent that they allowed for the admission of testimonial statements by witnesses.

After overruling the cases noted above, the West Virginia Supreme Court discussed the holdings in both *Crawford* and *Davis*. In the new syllabus points set forth below, the West Virginia Supreme Court adopted the holdings of *Crawford* and *Davis* to determine whether a statement is testimonial. Following the guidance of the United States Supreme Court, the West Virginia Supreme Court recognized that a defendant may forfeit his or her right to confrontation if he or she, by wrongdoing, obtains the absence of a witness.

With regard to the facts of the instant case, the West Virginia Supreme Court held that the victim's statements to the police officers were testimonial and, therefore, should have been excluded. The Court, however, remanded the case to the trial court to determine whether the victim's statements to her neighbor could be considered testimonial or not.

Syl. Pt. 6: Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. See Syl. Pt. 1, *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010); Syl. Pt. 3, *State v. Lambert*, 232 W. Va. 104, 750 S.E.2d 657 (2013).

Syl. Pt. 7: To the extent that *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999), rely upon *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980) (overruled by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)) and permit the admission of a testimonial statement by a witness who does not appear at trial, regardless of the witness's unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, those cases are overruled.

Syl. Pt. 8: Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, a testimonial statement is, generally a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Syl. Pt. 9: Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.

Syl. Pt. 10: A court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

Syl. Pt. 11: Under the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

E. Alford/Kennedy Pleas

State ex rel. DHHR v. Fox, 218 W. Va. 397, 624 S.E.2d 834 (2005)

In this abuse and neglect case, the Department contended that a child was abused because his father had allegedly killed the child's brother. Subject to criminal charges as well as the abuse and neglect petition, the father was tried and convicted, but the verdict was set aside because of juror misconduct. Faced with a second trial, the father entered an *Alford* plea, "a guilty plea by a defendant who continues to protest his or her innocence," to involuntary manslaughter. 624 S.E.2d 834, n. 4. (This type of plea was recognized by the West Virginia Supreme Court in *Kennedy v. Frazier*, 357 S.E.2d 43 (W. Va. 1987), and may be referred to as a *Kennedy* plea.)

In the dissenting and two concurring opinions, the significance of the father's entry of an *Alford* plea was addressed. The dissent indicated that the plea supported a conclusion of child abuse. In the first concurring opinion, it was recognized that the father's entry of an *Alford* plea allowed him the opportunity to avoid prison and thereby the chance to regain custody of his son. In the second concurring opinion, it was recognized that the entry of the plea was the result of the financial burden associated with the defense of criminal charges. Although the *Alford* plea was discussed, the majority opinion did not adopt a rule of law concerning the significance of an *Alford* plea in a criminal case to an abuse and neglect case.

F. Evidence of Other Crimes, Wrongs, or Acts

State v. Mongold, 220 W. Va. 259, 647 S.E.2d 539 (2007)

In this case, the defendant was convicted of the crime of death of a child by a parent, guardian or custodian by child abuse in violation of W. Va. Code § 61-8D-2a. On appeal, the defendant claimed that the trial court erred when it allowed the prosecution to cross-examine him on a prior child abuse incident pursuant to Rule 404(b) of the West Virginia Rules of Evidence because he did not receive pretrial notice from the State and he had been acquitted of the prior felony child abuse charge.

The Supreme Court disagreed and adopted the following syllabus points:

Syl. Pt. 3: Rule 404(b)[20] of the West Virginia Rules of Evidence requires the prosecution in a criminal case to disclose evidence of other

[20] Rule 404(b) has been amended. Any party who seeks to admit this type of evidence must disclose it before trial unless the court excuses the lack of pretrial notice. The duty to disclose is no longer trigged by a

crimes, wrongs or acts prior to trial if such disclosure has been requested by the accused; however, upon reasonable notice such evidence may be disclosed for the first time during trial upon a showing of good cause for failure to provide the requested pretrial notice.

Syl. Pt. 4: The fact that a criminal charge against a defendant is dismissed or that he/she is acquitted of the same does not prohibit use of the incident under Rule 404(b) of the West Virginia Rules of Evidence.

XXIII. CRIMINAL OFFENSES INVOLVING ABUSE AND NEGLECT OF CHILDREN

A. Felonious Neglect

State v. DeBerry, 185 W. Va. 512, 408 S.E.2d 91 (1991)

The defendant mother took her 12 year old daughter to a party where she knew alcohol would be served. Once there, the defendant encouraged her daughter to consume alcohol. The daughter did so until she lost consciousness. The defendant then arranged for a man to carry her daughter's unconscious body home, while the defendant remained at the party. The man raped the daughter, after which the daughter dies from acute ethanol intoxication. The Court reversed a trial court's dismissal of a charge of causing serious bodily injury to a child by felonious neglect, holding that (1) to obtain a conviction pursuant to W. Va. Code § 61-8D-4(b), the state must prove that the defendant neglected a minor child within the meaning of the term neglect found in W. Va. Code § 61-8D-1(6). The term neglect is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." The state must also prove that the neglect caused serious bodily injury. There is no need, however, for the state to prove criminal intent under the statute; and (2) the term neglect as defined by the statute is not unconstitutionally vague.

B. Sexual Assault

State v. Edward Charles L., Sr., 183 W. Va. 641, 398 S.E.2d 123 (1990)

The defendant was convicted of two counts of first degree sexual assault and two counts of first degree sexual abuse of his four year old son and daughter. The defendant assaulted his son both orally and anally. He assaulted his daughter by inserting his finger into her vagina. The state introduced collateral evidence of the defendant's sexual acts and sexual tendencies toward the children. Also introduced into evidence were

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defendant's request.

statements about the crime made by the child victim to his treating psychologist and his mother.

C. Abuse Creating Substantial Risk of Injury or Death

Syl. Pt. 3, *State v. Snodgrass*, 207 W. Va. 631, 535 S.E.2d 475 (2000)

The offense of child abuse creating a risk of injury as set forth in W. Va. Code § 61-8D-3(c) is committed when any person inflicts upon a minor physical injury by other than accidental means and by such action, creates a substantial possibility of serious bodily injury or death.

D. Death of a Child by a Parent, Guardian or Custodian by Child Abuse

State v. Mongold, 220 W. Va. 259, 647 S.E.2d 539 (2007)

While in his care, the defendant's two year old stepdaughter was rushed to the hospital when she became limp and unresponsive. At the hospital, doctors concluded that the child was suffering from swelling of the brain and that she had blood on the surface of her skull. The child died two days later and an autopsy revealed that the cause of her death was four blunt impacts to the head.

At trial, the defendant claimed that her injuries could have been caused by a fall from the deck, being knocked over by the family dog, or when the defendant and the child were playing a game of airplane. The state's evidence indicated that the injuries could not have occurred as claimed by the defendant. The jury found the defendant guilty of death of a child by a parent, guardian or custodian by child abuse pursuant to W. Va. Code § 61-8D-2a.

XXIV. FAMILY COURT PROCEEDINGS INVOLVING ABUSE AND NEGLECT ALLEGATIONS

Note: For a discussion of caselaw involving the overlap of child abuse and neglect issues in family and circuit court, see Caselaw Digest Section III. For a complete discussion of pre-petition proceedings relating to child abuse and neglect, see Special Procedures Section X.

A. Referral of Child Abuse and Neglect Allegations to the DHHR by Judicial Officials

Syl. Pt. 6, *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993)

W. Va. Code § 49-2-803

Under W. Va. Code § 49-6A-2, it is mandatory for any circuit judge, family law master, or magistrate having reasonable cause to suspect abuse

or neglect to immediately report the same to the Division of Human Services of the Department of Health and Human Resources.

Syl. Pt. 8, *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006)

When any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to W. Va. Code § 49-6A-2 and, if applicable, Rule 48 of the Rules of Practice and Procedure for Family Court.

W. Va. Code § 49-2-803

B. Emergency Change of Custody

Syl. Pt. 1, *State ex rel. George B.W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997); Syl. Pt. 2, *Haller v. Haller,* 198 W. Va. 487, 481 S.E.2d 793 (1996)

Although a court may enter an emergency order transferring custody where there are allegations of abuse or neglect without notice and full hearing if the court deems such an order necessary for the immediate protection of the child(ren), such order should be of limited duration, should set a prompt and full hearing on the allegations, and should appraise both parties of the scope of the hearing. In the event such emergency change is found to be warranted, the court should immediately appoint a guardian ad litem for the child.

C. Minor Guardianship Proceedings

Syl. Pt. 12, *Brooke B. v. Donald C.*, 230 W. Va. 355, 738 S.E.2d 21 (2013)

W.Va. Code § 44-10-3(a) places jurisdiction and venue of an infant guardianship action in the West Virginia county in which a minor resides. It is the minor's residency alone that controls, and not the residency of any other person such as a parent, guardian, or other person with custody or control of the minor. A determination of the minor's residency is typically a question of fact.

Syl. Pt. 5, *In re Antonio R.A.*, 228 W. Va. 380, 719 S.E.2d 850 (2011)

A family or circuit court's authority to appoint a suitable person as a guardian for a minor, including a minor above the age of fourteen, is derived from West Virginia Code § 44-10-3 (2010), which grants courts discretion in determining when the appointment of a guardian for a minor is appropriate. West Virginia Code § 44-10-4 (2010), which entitles a minor above the age of fourteen to nominate his or her own guardian, applies only after a court

has determined, pursuant to West Virginia Code § 44-10-3, that a particular circumstance warrants the appointment of a guardian.

In re Abbigail Faye B., 222 W. Va. 466, 665 S.E.2d 300 (2008)

Syl. Pt. 6: Pursuant to the plain language of W. Va. Code § 44-10-3(a), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. "However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian." W. Va. Code § 44-10-3(a).

Syl. Pt. 7: Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

W. Va. Code § 49-1-201

After a custody dispute arose between a mother and maternal grandparents, the parties each filed domestic violence petitions and minor guardianship petitions. The grandparents also filed an amended guardianship petition that included abuse and neglect allegations. After the family court conducted initial proceedings, it appointed the grandparents as temporary guardians of the minor, removed the case to circuit court and referred the matter to Child Protective Services to investigate the abuse and neglect allegations. After conducting several evidentiary hearings, the circuit court appointed the mother as the guardian of the child and the grandparents appealed.

Reviewing the minor guardianship statute, West Virginia Code § 44-10-3, the Court recognized that "a court shall give priority to the minor's mother or father." Syl. Pt. 6, in part, *Abbigail Faye B.*, *supra*. Notwithstanding this priority, the Court further held that: "'[I]n every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W. Va. Code § 44-10-3(a)." *Id.* Therefore, the preference for appointing a parent as a guardian may give way based upon the competency and fitness of the guardian and the child's best interests.

The Court further discussed the provisions of Rule 48a of the Rules of Practice and Procedure for Family Court that address removal of minor

guardianship cases to circuit court when a minor guardianship is based, in whole or part, upon abuse and neglect allegations. The Court expressly noted that the directives of this rule were clear and that the family court had correctly removed the case to circuit court.

In re Richard P., 227 W. Va. 285, 708 S.E.2d 479 (2010)

This case originated when the petitioners filed a minor guardianship petition in family court. One of the petitioners, Jennifer P., was a parent of two minor children, and the second petitioner, Cary P., had been residing with them for a significant period of time and had been providing parental care for the children. In the petition, the petitioners sought to have Cary P. named as the children's legal guardian so that she could make medical, educational and other legal decisions for the children when Jennifer P. was unavailable. As background, the petition indicated that the children's father has been abusive to Jennifer P. and the children. Because the petition contained allegations of abuse and neglect, the family court transferred the case to circuit court.

The primary holding of this case did not involve the appointment of a guardian because of abuse and neglect. Rather, it involved the Caregiver's Consent Act, West Virginia Code §§ 49-2-701, *et seq.*, an act that allows parents to designate a third party who resides with the children to consent to health care for the children, provided the requirements of the statute have been fulfilled. The Court did, however, note that either the family or circuit court may rule on a minor guardianship petition and discussed the transfer provisions in Rule 48a(a) of the Family Court Rules if a minor guardianship proceeding is based upon allegations of abuse and neglect.

In re Haylea G., 231 W. Va. 494, 745 S.E.2d 532 (2013) (per curiam)

The primary issue in this case was whether a five-year minor guardianship should continue. The minor guardianship was originally established because the mother was going to prison for fraudulent use of a credit card and some related misdemeanors. After completing both her sentence and parole and making significant positive changes in her life, the mother sought to have the guardianship terminated. Although it was evident that the child had thrived under the care of her guardian, the circuit court terminated the guardianship because "the ability for another person to provide for a child does not render a parent unfit to raise her child." 745 S.E.2d at 538. On appeal, the Supreme Court found that the circuit court had correctly applied the law to the facts and affirmed the ruling.

In re I.T., 233 W. Va. 500, 759 S.E.2d 447 (2014) (per curiam)

The grandmother of a child filed a minor guardianship petition in family court based upon the mother's alleged unfitness. An order was

entered that granted the grandmother temporary custody, and the case was removed to circuit court because the mother had filed several domestic violence petitions. After conducting two evidentiary hearings in which a CPS worker testified that CPS did not have a reason to object to placing custody of the child with the mother, the circuit court awarded custody to the mother. Affirming the circuit court ruling, the Supreme Court held that the circuit court did not abuse its discretion.

In re K.H., 235 W. Va. 254, 773 S.E.2d 20 (2015)

The issue in this case was whether the family court had correctly terminated a grandmother's eight-year guardianship of K.H., a minor child. When K.H. was born, she resided with her mother, and her father did not meet the child until she was over a year old. Approximately six weeks after the meeting between the child and her father, K.H.'s mother died in a car accident. In response to these circumstances, K.H.'s maternal grandmother petitioned for and was appointed guardian for K.H. At this initial hearing, the father did not object to the grandmother's appointment as a guardian.

A year later, the father filed a petition to establish custodial responsibility for K.H., and he received parenting time every other weekend and began paying child support. Two years later, the father filed a petition to revoke the guardianship, and it was resolved by an agreed order that granted the father increased parenting time.

Approximately two years later, the father filed another petition to revoke the guardianship. A guardian *ad litem* was appointed, and he recommended that the child be placed in her father's custody based upon the father's ability to care for the child. The guardian *ad litem* also discovered that the grandmother had been sharing custody of the child with a 76-year-old man who had an extensive criminal history. A psychologist, hired by the grandmother, testified that the child viewed the grandmother as her mother. The psychologist did not, however, interview the father. After hearing the evidence, the family court terminated the guardianship and denied the grandmother's request for visitation.

As an initial allegation of error, the grandmother argued that the family court had failed to apply the amended provisions of West Virginia Code § 44-10-3 correctly. The Supreme Court, however, found that the family court had correctly considered the child's best interests and also considered the father's increased participation in parenting his daughter.

As another allegation of error, the grandmother argued that the family court had erred when it failed to recognize her as the psychological parent of K.H. Rather, the family court had characterized the eight-year guardianship as "temporary." The Supreme Court discussed, in detail, the concept of a "psychological parent" and the cases addressing it. After

reviewing the facts of the case, the Court found that the lower court had erred when it failed to recognize the grandmother as the psychological parent of K.H. The Court also held that K.H. and her grandmother had a right to continued association. Accordingly, the case was remanded to establish a visitation schedule between the child and her grandmother.

D.B. v. J.R., 235 W. Va. 409, 774 S.E.2d 75 (2015)

This case involved a dispute over the guardianship of a three-year-old girl, J.R. The parties to the case were the maternal grandfather and his wife (step-grandmother to J.R.) and the child's father. The child's mother had died in a car accident before the case was initiated. The child and her mother had lived with the maternal grandfather and step-grandmother for most of the child's young life. As a result of the mother's death, the maternal grandfather and his wife filed a guardianship petition. At an initial hearing, the parties agreed that the grandfather should serve as the guardian pending a final evidentiary hearing. The evidentiary hearing was not, however, conducted until over a year later.

At the evidentiary hearing, the grandparents presented evidence that the child's father had committed three acts of domestic violence against the child's mother. Specifically, a CPS worker and a deputy testified as to different acts of domestic violence that the father had perpetrated against J.R.'s mother. Ultimately, the circuit court found that the domestic violence was not relevant because the mother had died and the father was not currently in a relationship. Other testimony involved the child's worsened asthma as a result of exposure to secondhand smoke from the father, and the child's attachment to her step-grandmother.

Approximately three months after the evidentiary hearing was completed, the trial court denied the grandparents' guardianship petition. As a basis to deny the guardianship petition, the circuit court relied upon the syllabus of *Whiteman v. Robinson*, 116 S.E.2d 691 (W. Va. 1960), which indicates that a parent has a right to the custody of his or her child unless the parent is proven to be unfit. In its order, the circuit court found that the petitioners had failed to meet their burden to prove that the father was unfit and, therefore, denied the guardianship petition.

On appeal, the grandparents argued that the burden of proof should have been placed on the father pursuant to Syllabus Point 2 of *Overfield v. Collins*, 483 S.E.2d 27 (W. Va. 1996) and that the circuit court erred when it found that the domestic violence incidents were not relevant. In response, the father argued that the circuit was correct in finding him to be a fit parent.

To address these issues, the Court first discussed *Whiteman*, a case in which a father had left his child with an uncle for a relatively brief period of time when the child's mother died. In *Whiteman*, the Court noted that

there was no evidence that the father had transferred custody of the child to the uncle. In addition, there was no evidence that the father was unfit. For that reason, the burden was placed on the proposed guardians to prove the father unfit.

The Court also discussed *Overfield* which involved a mother, who, after experiencing a traumatic injury, executed an affidavit that placed custody of a child with her parents. Suing to regain custody, the mother argued that the transfer of custody was intended to be temporary, and the grandparents argued that the transfer was intended to be permanent. In *Overfield*, the Supreme Court reversed and remanded the case and adopted Syllabus Point 2. This syllabus point indicates that when a parent transfers custody to a third person, he or she has the burden to prove his or her fitness as a parent. The burden then shifts to the third party to show that the child's placement should not be disturbed.

To resolve the instant case, the Court found that Syllabus Point 2 of *Overfield* should be applied, not the syllabus of *Whiteman*, because custody had been transferred to the grandparents. Secondly, the Court found that the allegations of domestic violence were relevant to the father's fitness as a parent. The Court remanded the case with instructions to apply Syllabus Point 2 of *Overfield* and to consider the evidence of the father's acts of domestic violence.

D. Supervised Visitation – Analysis of Best Interests

Syl. Pt. 3, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 4, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006); Syl. Pt. 6, *In re Marriage of Misty D.G.*, 221 W. Va. 144, 650 S.E.2d 243 (2007)

Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

Syl. Pt. 5, *Carter v. Carter,* 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 3, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006); Syl. Pt. 5, *In re Marriage of Misty D.G.*, 221 W. Va. 144, 650 S.E.2d 243 (2007); Syl. Pt. 6, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.

Syl. Pt. 3, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 5, *State ex rel. George B.W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997) ; Syl. Pt. 1, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997); Syl. Pt. 3, *Alireza D. v. Kim Elaine W.*, 198 W. Va. 178, 479 S.E.2d 688 (1996); Syl. Pt. 3, *Mary Ann P. v. William R.P.*, 197 W. Va. 1, 475 S.E.2d 1 (1996); Syl. Pt. 8, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

Where supervised visitation is ordered pursuant to W. Va. Code § 48-2-15(b)(1), the best interest of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have a secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Belinda Kay C. v. John David C., 193 W. Va. 196, 455 S.E.2d 565 (1995)

In custody cases, where there is evidence that a parent has on occasion demonstrated violent propensities and that his violence has, at least, disturbed his children, such evidence is sufficient to require restrictions on the parent's visitation, including, but not limited to, supervision. 455 S.E.2d at 566.

The best of the interest of the child must be the determining factor in assessing how supervision should be conducted. In order to require supervision it is not necessary to demonstrate that the parent has abused the child. Evidence of previous violent propensities as well as evidence that those propensities have had some impact on the parties' children is sufficient. 455 S.E.2d at 568.

E. Supervised Visitation – Requisite Finding and Standard of Proof

Syl. Pt. 2, in part, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 6, *State ex rel. George B.W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997)

Prior to ordering supervised visitation pursuant to W. Va. Code § 48-2-15(b)(1), if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to

ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place.

Syl. Pt. 2, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006)

Prior to ordering supervised visitation … if there is an allegations involving whether one of the parents sexually abused the child involved, a family law … [judge] or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law … [judge] or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law … [judge] or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child.

F. Supervised Visitation During and After an Investigation Ordered by a Family Court

Syl. Pt. 9, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

A family court finding potential safety risks to minor children that warrant a court-ordered investigation pursuant to West Virginia Code § 48-9-301 may not order visitation between a child and the party posing the potential risks while the investigation proceeds. Supervised visitation may be ordered following the investigation if the court finds the investigation or other information supplies the requisite credible evidentiary basis to believe a child's safety will be jeopardized if visitation is not supervised. Where supervised visitation is contemplated, the family court should schedule a hearing, with notice to all parties and any proposed supervisors, regarding the most suitable source for supervision under the circumstances. The purpose of the hearing is to determine the most appropriate source for supervision by considering (1) whether the child is comfortable and familiar with a potential supervisor through prior contact or otherwise, and (2) whether the potential supervisor is willing and has ability to fulfill the obligation. In order to provide an adequate basis for review, this determination should be incorporated as a finding of the family court judge in the order granting supervised visitation.

G. When Supervised Visitation No Longer Necessary

Syl. Pt. 4, *Carter v. Carter,* 196 W. Va. 239, 470 S.E.2d 193 (1996)

If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "credible evidence" (*Mary D. v. Watt*, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interest of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

CHAPTER 6:
RELEVANT STATUTES AND REGULATIONS

(through 2015 Legislative Sessions)

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ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

PART I. GENERAL PROVISIONS AND PURPOSE.

§ 49-1-101 Short title; intent of recodification.

(a) This chapter shall be known and may be cited as the "West Virginia Child Welfare Act."

(b) The recodification of this chapter during the regular session of the Legislature in the year 2015 is intended to embrace in a revised, consolidated, and codified form and arrangement the laws of the State of West Virginia relating to child welfare at the time of that enactment.

§ 49-1-102 Legislative Intent; continuation of existing statutory provisions; no increase in funding obligations.

In recodifying the child welfare law of this state during the regular session of the Legislature in the year 2015, it is intended by the Legislature that each specific reenactment of a substantively similar prior statutory provision will be construed as continuing the intended meaning of the corresponding prior statutory provision and any existing judicial interpretation of the prior statutory provision. It is not the intent of the Legislature, by recodifying the child welfare law of this state during the regular session of the Legislature in the year 2015 to alter the substantive law of this state as it relates to child welfare or to increase or enlarge any funding obligation of any spending unit of the state.

§ 49-1-103 Operative date of enactment; effect on existing law.

The amendment and reenactment of chapter forty-nine of this code, as enacted by the Legislature during the regular session, 2015, are operative ninety days from passage. The prior enactments of chapter forty-nine of this code, whether amended and reenacted or repealed by the action of the Legislature during the 2015 regular session, have full force and effect until that time.

§ 49-1-104 West Virginia Code replacement; no increase of funding obligations to be construed.

(a) The Department of Health and Human Resources and the Department of Military Affairs and Public Safety are not required to change any form or letter that contains a citation to this code that is changed or otherwise affected by the recodification of this chapter during the 2015 regular session of the Legislature unless specifically required by a provision of this code.

(b) No provision of the recodification of this chapter during the 2015 regular session of the Legislature may be construed to increase or enlarge any funding obligation of any spending unit of the state.

§ 49-1-105 Purpose.

(a) It is the purpose of this chapter to provide a system of coordinated child welfare and juvenile justice services for the children of this state. The state has a duty to assure that proper and appropriate care is given and maintained.

(b) The child welfare and juvenile justice system shall:

(1) Assure each child care, safety and guidance;

(2) Serve the mental and physical welfare of the child;

(3) Preserve and strengthen the child family ties;

(4) Recognize the fundamental rights of children and parents;

(5) Develop and establish procedures and programs which are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk;

(6) Involve the child, the child's family or the child's caregiver in the planning and delivery of programs and services;

(7) Provide community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family;

(8) Provide for early identification of the problems of children and their families, and respond appropriately to prevent abuse and neglect or delinquency;

(9) Provide for the rehabilitation of status offenders and juvenile delinquents;

(10) As necessary, provide for the secure detention of juveniles alleged or adjudicated delinquent;

(11) Provide for secure incarceration of children or juveniles adjudicated delinquent and committed to the custody of the director of the Division of Juvenile Services; and

(12) Protect the welfare of the general public.

(c) It is also the policy of this state to ensure that those persons and entities offering quality child care are not over-encumbered by licensure and registration requirements and that the extent of regulation of child care facilities and child placing agencies be moderately proportionate to the size of the facility.

(d) Through licensure, approval, and registration of child care, the state exercises its benevolent police power to protect the user of a service from risks against which he or she would have little or no competence for self protection. Licensure, approval, and registration processes shall, therefore, continually balance the child's rights and need for protection with the interests, rights and responsibility of the service providers.

§ 49-1-106 Location of child welfare services; state and federal cooperation; juvenile services.

(a) The child welfare service of the state shall be located within and administered by the Department of Health and Human Resources. The Division of Juvenile Services of the Department of Military Affairs and Public Safety shall administer the secure predispositional juvenile detention and juvenile correctional facilities of the state. Notwithstanding any other provision of this code to the contrary, the administrative authority of the Division of Juvenile Services over any child or juvenile in this state extends only to those detained or committed to a secure detention facility or secure correctional facility operated and maintained by the division by an order of a court of competent jurisdiction during the period of actual detention or confinement in the facility.

(b) The Department of Health and Human Resources is designated as the state entity to cooperate with the United States Department of Health and Human Services and United States Department of Justice in extending and improving child welfare services, to comply with federal regulations, and to receive and expend federal funds for these services. The Division of Juvenile Services of the Department of Military Affairs and Public Safety is designated as the state entity to cooperate with the United States Department of Health and Human Services and United States Department of Justice in operating, maintaining and improving juvenile correction facilities and centers for the predispositional detention of children, to comply with federal regulations, and to receive and expend federal funds for these services.

(c) The Division of Juvenile Services of the Department of Military Affairs and Public Safety is authorized to operate and maintain centers for juveniles needing detention pending disposition by a court having juvenile jurisdiction or temporary care following that court action.

PART II. DEFINITIONS.

§ 49-1-201 Definitions related, but not limited, to child abuse and neglect.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, child abuse and neglect, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Abandonment" means any conduct that demonstrates the settled purpose to forego the duties and parental responsibilities to the child;

"Abused child" means a child whose health or welfare is being harmed or threatened by:

(A) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home. Physical injury may include an injury to the child as a result of excessive corporal punishment;

(B) Sexual abuse or sexual exploitation;

(C) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section fourteen-h, article two, chapter sixty-one of this code; or

(D) Domestic violence as defined in section two hundred two, article twenty-seven, chapter forty-eight of this code.

"Abusing parent" means a parent, guardian or other custodian, regardless of his or her age, whose conduct has been adjudicated by the court to constitute child abuse or neglect as alleged in the petition charging child abuse or neglect.

"Battered parent," for the purposes of part six, article four of this chapter, means a respondent parent, guardian, or other custodian who has been adjudicated by the court to have not condoned the abuse or neglect and has not been able to stop the abuse or neglect of the child or children due to being the victim of domestic violence as defined by section two hundred two, article twenty-seven, chapter forty-eight of this code which was perpetrated by the same person or persons determined to have abused or neglected the child or children.

"Child abuse and neglect services" means social services which are directed toward:

(A) Protecting and promoting the welfare of children who are abused or neglected;

(B) Identifying, preventing and remedying conditions which cause child abuse and neglect;

(C) Preventing the unnecessary removal of children from their families by identifying family problems and assisting families in resolving problems which could lead to a removal of children and a breakup of the family;

(D) In cases where children have been removed from their families, providing time-limited reunification services to the children and the families so as to reunify those children with their families or some portion thereof;

(E) Placing children in suitable adoptive homes when reunifying the children with their families, or some portion thereof, is not possible or appropriate; and

(F) Assuring the adequate care of children or juveniles who have been placed in the custody of the department or third parties.

"Condition requiring emergency medical treatment" means a condition which, if left untreated for a period of a few hours, may result in permanent physical damage; that condition includes, but is not limited to, profuse or arterial bleeding, dislocation or fracture, unconsciousness and evidence of ingestion of significant amounts of a poisonous substance.

"Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of the child is threatened. These conditions may include an emergency situation when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health, life, or safety of any child in the home:

(A) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a babysitter or other caretaker;

(B) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome;

(C) Nutritional deprivation;

(D) Abandonment by the parent, guardian or custodian;

(E) Inadequate treatment of serious illness or disease;

(F) Substantial emotional injury inflicted by a parent, guardian or custodian;

(G) Sale or attempted sale of the child by the parent, guardian or custodian;

(H) The parent, guardian or custodian's abuse of alcohol or drugs or other controlled substance as defined in section one hundred one, article one, chapter sixty-a of this code, has impaired his or her parenting skills to a degree as to pose an imminent risk to a child's health or safety; or

(I) Any other condition that threatens the health, life, or safety of any child in the home.

"Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when that refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

(C) "Neglected child" does not mean a child whose education is conducted within the provisions of section one, article eight, chapter eighteen of this code.

"Petitioner or co-petitioner" means the Department or any reputable person who files a child abuse or neglect petition pursuant to section six hundred one, article four, of this chapter.

"Permanency plan" means the part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available.

"Respondent" means all parents, guardians, and custodians identified in the child abuse and neglect petition who are not petitioners or co-petitioners.

"Sexual abuse" means:

(A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by section three, article eight-c, chapter sixty-one, which a parent, guardian or custodian engages in, attempts to engage in, or

knowingly procures another person to engage in with a child notwithstanding the fact that for a child who is less than sixteen years of age the child may have willingly participated in that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct or, for a child sixteen years of age or older the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct;

(B) Any conduct where a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making that display, or of the child, or for the purpose of affronting or alarming the child; or

(C) Any of the offenses proscribed in sections seven, eight or nine of article eight-b, chapter sixty-one of this code.

"Sexual assault" means any of the offenses proscribed in sections three, four or five of article eight-b, chapter sixty-one of this code.

"Sexual contact" means sexual contact as that term is defined in section one, article eight-b, chapter sixty-one of this code.

"Sexual exploitation" means an act where:

(A) A parent, custodian or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct as that term is defined in section one, article eight-c, chapter sixty-one of this code; or

(B) A parent, guardian or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian or custodian knows that the display is likely to be observed by others who would be affronted or alarmed.

"Sexual intercourse" means sexual intercourse as that term is defined in section one, article eight-b, chapter sixty-one of this code.

"Sexual intrusion" means sexual intrusion as that term is defined in section one, article eight-b, chapter sixty-one of this code.

"Serious physical abuse" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged

impairment of health or prolonged loss or impairment of the function of any bodily organ.

§ 49-1-202 Definitions related, but not limited, to adult, child, developmental disability, and transitioning adult status.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, adult, child, developmental disability, and transitioning adult status, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Adult" means a person who is at least eighteen years of age.

"Child" or "Juvenile" means any person under eighteen years of age or is a transitioning adult. Once a child or juvenile is transferred to a court with criminal jurisdiction pursuant to section seven hundred ten, article four of this chapter, he or she shall remain a child or juvenile for the purposes of the applicability of this chapter. Unless otherwise stated, for the purpose of child care services "child" means an individual who meets one of the following conditions:

(A) Is under thirteen years of age;

(B) Is thirteen to eighteen years of age and under court supervision; or

(C) Is thirteen to eighteen years of age and presenting a significant delay of at least twenty-five percent in one or more areas of development, or a six month delay in two or more areas as determined by an early intervention program, special education program or other multidisciplinary team.

"Juvenile delinquent" means a juvenile who has been adjudicated as one who commits an act which would be a crime under state law or a municipal ordinance if committed by an adult.

"Status offender" means a juvenile who has been adjudicated as one:

(A) Who habitually and continually refuses to respond to the lawful supervision by his or her parents, guardian or legal custodian such that the juvenile's behavior substantially endangers the health, safety or welfare of the juvenile or any other person;

(B) Who has left the care of his or her parents, guardian or custodian without the consent of that person or without good cause; or

(C) Who is habitually absent from school without good cause.

"Transitioning adult" means an individual with a transfer plan to move to an adult setting who meets one of the following conditions:

(A) Is eighteen years of age but under twenty-one years of age, was in the custody of the Department of Health and Human Resources upon reaching eighteen years of age and committed an act of delinquency before reaching eighteen years of age, remains under the jurisdiction of the juvenile court, and requires supervision and care to complete an education and or treatment program which was initiated prior to the eighteenth birthday; or

(B) Is eighteen years of age but under twenty-one years of age, was adjudicated abused, neglected, or in the custody of the Department of Health and Human Resources upon reaching eighteen years of age and enters into a contract with the Department of Health and Human Resources to continue in an educational, training, or treatment program which was initiated prior to the eighteenth birthday.

§ 49-1-203 Definitions related, but not limited, to licensing and approval of programs.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, licensing and approval of programs, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Approval" means a finding by the Secretary of the Department of Health and Human Resources that a facility operated by the state has met the requirements of legislative rules promulgated for operation of that facility and that a Certificate of Approval or a Certificate of Operation has been issued.

"Certification of Approval" or "Certificate of Operation" means a statement issued by the Secretary of the Department of Health and Human Resources that a facility meets all of the necessary requirements for operation.

"Certificate of license" means a statement issued by the Secretary of the Department of Health and Human Resources authorizing an individual, corporation, partnership, voluntary association, municipality or county, or any agency thereof, to provide specified services for a limited period of time in accordance with the terms of the certificate.

"Certificate of registration" means a statement issued by the Secretary of the Department of Health and Human Resources to a family child care home, informal family child care home or relative family child care home,

upon receipt of a self-certification statement of compliance with the legislative rules promulgated pursuant to this chapter.

"License" means the grant of official permission to a facility to engage in an activity which would otherwise be prohibited.

"Registration" means the process by which a family child care home, informal family child care home or a relative family child care home self-certifies compliance with the legislative rules promulgated pursuant to this chapter.

"Rule" means legislative rules promulgated by the Secretary of the Department of Health and Human Resources or a statement issued by the Secretary of the Department of Health and Human Resources of the standards to be applied in the various areas of child care.

"Variance" means a declaration that a rule may be accomplished in a manner different from the manner set forth in the rule.

"Waiver" means a declaration that a certain legislative rule is inapplicable in a particular circumstance.

§ 49-1-204 Definitions related, but not limited, to custodians, legal guardians and family.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, custodians, legal guardians and family, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Caregiver" means any person who is at least eighteen years of age and:

(A) Is related by blood, marriage or adoption to the minor, but who is not the legal custodian or guardian of the minor; or

(B) Has resided with the minor continuously during the immediately preceding period of six months or more.

"Custodian" means a person who has or shares actual physical possession or care and custody of a child, regardless of whether that person has been granted custody of the child by any contract or agreement.

"Dysfunctional family," for the purposes of part two, article two of this chapter, means a parent or parents or an adult or adults and a child or children living together and functioning in an impaired or abnormal manner so as to cause substantial physical or emotional danger, injury or harm to one or more children thereof regardless of whether those children are

natural offspring, adopted children, step children or unrelated children to that parents.

"Legal or minor guardianship" means the permanent relationship between a child and a caretaker, established by order of the court having jurisdiction over the child or juvenile, pursuant to this chapter and chapter forty-four of this code.

"Parent" means an individual defined as a parent by law or on the basis of a biological relationship, marriage to a person with a biological relationship, legal adoption or other recognized grounds.

"Parental rights" means any and all rights and duties regarding a parent to a minor child.

"Parenting skills" means a parent's competency in providing physical care, protection, supervision and psychological support appropriate to a child's age and state of development.

"Siblings" means children who have at least one biological parent in common or who have been legally adopted by the same parent or parents.

§ 49-1-205 Definitions related, but not limited, to developmental disabilities.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, developmental disabilities, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Developmental disability" means a severe, chronic disability of a person which:

(A) Is attributable to a mental or physical impairment or a combination of mental and physical impairments;

(B) Is manifested before the person attains age twenty-two;

(C) Results in substantial functional limitations in three or more of the following areas of major life activity:

(i) Self-care;

(ii) Receptive and expressive language;

(iii) Learning;

(iv) Mobility;

(v) Self-direction;

(vi) Capacity for independent living; and

(vii) Economic self-sufficiency; and

(D) Reflects the person's need for services and supports which are of lifelong or extended duration and are individually planned and coordinated.

(E) The term "developmental disability", when applied to infants and young children, means individuals from birth to age five, inclusive, who have substantial developmental delays or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

"Family or primary caregiver," for the purposes of part six, article two of this chapter, means the person or persons with whom the developmentally disabled person resides and who is primarily responsible for the physical care, education, health and nurturing of the disabled person pursuant to the provisions of part six, article two of this chapter. The term does not include hospitals, nursing homes, personal care homes or any other similar institution.

"Legal guardian," for the purposes of part six of article two of this chapter, means the person who is appointed legal guardian of a developmentally disabled person and who is responsible for the physical and financial aspects of caring for that person, regardless of whether the disabled person resides with his or her legal guardian or another family member.

§ 49-1-206 Definitions related, but not limited, to child advocacy, care, residential, and treatment programs.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, child advocacy, care, residential and treatment programs, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Child advocacy center (CAC)" means a community-based organization that is a member in good standing with the West Virginia Child Abuse Network, Inc., as set forth in section one hundred one, article three of this chapter.

"Child care" means responsibilities assumed and services performed in relation to a child's physical, emotional, psychological, social and personal needs and the consideration of the child's rights and entitlements, but does

not include secure detention or incarceration under the jurisdiction of the Division of Juvenile Services pursuant to part nine, article two of this chapter. It includes the provision of child care services or residential services.

"Child care center" means a facility maintained by the state or any county or municipality thereof, or any agency or facility maintained by an individual, firm, corporation, association or organization, public or private for the care of thirteen or more children for child care services in any setting, if the facility is open for more than thirty days per year per child.

"Child care services" means direct care and protection of children during a portion of a twenty-four hour day outside of the child's own home which provides experiences to children that foster their healthy development and education.

"Child placing agency" means a child welfare agency organized for the purpose of placing children in private family homes for foster care or for adoption. The function of a child-placing agency may include the investigation and certification of foster family homes and foster family group homes as provided in this chapter. The function of a child placing agency may also include the supervision of children who are sixteen or seventeen years old and living in unlicensed residences.

"Child welfare agency" means any agency or facility maintained by the state or any county or municipality thereof, or any agency or facility maintained by an individual, firm, corporation, association or organization, public or private, to receive children for care and maintenance or for placement in residential care facilities, including, without limitation, private homes or any facility that provides care for unmarried mothers and their children. A child welfare agency does not include juvenile detention facilities or juvenile correctional facilities operated by or under contract with the Division of Juvenile Services, pursuant to part nine, article two of this chapter, nor any other facility operated by that division for the secure housing or holding of juveniles committed to its custody.

"Community based" means a facility, program or service located near the child's home or family and involving community participation in planning, operation and evaluation and which may include, but is not limited to, medical, educational, vocational, social and psychological guidance, training, special education, counseling, substance abuse and any other treatment or rehabilitation services.

"Community-based juvenile probation sanctions" means any of a continuum of nonresidential accountability measures, programs and sanctions in response to a technical violation of probation, as part of a

system of community-based juvenile probation sanctions and incentives, that may include, but are not limited to:

(A) Electronic monitoring;

(B) Drug and alcohol screening, testing or monitoring;

(C) Youth reporting centers;

(D) Reporting and supervision requirements;

(E) Community service; and

(F) Rehabilitative interventions such as family counseling, substance abuse treatment, restorative justice programs and behavioral or mental health treatment.

"Community services" means nonresidential prevention or intervention services or programs that are intended to reduce delinquency and future court involvement.

"Evidence-based practices" means policies, procedures, programs and practices demonstrated by research to reliably produce reductions in the likelihood of reoffending.

"Facility" means a place or residence, including personnel, structures, grounds and equipment used for the care of a child or children on a residential or other basis for any number of hours a day in any shelter or structure maintained for that purpose. Facility does not include any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Juvenile Services for the secure housing or holding of juveniles committed to its custody.

"Family child care facility" means any facility which is used to provide nonresidential child care services for compensation for seven to twelve children, including children who are living in the household, who are under six years of age. No more than four of the total number of children may be under twenty-four months of age. A facility may be in a provider's residence or a separate building.

"Family child care home" means a facility which is used to provide nonresidential child care services for compensation in a provider's residence. The provider may care for four to six children, at one time including children who are living in the household, who are under six years of age. No more than two of the total number of children may be under twenty-four months of age.

"Family resource network" means:

(A) A local community organization charged with service coordination, needs and resource assessment, planning, community mobilization and evaluation, and which has met the following criteria:

(i) Agreeing to a single governing entity;

(ii) Agreeing to engage in activities to improve service systems for children and families within the community;

(iii) Addressing a geographic area of a county or two or more contiguous counties;

(iv) Having nonproviders, which include family representatives and other members who are not employees of publicly funded agencies, as the majority of the members of the governing body, and having family representatives as the majority of the nonproviders;

(v) Having representatives of local service agencies, including, but not limited to, the public health department, the behavioral health center, the local health and human resources agency and the county school district, on the governing body; and

(vi) Accepting principles consistent with the cabinet's mission as part of its philosophy.

(B) A family resource network may not provide direct services, which means to provide programs or services directly to children and families.

"Family support", for the purposes of part six, article two of this chapter, means goods and services needed by families to care for their family members with developmental disabilities and to enjoy a quality of life comparable to other community members.

"Family support program" means a coordinated system of family support services administered by the Department of Health and Human Resources through contracts with behavioral health agencies throughout the state.

"Foster family home" means a private residence which is used for the care on a residential basis of no more than five children who are unrelated by blood, marriage or adoption to any adult member of the household.

"Health care and treatment" means:

(A) Developmental screening;

(B) Mental health screening;

(C) Mental health treatment;

(D) Ordinary and necessary medical and dental examination and treatment;

(E) Preventive care including ordinary immunizations, tuberculin testing and well-child care; and

(F) Nonemergency diagnosis and treatment. However, nonemergency diagnosis and treatment does not include an abortion.

"Home-based family preservation services" means services dispensed by the Division of Human Services or by another person, association or group who has contracted with that division to dispense services when those services are intended to stabilize and maintain the natural or surrogate family in order to prevent the placement of children in substitute care. There are two types of home-based family preservation services and they are as follows:

(A) Intensive, short-term intervention of four to six weeks; and

(B) Home-based, longer-term after care following intensive intervention.

"Informal family child care" means a home that is used to provide nonresidential child care services for compensation for three or fewer children, including children who are living in the household, who are under six years of age. Care is given in the provider's own home to at least one child who is not related to the caregiver.

"Nonsecure facility" means any public or private residential facility not characterized by construction fixtures designed to physically restrict the movements and activities of individuals held in lawful custody in that facility and which provides its residents access to the surrounding community with supervision.

"Nonviolent misdemeanor offense" means a misdemeanor offense that does not include any of the following:

(A) An act resulting in bodily injury or death;

(B) The use of a weapon in the commission of the offense;

(C) A domestic abuse offense involving a significant or likely risk of harm to a family member or household member;

(D) A criminal sexual conduct offense; or

(E) Any offense for driving under the influence of alcohol or drugs.

"Out-of-home placement" means a post-adjudication placement in a foster family home, group home, nonsecure facility, emergency shelter, hospital, psychiatric residential treatment facility, staff-secure facility, hardware secure facility, detention facility or other residential placement other than placement in the home of a parent, custodian or guardian.

"Out-of-school time" means a child care service which offers activities to children before and after school, on school holidays, when school is closed due to emergencies and on school calendar days set aside for teacher activities.

"Placement" means any temporary or permanent placement of a child who is in the custody of the state in any foster home, group home or other facility or residence.

"Pre-adjudicatory community supervision" means supervision provided to a youth prior to adjudication, a period of supervision up to one year for an alleged status or delinquency offense.

"Regional family support council" means the council established by the regional family support agency to carry out the responsibilities specified in part six, article two of this chapter.

"Relative family child care" means a home that provides nonresidential child care services only to children related to the caregiver. The caregiver is a grandparent, great grandparent, aunt, uncle, great-aunt, great-uncle or adult sibling of the child or children receiving care. Care is given in the provider's home.

"Residential services" means child care which includes the provision of nighttime shelter and the personal discipline and supervision of a child by guardians, custodians or other persons or entities on a continuing or temporary basis. It may include care and/or treatment for transitioning adults. Residential services does not include or apply to any juvenile detention facility or juvenile correctional facility operated by the Division of Juvenile Services, created pursuant to this chapter, for the secure housing or holding of juveniles committed to its custody.

"Risk and needs assessment" means a validated, standardized actuarial tool which identifies specific risk factors that increase the likelihood of reoffending and the factors that, when properly addressed, can reduce the likelihood of reoffending.

"Secure facility" means any public or private residential facility which includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility.

"Staff-secure facility" means any public or private residential facility characterized by staff restrictions of the movements and activities of individuals held in lawful custody in such facility and which limits its residents' access to the surrounding community, but is not characterized by construction fixtures designed to physically restrict the movements and activities of residents.

"Standardized screener" means a brief, validated nondiagnostic inventory or questionnaire designed to identify juveniles in need of further assessment for medical, substance abuse, emotional, psychological, behavioral, or educational issues, or other conditions.

"State family support council" means the council established by the Department of Health and Human Resources pursuant to part six, article two of this chapter to carry out the responsibilities specified in article two of this chapter.

"Time-limited reunification services" means individual, group and family counseling, inpatient, residential or outpatient substance abuse treatment services, mental health services, assistance to address domestic violence, services designed to provide temporary child care and therapeutic services for families, including crisis nurseries and transportation to or from those services, provided during fifteen of the most recent twenty-two months a child or juvenile has been in foster care, as determined by the earlier date of the first judicial finding that the child is subjected to abuse or neglect, or the date which is sixty days after the child or juvenile is removed from home.

"Technical violation" means an act that violates the terms or conditions of probation or a court order that does not constitute a new delinquent offense.

"Truancy diversion specialist" means a school-based probation officer or truancy social worker within a school or schools who, among other responsibilities, identifies truants and the causes of the truant behavior, and assists in developing a plan to reduce the truant behavior prior to court involvement.

§ 49-1-207 Definitions related to court actions.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, court actions, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Court" means the circuit court of the county with jurisdiction of the case or the judge in vacation unless otherwise specifically provided.

"Court appointed special advocate (CASA) program" means a community organization that screens, trains and supervises CASA volunteers to advocate for the best interests of children who are involved in abuse and neglect proceedings section one hundred two, article three of this chapter.

"Extrajudicial Statement" means any utterance, written or oral, which was made outside of court.

"Multidisciplinary team" means a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose and treat specific cases of child abuse and neglect. Multidisciplinary teams may include, but are not limited to, medical, educational, child care and law-enforcement personnel, social workers, psychologists and psychiatrists. Their goal is to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children.

"Community team" means a multidisciplinary group which addresses the general problem of child abuse and neglect in a given community and may consist of several multidisciplinary teams with different functions.

"Res gestae" means a spontaneous declaration made by a person immediately after an event and before the person has had an opportunity to conjure a falsehood.

"Valid court order" means an order issued by a court of competent jurisdiction relating to a child brought before the court and who is the subject of that order. Prior to the entry of the order the child shall have received the full due process rights guaranteed to that child or juvenile by the Constitutions of the United States and the State of West Virginia.

"Violation of a traffic law of West Virginia" means a violation of chapter seventeen-a, seventeen-b, seventeen-c or seventeen-d of this code except a violation of section one or two, article four, chapter seventeen-c of this code relating to hit and run or section one, two or three, article five of that chapter, relating, respectively, to negligent homicide, driving under the influence of alcohol, controlled substances or drugs and reckless driving.

§ 49-1-208 Definitions related, but not limited, to state and local agencies.

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, state and local agencies, except in those instances where a different meaning is

provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Department" or "state department" means the West Virginia Department of Health and Human Resources.

"Division of Juvenile Services" means the division within the West Virginia Department of Military Affairs and Public Safety.

"Law-enforcement officer" means a law-enforcement officer of the State Police, a municipality or county sheriff's department.

"Secretary" means the Secretary of the West Virginia Department of Health and Human Resources.

§ 49-1-209 Definitions related, but not limited, to missing children.

As used in article six of this chapter:

"Child" means an individual under the age of eighteen years who is not emancipated;

"Clearinghouse" means the West Virginia missing children information clearinghouse;

"Custodian" means a parent, guardian, custodian or other person who exercises legal physical control, care or custody of a child;

"Missing child" means a child whose whereabouts are unknown to the child's custodian and the circumstances of whose absence indicate that:

(A) The child did not leave the care and control of the custodian voluntarily and the taking of the child was not authorized by law; or

(B) The child voluntarily left the care and control of his or her custodian without the custodian's consent and without intent to return;

"Missing child report" means information that is:

(A) Given to a law-enforcement agency on a form used for sending information to the national crime information center; and

(B) About a child whose whereabouts are unknown to the reporter and who is alleged in the form submitted by the reporter to be missing;

"Possible match" means the similarities between an unidentified body of a child and a missing child that would lead one to believe they are the same child;

"Reporter" means the person who reports a missing child; and

"State agency" means an agency of the state, political subdivision of the state or public post-secondary educational institution.

ARTICLE 2. STATE RESPONSIBILITIES FOR CHILDREN.

PART I. GENERAL AUTHORITY AND DUTIES OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES

§ 49-2-101 Authorization and responsibility.

(a) The Department of Health and Human Resources is authorized to provide care, support and protective services for children who are handicapped by dependency, neglect, single parent status, mental or physical disability, or who for other reasons are in need of public service. The department is also authorized to accept children for care from their parent or parents, guardian, custodian or relatives and to accept the custody of children committed to its care by courts. The Department of Health and Human Resources or any county office of the department is also authorized and to accept temporary custody of children for care from any law-enforcement officer in an emergency situation.

(b) The Department of Health and Human Resources is responsible for the care of the infant child of an unmarried mother who has been committed to the custody of the department while the infant is placed in the same licensed child welfare agency as his or her mother. The department may provide care for those children in family homes meeting required standards, at board or otherwise, through a licensed child welfare agency, or in a state institution providing care for dependent or neglected children. If practical, when placing any child in the care of a family or a child welfare agency the department shall select a family holding the same religious belief as the parents or relatives of the child or a child welfare agency conducted under religious auspices of the same belief as the parents or relatives.

§ 49-2-102 Minimum staffing complement for child protective services.

For the sole purpose of increasing the number of full time front line child protective service case workers and investigators, the Secretary of the Department of Health and Human Resources shall have the authority to transfer funds between all general revenue accounts under the secretary's authority and/or between personnel and nonpersonnel lines within each account under the secretary's authority. Nothing in this section shall be construed to require the department to hire additional child protective service workers at any time if the department determines that funds are not available for those workers. Additionally, the secretary shall prepare a plan

to allow the department to progressively reduce caseload standards in West Virginia for child protective services workers, which if adopted by the Legislature during the regular session of 1995, shall require implementation no later than July 1, 1996, with the plan to be submitted to the joint committee on government and finance by the September 30, 1994, and a final report to be submitted to the Legislature by January 1, 1995.

§ 49-2-103 Proceedings by the state department.

The state department shall have the authority to institute, in the name of the state, proceedings incident to the performance of its duties under the provisions of this chapter.

§ 49-2-104 Education of the public.

The secretary shall provide ongoing education of the public in regard to the requirements of this chapter through the use of mass media and other methods as are deemed appropriate and within fiscal limitations.

§ 49-2-105 Administrative and judicial review.

Any person, corporation, governmental official or child welfare agency, aggrieved by a decision of the secretary made pursuant to this chapter may contest the decision upon making a request for a hearing by the secretary within thirty days of receipt of notice of the decision. Administrative and judicial review shall be made in accordance with article five, chapter twenty-nine-a of this code. Any decision issued by the secretary may be made effective from the date of issuance. Immediate relief therefrom may be obtained upon a showing of good cause made by verified petition to the Circuit Court of Kanawha County or the circuit court of any county where the affected facility or child welfare agency may be located. The dependency of administrative or judicial review shall not prevent the secretary from obtaining injunctive relief pursuant to section one hundred twenty, article two of this chapter.

§ 49-2-106 Department responsibility for foster care homes.

It is the responsibility of the Department of Health and Human Resources to provide care for neglected children who are committed to its care for custody or guardianship. The department may provide this care for children in family homes meeting required standards of certification established and enforced by the Department of Health and Human Resources.

§ 49-2-107 Foster-home care; minimum standards; certificate of operation; inspection.

(a) The department shall establish minimum standards for foster-home care to which all certified foster homes must conform by legislative rule. Any home that conforms to the standards of care set by the department shall receive a certificate of operation.

(b) The certificate of operation shall be in force for one year from the date of issuance and may be renewed unless revoked because of willful violation of this chapter.

(c) The certificate shall show the name of the person or persons authorized to conduct the home, its exact location and the number of children that may be received and cared for at one time and other information as set forth in legislative rule. No certified foster home shall provide care for more children than are specified in the certificate.

(d) No unsupervised foster home shall be certified until an investigation of the home and its standards of care has been made by the department or by a licensed child welfare agency serving as a representative of the department.

§ 49-2-108 Visits and inspections; records.

The department or its authorized agent shall visit and inspect every certified foster home as often as is necessary to assure proper care is given to the children. Every certified foster home shall maintain a record of the children received. This record shall include information as prescribed by the department in legislative rule and shall be in a form and manner as prescribed by the department in legislative rule.

§ 49-2-109 Placing children from other states in private homes of state.

An institution or organization incorporated under the laws of another state shall not place a child in a private home in the state without the approval of the department, and the agency so placing the child shall arrange for supervision of the child through its own staff or through a licensed child welfare agency in this state, and shall maintain responsibility for the child until he or she is adopted or discharged from care with the approval of the department.

§ 49-2-110 Development of standards of child care.

The department shall develop standards for the care of children. It shall cooperate with, advise and assist all child welfare agencies, including state

institutions, which care for neglected, delinquent, or mentally or physically handicapped children, and shall supervise those agencies. The department, in cooperation with child welfare agencies, shall formulate and make available standards of child care and services for children, to which all child welfare agencies must conform.

§ 49-2-111 Supervision of child welfare agencies by the department; records and reports.

(a) In order to improve standards of child care, the department shall cooperate with the governing boards of child welfare agencies, assist the staffs of those agencies through advice on progressive methods and procedures of child care and improvement of the service rendered, and assist in the development of community plans of child care. The department, or its duly authorized agent, may visit any child welfare agency to advise the agency on matters affecting the health of children and to inspect the sanitation of the buildings used for their care.

(b) Each child welfare agency shall keep records of each child under its control and care as the department may prescribe, and shall report to the department, whenever requested, facts as may be required with reference to the children, upon forms furnished by the department. All records regarding children and all facts learned about children and their parents or relatives shall be regarded as confidential and shall be properly safeguarded by the agency and the department.

§ 49-2-112 Family homes; approval of incorporation by Secretary of State; approval of articles of incorporation.

(a) Before issuing a charter for the incorporation of any organization having as its purpose the receipt of children for care or for placement in family homes, the Secretary of State shall provide a copy of the petition, together with any other information in his or her possession pertaining to the proposed corporation, to the secretary, and no charter for a corporation may be issued unless the secretary shall first certify to the Secretary of State that it has investigated the need for the services proposed and the merits of the proposed charitable corporation and recommends the issuance thereof; applications for amendments of any existing charter shall be similarly referred and shall be granted only upon similar approval.

(b) A child welfare agency may not be incorporated in this state unless the articles of incorporation have first been examined and approved by the secretary, or his or her designee. Proposed amendments to articles of incorporation shall be subject to the examination and approval of the secretary, or his or her designee.

§ 49-2-113 Residential child care centers; licensure, certification, approval and registration; requirements.

(a) Any person, corporation or child welfare agency, other than a state agency, which operates a residential child care center shall obtain a license from the department.

(b) Any residential child care facility, day care center or any child-placing agency operated by the state shall obtain approval of its operations from the secretary.

(c) Any family day care facility which operates in this state, including family day care facilities approved by the department for receipt of funding, shall obtain a statement of certification from the department.

(d) Every family day care home which operates in this state, including family day care homes approved by the department for receipt of funding, shall obtain a certificate of registration from the department. The facilities and placing agencies shall maintain the same standards of care applicable to licensed facilities, centers or placing agencies of the same category.

(e) This section does not apply to:

(1) A kindergarten, preschool or school education program which is operated by a public school or which is accredited by the state Department of Education, or any other kindergarten, preschool or school programs which operate with sessions not exceeding four hours per day for any child;

(2) An individual or facility which offers occasional care of children for brief periods while parents are shopping, engaging in recreational activities, attending religious services or engaging in other business or personal affairs;

(3) Summer recreation camps operated for children attending sessions for periods not exceeding thirty days;

(4) Hospitals or other medical facilities which are primarily used for temporary residential care of children for treatment, convalescence or testing;

(5) Persons providing family day care solely for children related to them;

(6) Any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Juvenile Services for the secure housing or holding of juveniles committed to its custody;

(7) Any out-of-school time program that has been awarded a grant by the West Virginia Department of Education to provide out-of-school time

programs to kindergarten through twelfth grade students when the program is monitored by the West Virginia Department of Education; or

(8) Any out-of-school time program serving children six years of age or older and meets all of the following requirements, or is an out-of-school time program that is affiliated and in good standing with a national Congressionally chartered organization and meets all of the following requirements:

(A) The program is located in a facility that meets all fire and health codes;

(B) The program performs background checks on all volunteers and staff;

(C) The program's primary source of funding is not from fees for service; and

(D) The program has a formalized monitoring system in place.

(f) The secretary is authorized to issue an emergency rule relating to conducting a survey of existing facilities in this state in which children reside on a temporary basis in order to ascertain whether they should be subject to licensing under this article or applicable licensing provisions relating to behavioral health treatment providers.

(g) Any informal family child care home or relative family child care home may voluntarily register and obtain a certificate of registration from the department.

(h) All facilities or programs that provide out-of-school time care shall register with the department upon commencement of operations and on an annual basis thereafter. The department shall obtain information, such as the name of the facility or program, the description of the services provided and any other information relevant to the determination by the department as to whether the facility or program meets the criteria for exemption under this section.

(i) Any child care service that is licensed or receives a certificate of registration shall have a written plan for evacuation in the event of fire, natural disaster or other threatening situation that may pose a health or safety hazard to the children in the child care service.

(1) The plan shall include, but not be limited to:

(A) A designated relocation site and evacuation;

(B) Procedures for notifying parents of the relocation and ensuring family reunification;

(C) Procedures to address the needs of individual children including children with special needs;

(D) Instructions relating to the training of staff or the reassignment of staff duties, as appropriate;

(E) Coordination with local emergency management officials; and

(F) A program to ensure that appropriate staff are familiar with the components of the plan.

(2) A child care service shall update the evacuation plan by December 31, of each year. If a child care service fails to update the plan, no action shall be taken against the child care service's license or registration until notice is provided and the child care service is given thirty days after the receipt of notice to provide an updated plan.

(3) A child care service shall retain an updated copy of the plan for evacuation and shall provide notice of the plan and notification that a copy of the plan will be provided upon request to any parent, custodian or guardian of each child at the time of the child's enrollment in the child care service and when the plan is updated.

(4) All child care centers and family child care facilities shall provide the plan and each updated copy of the plan to the Director of the Office of Emergency Services in the county where the center or facility is located.

§ 49-2-114 Application for license or approval.

(a) Any person or corporation or any governmental agency intending to act as a child welfare agency shall apply for a license, approval or registration certificate to operate child care facilities regulated by this chapter. Applications for licensure, approval or registration shall be made separately for each child care facility to be licensed, approved, certified or registered.

(b) The secretary shall prescribe by legislative rule forms and reasonable application procedures including, but not limited to, fingerprinting of applicants and other persons responsible for the care of children for submission to the State Police and, if necessary, to the Federal Bureau of Investigation for criminal history record checks.

(c) Before issuing a license, or approval, the secretary shall investigate the facility, program and persons responsible for the care of children. The investigation shall include, but not be limited to, review of resource need, reputation, character and purposes of applicants, a check of personnel criminal records, if any, and personnel medical records, the financial

records of applicants, review of the facilities emergency evacuation plan and consideration of the proposed plan for child care from intake to discharge.

(d) Before a home registration is granted, the secretary shall make inquiry as to the facility, program and persons responsible for the care of children. The inquiry shall include self-certification by the prospective home of compliance with standards including, but not limited to:

(1) Physical and mental health of persons present in the home while children are in care;

(2) Criminal and child abuse or neglect history of persons present in the home while children are in care;

(3) Discipline;

(4) Fire and environmental safety;

(5) Equipment and program for the children in care; and

(6) Health, sanitation and nutrition.

(e) Further inquiry and investigation may be made as the secretary may direct and sees as necessary.

(f) The secretary shall make a decision on each application within sixty days of its receipt and shall provide to unsuccessful applicants written reasons for the decision.

§ 49-2-115 Conditions of licensure, approval and registration.

(a) A license or approval is effective for a period up to two years from the date of issuance, unless revoked or modified to provisional status based on evidence of a failure to comply with this chapter or any legislative rules promulgated by the secretary. The license or approval shall be reinstated upon application to the secretary and a determination of compliance.

(b) An initial six-month license or approval shall be issued to an applicant establishing a new service found to be in compliance on initial review with regard to policy, procedure, organization, risk management, human resources, service environment and record keeping regulations.

(c) A provisional license or approval may be issued when a licensee is not in compliance with the legislative rules promulgated by the secretary but does not pose a significant risk to the rights, well-being, health and safety of a consumer. It shall expire not more than six months from date of

issuance, and not be consecutively reissued unless the provisional recommendation is that of the State Fire Marshal.

(d) A renewal license or approval may be issued of any duration up to two years at the discretion of the secretary. In the event a renewal license is not issued, the facility must make discharge plans for residents and cease operation within thirty days of the expiration of the license.

(e) A certificate of registration is effective for a period up to two years from the date of issuance, unless revoked based on evidence of a failure to comply with this article or any rules promulgated pursuant to this article. The certificate of registration shall be reinstated upon application to the secretary, including a statement of assurance of continued compliance with the legislative rules promulgated pursuant to this article.

(f) The license, approval or registration issued under this article is not transferable and applies only to the facility and its location stated in the application. The license, registration or approval shall be publicly displayed. The foster and adoptive family homes, informal family child care homes and relative family child care homes shall be required to display registration certificates of registration or approval upon request rather than by posting.

(g) Provisional certificates of registration may be issued to family child care homes.

(h) The secretary, as a condition of issuing a license, registration or approval, may:

(1) Limit the age, sex or type of problems of children allowed admission to a particular facility;

(2) Prohibit intake of any children; or

(3) Reduce the number of children which the agency, facility or home operated by the agency is licensed, approved, certified or registered to receive.

§ 49-2-116 Investigative authority; evaluation; complaint.

(a) The secretary shall enforce this article.

(b) An on-site evaluation of every facility regulated pursuant to this chapter, except registered family child care homes, informal family child care and relative family child care homes shall be conducted no less than once per year by announced or unannounced visits.

(c) A random sample of not less than five percent of the total number of registered family child care homes, informal family child care homes and

relative family child care homes shall be monitored annually through on-site evaluations.

(d) The secretary shall have access to the premises, personnel, children in care and records of each facility subject to inspection, including at a minimum, case records, corporate and financial records and board minutes. Applicants for licenses, approvals, and certificates of registration shall consent to reasonable on-site administrative inspections, made with or without prior notice, as a condition of licensing, approval, or registration.

(e) When a complaint is received by the secretary alleging violations of licensure, approval, or registration requirements, the secretary shall investigate the allegations. The secretary may notify the facility's director before or after a complaint is investigated and shall cause a written report of the results of the investigation to be made.

(f) The secretary may enter any unlicensed, unregistered or unapproved child care facility or personal residence for which there is probable cause to believe that the facility or residence is operating in violation of this article. Those entries shall be made with a law-enforcement officer present. The secretary may enter upon the premises of any unregistered residence only after two attempts by the secretary to bring this facility into compliance.

§ 49-2-117 Revocation; provisional licensure and approval.

(a) The secretary may revoke or make provisional the licensure registration of any home facility or child welfare agency regulated pursuant to this chapter if a facility materially violates this article, or any terms or conditions of the license, registration or approval issued, or fails to maintain established requirements of child care. This section does not apply to family child care homes.

(b) The secretary may revoke the certificate of registration of any family child care home if a facility materially violates this article, or any terms or conditions of the registration certificate issued, or fails to maintain established requirements of child care.

§ 49-2-118 Closing of facilities by the secretary; placement of children.

When the secretary finds that the operation of a facility constitutes an immediate danger of serious harm to children served by the facility, the secretary shall issue an order of closure terminating operation of the facility. When necessary, the secretary shall place or direct the placement of the children in a residential facility which has been closed into appropriate facilities. A facility closed by the secretary may not operate pending administrative or judicial review without court order.

§ 49-2-119 Supervision; consultation; State Fire Marshall to cooperate.

(a) The secretary shall provide supervision to ascertain compliance with the rules promulgated pursuant to this chapter through regular monitoring, visits to facilities, documentation, evaluation and reporting. The secretary is responsible for training and education, within fiscal limitations, specifically for the improvement of care in family child care homes and facilities. The secretary shall consult with applicants, the personnel of child welfare agencies, and children under care to assure the highest quality child care possible.

(b) The State Fire Marshal shall cooperate with the secretary in the administration of this article by providing reports and assistance as may be requested by the secretary.

§ 49-2-120 Penalties; injunctions; venue.

(a) Any individual or corporation which operates a child welfare agency, residential facility or child care center without a license when a license is required is guilty of a misdemeanor and, upon conviction, shall be confined in jail not exceeding one year, or fined not more than $500, or both fined and confined.

(b) Any family child care facility which operates without a license when a license is required is guilty of a misdemeanor and, upon conviction, shall be fined not more than $500.

(c) Where a violation of this article or a legislative rule promulgated by the secretary may result in serious harm to children under care, the secretary may seek injunctive relief against any person, corporation, child welfare agency, child placing agency, child care center, family child care facility, family child care home or governmental official through proceedings instituted by the Attorney General, or the appropriate county prosecuting attorney, in the Circuit Court of Kanawha County or in the circuit court of any county where the children are residing or may be found.

§ 49-2-121 Rule-making.

(a) The secretary shall promulgate legislative rules in accordance with chapter twenty-nine-a of this code regarding the licensure, approval, certification and registration of child care facilities and the implementation of this article. The rules shall provide at a minimum the requirement that every residential child care facility shall be subject to an annual time study regarding the quantification of staff supervision time at each facility. Every residential child care facility shall participate in the time study at the request of the department.

(b) The secretary shall review the rules promulgated pursuant to this article at least once every five years, making revisions when necessary or convenient.

(c) The rules shall incorporate by reference the requirements of the Integrated Pest Management Program established by legislative rule by the Department of Agriculture under section four, article sixteen-a, chapter nineteen of this code.

§ 49-2-122 Waivers and variances to rules.

Waivers or variances of rules may be granted by the secretary if the health, safety or well-being of a child would not be endangered thereby. The secretary shall promulgate by legislative rule criteria and procedures for the granting of waivers or variances so that uniform practices may be maintained throughout the state.

§ 49-2-123 Annual reports; directory; licensing reports and recommendations.

(a) The secretary shall submit on or before January 1, of each year a report to the Governor and the Legislative Oversight Commission on Health and Human Resources Accountability, concerning the regulation of child welfare agencies, child placing agencies, child care centers, family child care facilities, family child care homes, informal family child care homes, relative family child care homes and child care facilities during the year. The report shall include at a minimum, data on the number of children and staff at each facility (except family child care, informal family child care homes and relative family child care), applications received, types of licenses, approvals and registrations granted, denied, made provisional or revoked and any injunctions obtained or facility closures ordered.

(b) The secretary also shall compile annually a directory of licensed, certified and approved child care providers including a brief description of their program and facilities, the program's capacity and a general profile of children served. A listing of family child care homes shall also be compiled annually.

(c) Licensing reports and recommendations for licensure which are a part of the yearly review of each licensed facility shall be sent to the facility director. Copies shall be available to the public upon written request to the secretary.

§ 49-2-124 Certificate of need not required; conditions; review.

(a) A certificate of need, as provided in article two-d, chapter sixteen of this code, is not required by an entity proposing behavioral health care

facilities or behavioral health care services for children who are placed out of their home, or who are at imminent risk of being placed out of their home, if a summary review is performed in accordance with this section.

(b) A summary review of proposed health care facilities or health care services for children who are placed out of their home, or who are at imminent risk of being placed out of their home, is initiated when the proposal is recommended to the health care cost review authority by the Secretary of the Department of Health and Human Resources and the secretary has made the following findings:

(1) That the proposed facility or service is consistent with the state health plan;

(2) That the proposed facility or service is consistent with the department's programmatic and fiscal plan for behavioral health services for children with mental health and addiction disorders;

(3) That the proposed facility or service contributes to providing services that are child and family driven, with priority given to keeping children in their own homes;

(4) That the proposed facility or service will contribute to reducing the number of child placements in out-of-state facilities by making placements available in in-state facilities;

(5) That the proposed facility or service contributes to reducing the number of child placements in in-state or out-of-state facilities by returning children to their families, placing them in foster care programs or making available school-based and out-patient services; and

(6) If applicable, that the proposed services will be community-based, locally accessible and provided in an appropriate setting consistent with the unique needs and potential of each child and his or her family.

(c) The secretary's findings required by subsection (b) of this section shall be filed with the secretary's recommendation and appropriate documentation. If the secretary's findings are supported by the accompanying documentation, the proposal shall not require a certificate of need.

(d) Any entity that does not qualify for summary review shall be subject to certificate of need review.

(e) Notwithstanding any other provision of law to the contrary, the provision of regular or therapeutic foster care services does not constitute a behavioral health care facility or a behavioral health care service that

would subject it to the summary review procedure established in this section or to the certificate of need requirements provided in article two-d, chapter sixteen of this code.

§ 49-2-125 Commission to Study Residential Placement of Children; findings; requirements; reports; recommendations; termination.

(a) The Legislature finds that the state's current system of serving children and families in need of or at risk of needing social, emotional and behavioral health services is fragmented. The existing categorical structure of government programs and their funding streams discourages collaboration, resulting in duplication of efforts and a waste of limited resources. Children are usually involved in multiple child-serving systems, including child welfare, juvenile justice and special education. More than ten percent of children presently in care are presently in out-of-state placements. Earlier efforts at reform have focused on quick fixes for individual components of the system at the expense of the whole. It is the purpose of this section to establish a mechanism to achieve systemic reform by which all of the state's child-serving agencies involved in the residential placement of at-risk youth jointly and continually study and improve upon this system and make recommendations to their respective agencies and to the Legislature regarding funding and statutory, regulatory and policy changes. It is further the Legislature's intent to build upon these recommendations to establish an integrated system of care for at-risk youth and families that makes prudent and cost-effective use of limited state resources by drawing upon the experience of successful models and best practices in this and other jurisdictions, which focuses on delivering services in the least restrictive setting appropriate to the needs of the child, and which produces better outcomes for children, families and the state.

(b) There is created within the Department of Health and Human Resources the Commission to Study the Residential Placement of Children. The commission consists of the Secretary of the Department of Health and Human Resources, the Commissioner of the Bureau for Children and Families, the Commissioner for the Bureau for Behavioral Health and Health Facilities, the Commissioner for the Bureau for Medical Services, the State Superintendent of Schools, a representative of local educational agencies, the Director of the Office of Institutional Educational Programs, the Director of the Office of Special Education Programs and Assurance, the Director of the Division of Juvenile Services and the Executive Director of the Prosecuting Attorney's Institute. At the discretion of the West Virginia Supreme Court of Appeals, circuit and family court judges and other court personnel, including the Administrator of the Supreme Court of Appeals and the Director of the Juvenile Probation Services Division, may serve on the commission. These statutory members may further designate additional persons in their respective offices who may attend the meetings of the commission if they are the administrative head of the office or division

whose functions necessitate their inclusion in this process. In its deliberations, the commission shall also consult and solicit input from families and service providers.

(c) The Secretary of the Department of Health and Human Resources shall serve as chair of the commission, which shall meet on a quarterly basis at the call of the chair.

(d) At a minimum, the commission shall study:

(1) The current practices of placing children out-of-home and into in-residential placements, with special emphasis on out-of-state placements;

(2) The adequacy, capacity, availability and utilization of existing in-state facilities to serve the needs of children requiring residential placements;

(3) Strategies and methods to reduce the number of children who must be placed in out-of-state facilities and to return children from existing out-of-state placements, initially targeting older youth who have been adjudicated delinquent;

(4) Staffing, facilitation and oversight of multidisciplinary treatment planning teams;

(5) The availability of and investment in community-based, less restrictive and less costly alternatives to residential placements;

(6) Ways in which up-to-date information about in-state placement availability may be made readily accessible to state agency and court personnel, including an interactive secure web site;

(7) Strategies and methods to promote and sustain cooperation and collaboration between the courts, state and local agencies, families and service providers, including the use of inter-agency memoranda of understanding, pooled funding arrangements and sharing of information and staff resources;

(8) The advisability of including "no-refusal" clauses in contracts with in-state providers for placement of children whose treatment needs match the level of licensure held by the provider;

(9) Identification of in-state service gaps and the feasibility of developing services to fill those gaps, including funding;

(10) Identification of fiscal, statutory and regulatory barriers to developing needed services in-state in a timely and responsive way;

(11) Ways to promote and protect the rights and participation of parents, foster parents and children involved in out-of-home care;

(12) Ways to certify out-of-state providers to ensure that children who must be placed out-of-state receive high quality services consistent with this state's standards of licensure and rules of operation; and

(13) Any other ancillary issue relative to foster care placement.

(e) The commission shall report annually to the Legislative Oversight Commission on Health and Human Resources Accountability its conclusions and recommendations, including an implementation plan whereby:

(1) Out-of-state placements shall be reduced by at least ten percent per year and by at least fifty percent within three years;

(2) Child-serving agencies shall develop joint operating and funding proposals to serve the needs of children and families that cross their jurisdictional boundaries in a more seamless way;

(3) Steps shall be taken to obtain all necessary federal plan waivers or amendments in order for agencies to work collaboratively while maximizing the availability of federal funds;

(4) Agencies shall enter into memoranda of understanding to assume joint responsibilities;

(5) System of care components and cooperative relationships shall be incrementally established at the local, state and regional levels, with links to existing resources, such as family resource networks and regional summits, wherever possible; and

(6) Recommendations for changes in fiscal, statutory and regulatory provisions are included for legislative action.

(f) The commission shall terminate on December 31, 2015, unless continued by act of the Legislature.

§ 49-2-126. Legislative findings and declaration of intent for goals for foster children.

(a) The Legislature finds and declares that the design and delivery of child welfare services should be directed by the principle that the health and safety of children should be of paramount concern and, therefore, establishes the goals for children in foster care. A child in foster care should have:

(1) Protection by a family of his or her own, and be provided readily available services and support through care of an adoptive family or by plan, a continuing foster family;

(2) Nurturing by foster parents who have been selected to meet his or her individual needs, and who are provided services and support, including specialized education, so that the child can grow to reach his or her potential;

(3) A safe foster home free of violence, abuse, neglect and danger;

(4) The ability to communicate with the assigned social worker or case worker overseeing the child's case and have calls made to the social worker or case worker returned within a reasonable period of time;

(5) Permission to remain enrolled in the school the child attended before being placed in foster care, if at all possible;

(6) Participation in school extracurricular activities, community events, and religious practices;

(7) Communication with the biological parents. Communication is necessary if the child placed in foster care receives any immunizations and if any additional immunizations are needed, if the child will be transitioning back into a home with his or her biological parents;

(8) A bank or savings account established in accordance with state laws and federal regulations;

(9) Identification and other permanent documents, including a birth certificate, social security card and health records by the age of sixteen, to the extent allowed by federal and state law;

(10) The use of appropriate communication measures to maintain contact with siblings if the child placed in foster care is separated from his or her siblings; and

(11) Meaningful participation in a transition plan for those phasing out of foster care.

(b) A person shall not have a cause of action against the state or any of its subdivisions, agencies, contractors, subcontractors, or agents, based upon the adoption of or failure to provide adequate funding for the achievement of these goals by the Legislature. Nothing in this section requires the expenditure of funds to meet the goals established in this section, except funds specifically appropriated for that purpose.

(c) The West Virginia Department of Health and Human Resources shall propose rules for promulgation in accordance with the provisions of article three, chapter twenty-nine-a of this code to ensure that a child has an effective means of being heard if he or she believes the goals of this section are not being met.

(d) When a child who was previously placed into foster care, but left the custody or guardianship of the department, is again placed into foster care, the department shall notify the foster parents who most recently cared for the child of the child's availability for foster care placement to determine if the foster parents are desirous of seeking a foster care arrangement for the child. The arrangement may only be made if the foster parents are otherwise qualified or can become qualified to enter into the foster care arrangement with the department and if the arrangement is in the best interests of the child: *Provided,* That the department may petition the court to waive notification to the foster parents. This waiver may be granted, ex parte, upon a showing of compelling circumstances.

PART II. HOME-BASED FAMILY PRESERVATION ACT

§ 49-2-201 Findings and purpose.

The Legislature finds that there exists a need in this state to assist dysfunctional families by providing nurture and care to those families' children as an alternative to removing children from the families.

The Legislature also finds that the family is the primary social institution responsible for meeting the needs of children and that the state has an obligation to assist families in this regard.

The Legislature further finds that children have significant emotional and social ties to the natural or surrogate family beyond basic care and nurture for which the family is responsible.

The purpose of this article is to establish a pilot program to evaluate the utility of providing intensive intervention with the families of children that are at risk of being removed from the home. For these limited purposes, the department is authorized to use available appropriate funds for that intervention service, but only to the extent that moneys would normally be available for the removal and placement of the particular child at risk.

§ 49-2-202 When family preservation services required.

Home-based family preservation services are required in all cases where the removal of a child or children is seriously being considered, whether from a natural home or a surrogate home, wherein a child or children have lived for a substantial period of time. However, those services are not

required when the child appears in imminent danger of serious bodily or serious emotional injury.

§ 49-2-203 Caseload limits for home-based preservation services.

For purposes of this article, no contractor employee of the department may exceed three families during any period of time when that contractor employee is engaged in providing intensive, short term home-based family preservation intervention. In addition, no caseload may exceed six families during any period of time when home-based aftercare is provided pursuant to this article. When providing either type of home-based family preservation services to any family, the department or contractor shall provide trained personnel who shall be available during nonworking hours to assist families on an emergency basis.

§ 49-2-204 Situational criteria requiring service.

The services required by this article shall be made available to any dysfunctional family in which there exists an imminent risk of placement of at least one child outside the home as the result of abuse, neglect, dependency or delinquency or any emotional and behavioral problems. Payment for contractual services shall be on a cost-per-family basis. Any renewal of a contract shall be based on performance.

§ 49-2-205 Service delivery through service contracts; accountability.

The services required by this article which are not practically deliverable directly from the department may be subcontracted to professionally qualified private individuals, associations, agencies, corporations, partnerships or groups. The service provider shall be required to submit monthly activity reports as to any services rendered to the department of human services. The activity reports shall include project evaluation in relation to individual families being served as well as statistical data concerning families that are referred for services which are not served due to unavailability of resources. The costs of program evaluation are an allowable cost consideration in any service contract negotiated in accordance with this article. The department shall conduct a thorough investigation of the contractors utilized by the department pursuant to this article.

§ 49-2-206 Special services to be provided.

The costs of providing special services to families receiving regular services in accordance with this article are allowable to the extent those goods and services are justified pursuant to carrying out the purposes of this article. Those special services may include, but are not limited to,

homemaker assistance, food, clothing, educational materials, respite care and recreational or social activities.

§ 49-2-207 Development of home-based family preservation services.

The department is authorized to use appropriate state, federal, and/or private funds within its budget for the provision of family preservation and reunification services. Appropriated state funding made available through capture of additional federal funds shall be utilized to provide family preservation and reunification services as described in this article. Costs of providing home-based services described in this article shall not exceed the costs of out-of-home care which would be incurred otherwise.

PART III. QUALITY IMPROVEMENT AND RATING SYSTEM FOR CHILD CARE.

§ 49-2-301 Findings and intent; advisory council.

(a) The Legislature finds that:

(1) High quality early childhood development substantially improves the intellectual and social potential of children and reduces societal costs;

(2) A child care program quality rating and improvement system provides incentives and resources to improve the quality child care programs; and

(3) A child care program quality rating and improvement system provides information about the quality of child care programs to parents so they may make more informed decisions about the placement of their children.

(b) It is the intent of the Legislature to require the Secretary of the Department of Health and Human Resources promulgate a legislative rule and establish a plan for the phased implementation of a child care program quality rating and improvement system not inconsistent with the provisions of this article.

(c) The Secretary of the Department of Health and Human Resources shall create a Quality Rating and Improvement System Advisory Council to provide advice on the development of the rule and plan for the phased implementation of a child care program quality rating and improvement system and the ongoing program review and policies for quality improvement. The secretary shall facilitate meetings of the advisory council. The advisory council shall include representatives from the provider community, advocacy groups, the Legislature, providers of professional development services for the early childhood community, regulatory

agencies and others who may be impacted by the creation of a quality rating and improvement system.

(d) Nothing in this article requires an appropriation, or any specific level of appropriation, by the Legislature.

§ 49-2-302 Creation of statewide quality rating system; rule-making; minimum requirements.

(a) The Secretary of the Department of Health and Human Resources shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to implement a quality rating and improvement system. The quality rating and improvement system shall be applicable to licensed child care centers and facilities and registered family child care homes. If other types of child care settings, such as school-age child care programs become licensed after the implementation of a statewide quality rating and improvement system, the secretary may develop quality criteria and incentives that will allow the other types of child care settings to participate in the quality rating and improvement system. The rules shall include, but are not limited to, the following:

(1) A four-star rating system for registered family child care homes and a four-star rating system for all licensed programs, including family child care facilities and child care centers, to easily communicate to consumers four progressively higher levels of quality child care. One star indicating meeting the minimum acceptable standard and four stars indicating meeting or exceeding the highest standard. The system shall reflect the cumulative attainment of the standards at each level and all lesser levels. However, any program accredited by the National Association for the Education of Young Children or the National Association for Family Child Care, as applicable, shall automatically be awarded four-star status;

(2) Program standards for registered family child care homes and program standards for all licensed programs, including family child care facilities and child care centers, that are each divided into four levels of attributes that progressively improve the quality of child care beginning with basic state registration and licensing requirements at level one, through achievement of a national accreditation by the appropriate organization at level four. Participation beyond the first level is voluntary. The program standards shall be categorized using the West Virginia State Training and Registry System Core Knowledge Areas or its equivalent;

(3) Accountability measures that provide for a fair, valid, accurate and reliable assessment of compliance with quality standards, including, but not limited to:

(A) Evaluations conducted by trained evaluators with appropriate early childhood education and training on the selected assessment tool and with a demonstrated inter-rater reliability of eighty-five percent or higher. The evaluations shall include an on-site inspection conducted at least annually to determine whether programs are rated correctly and continue to meet the appropriate standards. The evaluations and observations shall be conducted on at least a statistically valid percentage of center classrooms, with a minimum of one class per age group;

(B) The use of valid and reliable observation and assessment tools, such as environmental rating scales for early childhood, infant and toddler, school-age care and family child care as appropriate for the particular setting and age group;

(C) An annual self-assessment using the proper observation and assessment tool for programs rated at two stars; and

(D) Model program improvement planning shall be designed to help programs improve their evaluation results and level of program quality.

(b) The rules required pursuant to this section shall include policies relating to the review, reduction, suspension or disqualification of child care programs from the quality rating and improvement system.

(c) The rules shall provide for implementation of the statewide quality rating system effective July 1, 2011, subject to section three hundred four of this article.

§ 49-2-303 Statewide quality improvement system; financial plan; staffing requirements; public awareness campaign; management information system; financial assistance for child care programs; program staff; child care consumers.

Attached to the proposed rules required in section three hundred two of this article, the Secretary of the Department of Health and Human Resources shall submit a financial plan to support the implementation of a statewide quality rating and improvement system and help promote quality improvement. The financial plan shall be considered a part of the rule and shall include specific proposals for implementation of the provisions of this section as determined by the secretary. The plan shall address, but is not limited to, the following:

(1) State agency staffing requirements may include the following:

(A) Highly trained evaluators to monitor the assessment process and ensure inter-rater reliability of eighty-five percent or higher;

(B) Technical assistance staff responsible for career advising, accreditation support services, improvement planning, portfolio development and evaluations for improvement planning only. The goal for technical assistance staffing is to ensure that individualized technical assistance is available to participating programs;

(C) A person within the department to collaborate with other professional development providers to maximize funding for training, scholarships and professional development. The person filling this position also shall encourage community and technical colleges to provide courses through nontraditional means, such as online training, evening classes and off-campus training;

(D) Additional infant and toddler specialists to provide high level professional development for staff caring for infants and to provide on-site assistance with infant and toddler issues;

(E) At least one additional training specialist at each of the child care resource and referral agencies to support new training topics and to provide training for school-age child care programs. Training providers, such as the child care resource and referral agencies shall purchase new training programs on topics, such as business management, the Devereux Resiliency Training and Mind in the Making; and

(F) Additional staff necessary for program administration;

(2) Implementation of a broad public awareness campaign and communication strategies that may include the following:

(A) Brochures, internet sites, posters, banners, certificates, decals and pins to educate parents; and

(B) Strategies, such as earned media campaigns, paid advertising campaigns, e-mail and internet-based outreach, face-to-face communication with key civic groups and grassroots organizing techniques; and

(3) Implementation of an internet-based management information system that meets the following requirements:

(A) The system shall allow for multiple agencies to access and input data;

(B) The system shall provide the data necessary to determine if the quality enhancements result in improved care and better outcomes for children;

(C) The system shall allow access by Department of Health and Human Resources subsidy and licensing staff, child care resource and referral

agencies, the agencies that provide training and scholarships, evaluators and the child care programs;

(D) The system shall include different security levels in order to comply with the numerous confidentiality requirements;

(E) The system shall assist in informing practice; determining training needs; and tracking changes in availability of care, cost of care, changes in wages and education levels; and

(F) The system shall provide accountability for child care programs and recipients and assure funds are being used effectively;

(4) Financial assistance for child care programs needed to improve learning environments, attain high ratings and sustain long-term quality without passing additional costs on to families that may include, but are not limited to:

(A) Assistance to programs in assessment and individual program improvement planning and providing the necessary information, coaching and resources to assist programs to increase their level of quality;

(B) Subsidizing participating programs for providing child care services to children of low-income families in accordance with the following:

(i) Base payment rates shall be established at the seventy-fifth percentile of market rate; and

(ii) A system of tiered reimbursement shall be established which increases the payment rates by a certain amount above the base payment rates in accordance with the rating tier of the child care program;

(C) Two types of grants shall be awarded to child care programs in accordance with the following:

(i) An incentive grant shall be awarded based on the type of child care program and the level at which the child care program is rated with the types of child care programs having more children and child care programs rated at higher tiers being awarded a larger grant than the types of child care programs having less children and child care programs rated at lower tiers; and

(ii) Grants for helping with the cost of national accreditation shall be awarded on an equitable basis.

(5) Support for increased salaries and benefits for program staff to increase educational levels essential to improving the quality of care that may include, but are not limited to:

(A) Wage supports and benefits provided as an incentive to increase child care programs ratings and as an incentive to increase staff qualifications in accordance with the following:

(i) The cost of salary supplements shall be phased in over a five-year period;

(ii) The Secretary of the Department of Health and Human Resources shall establish a salary scale for each of the top three rating tiers that varies the salary support based on the education of the care giver and the rating tier of the program; and

(iii) Any center with at least a tier two rating that employs at least one staff person participating in the scholarship program required pursuant to paragraph (B) of this subdivision or employs degree staff may apply to the Secretary of the Department of Health and Human Resources for funding to provide health care benefits based on the Teacher Education and Compensation Helps model in which insurance costs are shared among the employees, the employer and the state; and

(B) The provision of scholarships and establishment of professional development plans for center staff that would promote increasing the credentials of center staff over a five-year period; and

(6) Financial assistance to the child care consumers whose income is at two hundred percent of the federal poverty level or under to help them afford the increased market price of child care resulting from increased quality.

§ 49-2-304 Quality rating and improvement system pilot projects; independent third-party evaluation; modification of proposed rule and financial plan; report to Legislature; limitations on implementation.

The secretary shall report annually to the Legislature on the progress on development and implementation of a child care quality rating and improvement system and its impact on improving the quality of child care in the state. The secretary may propose amendments to the rules and financial plan necessary to promote implementation of the quality rating and improvement system and improve the quality of child care and may recommend needed legislation. Nothing in this article requires the implementation of a quality rating and improvement system unless funds are appropriated therefore. The secretary may prioritize the components of the financial plan for implementation and quality improvement for funding purposes. If insufficient funds are appropriated for full implementation of the quality rating and improvement system, the rules shall provide for gradual implementation over a period of several years.

PART VI. WEST VIRGINIA FAMILY SUPPORT PROGRAM.

§ 49-2-601 Findings; intent.

(a) The West Virginia Legislature finds that families are the greatest resource available to individuals with developmental disabilities, and they must be supported in their role as primary caregivers. It further finds that supporting families in their effort to care for their family members at home is more efficient, cost effective and humane than placing the developmentally disabled person in an institutional setting.

(b) The Legislature accepts the following as basic principles for providing services to support families of people with developmental disabilities:

(1) The quality of life of children with developmental disabilities, their families and communities is enhanced by caring for the children within their own homes. Children with disabilities benefit by growing up in their own families, families benefit by staying together and communities benefit from the inclusion of people with diverse abilities.

(2) Adults with developmental disabilities should be afforded the opportunity to make decisions for themselves, live in typical homes and communities and exercise their full rights as citizens. Developmentally disabled adults should have the option of living separately from their families but when this is not the case, families of disabled adults should be provided the support services they need.

(3) Services and support for families should be individualized and flexible, should focus on the entire family and should promote the inclusion of people with developmental disabilities in all aspects of school and community life.

(4) Families are the best experts about what they need. The service system can best assist families by supporting families as decision makers as opposed to making decisions for them.

(c) The Legislature finds that there are at least ten thousand West Virginians with developmental disabilities who live with and are supported by their families, and that the state's policy is to prevent the institutionalization of people with developmental disabilities.

(d) To maximize the number of families supported by this program, each family will contribute to the cost of goods and services based on their ability to pay, taking into account their needs and resources.

(e) Therefore, it is the intent of the Legislature to initiate, within the resources available, a program of services to support families who are caring for family members with developmental disabilities in their homes.

§ 49-2-602 Family support services; responsibilities; funds; case management; outreach; differential fees.

(a) The regional family support agency, designated under article two of this chapter, shall direct and be responsible for the individual assessment of each developmentally disabled person which it has designated and shall prepare a service plan with the developmentally disabled person's family. The needs and preferences of the family will be the basis for determining what goods and services will be made available within the resources available.

(b) The family support program may provide funds to families to purchase goods and services included in the family service plan. Those goods and services related to the care of the developmentally disabled person may include, but are not limited to:

(1) Respite care;

(2) Personal and attendant care;

(3) Child care;

(4) Architectural and vehicular modifications;

(5) Health-related costs not otherwise covered;

(6) Equipment and supplies;

(7) Specialized nutrition and clothing;

(8) Homemaker services;

(9) Transportation;

(10) Utility costs;

(11) Integrated community activities; and

(12) Training and technical assistance.

(c) As part of the family support program, the regional family support agency, designated under section six hundred two of this article, shall provide case management for each family to provide information, service coordination and other assistance as needed by the family.

(d) The family support program shall assist families of developmentally disabled adults in planning and obtaining community living arrangements, employment services and other resources needed to achieve, to the greatest extent possible, independence, productivity and integration of the developmentally disabled adult into the community.

(e) The family support program shall conduct outreach to identify families in need of assistance and shall maintain a waiting list of individuals and families in the event that there are insufficient resources to provide services to all those who request them.

(f) The family support program may provide for differential fees for services under the program or for appropriate cost participation by the recipient families consistent with the goals of the program and the overall financial condition of the family.

(g) Funds, goods or services provided to eligible families by the family support program under this article shall not be considered as income to those families for any purpose under this code or under the rules and regulations of any agency of state government.

§ 49-2-603 Eligibility; primary focus.

(a) To be eligible for the family support program, a family must have at least one family member who has a developmental disability, as defined in this article, living with the family.

(b) The primary focus of the family support program is supporting: (1) Developmentally disabled children, school age and younger, within their families; (2) adults with developmental disabilities who choose to live with their families; and (3) adults with developmental disabilities for whom other community living arrangements are not available and who are living with their families.

§ 49-2-604 Program administration; implementation; procedures; annual evaluation; coordination; plans; grievances; reports.

(a) The administering agency for the family support program is the Department of Health and Human Resources.

(b) The Department of Health and Human Resources shall initially implement the family support program through contracts with an agency within four of the state's behavioral health regions, with the four regions to be determined by the Department of Health and Human Resources in consultation with the state family support council. These regional family support agencies of the family support program will be responsible for

implementing this article and subsequent policies for the families of persons with developmental disabilities residing within their respective regions.

(c) The Department of Health and Human Resources, in conjunction with the state family support council, shall adopt policies and procedures regarding:

(1) Development of annual budgets;

(2) Program specifications;

(3) Criteria for awarding contracts for operation of regional family support programs and the role of regional family support councils;

(4) Annual evaluation of services provided by each regional family support agency, including consumer satisfaction;

(5) Coordination of the family support program and the use of its funds, throughout the state and within each region, with other publicly funded programs, including Medicaid;

(6) Performance of family needs assessments and development of family service plans;

(7) Methodology for allocating resources to families within the funds available; and

(8) Resolution of grievances filed by families pertaining to actions of the family support program.

(d) The Department of Health and Human Resources shall submit a report to the Governor and the Legislature on the family support program by September 15, of every year so long as the program is funded.

§ 49-2-605 Regional and state family support councils; membership; meetings; reimbursement of expenses.

(a) Each regional family support agency shall establish a regional family support council comprised of at least seven members, of whom at least a majority shall be persons with developmental disabilities or their parents or primary caregivers. Each regional family support council shall meet at least quarterly to advise the regional family support agency on matters related to local implementation of the family support program and to communicate information and recommendations regarding the family support program to the State Family Support Council.

(b) The Secretary of the Department of Health and Human Resources shall appoint a State Family Support Council comprised of at least twenty-

two members, of whom at least a majority shall be persons with developmental disabilities or their parents or primary caregivers. A representative elected by each regional council shall serve on the state council. The state council shall also include a representative from each of the following agencies: The State Developmental Disabilities Council, the State Protection and Advocacy Agency, the Center for Excellence in Disabilities, the Office of Special Education, the Behavioral Health Care Providers Association and the Early Intervention Interagency Coordinating Council.

(c) The state council shall meet at least quarterly. The state council will participate in the development of program policies and procedures, annual contracts and perform other duties as are necessary for statewide implementation of the family support program.

(d) Members of the state and regional councils who are a member of the family or the primary caregiver of a developmentally disabled person shall be reimbursed for travel and lodging expenses incurred in attending official meetings of their councils. Child care expenses related to the developmentally disabled person shall also be reimbursed. Members of regional councils who are eligible for expense reimbursement shall be reimbursed by their respective regional family support agencies.

PART VIII. REPORTS OF CHILDREN SUSPECTED OF ABUSE.

§ 49-2-801 Purpose.

It is the purpose of this article through the complete reporting of child abuse and neglect:

(1) To protect the best interests of the child;

(2) To offer protective services in order to prevent any further harm to the child or any other children living in the home;

(3) To stabilize the home environment, to preserve family life whenever possible;

(4) To promote adult responsibility for protecting children; and

(5) To encourage cooperation among the states to prevent future incidents of child abuse and neglect and in dealing with the problems of child abuse and neglect.

§ 49-2-802 Establishment of child protective services; general duties and powers; administrative procedure; immunity from civil liability; cooperation of other state agencies.

(a) The department shall establish or designate in every county a local child protective services office to perform the duties and functions set forth in this article.

(b) The local child protective services office shall investigate all reports of child abuse or neglect. Under no circumstances may investigating personnel be relatives of the accused, the child or the families involved. In accordance with the local plan for child protective services, it shall provide protective services to prevent further abuse or neglect of children and provide for or arrange for and coordinate and monitor the provision of those services necessary to ensure the safety of children. The local child protective services office shall be organized to maximize the continuity of responsibility, care and service of individual workers for individual children and families. Under no circumstances may the secretary or his or her designee promulgate rules or establish any policy which restricts the scope or types of alleged abuse or neglect of minor children which are to be investigated or the provision of appropriate and available services.

(c) Each local child protective services office shall:

(1) Receive or arrange for the receipt of all reports of children known or suspected to be abused or neglected on a twenty-four hour, seven-day-a-week basis and cross-file all reports under the names of the children, the family and any person substantiated as being an abuser or neglecter by investigation of the Department of Health and Human Resources, with use of cross-filing of the person's name limited to the internal use of the department;

(2) Provide or arrange for emergency children's services to be available at all times;

(3) Upon notification of suspected child abuse or neglect, commence or cause to be commenced a thorough investigation of the report and the child's environment. As a part of this response, within fourteen days there shall be a face-to-face interview with the child or children and the development of a protection plan, if necessary for the safety or health of the child, which may involve law-enforcement officers or the court;

(4) Respond immediately to all allegations of imminent danger to the physical well-being of the child or of serious physical abuse. As a part of this response, within seventy-two hours there shall be a face-to-face interview with the child or children and the development of a protection plan, which may involve law-enforcement officers or the court; and

(5) In addition to any other requirements imposed by this section, when any matter regarding child custody is pending, the circuit court or family court may refer allegations of child abuse and neglect to the local child protective services office for investigation of the allegations as defined by this chapter and require the local child protective services office to submit a written report of the investigation to the referring circuit court or family court within the time frames set forth by the circuit court or family court.

(d) In those cases in which the local child protective services office determines that the best interests of the child require court action, the local child protective services office shall initiate the appropriate legal proceeding.

(e) The local child protective services office shall be responsible for providing, directing or coordinating the appropriate and timely delivery of services to any child suspected or known to be abused or neglected, including services to the child's family and those responsible for the child's care.

(f) To carry out the purposes of this article, all departments, boards, bureaus and other agencies of the state or any of its political subdivisions and all agencies providing services under the local child protective services plan shall, upon request, provide to the local child protective services office any assistance and information as will enable it to fulfill its responsibilities.

(g)(1) In order to obtain information regarding the location of a child who is the subject of an allegation of abuse or neglect, the Secretary of the Department of Health and Human Resources may serve, by certified mail or personal service, an administrative subpoena on any corporation, partnership, business or organization for the production of information leading to determining the location of the child.

(2) In case of disobedience to the subpoena, in compelling the production of documents, the secretary may invoke the aid of:

(A) The circuit court with jurisdiction over the served party if the person served is a resident; or

(B) The circuit court of the county in which the local child protective services office conducting the investigation is located if the person served is a nonresident.

(3) A circuit court shall not enforce an administrative subpoena unless it finds that:

(A) The investigation is one the Division of Child Protective Services is authorized to make and is being conducted pursuant to a legitimate purpose;

(B) The inquiry is relevant to that purpose;

(C) The inquiry is not too broad or indefinite;

(D) The information sought is not already in the possession of the Division of Child Protective Services; and

(E) Any administrative steps required by law have been followed.

(4) If circumstances arise where the secretary, or his or her designee, determines it necessary to compel an individual to provide information regarding the location of a child who is the subject of an allegation of abuse or neglect, the secretary, or his or her designee, may seek a subpoena from the circuit court with jurisdiction over the individual from whom the information is sought.

(h) No child protective services caseworker may be held personally liable for any professional decision or action taken pursuant to that decision in the performance of his or her official duties as set forth in this section or agency rules promulgated thereupon. However, nothing in this subsection protects any child protective services worker from any liability arising from the operation of a motor vehicle or for any loss caused by gross negligence, willful and wanton misconduct or intentional misconduct.

§ 49-2-803 Persons mandated to report suspected abuse and neglect; requirements.

(a) Any medical, dental or mental health professional, Christian Science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services personnel, peace officer or law-enforcement official, humane officer, member of the clergy, circuit court judge, family court judge, employee of the Division of Juvenile Services, magistrate, youth camp administrator or counselor, employee, coach or volunteer of an entity that provides organized activities for children, or commercial film or photographic print processor who has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect shall immediately, and not more than forty-eight hours after suspecting this abuse or neglect, report the circumstances or cause a report to be made to the Department of Health and Human Resources. In any case where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report, or cause a report to be made, to the

State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff or volunteer of a public or private institution, school, entity that provides organized activities for children, facility or agency shall also immediately notify the person in charge of the institution, school, entity that provides organized activities for children, facility or agency, or a designated agent thereof, who may supplement the report or cause an additional report to be made.

(b) Any person over the age of eighteen who receives a disclosure from a credible witness or observes any sexual abuse or sexual assault of a child, shall immediately, and not more than forty-eight hours after receiving that disclosure or observing the sexual abuse or sexual assault, report the circumstances or cause a report to be made to the Department of Health and Human Resources or the State Police or other law-enforcement agency having jurisdiction to investigate the report. In the event that the individual receiving the disclosure or observing the sexual abuse or sexual assault has a good faith belief that the reporting of the event to the police would expose either the reporter, the subject child, the reporter's children or other children in the subject child's household to an increased threat of serious bodily injury, the individual may delay making the report while he or she undertakes measures to remove themselves or the affected children from the perceived threat of additional harm and the individual makes the report as soon as practicable after the threat of harm has been reduced. The law-enforcement agency that receives a report under this subsection shall report the allegations to the Department of Health and Human Resources and coordinate with any other law-enforcement agency, as necessary to investigate the report.

(c) Any school teacher or other school personnel who receives a disclosure from a witness, which a reasonable prudent person would deem credible, or personally observes any sexual contact, sexual intercourse or sexual intrusion, as those terms are defined in article eight-b, chapter sixty-one, of a child on school premises or on school buses or on transportation used in furtherance of a school purpose shall immediately, but not more than 24 hours, report the circumstances or cause a report to be made to the State Police or other law-enforcement agency having jurisdiction to investigate the report: *Provided*, That this subsection will not impose any reporting duty upon school teachers or other school personnel who observe, or receive a disclosure of any consensual sexual contact, intercourse, or intrusion occurring between students who would not otherwise be subject to section three, five, seven or nine of article eight-8, chapter sixty-one of this code: *Provided, however*, That any teacher or other school personnel shall not be in violation of this section if he or she makes known immediately, but not more than 24 hours. to the principal, assistant principal or similar person in charge, a disclosure from a witness, which a reasonable

prudent person would deem credible, or personal observation of conduct described in this section: *Provided further*, That a principal, assistant principal or similar person in charge made aware of such disclosure or observation from a teacher or other school personnel shall be responsible for immediately, but not more than 24 hours, reporting such conduct to law enforcement.

(d) County boards of education and private school administrators shall provide all employees with a written statement setting forth the requirement contained in this subsection and shall obtain and preserve a signed acknowledgment from school employees that they have received and understand the reporting requirement.

(e) The reporting requirements contained in this section specifically include reported, disclosed or observed conduct involving or between students enrolled in a public or private institution of education, or involving a student and school teacher or personnel. When the alleged conduct is between two students or between a student and school teacher or personnel, the law enforcement body that received the report under this section is required to make such a report under this section shall additionally immediately, but not more than 24 hours, notify the students' parents, guardians, and custodians about the allegations.

(f) Nothing in this article is intended to prevent individuals from reporting suspected abuse or neglect on their own behalf. In addition to those persons and officials specifically required to report situations involving suspected abuse or neglect of children, any other person may make a report if that person has reasonable cause to suspect that a child has been abused or neglected in a home or institution or observes the child being subjected to conditions or circumstances that would reasonably result in abuse or neglect.

§ 49-2-804 Notification of disposition of reports.

The Department of Health and Human Resources shall continue to develop, update and implement a procedure to notify any person mandated to report suspected child abuse and neglect pursuant to section eight hundred three of this article, of whether an investigation into the reported suspected abuse or neglect has been initiated and when the investigation is completed.

§ 49-2-805 Educational programs; requirements.

Subject to appropriation in the budget, the department shall conduct educational and training programs for persons required to report suspected abuse or neglect, and the general public, as well as implement evidence-based programs that reduce incidents of child maltreatment including

sexual abuse. Training for persons require to report and the general public shall include:

(1) Indicators of child abuse and neglect;

(2) Tactics used by sexual abusers;

(3) How and when to make a report; and

(4) Protective factors that prevent abuse and neglect in order to promote adult responsibility for protecting children, encourage maximum reporting of child abuse and neglect, and to improve communication, cooperation and coordination among all agencies involved in the identification, prevention and treatment of the abuse and neglect of children.

§ 49-2-806 Mandatory reporting of suspected animal cruelty by child protective service workers.

In the event a child protective service worker, in response to a report mandated by section eight hundred two and eight hundred three of this article, forms a reasonable suspicion that an animal is the victim of cruel or inhumane treatment, he or she shall report the suspicion and the basis therefor to the county humane officer provided under section one, article ten, chapter seven of this code within twenty-four hours of the response to the report.

§ 49-2-807 Mandatory reporting to medical examiner or coroner; postmortem investigation.

Any person or official who is required pursuant to section eight hundred three of this article to report cases of suspected child abuse or neglect and who has reasonable cause to suspect that a child has died as a result of child abuse or neglect, shall report that fact to the appropriate medical examiner or coroner. Upon the receipt of that report, the medical examiner or coroner shall cause an investigation to be made and report his or her findings to the police, the appropriate prosecuting attorney, the local child protective service agency and, if the institution making a report is a hospital, to the hospital.

§ 49-2-808 Photographs and X rays.

Any person required to report cases of children suspected of being abused and neglected may take or cause to be taken, at public expense, photographs of the areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child. Any photographs or X rays taken shall be sent to the appropriate child protective service as soon as possible.

§ 49-2-809 Reporting procedures.

(a) Reports of child abuse and neglect pursuant to this article shall be made immediately by telephone to the local department child protective service agency and shall be followed by a written report within forty-eight hours if so requested by the receiving agency. The state department shall establish and maintain a twenty-four hour, seven-day-a-week telephone number to receive those calls reporting suspected or known child abuse or neglect.

(b) A copy of any report of serious physical abuse, sexual abuse or assault shall be forwarded by the department to the appropriate law-enforcement agency, the prosecuting attorney or the coroner or medical examiner's office. All reports under this article are confidential. Reports of known or suspected institutional child abuse or neglect shall be made and received as all other reports made pursuant to this article.

§ 49-2-810 Immunity from liability.

Any person, official or institution participating in good faith in any act permitted or required by this article are immune from any civil or criminal liability that otherwise might result by reason of those actions.

§ 49-2-811 Abrogation of privileged communications; exception.

The privileged quality of communications between husband and wife and between any professional person and his or her patient or his or her client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect.

§ 49-2-812 Failure to report; penalty.

(a) Any person, official or institution required by this article to report a case involving a child known or suspected to be abused or neglected, or required by section eight hundred nine of this article to forward a copy of a report of serious injury, who knowingly fails to do so or knowingly prevents another person acting reasonably from doing so, is guilty of a misdemeanor and, upon conviction, shall be confined in jail not more than ninety days or fined not more than $5,000, or both fined and confined.

(b) Any person, official or institution required by this article to report a case involving a child known or suspected to be sexually assaulted or sexually abused, or student known or suspected to have been a victim of any non-consensual sexual contact, sexual intercourse or sexual intrusion on school premises, who knowingly fails to do so or knowingly prevents another person acting reasonably from doing so, is guilty of a misdemeanor

and, upon conviction thereof, shall be confined in jail not more than six months or fined not more than $10,000, or both.

§ 49-2-813 Statistical index; reports.

The Department of Health and Human Resources shall maintain a statewide child abuse and neglect statistical index of all substantiated allegations of child abuse or neglect cases to include information contained in the reports required under this article and any other information considered appropriate by the Secretary of the Department of Health and Human Resources. Nothing in the statistical data index maintained by the Department of Health and Human Resources may contain information of a specific nature that would identify individual cases or persons. Notwithstanding section two hundred one, article four of this chapter, the Department of Health and Human Resources shall provide copies of the statistical data maintained pursuant to this subsection to the State Police child abuse and neglect investigations unit to carry out its responsibilities to protect children from abuse and neglect.

§ 49-2-814. Task Force on Prevention of Sexual Abuse of Children.

(a) This section may be referred to as "Erin Merryn's Law".

(b) The Task Force on Prevention of Sexual Abuse of Children is established. The task force consists of the following members:

(1) The Chair of the West Virginia Senate Committee on Health and Human Resources, or his or her designee;

(2) The Chair of the House of Delegates Committee on Health and Human Resources, or his or her designee;

(3) The Chair of the West Virginia Senate Committee on Education, or his or her designee;

(4) The Chair of the House of Delegates Committee on Education, or his or her designee;

(5) One citizen member appointed by the President of the Senate;

(6) One citizen member appointed by the Speaker of the House of Delegates;

(7) One citizen member, who is a survivor of child sexual abuse, appointed by the Governor;

(8) The President of the State Board of Education, or his or her designee;

(9) The State Superintendent of Schools, or his or her designee;

(10) The Secretary of the Department of Health and Human Resources, or his or her designee;

(11) The Director of the Prosecuting Attorney's Institute, or his or her designee;

(12) One representative of each statewide professional teachers' organization, each selected by the leader of his or her respective organization;

(13) One representative of the statewide school service personnel organization, selected by the leader of the organization;

(14) One representative of the statewide school principals' organization, appointed by the leader of the organization;

(15) One representative of the statewide professional social workers' organization, appointed by the leader of the organization;

(16) One representative of a teacher preparation program of a regionally accredited institution of higher education in the state, appointed by the Chancellor of the Higher Education Policy Commission;

(17) The Chief Executive Officer of the Center for Professional Development, or his or her designee;

(18) The Director of Prevent Child Abuse West Virginia, or his or her designee;

(19) The Director of the West Virginia Child Advocacy Network, or his or her designee;

(20) The Director of the West Virginia Coalition Against Domestic Violence, or his or her designee;

(21) The Director of the West Virginia Foundation for Rape Information and Services, or his or her designee;

(22) The Administrative Director of the West Virginia Supreme Court of Appeals, or his or her designee;

(23) The Executive Director of the West Virginia Sheriffs' Association, or his or her designee;

(24) One representative of an organization representing law enforcement, appointed by the Superintendent of the West Virginia State Police; and

(25) One practicing school counselor appointed by the leader of the West Virginia School Counselors Association.

(c) To the extent practicable, members of the task force shall be individuals actively involved in the fields of child abuse and neglect prevention and child welfare.

(d) At the joint call of the House of Delegates and Senate Education Committee Chairs, the task force shall convene its first meeting and by majority vote of members present elect presiding officers. Subsequent meetings shall be at the call of the presiding officer.

(e) The task force shall make recommendations for decreasing incidence of sexual abuse of children in West Virginia. In making those recommendations, the task force shall:

(1) Gather information regarding sexual abuse of children throughout the state;

(2) Receive related reports and testimony from individuals, state and local agencies, community-based organizations, and other public and private organizations;

(3) Create goals for state education policy that would prevent sexual abuse of children;

(4) Create goals for other areas of state policy that would prevent sexual abuse of children; and

(5) Submit a report with its recommendations to the Governor and the Legislature.

(f) The recommendations may include proposals for specific statutory changes and methods to foster cooperation among state agencies and between the state and local governments. The task force shall consult with employees of the Bureau for Children and Family Services, the Division of Justice and Community Services, the West Virginia State Police, the State Board of Education, and any other state agency or department as necessary to accomplish its responsibilities under this section.

(g) Task force members serve without compensation and do not receive expense reimbursement.

ARTICLE 3. SPECIALIZED ADVOCACY PROGRAMS.

§ 49-3-101 Child advocacy centers; services; requirements.

Child advocacy centers provide the following services to children in the child welfare program in West Virginia:

(1) Operation of a child-appropriate or child-friendly facility that provides a comfortable, private setting that is both physically and psychologically safe for clients.

(2) Participation in a multidisciplinary team for response to child abuse allegations.

(3) Operate a legal entity responsible for program and fiscal operations that has established and implemented basic sound administrative practices.

(4) Promote policies, practices and procedures that are culturally competent and diverse. Cultural competency is defined as the capacity to function in more than one culture, requiring the ability to appreciate, understand and interact with members of diverse populations within the local community.

(5) Conduct forensic interviews in a manner which is of a neutral, fact-finding nature and coordinated to avoid duplicative interviewing.

(6) Provide specialized medical evaluation and treatment made available to clients as part of the team response, either at the CAC or through coordination and referral with other specialized medical providers.

(7) Offer therapeutic intervention through specialized mental health services made available as part of the team response, either at the child advocacy center or through coordination and referral with other appropriate treatment providers.

(8) Victim support and advocacy as part of the team response, either at the child advocacy center or through coordination with other providers, throughout the investigation and subsequent legal proceedings.

(9) Conducting team discussions and providing information sharing regarding the investigation, case status and services needed by the child and family are to occur on a routine basis.

(10) Developing and implementing a system for monitoring case progress and tracking case outcomes for team components.

(11) May establish a safe exchange location for children and families who have a parenting agreement or an order providing for visitation or custody of the children that require a safe exchange location.

§ 49-3-102 Court appointed special advocate; operations.

A court appointed special advocate (CASA) shall operate as follows:

(1) Standards: CASA programs shall be members in good standing with the West Virginia Court Appointed Special Advocate Association, Inc., and the National Court Appointed Special Advocates Association and adhere to all standards set forth by these entities.

(2) Organizational capacity: A designated legal entity is responsible for program and fiscal operations has been established and implements basic sound administrative practice.

(3) Cultural competency and diversity: CASA programs shall promote policies, practices and procedures that are culturally competent. "Cultural competency" is defined as the capacity to function in more than one culture, requiring the ability to appreciate, understand and interact with members of diverse populations within the local community.

(4) Case management: CASA programs must utilize a uniform case management system to monitor case progress and track outcomes.

(5) Case review: CASA volunteers shall meet with CASA staff on a routine basis to discuss case status and outcomes.

(6) Training: Court appointed special advocates shall serve as volunteers without compensation and shall receive training consistent with state and nationally developed standards.

ARTICLE 4. COURT ACTIONS.

PART I. GENERAL PROVISIONS.

§ 49-4-101 Exercise of powers and jurisdiction by judge in vacation.

The powers and jurisdiction of the court, under the provisions of this chapter, may be exercised by the judge in vacation.

§ 49-4-102 Procedure for appealing decisions.

Cases under this chapter, if tried in any inferior court, may be reviewed by writ of error or appeal to the circuit court, and if tried or reviewed in a circuit court, by writ of error or appeal to the Supreme Court of Appeals.

§ 49-4-103 Proceedings may not be evidence against child, or be published; adjudication is not a conviction and not a bar to civil service eligibility.

Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, may not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against the child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor may the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor may any adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor may any child be deemed a criminal by reason of the adjudication, nor may the adjudication be deemed a conviction, nor may any adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

§ 49-4-104 General provisions relating to court orders regarding custody; rules.

(a) The Supreme Court of Appeals, in consultation with the Department of Health and Human Resources and the Division of Juvenile Services in order to eliminate unnecessary state funding of out-of-home placements where federal funding is available, shall develop and disseminate form court orders to effectuate chapter forty-nine of this code which authorize disclosure and transfer of juvenile records between agencies while requiring maintenance of confidentiality, Child Welfare Services, 42 U.S.C. § 620, *et seq.*, and 42 U.S.C. § 670, *et seq.*, relating to the promulgation of uniform court orders for placement of minor children and the rules promulgated thereunder, for use in the courts of the state.

(b) Judges and magistrates, upon being supplied the form orders required by subsection (a) of this section, shall act to ensure the proper form order is entered in the case so as to allow federal funding of eligible out-of-home placements.

§ 49-4-105 Hearing required to determine "reasonable efforts."

A hearing by a circuit court of competent jurisdiction is required to determine whether or not "reasonable efforts" have been made to stabilize and maintain the family situation before any child may be placed outside the home, except that in the event any child appears in imminent danger of serious bodily or emotional injury or death in any home, a post-removal hearing shall be substituted for the pre-removal hearing.

§ 49-4-106 Limitation on out-of-home placements.

Before any child may be directed for placement in a particular facility or for services of a child welfare agency licensed by the department, a court shall make inquiry into the bed space of the facility available to accommodate additional children and the ability of the child welfare agency to meet the particular needs of the child. A court may not order the placement of a child in a particular facility, including status offender facilities operated by the Division of Juvenile Services, if it has reached its licensed capacity or order conditions on the placement of the child which conflict with licensure regulations applicable to the facility promulgated pursuant to article two of this chapter and articles one-a, nine and seventeen, chapter twenty-seven of this code. Further, a child welfare agency is not required to accept placement of a child at a particular facility if the facility remains at licensed capacity or is unable to meet the particular needs of the child. A child welfare agency is not required to make special dispensation or accommodation, reorganize existing child placement, or initiate early release of children in placement to reduce actual occupancy at the facility.

§ 49-4-107 Penalties.

A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates this chapter for which punishment has not been specifically provided, is guilty of a misdemeanor and, upon conviction shall be fined not less than $10 nor more than $100, or confined in jail not less than five days nor more than six months, or both fined and confined.

§ 49-4-108 Payment of services.

At any time during any proceedings brought pursuant to this article, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. The Department of Health and Human Resources shall

set the fee schedule for the services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the Department of Health and Human Resources.

§ 49-4-109 Guardianship of estate of child unaffected.

This chapter may not be construed to give the guardian appointed hereunder the guardianship of the estate of the child, or to change the age of minority for any other purpose except the custody of the child.

The guardian of the estate of a child committed to guardianship hereunder shall furnish, when and in the form as may be required, full information concerning the property of the child to the state department or to the court or judge before whom the case of the child is heard.

§ 49-4-110 Foster care; quarterly status review; transitioning adults; annual permanency hearings.

(a) For each child who remains in foster care as a result of a juvenile proceeding or as a result of a child abuse and neglect proceeding, the circuit court with the assistance of the multidisciplinary treatment team shall conduct quarterly status reviews in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safety maintained in the home or placed for adoption or legal guardianship. Quarterly status reviews shall commence three months after the entry of the placement order. The permanency hearing provided in subsection (c) of this section may be considered a quarterly status review.

(b) For each transitioning adult as that term is defined in section two hundred two, article one of this chapter who remains in foster care, the circuit court shall conduct status review hearings as described in subsection (a) of this section once every three months until permanency is achieved.

(c) For each child or transitioning adult who continues to remain in foster care, the circuit court shall conduct a permanency hearing no later that twelve months after the date the child or transitioning adult is considered to have entered foster care, and at least once every twelve months thereafter until permanency is achieved. For purposes of permanency planning for transitioning adults, the circuit court shall make factual findings and

conclusions of law as to whether the department made reasonable efforts to finalize a permanency plan to prepare a transitioning adult for emancipation or independence or another approved permanency option such as, but not limited to, adoption or legal guardianship pursuant to the West Virginia Guardianship and Conservatorship Act.

(d) Nothing in this section may be construed to abrogate the responsibilities of the circuit court from conducting required hearings as provided in other provisions of this code, procedural court rules, or setting required hearings at the same time.

§ 49-4-111 Criteria and procedure for temporary removal of child from foster home; foster care arrangement termination; notice of child's availability for placement; adoption; sibling placements; limitations.

(a) The department may temporarily remove a child from a foster home based on an allegation of abuse or neglect, including sexual abuse, that occurred while the child resided in the home. If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement, preclude contact between the children and the foster parents, provide written notice to the multidiscplinary treatment team members and schedule an emergency team meeting to address placement options. If, after investigation, the allegation is determined to be true by the department or after a judicial proceeding a court finds the allegation to be true or if the foster parents fail to contest the allegation in writing within twenty calendar days of receiving written notice of the allegations, the department shall permanently terminate all foster care arrangements with the foster parents. If the department determines that the abuse occurred due to no act or failure to act on the part of the foster parents and that continuation of the foster care arrangement is in the best interests of the child, the department may, in its discretion, elect not to terminate the foster care arrangement or arrangements.

(b) When a child has been placed in a foster care arrangement for a period in excess of eighteen consecutive months, and the department determines that the placement is a fit and proper place for the child to reside, the foster care arrangement may not be terminated unless the termination is in the best interest of the child and:

(1) The foster care arrangement is terminated pursuant to subsection (a) of this section;

(2) The foster care arrangement is terminated due to the child being returned to his or her parent or parents;

(3) The foster care arrangement is terminated due to the child being united or reunited with a sibling or siblings;

(4) The foster parent or parents agree to the termination in writing;

(5) The foster care arrangement is terminated at the written request of a foster child who has attained the age of fourteen; or

(6) A court orders the termination upon a finding that the department has developed a more suitable long-term placement for the child upon hearing evidence in a proceeding brought by the department seeking removal and transfer.

(c) When a child has been residing in a foster home for a period in excess of six consecutive months in total and for a period in excess of thirty days after the parental rights of the child's biological parents have been terminated and the foster parents have not made an application to the department to establish an intent to adopt the child within thirty days of parental rights being terminated, the department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed. If the child is twelve years of age or older, the child shall be provided the option of remaining in the existing foster care arrangement if the child so desires and if continuation of the existing arrangement is in the best interest of the child.

(d)(1) When a child is placed into foster care or becomes eligible for adoption and a sibling or siblings have previously been placed in foster care or have been adopted, the department shall notify the foster parents or adoptive parents of the previously placed or adopted sibling or siblings of the child's availability for foster care placement or adoption to determine if the foster parents or adoptive parents are desirous of seeking a foster care arrangement or adoption of the child.

(2) Where a sibling or siblings have previously been adopted, the department shall also notify the adoptive parents of a sibling of the child's availability for foster care placement in that home and a foster care arrangement entered into to place the child in the home if the adoptive parents of the sibling are otherwise qualified or can become qualified to enter into a foster care arrangement with the department and if the arrangement is in the best interests of the child.

(3) The department may petition the court to waive notification to the foster parents or adoptive parents of the child's siblings. This waiver may be granted, ex parte, upon a showing of compelling circumstances.

(e)(1) When a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who

have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the department to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that the child may be united or reunited with a sibling or siblings, the department shall, upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings.

(2) If the department is of the opinion based upon available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the department can document that the reunification of the siblings would not be in the best interest of one or all of the children, the department may petition the circuit court for an order allowing the separation of the siblings to continue.

(3) If the child is twelve years of age or older, the department shall provide the child the option of remaining in the existing foster care arrangement if remaining is in the best interests of the child. In any proceeding brought by the department to maintain separation of siblings, the separation may be ordered only if the court determines that clear and convincing evidence supports the department's determination.

(4) In any proceeding brought by the department seeking to maintain separation of siblings, notice afforded, in addition to any other persons required by any provision of this code to receive notice, to the persons seeking to adopt a sibling or siblings of a previously placed or adopted child and the persons may be parties to the action.

(f) Where two or more siblings have been placed in separate foster care arrangements and the foster parents of the siblings have made application to the department to enter into a foster care arrangement regarding the sibling or siblings not in their home or where two or more adoptive parents seek to adopt a sibling or siblings of a child they have previously adopted, the department's determination as to placing the child in a foster care arrangement or in an adoptive home shall be based solely upon the best interests of the siblings.

§ 49-4-112 Subsidized adoption and legal guardianship; conditions.

(a) From funds appropriated to the Department of Health and Human Resources, the secretary shall establish a system of assistance for facilitating the adoption or legal guardianship of children. An adoption

subsidy shall be available for children who are legally free for adoption and who are dependents of the department or a child welfare agency licensed to place children for adoption. A legal guardianship subsidy may not require the surrender or termination of parental rights. For either subsidy, the children must be in special circumstances because one or more of the following conditions inhibit their adoption or legal guardianship placement:

(1) They have a physical or mental disability;

(2) They are emotionally disturbed;

(3) They are older children;

(4) They are a part of a sibling group; or

(5) They are a member of a racial or ethnic minority.

(b)(1) The department shall provide assistance in the form of subsidies or other services to parents who are found and approved for adoption or legal guardianship of a child certified as eligible for subsidy by the department, but before the final decree of adoption or order of legal guardianship is entered, there must be a written agreement between the family entering into the subsidized adoption or legal guardianship and the department.

(2) Adoption or legal guardianship subsidies in individual cases may commence with the adoption or legal guardianship placement, and will vary with the needs of the child as well as the availability of other resources to meet the child's needs. The subsidy may be for special services only, or for money payments, and either for a limited period, or for a long term, or for any combination of the foregoing.

(3) The specific financial terms of the subsidy shall be included in the agreement between the department and the adoptive parents or legal guardians. The agreement may recognize and provide for direct payment by the department of attorney's fees to an attorney representing the adoptive parent.

(4) The amount of the time-limited or long-term subsidy may in no case exceed that which would be allowable from time to time for the child under foster family care or, in the case of a special service, the reasonable fee for the service rendered.

(5) In addition, the department shall provide either Medicaid or other health insurance coverage for any special needs child for whom there is an adoption or legal guardianship assistance agreement between the department and the adoptive parent or legal guardian and who the

department determines cannot be placed with an adoptive parent or legal guardian without medical assistance because the child has special needs for medical, mental health or rehabilitative care.

(c) After reasonable efforts have been made without the use of subsidy and no appropriate adoptive family or legal guardian has been found for the child, the department shall certify the child as eligible for a subsidy in the event of adoption or a legal guardianship. Reasonable efforts to place a child without a subsidy shall not be required if it is in the best interest of the child because of the factors as the existence of significant emotional ties developed between the child and the prospective parent or guardian while in care as a foster child.

(d) If the child is the dependent of a voluntary licensed child-placing agency, that agency shall present to the department evidence of the inability to place the child for adoption or legal guardianship without the use of subsidy or evidence that the efforts would not be in the best interests of the child. In no event may the value of the services and assistance provided by the department under an agreement pursuant to this section exceed the value of assistance available to foster families in similar circumstances. All records regarding subsidized adoptions or legal guardianships are to be held in confidence; however, records regarding the payment of public funds for subsidized adoptions or legal guardianships shall be available for public inspection provided they do not directly or indirectly identify any child or persons receiving funds for the child.

§ 49-4-113 Duration of custody or guardianship of children committed to department.

(a) A child committed to the department for guardianship, after termination of parental rights, shall remain in the care of the department until he or she attains the age of eighteen years, or is married, or is adopted, or guardianship is relinquished through the court.

(b) A child committed to the department for custody shall remain in the care of the department until he or she attains the age of eighteen years, or until he or she is discharged because he or she is no longer in need of care.

§ 49-4-114 Consent by agency or department to adoption of child; statement of relinquishment by parent; counseling services; petition to terminate parental rights; notice; hearing; court orders.

(a)(1) Whenever a child welfare agency licensed to place children for adoption or the Department of Health and Human Resources has been given the permanent legal and physical custody of any child and the rights of the mother and the rights of the legal, determined, putative, outside or unknown father of the child have been terminated by order of a court of

competent jurisdiction or by a legally executed relinquishment of parental rights, the child welfare agency or the department may consent to the adoption of the child pursuant to article twenty-two, chapter forty-eight of this code.

(2) Relinquishment for an adoption to an agency or to the department is required of the same persons whose consent or relinquishment is required under section three hundred one, article twenty-two, chapter forty-eight of this code. The form of any relinquishment so required shall conform as nearly as practicable to the requirements established in section three hundred three, article twenty-two, chapter forty-eight, and all other provisions of that article providing for relinquishment for adoption shall govern the proceedings herein.

(3) For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

(4) The department shall make available, upon request, for purposes of any private or agency adoption proceeding, preplacement and post-placement counseling services by persons experienced in adoption counseling, at no cost, to any person whose consent or relinquishment is required pursuant to article twenty-two, chapter forty-eight of this code.

(b)(1) Whenever the mother has executed a relinquishment pursuant to this section, and the legal, determined, putative, outsider or unknown father, as those terms are defined pursuant to part one, article twenty-two, chapter forty-eight of this code, has not executed a relinquishment, the child welfare agency or the department may, by verified petition, seek to have the father's rights terminated based upon the grounds of abandonment or neglect of the child. Abandonment may be established in accordance with section three hundred six, article twenty-two, chapter forty-eight of this code.

(2) Unless waived by a writing acknowledged as in the case of deeds or by other proper means, notice of the petition shall be served on any person entitled to parental rights of a child prior to its adoption who has not signed a relinquishment of custody of the child.

(3) In addition, notice shall be given to any putative, outsider or unknown father who has asserted or exercised parental rights and duties to and with

the child and who has not relinquished any parental rights and the rights have not otherwise been terminated, or who has not had reasonable opportunity before or after the birth of the child to assert or exercise those rights, except that if the child is more than six months old at the time the notice would be required and the father has not asserted or exercised his or her parental rights and he or she knew the whereabouts of the child, then the father shall be presumed to have had reasonable opportunity to assert or exercise any rights.

(c)(1) Upon the filing of the verified petition seeking to have the parental rights terminated, the court shall set a hearing on the petition. A copy of the petition and notice of the date, time and place of the hearing on the petition shall be personally served on any respondent at least twenty days prior to the date set for the hearing.

(2) The notice shall inform the person that his or her parental rights, if any, may be terminated in the proceeding and that the person may appear and defend any rights within twenty days of the service. In the case of a person who is a nonresident or whose whereabouts are unknown, service shall be achieved: (1) By personal service; (2) by registered or certified mail, return receipt requested, postage prepaid, to the person's last known address, with instructions to forward; or (3) by publication. If personal service is not acquired, then if the person giving notice has any knowledge of the whereabouts of the person to be served, including a last known address, service by mail shall be first attempted as herein provided. Service achieved by mail shall be complete upon mailing and is sufficient service without the need for notice by publication. In the event that no return receipt is received giving adequate evidence of receipt of the notice by the addressee or of receipt of the notice at the address to which the notice was mailed or forwarded, or if the whereabouts of the person are unknown, then the person required to give notice shall file with the court an affidavit setting forth the circumstances of any attempt to serve the notice by mail, and the diligent efforts to ascertain the whereabouts of the person to be served. If the court determines that the whereabouts of the person to be served cannot be ascertained and that due diligence has been exercised to ascertain the person's whereabouts, then the court shall order service of the notice by publication as a Class II publication in compliance with article three, chapter fifty-nine of this code, and the publication area shall be the county where the proceedings are had, and in the county where the person to be served was last known to reside. In the case of a person under disability, service shall be made on the person and his or her personal representative, or if there be none, on a guardian ad litem.

(3) In the case of service by publication or mail or service on a personal representative or a guardian ad litem, the person is allowed thirty days from the date of the first publication or mailing of the service on a personal

representative or guardian ad litem in which to appear and defend the parental rights.

(d) A petition under this section may be instituted in the county where the child resides or where the child is living.

(e) If the court finds that the person certified to parental rights is guilty of the allegations set forth in the petition, the court shall enter an order terminating his or her parental rights and shall award the legal and physical custody and control of the child to the petitioner.

§ 49-4-115 Emancipation.

(a) A child over the age of sixteen may petition a court to be declared emancipated. The parents or custodians shall be made respondents and, in addition to personal service thereon, there shall be publication as a Class II legal advertisement in compliance with article three, chapter fifty-nine of this code.

(b) Upon a showing that the child can provide for his or her physical and financial well-being and has the ability to make decisions for himself or herself, the court may for good cause shown declare the child emancipated. The child shall thereafter have full capacity to contract in his or her own right and the parents or custodians have no right to the custody and control of the child or duty to provide the child with care and financial support.

(c) A child over the age of sixteen years who marries is emancipated by operation of law. An emancipated child has all of the privileges, rights and duties of an adult, including the right of contract, except that the child remains a child as defined for the purposes of part ten, article two, or part seven, article four of this chapter.

§ 49-4-116 Voluntary placement; petition; requirements; attorney appointed; court hearing; orders.

(a) Within ninety days of the date of the signatures to a voluntary placement agreement, after receipt of physical custody, the department shall file with the court a petition for review of the placement. The petition shall include:

(1) A statement regarding the child's situation; and,

(2) The circumstance that gives rise to the voluntary placement.

(b) If the department intends to extend the voluntary placement agreement, the department shall file with the court a copy of the child's case plan.

(c) The court shall appoint an attorney for the child, who shall receive a copy of the case plan as provided in subsection (b) of this section.

(d) The court shall schedule a hearing and give notice of the time and place and right to be present at the hearing to:

(1) The child's attorney;

(2) The child, if twelve years of age or older;

(3) The child's parents or guardians;

(4) The child's foster parents;

(5) Any preadoptive parent or relative providing care for the child; and

(6) Any other persons as the court may in its discretion direct.

The child's presence at the hearing may be waived by the child's attorney at the request of the child or if the child would suffer emotional harm.

(e) At the conclusion of the proceedings, but no later than ninety days after the date of the signatures to the voluntary placement agreement, the court shall enter an order:

(1) Determining whether or not continuation of the voluntary placement is in the best interests of the child;

(2) Specifying under what conditions the child's placement will continue;

(3) Specifying whether or not the department is required to and has made reasonable efforts to preserve and to reunify the family; and

(4) Providing a plan for the permanent placement of the child.

PART II. EMERGENCY POSSESSION OF CERTAIN RELINQUISHED CHILDREN.

§ 49-4-201 Accepting possession of certain relinquished children.

(a) A hospital or health care facility operating in this state, shall, without a court order, take possession of a child if the child is voluntarily delivered to the hospital or health care facility by the child's parent within thirty days of the child's birth, and the parent did not express an intent to return for the child.

(b) A hospital or health care facility that takes possession of a child under this article shall perform any act necessary to protect the physical health or

safety of the child. In accepting possession of the child, the hospital or health care facility may not require the person to identify himself or herself and shall otherwise respect the person's desire to remain anonymous.

§ 49-4-202 Notification of possession of relinquished child; department responsibilities.

(a) Not later than the close of the first business day after the date on which a hospital or health care facility takes possession of a child pursuant to section two hundred one of this article, the hospital or health care facility shall notify the Child Protective Services division of the Department of Health and Human Resources that it has taken possession of the child and shall provide the division any information provided by the parent delivering the child. The hospital or health care facility shall refer any inquiries about the child to the Child Protective Services division.

(b) The Department of Health and Human Resources shall assume the care, control and custody of the child as of the time of delivery of the child to the hospital or health care facility, and may contract with private child care agency for the care and placement of the child after the child leaves the hospital or health care facility.

§ 49-4-203 Filing petition after accepting possession of relinquished child.

A child of whom the Department of Health and Human Resources assumes care, control and custody under this article is a relinquished child and to be treated in all respects as a child taken into custody pursuant to section three hundred three, article four of this chapter. Upon taking custody of a child under this article, the department, with the cooperation of the county prosecuting attorney, shall cause a petition to be presented pursuant to section six hundred two, article four of this chapter. The department and county prosecuting attorney may not identify in the petition the parent(s) who utilized this article to relinquish his or her child. Thereafter, the department shall proceed in compliance with part six, of this article.

§ 49-4-204 Immunity from certain prosecutions.

A parent who relinquishes his or her child in good faith within thirty days of the child's birth under this article is immune from prosecution under subsection (a), section four, article eight-d, chapter sixty-one of this code.

§ 49-4-205 Adoption eligibility.

The child is eligible for adoption as an abandoned child under chapter forty-eight of the code.

PART III. EMERGENCY CUSTODY OF CHILDREN PRIOR TO PETITION.

§ 49-4-301 Custody of a neglected child by law enforcement in emergency situations; protective custody; requirements; notices; petition for appointment of special guardian; discharge; immunity.

(a) A child believed to be a neglected child or an abused child may be taken into custody without the court order otherwise required by section six hundred two of this article by a law-enforcement officer if:

(1) The child is without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to that child; or

(2) That officer determines that the child is in a condition requiring emergency medical treatment by a physician and the child's parents, parent, guardian or custodian refuses to permit the treatment, or is unavailable for consent. A child who suffers from a condition requiring emergency medical treatment, whose parents, parent, guardian or custodian refuses to permit the providing of the emergency medical treatment, may be retained in a hospital by a physician against the will of the parents, parent, guardian or custodian, as provided in subsection (c) of this section.

(b) A child taken into protective custody pursuant to subsection (a) of this section may be housed by the department or in any authorized child shelter facility. The authority to hold the child in protective custody, absent a petition and proper order granting temporary custody pursuant to section six hundred two of this article, terminates by operation of law upon the happening of either of the following events, whichever occurs first:

(1) The expiration of ninety-six hours from the time the child is initially taken into protective custody; or

(2) The expiration of the circumstances which initially warranted the determination of an emergency situation.

No child may be considered in an emergency situation and custody withheld from the child's parents, parent, guardian or custodian presenting themselves, himself or herself in a fit and proper condition and requesting physical custody of the child. No child may be removed from a place of residence as in an emergency under this section until after:

(1) All reasonable efforts to make inquiries and arrangements with neighbors, relatives and friends have been exhausted; or if no arrangements can be made; and

(2) The state department may place in the residence a home services worker with the child for a period of not less than twelve hours to await the return of the child's parents, parent, guardian or custodian.

Prior to taking a child into protective custody as abandoned at a place at or near the residence of the child, the law-enforcement officer shall post a typed or legibly handwritten notice at the place the child is found, informing the parents, parent, guardian or custodian that the child was taken by a law-enforcement officer, the name, address and office telephone number of the officer, the place and telephone number where information can continuously be obtained as to the child's whereabouts, and if known, the worker for the state department having responsibility for the child.

(c) A child taken into protective custody pursuant to this section for emergency medical treatment may be held in a hospital under the care of a physician against the will of the child's parents, parent, guardian or custodian for a period not to exceed ninety-six hours. The parents, parent, guardian or custodian may not be denied the right to see or visit with the child in a hospital. The authority to retain a child in protective custody in a hospital as requiring emergency medical treatment terminates by operation of law upon the happening of either of the following events, whichever occurs first:

(1) When the condition, in the opinion of the physician, no longer required emergency hospitalization, or;

(2) Upon the expiration of ninety-six hours from the initiation of custody, unless within that time, a petition is presented and a proper order obtained from the circuit court.

(d) Prior to assuming custody of a child from a law-enforcement officer, pursuant to this section, a physician or worker from the department shall require a typed or legibly handwritten statement from the officer identifying the officer's name, address and office telephone number and specifying all the facts upon which the decision to take the child into protective custody was based, and the date, time and place of the taking.

(e) Any worker for the department assuming custody of a child pursuant to this section shall immediately notify the parents, parent, guardian or custodian of the child of the taking of the custody and the reasons therefor, if the whereabouts of the parents, parent, guardian or custodian are known or can be discovered with due diligence; and if not, notice and explanation shall be given to the child's closest relative, if his or her whereabouts are

known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors, and if a relative or appropriate neighbor is willing to assume custody of the child, the child will temporarily be placed in custody.

(f) No child may be taken into custody under circumstances not justified by this section or pursuant to section six hundred two of this article without appropriate process. Any retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law.

(g) *Petition for appointment of special guardian*. -- Upon the verified petition of any person showing:

(1) That any person under the age of eighteen years is threatened with or there is a substantial possibility that the person will suffer death, serious or permanent physical or emotional disability, disfigurement or suffering; and

(2) That disability, disfigurement or suffering is the result of the failure or refusal of any parent, guardian or custodian to procure, consent to or authorize necessary medical treatment, the circuit court of the county in which the person is located may direct the appointment of a special guardian for the purposes of procuring, consenting to and giving authorization for the administration of necessary medical treatment. The circuit court may not consider any petition filed in accordance with this section unless it is accompanied by a supporting affidavit of a licensed physician.

(h) *Notice of petition*. -- So far as practicable, the parents, guardian or custodian of any person for whose benefit medical treatment is sought shall be given notice of the petition for the appointment of a special guardian under this section. Notice is not necessary if it would cause a delay that would result in the death or irreparable harm to the person for whose benefit medical treatment is sought. Notice may be given in a form and manner as may be necessary under the circumstances.

(i) *Discharge of special guardian*. -- Upon the termination of necessary medical treatment to any person under this section, the circuit court order the discharge of the special guardian from any further authority, responsibility or duty.

(j) *Immunity from civil liability*. -- No person appointed special guardian in accordance with this article is civilly liable for any act done by virtue of the authority vested in him or her by order of the circuit court.

§ 49-4-302 Authorizing a family court judge to order custody of a child in emergency situations; requirements; orders; investigative reports; notification required.

(a) Notwithstanding the jurisdictional limitations contained in section two, article two-a, chapter fifty-one of this code, family court judges are authorized to order the department to take emergency custody of a child who is in the physical custody of a party to an action or proceeding before the family court, if the family court judge finds that there is clear and convincing evidence that:

(1) There exists an imminent danger to the physical well-being of the child as defined in section two hundred one, article one of this chapter;

(2) The child is not the subject of a pending action before the circuit court alleging abuse and neglect of the child; and

(3) There are no reasonable available alternatives to the emergency custody order.

(b) An order entered pursuant to subsection (a) of this section must include specific written findings.

(c) A copy of the order issued pursuant to subsection (a) of this section shall be transmitted forthwith to the department, the circuit court and the prosecuting attorney.

(d) Upon receipt of an order issued pursuant to subsection (a) of this section, the department shall immediately respond and assist the family court judge in emergency placement of the child.

(e)(1) Upon receipt of an order issued pursuant to subsection (a) of this section, the circuit court shall cause to be entered and served, an administrative order in the name of and regarding the affected child, directing the department to submit, within ninety-six hours from the time the child was taken into custody, an investigative report to both the circuit and family court.

(2) The investigative report shall include a statement of whether the department intends to file a petition pursuant to section six hundred two of this article.

(f)(1) An order issued pursuant to subsection (a) of this section terminates by operation of law upon expiration of ninety-six hours from the time the child is initially taken into protective custody unless a petition is filed with the circuit court under section six hundred two of this article within

ninety-six hours from the time the child is initially taken into protective custody.

(2) The filing of a petition within ninety-six hours from the time the child is initially taken into protective custody extends the emergency custody order issued pursuant to subsection (a) of this section until a preliminary hearing is held before the circuit court, unless the circuit court orders otherwise.

(g)(1) Any worker for the department assuming custody of a child pursuant to this section shall immediately notify the parents, parent, grandparents, grandparent, guardian or custodian of the child of the taking of the custody and the reasons therefor if the whereabouts of the parents, parent, grandparents, grandparent, guardian or custodian are known or can be discovered with due diligence and, if not, a notice and explanation shall be given to the child's closest relative if his or her whereabouts are known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors and, if an appropriate relative or neighbor is willing to assume custody of the child, the child will temporarily be placed in that person's custody.

(2) In the event no other reasonable alternative is available for temporary placement of a child pursuant to subdivision (1) of this subsection, the child may be housed by the department in an authorized child shelter facility.

§ 49-4-303 Emergency removal by department before filing of petition; conditions; referee; application for emergency custody; order.

Prior to the filing of a petition, a child protective service worker may take the child or children into his or her custody (also known as removing the child) without a court order when:

(1) In the presence of a child protective service worker a child or children are in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in section two hundred one, article one of this chapter; and

(2) The worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered.

After taking custody of the child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or referee of the county where custody was taken and immediately apply for an order. If no judge or referee is available, the worker shall appear before a circuit judge or referee of an adjoining county, and immediately apply for an order. This

order shall ratify the emergency custody of the child pending the filing of a petition.

The circuit court of every county in the state shall appoint at least one of the magistrates of the county to act as a referee. He or she serves at the will and pleasure of the appointing court, and shall perform the functions prescribed for the position by this subsection.

The parents, guardians or custodians of the child or children may be present at the time and place of application for an order ratifying custody. If at the time the child or children are taken into custody by the worker he or she knows which judge or referee is to receive the application, the worker shall so inform the parents, guardians or custodians.

The application for emergency custody may be on forms prescribed by the Supreme Court of Appeals or prepared by the prosecuting attorney or the applicant, and shall set forth facts from which it may be determined that the probable cause described above in this subsection exists. Upon the sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order the emergency taking by the worker to be ratified. If appropriate under the circumstances, the order may include authorization for an examination as provided in subsection (b), section six hundred three of this article.

If a referee issues an order, the referee shall by telephonic communication have that order orally confirmed by a circuit judge of the circuit or an adjoining circuit who shall, on the next judicial day, enter an order of confirmation. If the emergency taking is ratified by the judge or referee, emergency custody of the child or children is vested in the department until the expiration of the next two judicial days, at which time any child taken into emergency custody shall be returned to the custody of his or her parent or guardian or custodian unless a petition has been filed and custody of the child has been transferred under section six hundred two of this article.

PART IV. MULTIDISCIPLINARY TEAMS, CASE PLANS, TRANSITION PLANS AND AFTERCARE PLANS.

§ 49-4-401 Purpose; system to be a complement to existing programs.

(a) This article:

(1) Provides a system for evaluation of and coordinated service delivery for children who may be victims of abuse or neglect and children undergoing certain status offense and delinquency proceedings;

(2) Establishes, as a complement to other programs of the Department of Health and Human Resources, a multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning, following the initiation of judicial proceedings, to recommend alternatives and to coordinate evaluations and in-community services; and

(3) Ensures that children are safe from abuse and neglect and to coordinate investigation of alleged child abuse offenses and competent criminal prosecution of offenders to ensure that safety, as determined appropriate by the prosecuting attorney.

(b) Nothing in this article precludes any multidisciplinary team from considering any case upon the consent of the members of the team.

§ 49-4-402 Multidisciplinary investigative teams; establishment; membership; procedures; coordination among agencies; confidentiality.

(a) The prosecuting attorney of each county shall establish a multidisciplinary investigative team in that county. The multidisciplinary team shall be headed and directed by the prosecuting attorney, or his or her designee, and includes as permanent members:

(1) The prosecuting attorney, or his or her designee;

(2) A local child protective services caseworker from the Department of Health and Human Resources;

(3) A local law-enforcement officer employed by a law-enforcement agency in the county;

(4) A child advocacy center representative, where available;

(5) A health care provider with pediatric and child abuse expertise, where available;

(6) A mental health professional with pediatric and child abuse expertise, where available;

(7) An educator; and

(8) A representative from a licensed domestic violence program serving the county.

The Department of Health and Human Resources and any local law-enforcement agency or agencies selected by the prosecuting attorney shall appoint their representatives to the team by submitting a written designation of the team to the prosecuting attorney of each county within thirty days of

the prosecutor's request that the appointment be made. Within fifteen days of the appointment, the prosecuting attorney shall notify the chief judge of each circuit within which the county is situated of the names of the representatives so appointed. Any other person or any other appointee of an agency who may contribute to the team's efforts to assist a minor child as may be determined by the permanent members of the team may also be appointed as a member of the team by the prosecutor with notification to the chief judge.

(b) Any permanent member of the multidisciplinary investigative team shall refer all cases of accidental death of any child reported to their agency and all cases when a child dies while in the custody of the state for investigation and review by the team. The multidisciplinary investigative team shall meet at regular intervals at least once every calendar month.

(c) The investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.

(d) State, county and local agencies shall provide the multidisciplinary investigative team with any information requested in writing by the team as allowable by law or upon receipt of a certified copy of the circuit court's order directing the agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with this article remains confidential. For purposes of this section, the term "confidential" shall be construed in accordance with article five of this chapter.

§ 49-4-403 Multidisciplinary treatment planning process; coordination; access to information.

(a)(1) A multidisciplinary treatment planning process for cases initiated pursuant to part six and part seven of article four of this chapter shall be established within each county of the state, either separately or in conjunction with a contiguous county, by the secretary of the department with advice and assistance from the prosecutor's advisory council as set forth in section four, article four, chapter seven of this code. In each circuit, the department shall coordinate with the prosecutor's office, the public defender's office or other counsel representing juveniles to designate, with the approval of the court, at least one day per month on which multidisciplinary team meetings for that circuit shall be held: Provided, That multidisciplinary team meetings may be held on days other than the designated day or days when necessary. The Division of Juvenile Services shall establish a similar treatment planning process for delinquency cases

in which the juvenile has been committed to its custody, including those cases in which the juvenile has been committed for examination and diagnosis.

(2) This section does not require a multidisciplinary team meeting to be held prior to temporarily placing a child or juvenile out-of-home under exigent circumstances or upon a court order placing a juvenile in a facility operated by the Division of Juvenile Services.

(b) The case manager in the Department of Health and Human Resources for the child, family or juvenile or the case manager in the Division of Juvenile Services for a juvenile shall convene a treatment team in each case when it is required pursuant to this article.

(1) Prior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement with appropriate relatives then with foster care homes, facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child.

(2) Any person authorized by the provisions of this chapter to convene a multidisciplinary team meeting may seek and receive an order of the circuit court setting such meeting and directing attendance. Members of the multidisciplinary team may participate in team meetings by telephone or video conferencing. This subsection does not prevent the respective agencies from designating a person other than the case manager as a facilitator for treatment team meetings. Written notice shall be provided to all team members of the availability to participate by videoconferencing.

(c) The treatment team shall coordinate its activities and membership with local family resource networks and coordinate with other local and regional child and family service planning committees to assure the efficient planning and delivery of child and family services on a local and regional level.

(d) The multidisciplinary treatment team shall be afforded access to information in the possession of the Department of Health and Human Resources, Division of Juvenile Services, law-enforcement agencies and other state, county and local agencies. Those agencies shall cooperate in the sharing of information as may be provided in article five of this chapter or any other relevant provision of law. Any multidisciplinary team member

who acquires confidential information may not disclose the information except as permitted by the provisions of this code or court rules.

§ 49-4-404 Court review of service plan; hearing; required findings; order; team member's objections.

(a) In any case in which a multidisciplinary treatment team develops an individualized service plan for a child or family pursuant to this article, the court shall review the proposed service plan to determine if implementation of the plan is in the child's best interests. If the multidisciplinary team cannot agree on a plan or if the court determines not to adopt the team's recommendations, it shall, upon motion or sua sponte, schedule and hold within ten days of the determination, and prior to the entry of an order placing the child in the custody of the department or in an out-of-home setting, a hearing to consider evidence from the team as to its rationale for the proposed service plan. If, after a hearing held pursuant to this section, the court does not adopt the teams's recommended service plan, it shall make specific written findings as to why the team's recommended service plan was not adopted.

(b) In any case in which the court decides to order the child placed in an out-of-state facility or program it shall set forth in the order directing the placement the reasons why the child was not placed in an in-state facility or program.

(c) Any member of the multidisciplinary treatment team who disagrees with recommendations of the team may inform the court of his or her own recommendations and objections to the team's recommendations. The recommendations and objections of the dissenting team member may be made in a hearing on the record, made in writing and served upon each team member and filed with the court and indicated in the case plan, or both made in writing and indicated in the case plan. Upon receiving objections, the court will conduct a hearing pursuant to paragraph (a) of this section.

§ 49-4-405 Multidisciplinary treatment planning process involving child abuse and neglect; team membership; duties; reports; admissions.

(a) Within thirty days of the initiation of a judicial proceeding pursuant to part six, of this article, the Department of Health and Human Services shall convene a multidisciplinary treatment team to assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children or the adult respondents that it deems necessary to assist in the development of that plan.

(b) In a case initiated pursuant to part six of this article, the treatment team consists of:

(1) The child or family's case manager in the Department of Health and Human Resources;

(2) The adult respondent or respondents;

(3) The child's parent or parents, guardians, any copetitioners, custodial relatives of the child, foster or preadoptive parents;

(4) Any attorney representing an adult respondent or other member of the treatment team;

(5) The child's counsel or the guardian ad litem;

(6) The prosecuting attorney or his or her designee;

(7) A member of a child advocacy center when the child has been processed through the child advocacy center program or programs or it is otherwise appropriate that a member of the child advocacy center participate;

(8) Any court-appointed special advocate assigned to a case;

(9) Any other person entitled to notice and the right to be heard;

(10) An appropriate school official; and

(11) Any other person or agency representative who may assist in providing recommendations for the particular needs of the child and family, including domestic violence service providers.

The child may participate in multidisciplinary treatment team meetings if the child's participation is deemed appropriate by the multidisciplinary treatment team. Unless otherwise ordered by the court, a party whose parental rights have been terminated and his or her attorney may not be given notice of a multidisciplinary treatment team meeting and does not have the right to participate in any treatment team meeting.

(c) Prior to disposition in each case which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement with appropriate relatives then with foster care homes, facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after

considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child.

(d) The multidisciplinary treatment team shall submit written reports to the court as required by the rules governing this type of proceeding or by the court, and shall meet as often as deemed necessary but at least every three months until the case is dismissed from the docket of the court. The multidisciplinary treatment team shall be available for status conferences and hearings as required by the court.

(e) If a respondent or copetitioner admits the underlying allegations of child abuse or neglect, or both abuse and neglect, in the multidisciplinary treatment planning process, his or her statements may not be used in any subsequent criminal proceeding against him or her, except for perjury or false swearing.

§ 49-4-406 Multidisciplinary treatment process for status offenders or delinquents; requirements; custody; procedure; reports; cooperation; inadmissibility of certain statements.

(a) When a juvenile is adjudicated as a status offender pursuant to section seven hundred eleven of this article, the Department of Health and Human Resources shall promptly convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a risk and needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. Upon completion of the assessment, the treatment team shall prepare and implement a comprehensive, individualized service plan for the juvenile.

(b) When a juvenile is adjudicated as a delinquent or has been granted a preadjudicatory community supervision period pursuant to section seven hundred eight of this article, the court, either upon its own motion or motion of a party, may require the Department of Health and Human Resources to convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a risk and needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. A referral to the Department of Health and Human Resources to convene a multidisciplinary treatment team and to conduct such an assessment shall be made when the court is considering placing the juvenile in the department's custody or placing the juvenile out-of-home at the

department's expense pursuant to section seven hundred fourteen of this article. In any delinquency proceeding in which the court requires the Department of Health and Human Resources to convene a multidisciplinary treatment team, the probation officer shall notify the department at least fifteen working days before the court proceeding in order to allow the department sufficient time to convene and develop an individualized service plan for the juvenile.

(c) When a juvenile has been adjudicated and committed to the custody of the Director of the Division of Juvenile Services, including those cases in which the juvenile has been committed for examination and diagnosis, the Division of Juvenile Services shall promptly convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a risk and needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan. Upon completion of the assessment, the treatment team shall prepare and implement a comprehensive, individualized service plan for the juvenile, which shall be provided in writing to the court and team members. In cases where the juvenile is committed as a post-sentence disposition to the custody of the Division of Juvenile Services, the plan shall be reviewed quarterly by the multidisciplinary treatment team. Where a juvenile has been detained in a facility operated by the Division of Juvenile Services without an active service plan for more than sixty days, the director of the facility may call a multidisciplinary team meeting to review the case and discuss the status of the service plan.

(d)(1) The rules of juvenile procedure shall govern the procedure for obtaining any assessment of a juvenile, preparing an individualized service plan and submitting the plan and any assessment to the court.

(2) In juvenile proceedings conducted pursuant to part seven of this article, the following representatives shall serve as members and attend each meeting of the multidisciplinary treatment team, so long as they receive notice at least seven days prior to the meeting:

(A) The juvenile;

(B) The juvenile's case manager in the Department of Health and Human Resources or the Division of Juvenile Services;

(C) The juvenile's parent, guardian or custodian;

(D) The juvenile's attorney;

(E) Any attorney representing a member of the multidisciplinary treatment team;

(F) The prosecuting attorney or his or her designee;

(G) The county school superintendent or the superintendent's designee;

(H) A treatment or service provider with training and clinical experience coordinating behavioral or mental health treatment; and

(I) Any other person or agency representative who may assist in providing recommendations for the particular needs of the juvenile and family, including domestic violence service providers. In delinquency proceedings, the probation officer shall be a member of a multidisciplinary treatment team. When appropriate, the juvenile case manager in the Department of Health and Human Resources and the Division of Juvenile Services shall cooperate in conducting multidisciplinary treatment team meetings when it is in the juvenile's best interest.

(3) Prior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement at facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child. The multidisciplinary treatment team shall also determine and advise the court as to the individual treatment and rehabilitation plan recommended for the child for either out-of-home placement or community supervision. The plan may focus on reducing the likelihood of reoffending, requirements for the child to take responsibility for his or her actions, completion of evidence-based services or programs or any other relevant goal for the child. The plan may also include opportunities to incorporate the family, custodian or guardian into the treatment and rehabilitation process.

(4) The multidisciplinary treatment team shall submit written reports to the court as required by applicable law or by the court, shall meet with the court at least every three months, as long as the juvenile remains in the legal or physical custody of the state, and shall be available for status conferences and hearings as required by the court. The multidisciplinary treatment team shall monitor progress of the plan identified in subdivision (3) of this subsection and review progress of the plan at the regular meetings held at least every three months pursuant to this section, or at

shorter intervals, as ordered by the court, and shall report to the court on the progress of the plan or if additional modification is necessary.

(5) In any case in which a juvenile has been placed out of his or her home except for a temporary placement in a shelter or detention center, the multidisciplinary treatment team shall cooperate with the state agency in whose custody the juvenile is placed to develop an after-care plan. The rules of juvenile procedure and section four hundred nine of this article govern the development of an after-care plan for a juvenile, the submission of the plan to the court and any objection to the after-care plan.

(6) If a juvenile respondent admits the underlying allegations of the case initiated pursuant to part VII of this article, in the multidisciplinary treatment planning process, his or her statements may not be used in any juvenile or criminal proceedings against the juvenile, except for perjury or false swearing.

§ 49-4-407 Team directors; records; case logs.

All persons directing any team created pursuant to this article shall maintain records of each meeting indicating the name and position of persons attending each meeting and the number of cases discussed at the meeting, including a designation of whether or not that case was previously discussed by any multidisciplinary team. Further, all investigative teams shall maintain a log of all cases to indicate the number of referrals to that team, whether or not a police report was filed with the prosecuting attorney's office, whether or not a petition was sought pursuant to part six of this article or whether or not a criminal complaint was issued and a case was criminally prosecuted. All treatment teams shall maintain a log of all cases to indicate the basis for failure to review a case for a period in excess of six months.

§ 49-4-408 Unified child and family case plans; treatment teams; programs; agency requirements.

(a) The Department of Health and Human Resources shall develop a unified child and family case plan for every family wherein a person has been referred to the department after being allowed an improvement period or where the child is placed in foster care. The case plan must be filed within sixty days of the child coming into foster care or within thirty days of the inception of the improvement period, whichever occurs first. The department may also prepare a case plan for any person who voluntarily seeks child abuse and neglect services from the department, or who is referred to the department by another public agency or private organization. The case plan provisions shall comply with federal law and the rules of procedure for child abuse and neglect proceedings.

(b) The department shall convene a multidisciplinary treatment team, which shall develop the case plan. Parents, guardians or custodians shall participate fully in the development of the case plan, and the child shall also fully participate if sufficiently mature and the child's participation is otherwise appropriate. The case plan may be modified from time to time to allow for flexibility in goal development, and in each case the modifications shall be submitted to the court in writing. Reasonable efforts to place a child for adoption or with a legal guardian may be made at the same time as reasonable efforts are being made to prevent removal or to make it possible for a child to return safely home. The court shall examine the proposed case plan or any modification thereof, and upon a finding by the court that the plan or modified plan can be easily communicated, explained and discussed so as to make the participants accountable and able to understand the reasons for any success or failure under the plan, the court shall inform the participants of the probable action of the court if goals are met or not met.

(c) In furtherance of the provisions of this article, the department shall, within the limits of available funds, establish programs and services for the following purposes:

(1) For the development and establishment of training programs for professional and paraprofessional personnel in the fields of medicine, law, education, social work and other relevant fields who are engaged in, or intend to work in, the field of the prevention, identification and treatment of child abuse and neglect; and training programs for children, and for persons responsible for the welfare of children, in methods of protecting children from child abuse and neglect;

(2) For the establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams and community teams of personnel trained in the prevention, identification and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect, including direct support as well as providing advice and consultation to individuals, agencies and organizations which request the services;

(3) For furnishing services of multidisciplinary teams and community teams, trained in the prevention, identification and treatment of child abuse and neglect cases, on a consulting basis to small communities where the services are not available;

(4) For other innovative programs and projects that show promise of successfully identifying, preventing or remedying the causes of child abuse and neglect, including, but not limited to, programs and services designed to improve and maintain parenting skills, programs and projects for parent self help, and for prevention and treatment of drug-related child abuse and neglect; and

(5) Assisting public agencies or nonprofit private organizations or combinations thereof in making applications for grants from, or in entering into contracts with, the federal Secretary of the Department of Health and Human Services for demonstration programs and projects designed to identify, prevent and treat child abuse and neglect.

(d) Agencies, organizations and programs funded to carry out the purposes of this section shall be structured so as to comply with any applicable federal law, any regulation of the federal Department of Health and Human Services or its secretary, and any final comprehensive plan of the federal advisory board on child abuse and neglect. In funding organizations, the department shall, to the extent feasible, ensure that parental organizations combating child abuse and neglect receive preferential treatment.

§ 49-4-409 After-care plans; contents; written comments; contacts; objections; courts.

(a) Prior to the discharge of a child from any out-of-home placement to which the juvenile was committed pursuant to this chapter, the department or the Division of Juvenile Services shall convene a meeting of the multidisciplinary treatment team to which the child has been referred or, if no referral has been made, convene a multidisciplinary treatment team for any child for which a multidisciplinary treatment plan is required by this article and forward a copy of the juvenile's proposed after-care plan to the court which committed the juvenile. A copy of the plan shall also be sent to: (1) The child's parent, guardian or custodian; (2) the child's lawyer; (3) the child's probation officer or community mental health center professional; (4) the prosecuting attorney of the county in which the original commitment proceedings were held; and (5) the principal of the school which the child will attend. The plan shall have a list of the names and addresses of these persons attached to it.

(b) The after-care plan shall contain a detailed description of the education, counseling and treatment which the child received at the out-of-home placement and it shall also propose a plan for education, counseling and treatment for the child upon the child's discharge. The plan shall also contain a description of any problems the child has, including the source of those problems, and it shall propose a manner for addressing those problems upon discharge.

(c) Within twenty-one days of receiving the plan, the child's probation officer or community mental health center professional shall submit written comments upon the plan to the court which committed the child. Any other person who received a copy of the plan pursuant to subsection (a) of this section may submit written comments upon the plan to the court which committed the child. Any person who submits comments upon the plan shall

send a copy of those comments to every other person who received a copy of the plan.

(d) Within twenty-one days of receiving the plan, the child's probation officer or community mental health center professional shall contact all persons, organizations and agencies which are to be involved in executing the plan to determine whether they are capable of executing their responsibilities under the plan and to further determine whether they are willing to execute their responsibilities under the plan.

(e) If adverse comments or objections regarding the plan are submitted to the circuit court, it shall, within forty-five days of receiving the plan, hold a hearing to consider the plan and the adverse comments or objections. Any person, organization or agency which has responsibilities in executing the plan, or their representatives, may be required to appear at the hearing unless they are excused by the circuit court. Within five days of the hearing, the circuit court shall issue an order which adopts the plan as submitted or as modified in response to any comments or objections.

(f) If no adverse comments or objections are submitted, a hearing need not be held. In that case, the circuit court shall consider the plan as submitted and shall, within forty-five days of receiving the plan, issue an order which adopts the plan as submitted.

(g) Notwithstanding the provisions of subsections (e) and (f) of this section, the plan which is adopted by the circuit court shall be in the best interests of the child and shall also be in conformity with West Virginia's interest in youths as embodied in this chapter.

(h) The court which committed the child shall appoint the child's probation officer or community mental health center professional to act as supervisor of the plan. The supervisor shall report the child's progress under the plan to the court every sixty days or until the court determines that no report or no further care is necessary.

§ 49-4-410 Other agencies of government required to cooperate.

State, county and local agencies shall provide the multidisciplinary teams with any information requested in writing by the team as allowable by law or upon receipt of a certified copy of the circuit court's order directing the agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with this article remain confidential. For purposes of this section, the term "confidential" shall be construed in accordance with article five of this chapter.

§ 49-4-411 Law enforcement; prosecution; interference with performance of duties.

No multidisciplinary team may take any action which, in the determination of the prosecuting attorney or his or her assistant, impairs the ability of the prosecuting attorney, his or her assistant, or any law-enforcement officer to perform his or her statutory duties.

§ 49-4-412 Exemption from multidisciplinary team review before emergency out-of-home placements.

Notwithstanding any provision of this article to the contrary, a multidisciplinary team meeting may not be required before temporary out-of-home placement of a child in an emergency circumstance or for purposes of assessment as provided by this article. As soon a practicable after the emergency circumstance, the multidisciplinary treatment team shall convene to explore placement options.

§ 49-4-413. Individualized case planning.

(a) For any juvenile ordered to probation supervision pursuant to section seven hundred fourteen, article four of this chapter, the probation officer assigned to the juvenile shall develop and implement an individualized case plan in consultation with the juvenile's parents, guardian or custodian, and other appropriate parties, and based upon the results of a risk and needs assessment conducted within the last six months prior to the disposition to probation. The probation officer shall work with the juvenile and his or her family, guardian or custodian to implement the case plan following disposition. At a minimum, the case plan shall:

(1) Identify the actions to be taken by the juvenile and, if appropriate, the juvenile's parents, guardian or custodian to ensure future lawful conduct and compliance with the court's disposition order; and

(2) Identify the services to be offered and provided to the juvenile and, if appropriate, the juvenile's parents, guardian or custodian and may include services to address: Mental health and substance abuse issues; education; individual, group and family counseling services; community restoration; or other relevant concerns identified by the probation officer.

(b) For any juvenile disposed to an out-of-home placement with the department, the department shall ensure that the residential service provider develops and implements an individualized case plan based upon the recommendations of the multidisciplinary team pursuant to section four hundred six, article four of this chapter and the results of a risk and needs assessment. At a minimum, the case plan shall include:

(1) Specific treatment goals and the actions to be taken by the juvenile in order to demonstrate satisfactory attainment of each goal;

(2) The services to be offered and provided by the residential service providers; and

(3) A detailed plan designed to assure appropriate reintegration of the juvenile to his or her family, guardian, school and community following the satisfactory completion of the case plan treatment goals, including a protocol and timeline for engaging the parents, guardians or custodians prior to the release of the juvenile.

(c) For any juvenile committed to the Division of Juvenile Services, the Division of Juvenile Services shall develop and implement an individualized case plan based upon the recommendations made to the court by the multidisciplinary team pursuant to section four hundred six, article four of this chapter and the results of a risk and needs assessment. At a minimum, the case plan shall include:

(1) Specific correctional goals and the actions to be taken by the juvenile to demonstrate satisfactory attainment of each goal;

(2) The services to be offered and provided by the Division of Juvenile Services and any contracted service providers; and

(3) A detailed plan designed to assure appropriate reintegration of the juvenile to his or her family, guardian, school and community following the satisfactory completion of the case plan treatment goals, including a protocol and timeline for engaging the parents, guardians or custodians prior to the release of the juvenile.

PART V. DUTIES OF THE PROSECUTING ATTORNEY.

§ 49-4-501 Prosecuting attorney representation of the Department of Health and Human Resources; conflict resolution.

(a) The prosecuting attorney shall render to the Department of Health and Human Resources, without additional compensation, the legal services as the department may require. This section shall not be construed to prohibit the department from developing plans for cooperation with courts, prosecuting attorneys, and other law-enforcement officials in a manner as to permit the state and its citizens to obtain maximum fiscal benefits under federal laws, rules and regulations.

(b) Nothing in this code may be construed to limit the authority of a prosecuting attorney to file an abuse or neglect petition, including the duties

and responsibilities owed to its client the Department of Health and Human Resources, in his or her fulfillment of the provisions of this article.

(c) Whenever, pursuant to this chapter, a prosecuting attorney acts as counsel for the Department of Health and Human Resources, and a dispute arises between the prosecuting attorney and the department's representative because an action proposed by the other is believed to place the child at imminent risk of abuse or serious neglect, either the prosecuting attorney or the department's representative may contact the secretary of the department and the executive director of the West Virginia Prosecuting Attorneys Institute for prompt mediation and resolution. The secretary may designate either his or her general counsel or the director of social services to act as his or her designee and the executive director may designate an objective prosecuting attorney as his or her designee.

§ 49-4-502 Prosecuting attorney to represent and cooperate with persons other than the department in child abuse and neglect matters; duties.

It is the duty of every prosecuting attorney to fully and promptly cooperate with persons seeking to apply for relief, including co-petitioners with the department, under this article in all cases of suspected child abuse and neglect; to promptly prepare applications and petitions for relief requested by those persons, to investigate reported cases of suspected child abuse and neglect for possible criminal activity; and to report at least annually to the grand jury regarding the discharge of his or her duties with respect thereto.

§ 49-4-503 Prosecuting attorney to represent petitioner in juvenile cases.

The prosecuting attorney shall represent the petitioner in all proceedings under this article before the court judge or magistrate having juvenile jurisdiction.

§ 49-4-504 Prosecuting attorney duty to establish multidisciplinary investigative teams.

The prosecuting attorney of each county shall establish a multidisciplinary investigative team in that county, pursuant to section four hundred two of this article, and section five, article four of chapter seven.

PART VI. PROCEDURES IN CASES OF CHILD NEGLECT OR ABUSE.

§ 49-4-601 Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure.

(a) *Petitioner and venue*. -- If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or if the petition is being brought by the department, in the county in which the custodial respondent or other named party abuser resides, or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no circumstance may a party file a petition in more than one county based on the same set of facts.

(b) *Contents of Petition*. -- The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how the conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought.

(c) *Court action upon filing of petition*. -- Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child. When there is an order for temporary custody pursuant to this article, the preliminary hearing shall be held within ten days of the order continuing or transferring custody, unless a continuance for a reasonable time is granted to a date certain, for good cause shown.

(d) *Department action upon filing of the petition*. -- At the time of the institution of any proceeding under this article, the department shall provide supportive services in an effort to remedy circumstances detrimental to a child.

(e) *Notice of hearing*. --

(1) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to the parents or custodian at least five days' actual notice of a preliminary hearing and at least ten days' notice of any other hearing.

(2) Notice shall be given to the department, any foster or preadoptive parent, and any relative providing care for the child.

(3) In cases where personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to the person by

certified mail, addressee only, return receipt requested, to the last known address of the person. If the person signs the certificate, service shall be complete and the certificate shall be filed as proof of the service with the clerk of the circuit court.

(4) If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with article three, chapter fifty-nine of this code.

(5) A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that the proceedings can result in the permanent termination of the parental rights.

(6) Failure to object to defects in the petition and notice may not be construed as a waiver.

(f) *Right to counsel*. --

(1) In any proceeding under this article, the child, his or her parents and his or her legally established custodian or other persons standing in loco parentis to him or her has the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed.

(2) Counsel shall be appointed in the initial order. For parents, legal guardians, and other persons standing in loco parentis, the representation may only continue after the first appearance if the parent or other persons standing in loco parentis cannot pay for the services of counsel.

(3) Counsel for other parties shall only be appointed upon request for appointment of counsel. If the requesting parties have not retained counsel and cannot pay for the services of counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent the other party or parties and so inform the parties.

(4) Under no circumstances may the same attorney represent both the child and the other party or parties, nor may the same attorney represent both parents or custodians. However, one attorney may represent both parents or custodians where both parents or guardians consent to this representation after the attorney fully discloses to the client the possible conflict and where the attorney assures the court that she or he is able to represent each client without impairing her or his professional judgment; however, if more than one child from a family is involved in the proceeding, one attorney may represent all the children.

(5) A parent who is a copetitioner is entitled to his or her own attorney. The court may allow to each attorney so appointed a fee in the same amount which appointed counsel can receive in felony cases.

(g) *Continuing education for counsel*. -- Any attorney representing a party under this article shall receive a minimum of eight hours of continuing legal education training per reporting period on child abuse and neglect procedure and practice. In addition to this requirement, any attorney appointed to represent a child must first complete training on representation of children that is approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of Appeals shall develop procedures for approval and certification of training required under this section. Where no attorney has completed the training required by this subsection, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent the parent or child. Any attorney appointed pursuant to this section shall perform all duties required of an attorney licensed to practice law in the State of West Virginia.

(h) *Right to be heard*. -- In any proceeding pursuant to this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. Foster parents, preadoptive parents, and relative caregivers shall also have a meaningful opportunity to be heard.

(i) *Findings of the court*. -- Where relevant, the court shall consider the efforts of the department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether the child is abused or neglected and-whether the respondent is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

(j) *Priority of proceedings*. -- Any petition filed and any proceeding held under this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under section three hundred nine, article twenty-seven, chapter forty-eight of this code and actions in which trial is in progress. Any petition filed under this article shall be docketed immediately upon filing. Any hearing to be held at the end of an improvement period and any other hearing to be held during any proceedings under this article shall be held as nearly as practicable on successive days and, with respect to the hearing to be held at the end of an improvement period, shall be held as close in time as possible after the end of the improvement period and shall be held within thirty days of the termination of the improvement period.

(k) *Procedural safeguards*. -- The petition may not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Following the court's determination, it shall be inquired of the parents or custodians whether or not appeal is desired and the response transcribed. A negative response may not be construed as a waiver. The evidence shall be transcribed and made available to the parties or their counsel as soon as practicable, if the same is required for purposes of further proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating that he or she cannot pay therefor.

§ 49-4-602 Petition to court when child believed neglected or abused; temporary care, custody, and control of child at different stages of proceeding; temporary care; orders; emergency removal; when reasonable efforts to preserve family are unnecessary.

(a)(1) *Temporary care, custody, and control upon filing of the petition*. -- Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the care, custody, and control of the department or a responsible person who is not the custodial parent or guardian of the child, if it finds that:

(A) There exists imminent danger to the physical well-being of the child; and

(B) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody.

(2) Where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in the home unless the alleged abusing person is or has been precluded from visiting or residing in the home by judicial order.

(3) In a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal.

(4) The initial order directing custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of care, custody, and control of the child or children to the department or a responsible relative, which may include any parent, guardian, or other custodian. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why; and

(B) Whether or not the department made reasonable efforts to preserve the family and prevent the placement or that the emergency situation made those efforts unreasonable or impossible. The order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.

(b) *Temporary care, custody and control at preliminary hearing*. -- Whether or not the court orders immediate transfer of custody as provided in subsection (a) of this section, if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child, the court may schedule a preliminary hearing giving the respondents at least five days' actual notice. If the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary care, custody, and control of the department or a responsible person or agency found by the court to be a fit and proper person for the temporary care of the child for a period not exceeding sixty days. The court order shall state:

(1) That continuation in the home is contrary to the best interests of the child and set forth the reasons therefor;

(2) Whether or not the department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home;

(3) Whether or not the department made reasonable efforts to preserve the family and to prevent the placement or that the emergency situation made those efforts unreasonable or impossible;

(4) Whether or not the department made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services; and

(5) What efforts should be made by the department, if any, to facilitate the child's return home. If the court grants an improvement period as provided in section six hundred ten of this article, the sixty-day limit upon temporary custody is waived.

(c) *Emergency removal by department during pendency of case*. -- Regardless of whether the court has previously granted the department care and custody of a child, if the department takes physical custody of a child during the pendency of a child abuse and neglect case (also known as removing the child) due to a change in circumstances and without a court order issued at the time of the removal, the department must immediately notify the court and a hearing shall take place within ten days to determine if there is imminent danger to the physical well-being of the child, and there is no reasonably available alternative to removal of the child. The court findings and order shall be consistent with subsections (a) and (b) of this section.

(d) *Situations when reasonable efforts to preserve the family are not required*. -- For purposes of the court's consideration of temporary custody pursuant to subsection (a), (b), or (c) of this section, the department is not required to make reasonable efforts to preserve the family if the court determines:

(1) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(2) The parent has:

(A) Committed murder of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(B) Committed voluntary manslaughter of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(C) Attempted or conspired to commit murder or voluntary manslaughter or been an accessory before or after the fact to either crime;

(D) Committed unlawful or malicious wounding that results in serious bodily injury to the child, the child's other parent, guardian or custodian, to another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(E) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(F) Has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family; or

(3) The parental rights of the parent to another child have been terminated involuntarily.

§ 49-4-603 Medical and mental examinations; limitation of evidence; probable cause; testimony; judge or referee.

(a)(1) At any time during proceedings under this article the court may, upon its own motion or upon motion of the child or other parties, order the child or other parties to be examined by a physician, psychologist or psychiatrist, and may require testimony from the expert, subject to cross-examination and the rules of evidence.

(2) The court may not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination, nor may the court hold a party in contempt for refusing to submit to an examination.

(3) The physician, psychologist or psychiatrist shall be allowed to testify as to the conclusions reached from hospital, medical, psychological or laboratory records provided the same are produced at the hearing.

(4) If the child, parent or custodian is indigent, the witnesses shall be compensated out of the Treasury of the State, upon certificate of the court wherein the case is pending.

(5) No evidence acquired as a result of an examination of the parent or any other person having custody of the child may be used against the person in any subsequent criminal proceedings against the person.

(b)(1) If a person with authority to file a petition under this article shall have probable cause to believe that evidence exists that a child has been abused or neglected and that the evidence may be found by a medical examination, the person may apply to a judge or juvenile referee for an order to take the child into custody for delivery to a physician or hospital for examination.

(2) The application may be on forms prescribed by the Supreme Court of Appeals or prepared by the prosecuting attorney or the applicant, and shall set forth facts from which it may be determined that probable cause exists for the belief.

(3) Upon sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order any law-enforcement officer to take the child into custody and deliver the child to a physician or hospital for examination.

(4) If a referee issues an order the referee shall by telephonic communication have such order orally confirmed by a circuit judge of the circuit or an adjoining circuit who shall, on the next judicial day, enter an order of confirmation.

(5) Any child protection worker and the child's parents, guardians or custodians may accompany the officer for examination.

(6) After the examination the officer may return the child to the custody of his or her parent, guardian or custodian, retain custody of the child or deliver custody to the state department until the end of the next judicial day, at which time the child shall be returned to the custody of his or her parent, guardian or custodian unless a petition has been filed and custody of the child has been transferred to the department under section six hundred two of this article.

§ 49-4-604 Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions.

(a) *Child and family case plans*. -- Following a determination pursuant to section six hundred two of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term "case plan" means a written document that includes, where applicable, the requirements of the family case plan as provided in section four hundred eight of this article and that also includes, at a minimum, the following:

(1) A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions that made the child unsafe in the care of his or her parent(s), including any reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(2) A plan to facilitate the return of the child to his or her own home or the concurrent permanent placement of the child; and address the needs of the child while in relative or foster care, including a discussion of the appropriateness of the services that have been provided to the child.

The term "permanency plan" refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian should be made at the same time, or concurrent with, reasonable efforts to prevent removal or to make it possible for a child to return to the care of his or her parent(s) safely. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative, concurrent permanent placement plans for the child to include approximate time lines for when the placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.

(b) *Disposition decisions*. -- The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the department;

(4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;

(5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the care, custody, and control of the state department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why;

(B) Whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for

removing the child from the child's home and to make it possible for the child to safely return home;

(C) Whether the department has made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(D) What efforts were made or that the emergency situation made those efforts unreasonable or impossible; and

(E) The specific circumstances of the situation which made those efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department are to continue. Considerations pertinent to the determination include whether the child should:

(i) Be considered for legal guardianship;

(ii) Be considered for permanent placement with a fit and willing relative; or

(iii) Be placed in another planned permanent living arrangement, but only in cases where the child has attained 16 years of age and the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (i) or (ii) of this paragraph. The court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with part eight of this article; and

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors:

(A) The child's need for continuity of care and caretakers;

(B) The amount of time required for the child to be integrated into a stable and permanent home environment; and

(C) Other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The court order shall state:

(i) That continuation in the home is not in the best interest of the child and why;

(ii) Why reunification is not in the best interests of the child;

(iii) Whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made those efforts unreasonable or impossible; and

(iv) Whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that those efforts were unreasonable due to specific circumstances.

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(B) The parent has:

(i) Committed murder of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(ii) Committed voluntary manslaughter of the child's other parent, guardian or custodian, another child of the parent or any other child residing

in the same household or under the temporary or permanent custody of the parent;

(iii) Attempted or conspired to commit murder or voluntary manslaughter or been an accessory before or after the fact to either crime;

(iv) Committed a felonious assault that results in serious bodily injury to the child, the child's other parent, guardian or custodian, to another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(v) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(C) The parental rights of the parent to another child have been terminated involuntarily;

(D) A parent has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family.

(c) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Those conditions exist in the following circumstances, which are not exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the

continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child;

(6) The battered parent's parenting skills have been seriously impaired and the person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with the recommended and appropriate treatment plan.

(d) The court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.

§ 49-4-605 When department efforts to terminate parental rights are required.

(a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:

(1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is sixty days after the child is removed from the home;

(2) If a court has determined the child is abandoned, tortured, sexually abused, or chronically abused; or

(3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children, another child in the household, or the other parent of his or her children; has attempted or conspired to commit murder or voluntary manslaughter or has been an

accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children, another child in the household, or to the other parent of his or her children; or the parental rights of the parent to another child have been terminated involuntarily.

(b) The department may determine not to file a petition to terminate parental rights when:

(1) At the option of the department, the child has been placed permanently with a relative by court order;

(2) The department has documented in the case plan made available for court review a compelling reason, including, but not limited to, the child's age and preference regarding termination or the child's placement in custody of the department based on any proceedings initiated under part seven of this article, that filing the petition would not be in the best interests of the child; or

(3) The department has not provided, when reasonable efforts to return a child to the family are required, the services to the child's family as the department deems necessary for the safe return of the child to the home.

§ 49-4-606 Modification of dispositional orders; hearings; treatment team; unadopted children.

(a) Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests. A dispositional order may not be modified after the child has been adopted, except as provided in subsections (b) and (c) of this section. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian, the department and any person entitled to notice and the right to be heard. The circuit court of origin has exclusive jurisdiction over placement of the child, and the placement may not be disrupted or delayed by any administrative process of the department.

(b) If the child is removed or relinquished from an adoptive home or other permanent placement after the case has been dismissed, any party with notice thereof and the receiving agency shall promptly report the matter to the circuit court of origin, the department and the child's counsel, and the court shall schedule a permanency hearing within sixty days of the report to the circuit court, with notice given to any appropriate parties and persons entitled to notice and the right to be heard. The department shall convene

a multidisciplinary treatment team meeting within thirty days of the receipt of notice of permanent placement disruption.

(c) If a child has not been adopted, the child or department may move the court to place the child with a parent or custodian whose rights have been terminated and/or restore the parent's or guardian's rights. Under these circumstances, the court may order the placement and/or restoration of a parent's or guardian's rights if it finds by clear and convincing evidence a material change of circumstances and that the placement and/or restoration is in the child's best interests.

§ 49-4-607 Consensual termination of parental rights.

An agreement of a natural parent in termination of parental rights are valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud. Where during the pendency of an abuse and neglect proceeding, a parent offers voluntarily relinquish of his or her parental rights, and the relinquishment is accepted by the circuit court, the relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

§ 49-4-608 Permanency hearing; frequency; transitional planning; out-of-state placements; findings; notice; permanent placement review.

(a) *Permanency hearing when reasonable efforts are not required*. -- If the court finds, pursuant to this article, that the department is not required to make reasonable efforts to preserve the family, then, notwithstanding any other provision, a permanency hearing must be held within thirty days following the entry of the court order so finding, and a permanent placement review hearing must be conducted at least once every ninety days thereafter until a permanent placement is achieved.

(b) *Permanency hearing every twelve months until permanency is achieved*. -- If, twelve months after receipt by the department or its authorized agent of physical care, custody, and control of a child either by a court-ordered placement or by a voluntary agreement, the department has not placed a child in an adoptive home; placed the child with a natural parent, placed the child in legal guardianship, or permanently placed the child with a fit and willing relative, the court shall hold a permanency hearing. The department shall file a progress report with the court detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan, including the permanency plan as defined in section two hundred one, article one, and section six hundred four, article four of this chapter. Copies of the report shall be sent to the parties and all persons entitled to notice and the right to be heard. The court shall schedule

a hearing, giving notice and the right to be present to the child's attorney; the child; the child's parents; the child's guardians; the child's foster parents; any preadoptive parent or any relative providing care for the child; any person entitled to notice and the right to be heard; and other persons as the court may, in its discretion, direct. The child's presence may be waived by the child's attorney at the request of the child or if the child is younger than twelve years and would suffer emotional harm. The purpose of the hearing is to review the child's case, to determine whether and under what conditions the child's commitment to the department shall continue, to determine what efforts are necessary to provide the child with a permanent home, and to determine if the department has made reasonable efforts to finalize the permanency plan. The court shall conduct another permanency hearing within twelve months thereafter for each child who remains in the care, custody, and control of the department until the child is placed in an adoptive home, returned to his or her parents, placed in legal guardianship, or permanently placed with a fit and willing relative.

(c) *Transitional planning for older children*. -- In the case of a child who has attained sixteen years of age, the court shall determine the services needed to assist the child to make the transition from foster care to independent living. The child's case plan should specify services aimed at transitioning the child into adulthood. When a child turns seventeen, or as soon as a child aged seventeen comes into a case, the department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns seventeen, or as soon as a child aged seventeen with special needs comes into a case, he or she is entitled to the appointment of a department adult services worker to the multidisciplinary treatment team and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams.

(d) *Out-of-state placements*. -- In any case in which the court decides to order the child placed in an out-of-state facility or program it shall set forth in the order directing the placement the reasons why the child was not placed in an in-state facility or program. If the child is to be placed with a relative or other responsible person out of state, the court shall use judicial leadership to help expedite the process under the Interstate Compact for the Placement of Children provided in part one, article seven of this chapter and the Uniform Child Custody Jurisdiction and Enforcement Act provided in article twenty, chapter forty-eight of this code.

(e) *Findings in order*. -- At the conclusion of the hearing the court shall, in accordance with the best interests of the child, enter an order containing all the appropriate findings. The court order shall state:

(1) Whether or not the department made reasonable efforts to preserve the family and to prevent out-of-home placement or that the specific situation made the effort unreasonable;

(2) Whether or not the department made reasonable efforts to finalize the permanency plan and concurrent plan for the child;

(3) The appropriateness of the child's current placement, including its distance from the child's home and whether or not it is the least restrictive one (most family-like one) available;

(4) The appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(5) Services required to meet the child's needs and achieve permanency; and

(6) In addition, in the case of any child for whom another planned permanent living arrangement is the permanency plan, the court shall (A) inquire of the child about the desired permanency outcome for the child; (B) make a judicial determination explaining why, as of the date of the hearing, another planned permanent living arrangement is the best permanency plan for the child; and, (C) provide in the court order compelling reasons why it continues to not be in the best interest of the child to (i) return home, (ii) be placed for adoption, (iii) be placed with a legal guardian, or (iv) be placed with a fit and willing relative.

(f) The department shall annually report to the court the current status of the placements of children in the care, custody and control of the state department who have not been adopted.

(g) The department shall file a report with the court in any case where any child in the custody of the state receives more than three placements in one year no later than thirty days after the third placement. This report shall be provided to all parties and persons entitled to notice and the right to be heard. Upon motion by any party, the court shall review these placements and determine what efforts are necessary to provide the child with a permanent home. No report may be provided to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(h) The department shall give actual notice, in writing, to the court, the child, the child's attorney, the parents and the parents' attorney at least

forty-eight hours prior to the move if this is a planned move, or within forty-eight hours of the next business day after the move if the child is in imminent danger in the child's current placement, except where the notification would endanger the child or the foster family. A multidisciplinary treatment team shall convene as soon as practicable after notice to explore placement options. This requirement is not waived by placement of the child in a home or other residence maintained by a private provider. No notice may be provided pursuant to this provision to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(i) Nothing in this article precludes any party from petitioning the court for review of the child's case at any time. The court shall grant the petition upon a showing that there is a change in circumstance or needs of the child that warrants court review.

(j) Any foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the right to be heard at the permanency hearing provided in this section.

§ 49-4-609 Conviction for offenses against children.

In any case where a person is convicted of an offense against a child described in section twelve, article eight, chapter sixty-one of this code or articles eight-b or eight-d of that chapter and the person has custodial, visitation or other parental rights to the child who is the victim of the offense or to any child who resides in the same household as the victim, the court shall, at the time of sentencing, find that the person is an abusing parent within the meaning of this chapter as to the child victim, and may find that the person is an abusing parent as to any child who resides in the same household as the victim, and the court shall take further steps as are required by this article.

§ 49-4-610 Improvement periods in cases of child neglect or abuse; findings; orders; extensions; hearings; time limits.

In any proceeding brought pursuant to this article, the court may grant any respondent an improvement period in accord with this article. During the period, the court may require temporary custody with a responsible person which has been found to be a fit and proper person for the temporary custody of the child or children or the state department or other agency during the improvement period. An order granting an improvement period shall require the department to prepare and submit to the court a family case plan in accordance with section four hundred eight, of this article. The types of improvement periods are as follows:

(1) *Preadjudicatory improvement period*. -- A court may grant a respondent an improvement period of a period not to exceed three months

prior to making a finding that a child is abused or neglected pursuant to section six hundred one of this article only when:

(A) The respondent files a written motion requesting the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondents progress in the improvement period within sixty days of the order granting the improvement period; and

(D) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article;

(2) *Post-adjudicatory improvement period*. -- After finding that a child is an abused or neglected child pursuant to section six hundred one of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:

(A) The respondent files a written motion requesting the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) orders that a hearing be held to review the matter within thirty days of the granting of the improvement period; or

(ii) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and

(E) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(3) *Post-dispositional improvement period*. -- The court may grant an improvement period not to exceed six months as a disposition pursuant to section six hundred four of this article when:

(A) The respondent moves in writing for the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances, the respondent is likely to fully participate in the improvement period; and

(E) The order granting the improvement period shall require the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(4) *Responsibilities of the respondent receiving improvement period*. --

(A) When any improvement period is granted to a respondent pursuant to this section, the respondent shall be responsible for the initiation and completion of all terms of the improvement period. The court may order the

state department to pay expenses associated with the services provided during the improvement period when the respondent has demonstrated that he or she is unable to bear the expenses.

(B) When any improvement period is granted to a respondent pursuant to this section, the respondent shall execute a release of all medical information regarding that respondent, including, but not limited to, information provided by mental health and substance abuse professionals and facilities. The release shall be accepted by a professional or facility regardless of whether the release conforms to any standard required by that facility.

(5) *Responsibilities of the department during improvement period*. -- When any respondent is granted an improvement period pursuant to this article, the department shall monitor the progress of the person in the improvement period. This section may not be construed to prohibit a court from ordering a respondent to participate in services designed to reunify a family or to relieve the department of any duty to make reasonable efforts to reunify a family required by state or federal law.

(6) *Extension of improvement period*. -- A court may extend any improvement period granted pursuant to subdivision (2) or (3) of this section for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that the extension is otherwise consistent with the best interest of the child.

(7) *Termination of improvement period*. -- Upon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent has failed to fully participate in the terms of the improvement period or has satisfied the terms of the improvement period to correct any behavior alleged in the petition or amended petition to make his or her child unsafe.

(8) *Hearings on improvement period*. --

(A) Any hearing scheduled pursuant to this section may be continued only for good cause upon a written motion properly served on all parties. When a court grants a continuance, the court shall enter an order granting the continuance specifying a future date when the hearing will be held.

(B) Any hearing to be held at the end of an improvement period shall be held as nearly as practicable on successive days and shall be held as close in time as possible after the end of the improvement period and shall be held no later than thirty days of the termination of the improvement period.

(9) *Time limit for improvement periods*. -- Notwithstanding any other provision of this section, no combination of any improvement periods or extensions thereto may cause a child to be in foster care more than fifteen months of the most recent twenty-two months, unless the court finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to extend the time limits contained in this paragraph.

PART VIII. SUPPORT AND SUPPORT ORDERS.

§ 49-4-801 Support of a child removed from home pursuant to this chapter; order requirements.

(a) It is the intent of the Legislature that to the extent practicable, this article should encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care.

(b) This article shall be construed to be consistent with articles one, eleven, twelve, thirteen, fourteen, fifteen, sixteen, eighteen, nineteen and twenty four of chapter forty-eight of this code, and those articles apply to actions pursuant to this chapter unless expressly stated otherwise.

(c) When a child is removed from his or her home pursuant to this chapter, the court shall issue a support order payable by the child's mother. If the child's legal father has been determined, the court shall issue a child support order payable by the legal father. If no legal father has been determined, the court shall issue an order establishing paternity prior to or simultaneously with establishing a support order payable by the child's legal father. Copies of the orders shall be provided to the Department of Health and Human Resources, Bureau of Child Support Enforcement.

(d) The order establishing a child support obligation must use the Guidelines for Child Support Awards that are set forth in article thirteen, chapter forty-eight of this code.

(e) In addition to the reasons for deviation listed in section seven hundred two, article thirteen, chapter forty-eight of this code, deviation from the child support guidelines is appropriate when the court finds that:

(1) It may assist the parent in successful completion of an improvement period;

(2) It may be in the best interest of the minor child to issue a zero child support order; and/or

(3) The parent temporarily or permanently has no gross income as defined in section two hundred twenty eight, article one, chapter forty-eight of this code.

§ 49-4-802 General provisions for support orders; contempt.

(a) Any pre-existing support order from any other court or administrative agency with authority to issue a support order shall remain in full force and effect until a superseding order is issued.

(b) If a child is returned to the physical custody of a parent, that parent is not responsible for paying child support for the duration of time that parent has physical custody of the child without the necessity of entry of another court order terminating that parent's child support obligation.

(c) If the action is dismissed for failure to prove the allegations of abuse or neglect, any support provision issued pursuant to this chapter are void ab initio. Any adjudication of paternity shall remain in full force and effect.

(d) The support obligation shall automatically continue beyond the termination of the payor's parental rights, unless the support obligation is explicitly ended in an order.

§ 49-4-803 Enforcement of support orders.

(a) Support orders may be enforced through any manner provided in chapters thirty-eight and forty-eight of this code.

(b) An action for contempt for nonpayment of support may be brought by the Department of Health and Human Resources, Bureau for Children and Families or Bureau for Child Support Enforcement; the child's physical custodian; the child's guardian ad litem; or the prosecuting attorney.

ARTICLE 7. INTERSTATE COOPERATION.

PART I. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

§ 49-7-101 Adoption of compact.

The interstate compact on the placement of children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:

ARTICLE I. PURPOSE AND POLICY.

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(d) Appropriate jurisdictional arrangements for the care of children will be promoted.

ARTICLE II. DEFINITIONS.

As used in this compact:

(a) "Child" means a person who, by reason of minority is legally subject to parental, guardianship or similar control.

(b) "Sending agency" means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

(c) "Receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

(d) "Placement" means the arrangement for the care of a child in a family free home or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

ARTICLE III. CONDITIONS FOR REPLACEMENT.

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the

applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date and place of birth of the child.

(2) The identity and address or addresses of the parents or legal guardian.

(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

(4) A full statement of the reasons for the proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, the supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

ARTICLE IV. PENALTY FOR ILLEGAL REPLACEMENT.

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. A violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any punishment or penalty, a violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

ARTICLE V. RETENTION OF JURISDICTION.

(a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. The jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

(b) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of the case by the latter as agent for the sending agency.

(c) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (a) hereof.

ARTICLE VI. INSTITUTIONAL CARE OF DELINQUENT CHILDREN.

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard, prior to his or her being sent to the other party jurisdiction for institutional care and the court finds that:

1. Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

2. Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

ARTICLE VII. COMPACT ADMINISTRATOR.

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his or her jurisdiction and who, acting jointly with like officers of

other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

ARTICLE VIII. LIMITATIONS.

This compact shall not apply to:

(a) The sending or bringing of a child into a receiving state by his or her parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his or her guardian and leaving the child with a relative or nonagency guardian in the receiving state.

(b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between the states which has the force of law.

ARTICLE IX. ENACTMENT AND WITHDRAWAL.

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof. It shall become effective with respect to those jurisdictions when that other jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of the statute and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

ARTICLE X. CONSTRUCTION.

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the Constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

§ 49-7-102 Definitions; implementation.

(a) Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children shall be determined in accordance with the provisions of Article V thereof in the first instance. However, in the event of partial or complete default of performance thereunder, section one hundred one, article two of this chapter may be invoked.

(b) The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children shall, with reference to this state, mean the Department of Health and Human Resources and the agency shall receive and act with reference to notices required by Article III.

(c) As used in paragraph (a) of Article V of the Interstate Compact on the Placement of Children, the phrase "appropriate authority in the receiving state" with reference to this state shall mean the Department of Health and Human Resources.

(d) The officers and agencies of this state and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to paragraph (b) of Article V of the Interstate Compact on the Placement of Children. An agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof is not binding unless it has the approval in writing of the Auditor in the case of the state and of the chief local fiscal officer in the case of a subdivision of the state.

(e) Any requirements for visitation, inspection or supervision of children, homes, institutions or other agencies in another party state which may apply under sections one hundred eight and one hundred eleven, article two of this chapter shall be deemed to be met if performed pursuant to an agreement entered into by appropriate officers or agencies of this state or a subdivision thereof as contemplated by paragraph (b) of Article V of the Interstate Compact on the Placement of Children.

(f) Section one hundred nine, article two of this chapter does not apply to placements made pursuant to the Interstate Compact on the Placement of Children.

(g) Any court having jurisdiction to place delinquent children may place a child in an institution of or in another state pursuant to Article VI of the Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article V thereof.

(h) As used in Article VII of the interstate compact on the placement of children, the term "executive head" means the Governor. The Governor is hereby authorized to appoint a compact administrator in accordance with the terms of that Article VII.

PART II. INTERSTATE ADOPTION ASSISTANCE COMPACT.

§ 49-7-201 Interstate adoption assistance compact; findings and purpose.

(a) The Legislature finds that:

(1) Finding adoptive families for children, for whom state assistance is desirable pursuant to section one hundred twelve, article four, of this chapter and assuring the protection of the interests of the children affected during the entire assistance period, require special measures when the adoptive parents move to other states or are residents of another state; and

(2) Provision of medical and other necessary services for children, with state assistance, encounters special difficulties when the provision of services takes place in other states.

(b) The purposes of sections two hundred one through two hundred four of this article are to:

(1) Authorize the Department of Health and Human Resources to enter into interstate agreements with agencies of other states for the protection of children on behalf of whom adoption assistance is being provided by the Department of Health and Human Resources; and

(2) Provide procedures for interstate children's adoption assistance payments, including medical payments.

§ 49-7-202 Interstate adoption assistance compacts authorized; definitions.

(a) The Department of Health and Human Resources is authorized to develop, participate in the development of, negotiate and enter into one or more interstate compacts on behalf of this state with other states to implement one or more of the purposes set forth in sections two hundred one through two hundred four of this article. When so entered into, and for so long as it shall remain in force, the compact shall have the force and effect of law.

(b) For the purposes of sections two hundred one through two hundred four of this article, the term "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands,

Guam, the Commonwealth of the Northern Mariana Islands, or a Territory or Possession of or administered by the United States.

(c) For the purposes of sections two hundred one through two hundred four of this article, the term "adoption assistance state" means the state that is signatory to an adoption assistance agreement in a particular case.

(d) For the purposes of sections two hundred one through two hundred four of this article, the term "residence state" means the state of which the child is a resident by virtue of the residence of the adoptive parents.

§ 49-7-203 Interstate adoption assistance compact; contents of compact.

A compact entered into pursuant to the authority conferred by sections two hundred one through two hundred four of this article shall have the following content:

(1) A provision making it available to joinder by all states.

(2) A provision or provisions for withdrawal from the compact upon written notice to the parties, but with a period of one year between the date of the notice and the effective date of the withdrawal.

(3) A requirement that the protections afforded by or pursuant to the compact continue in force for the duration of the adoption assistance and be applicable to all children and their adoptive parents who on the effective date of the withdrawal are receiving adoption assistance from a party state other than the one in which they are resident and have their principal place of abode.

(4) A requirement that each instance of adoption assistance to which the compact applies be covered by an adoption assistance agreement in writing between the adoptive parents and the state department which undertakes to provide the adoption assistance, and further, that the agreement be expressly for the benefit of the adopted child and enforceable by the adoptive parents, and the state agency providing the adoption assistance.

(5) Other provisions as may be appropriate to implement the proper administration of the compact.

§ 49-7-204 Medical assistance for children with special needs; rule-making; penalties.

(a) A child with special needs resident in this state who is the subject of an adoption assistance agreement with another state shall be entitled to receive a medical assistance identification from this state upon the filing in the Division of Human Services of a certified copy of the adoption

assistance agreement obtained from the adoption assistance state. In accordance with regulations of the Department of Health and Human Resources the adoptive parents shall be required at least annually to show that the agreement is still in force or has been renewed.

(b) The Department of Health and Human Resources shall consider the holder of a medical assistance identification pursuant to this section as any other holder of a medical assistance identification under the laws of this state and shall process and make payment on claims on account of the holder in the same manner and pursuant to the same conditions and procedures as for other recipients of medical assistance.

(c) The Department of Health and Human Resources shall provide coverage and benefits for a child who is in another state and who is covered by an adoption assistance agreement made by the Department of Health and Human Resources for the coverage or benefits, if any, not provided by the residence state. To this end, the adoptive parents acting for the child may submit evidence of payment for services or benefit amounts not payable in the residence state and shall be reimbursed therefor. However, there may be no reimbursement for services or benefit amounts covered under any insurance or other third party medical contract or arrangement held by the child or the adoptive parents. The Department of Health and Human Resources shall propose rules in accordance with article three, chapter twenty-nine-a of this code that are necessary to effectuate the requirements and purposes of this section. The additional coverages and benefit amounts provided pursuant to this section shall be for services to the cost of which there is no federal contribution, or which, if federally aided, are not provided by the residence state. Among other things, the regulations shall include procedures to be followed in obtaining prior approvals for services in those instances where required for the assistance.

(d) Any person who submits a claim for payment or reimbursement for services or benefits pursuant to this section or the making of any statement in connection therewith, which claim of statement the maker knows or should know to be false, misleading or fraudulent is guilty of a felony and, upon conviction, shall be fined not more than $10,000, or incarcerated in a correctional facility not more than two years, or both fined and incarcerated.

(e) This section applies only to medical assistance for children under adoption assistance agreements from states that have entered into a compact with this state under which the other state provides medical assistance to children with special needs under adoption assistance agreements made by this state. All other children entitled to medical assistance pursuant to adoption assistance agreements entered into by this state shall be eligible to receive it in accordance with the laws and procedures applicable thereto.

CHAPTER 7:
RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

(including amendments through 11/9/15)

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Rule 1. Scope of child abuse and neglect rules.

These rules set forth procedures for circuit courts in child abuse and neglect proceedings instituted pursuant to W. Va. Code § 49-4-601, *et seq*. If these rules conflict with other rules or statutes, these rules shall apply.

Rule 2. Purposes of child abuse and neglect rules; construction and enforcement.

These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child. These rules are designed to accomplish the following purposes:

(a) To provide fair, timely and efficient disposition of cases involving suspected child abuse or neglect;

(b) To provide for judicial oversight of case planning;

(c) To ensure a coordinated decision-making process;

(d) To reduce unnecessary delays in court proceedings through strengthened court case management; and

(e) To encourage the involvement of all parties, including children, in the litigation as well as the involvement of all community agencies and resource personnel providing services to any party.

Rule 3. Definitions.

As used in these rules, these terms are defined as follows:

(a) "Adjudicatory hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-601 to determine whether a child has been abused and/or neglected as alleged in the petition;

(b) "CASA" shall mean Court-Appointed Special Advocate as set forth in Rule 52;

(c) "Child's case plan" shall mean the plan prepared by the Department pursuant to W. Va. Code §§ 49-4-408 and 49-4-604 following an adjudication by the court that the child is an abused and/or neglected child;

(d) "Civil petition" shall mean the petition instituting child abuse and/or neglect proceedings under W. Va. Code § 49-4-601;

(e) "Child abuse and neglect proceedings" shall mean proceedings instituted by the filing of a civil petition under W. Va. Code § 49-4-601;

(f) "Department" shall mean the West Virginia Department of Health and Human Resources and any subdivision or any successor or assignee designated by law carrying out the statutory functions of the Department or agency thereof involved in the investigation, adjudication, or dispositional aspects of child abuse and/or neglect proceedings under W. Va. Code § 49-4-601, *et seq*.;

(g) "Preliminary hearing" shall mean the hearing contemplated by W.Va. Code § 49-4-602 that is held within ten days of service of the petition when the court finds that the petition alleges facts demonstrating the existence of imminent danger to the child, whether or not the court has ordered immediate transfer of custody of the child to the Department or a responsible person. The hearing is held for the purpose of determining (1) whether there is reasonable cause to believe that the child is in imminent danger; (2) whether continuation in the home is contrary to the welfare of the child, setting forth the reasons; (3) whether the Department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home or whether an emergency situation made such efforts unreasonable or impossible; (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made; and (5) whether the child's school placement is in his or her school of origin, and if not, whether the change of school placement is in the child's best interests.

(h) "Permanency hearing" shall mean the hearing contemplated by W.Va. Code § 49-4-608 to determine the permanency plan for the child. The hearing shall be conducted in accordance with Rule 36a;

(i) "Disposition hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-604 that is held after a child has been adjudged to be abused and/or neglected, at which the court reviews the child and family case plan filed by the Department and determines the appropriate disposition of the case and permanency plan for the family;

(j) "Family case plan" shall mean the plan prepared by the Department pursuant to W. Va. Code §§ 49-4-408 and 49-4-604 following the grant of an improvement period;

(k) "Guardian *ad Litem*" means the attorney appointed to represent a child or children as set forth in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings;

(l) "Parent" or "parents" means an individual defined as a parent by law or on the basis of a biological relationship, marriage to a person with a biological relationship, legal adoption or other recognized grounds, pursuant to W. Va. Cod § 49-1-204;

(m) "Parties" means the petitioner, co-petitioner, respondent, adjudicated battered parent, and child;

(n) "Permanent placement" of a child shall mean:

(1) The petition has been dismissed and the child has been returned to the home or to a relative with no custodial supervision by the Department;

(2) The child has been placed in the permanent custody of a non-abusive parent; or

(3) A permanent out-of-home placement of the child has been achieved following entry of a final disposition order. A permanent out-of-home placement has been achieved only when the child has been adopted, placed in a legal guardianship, placed in another planned permanent living arrangement (APPLA), or emancipated; and

(o) "Persons entitled to notice and the right to be heard" are persons other than parties who include the CASA when appointed, foster parents, preadoptive parents, or custodial relatives providing care for the child.

Rule 3a. Pre-Petition Investigations.

(a) *Administrative Order Regarding Investigation*. Upon receiving a written referral from a family court pursuant to Rule 48 of the Rules of Practice and Procedure for Family Courts, a circuit court shall forthwith cause to be entered and served an administrative order in the name of and regarding the affected child or children directing the Department to submit to the court an investigation report or appear before the court in not more than 45 days, at a scheduled hearing, to show cause why the Department's investigation report

has not been submitted to the circuit court and referring family court. If a circuit court, based upon a review of the written referral from family court, determines that the allegations or other information present reason to believe a child may be in imminent danger, the circuit court may shorten the time for the Department to act upon the referral and appear before the circuit court. The scheduled hearing may be mooted by the Department's earlier submission of the investigation report or, in the alternative, the filing of an abuse and neglect petition under Chapter 49 of the West Virginia Code relating to the matters which were the subject of the family court referral and circuit court administrative order. The duties of the Department under this rule shall be in addition to the Department's obligations pursuant to W. Va. Code § 49-2-804 regarding notification of disposition to persons mandated to report suspected child abuse and neglect.

(b) *Mandamus Relief*. Following review of an investigation report in which the Department concludes that a civil petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the Department's investigation report, considered together, suggest circumstances upon which the Department would have a duty to file a civil petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause order shall issue by the court setting a prompt hearing to determine whether the respondent Department has a duty to file a civil petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the Department has a nondiscretionary duty pursuant to W. Va. Code § 49-4-605 to file a petition seeking to terminate parental rights, the Department shall be directed by writ to file such petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the Department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W. Va. Code § 49-4-602(d)(1), and that the Department acted arbitrarily and capriciously in the exercise of its discretion.

(c) *Service and Notice*. Orders and other documents issued pursuant to this rule shall be served on the Department by mail or facsimile transmission directed to the Department's local child protective services office. Copies of such orders shall also be delivered to the prosecuting attorney.

(d) *Confidentiality*. All orders and other documents pertaining to matters arising under this rule, and docket entries regarding the same, shall be treated as confidential records concerning a child consistent with W. Va. Code § 49-5-101; and any hearings conducted pursuant to this rule may be attended by those persons provided notice under subsection (c) above, but shall be closed to the general public except that persons whom the circuit court determines have a legitimate interest in the proceedings may attend. If the case in family court that gave rise to the referral to the Department was a domestic violence proceeding, staff from any involved licensed family protection program is entitled access to circuit court proceedings under this rule to the same extent such access is afforded under statutes and rules pertaining to domestic violence proceedings.

(e) *Transfer of Administrative Proceedings*. Within 10 days following service of an administrative order issued by a circuit court pursuant to subdivision (a), the Department may file a motion with the issuing court seeking transfer of the administrative proceedings to the circuit court of another county based upon reasons relating to a more appropriate venue for the administrative proceedings and any abuse and neglect case which may result from such proceedings. Unless the court finds the basis for the motion to be clearly unreasonable under the particular circumstances presented, the administrative proceedings shall be transferred as requested. If the administrative proceedings are transferred, the Department's obligations pursuant to W. Va. Code § 49-2-804 and Rule 48(c) of the Rules of Practice and Procedure for Family Court regarding the investigation and providing a copy of any investigative report remain applicable to the referring family court. The circuit clerk shall send certified copies of the order granting or denying the transfer motion to the referring family court and the prosecuting attorney. If the order grants the motion, certified copies shall also be sent to the circuit court and prosecuting attorney in the county where the administrative proceeding is transferred.

Rule 4. Transfer and consolidation.

A circuit court before which a civil petition is filed pursuant to W. Va. Code § 49-4-601, *et seq*., may order any other proceeding pending before another circuit court, family court, or magistrate court which arises out of the same facts alleged in the civil petition or involves the question of whether such abuse and neglect occurred transferred to the court where the civil petition is pending and may consolidate such proceedings, except criminal and delinquency proceedings, all in accordance with Rule 42 of the Rules of Civil Procedure and W. Va. Code § 56-9-1.

Rule 4a. Venue.

Pursuant to W.Va. Code § 49-4-601(a), the Department or a reputable person may file a petition to initiate a child abuse and neglect proceeding in the circuit court in the county where the child resides. If the Department is a petitioner, the petition may also be filed where the alleged abuse and/or neglect occurred, where the custodial respondent or one of the other respondents resides, or to the judge of the court in vacation. Under no circumstances may a party file a petition in more than one county based on the same set of facts.

Rule 5. Contemporaneous civil, criminal, and other proceedings.

Under no circumstances shall a child abuse and neglect proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings.

Rule 6. Maintaining case on court docket.

Each child abuse and neglect proceeding shall be maintained on the circuit court's docket until permanent placement of the child has been achieved. The court retains exclusive jurisdiction over placement of the child while the case is pending, as well as

over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation, except that (1) if the petition is dismissed for failure to state a claim under Chapter 49 of the W. Va. Code, or (2) if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both of his/her cohabitating parents without any visitation or child support provisions, then any future child custody, visitation, and/or child support proceedings between the parents may be brought in family court. However, should allegations of child abuse and/or neglect arise in the family court proceedings, then the matter shall proceed in compliance with Rule 3a.

Rule 6a. Confidentiality of Proceedings and Records; Access by Family Court.

(a) *Hearings and Reviews.* Attendance at all proceedings brought pursuant to W. Va. Code § 49-4-601, *et seq.* shall be limited to the parties, counsel, persons entitled to notice and the right to be heard, witnesses while testifying, multidisciplinary treatment team members, and other persons whom the circuit court determines have a legitimate interest in the proceedings.

(b) *Court Records*. All records and information maintained by the courts in child abuse and neglect proceedings shall be kept confidential except as otherwise provided in W. Va. Code, Chapter 49 and this rule. In the interest of assuring that any determination made in proceedings before a family court arising under W. Va. Code, Chapter 48, or W. Va. Code § 44-10-3, does not contravene any determination made by a circuit court in a related prior or pending child abuse and neglect case arising under W. Va. Code, Chapter 49, family courts and staff shall have access to all circuit court orders and case indexes in this State in all such related Chapter 49 proceedings.

Rule 7. Time computation; extensions of time and continuances.

Time frames prescribed in these rules shall be computed in accord with Rule 6(a) of the W.Va. Rules of Civil Procedure.

Except as provided for in Rule 5, extensions of time and continuances beyond the times specified in these rules or by other applicable law shall be granted only for good cause, regardless of whether the parties are in agreement. If a continuance is granted in accordance with this rule, the court shall set forth in a written order its reasons for finding good cause.

Rule 8. Testimony of children; inclusion of children in hearings and multidisciplinary treatment team meetings.

(a) *Restrictions on the testimony of children*. Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the court as determined by the Rules of Evidence and the Rules of Civil Procedure. However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the court shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the court may exclude the

child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

(b) *Procedure for taking testimony from children.* The court may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the court determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the court shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the court may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in camera interview of a child, the court may, before the interview, require the attorneys to submit questions for the court to ask the child witness rather than allow the attorneys to question the child directly, and the court may require the attorney to sit in an unobtrusive manner during the in camera interview. Whether or not the parties' attorneys are permitted to attend the in camera interview, they may submit interview questions and/or topics for consideration by the court.

(c) *Sealing of child's testimony*. If an interview was recorded and disclosed to the attorneys, the record of the child's testimony thereafter shall be sealed and shall not be opened unless:

(1) Ordered by the court for good cause shown; or

(2) For purposes of appeal.

(d) A child subject to a case may attend all or portions of hearings, unless the court deems such attendance inappropriate, and may attend all or portions of multidisciplinary treatment team meetings, unless the multidisciplinary treatment team deems such participation inappropriate. Consideration shall be given to the child's preferences and developmental maturity.

Rule 9. Use of closed circuit television testimony.

(a) In any case governed by these rules in which a child eleven (11) years old or less is to be a witness, the court, upon order of its own or upon motion of a party, may permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(b) In any case in which a child over the age of eleven (11) years is to be a witness, the court, upon order of its own or upon motion of a party, and upon a finding of good cause, shall permit the child witness to testify through live, one-way, closed-circuit

television whereby there shall be no transmission into the room from which the child witness is testifying.

(c) The testimony of the child witness shall be taken in any room, separate and apart from the courtroom, from which testimony of the child witness can be transmitted to the courtroom by means of live, one-way, closed-circuit television. The testimony shall be deemed as given in open court.

(d) The judge, the attorneys for the parties, and any other person the court permits for the purpose of providing support for the child in order to promote the ability of the child to testify shall be present in the testimonial room at all times during the testimony of the child witness. The judge may permit liberal consultation between counsel and the parties by adjournment, electronic means, or otherwise.

(e) The image and voice of the child witness, as well as the image of all other persons present in the testimony room, other than the operator, shall be transmitted live by means of live, one-way, closed-circuit television in the courtroom. The courtroom shall be equipped with monitors sufficient to permit the parties to observe the demeanor of the child witness during his or her testimony.

(f) The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the child witness to be transmitted to the courtroom.

(g) The child witness shall testify under oath, and the examination and cross-examination of the child witness shall, in all other respects, be conducted in the same manner as if the child witness testified in the courtroom.

(h) When the testimony of the child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the testimony in the same manner as if the child witness testified in the courtroom.

(i) Under all circumstances, the image of the child witness transmitted shall include the entirety of his or her person ordinarily subject to observation by the human eye, subject to such limitations as may be unavoidable by reason of standard courtroom furnishings.

(j) Should it be required, for the purposes of identification that the person to be identified and the child witness be present in the courtroom at the same time, the court shall ensure that this meeting takes place after the child witness has completed his or her testimony; and this confrontation shall, to the extent possible, be accomplished in a manner that is nonthreatening to the child witness.

Rule 10. Discovery.

(a) The attorney for the child shall have access to the file kept by the Department and the file kept by the attorney for the petitioner, including all information set forth in

W. Va. Code § 49-5-101 and the attorney may make such use thereof as may be appropriate to the case, subject to such limitations as the order of the court shall require;

(b) Unless otherwise ordered by the court pursuant to Rule 12, within three (3) days of the filing of the petition, the attorney for the petitioner shall provide to counsel for the respondent(s) or to the respondent(s) personally, if not represented by counsel, the attorney for the child, and all other persons entitled to notice and the opportunity to be heard, the following information, as is within the possession, custody, or control of the attorney for the petitioner, the existence of which is known, or by some exercise of due diligence may become known, to the attorney for the petitioner:

(1) Any relevant written or recorded statements made by the respondents (or any one of them), or copies thereof, and the substance of any oral statements which the petitioner intends to offer in evidence at the trial made by the respondents (or any one of them);

(2) Copies of the respondent's prior criminal records, if any;

(3) Copies of books, papers, documents, photographs, tangible objects, buildings, or places which are material to the preparation of the respondent's case or are intended for use by the attorney for the petitioner as evidence in chief at the trial or were obtained from or belonging to the respondent;

(4) Copies of results or reports of physical and/or mental examinations, if any, and copies of scientific tests and/or experiments, if any, which are material to the preparation of the respondent's case or are intended for use by the attorney for the petitioner as evidence in chief at the trial; and

(5) A written list of names and addresses of all witnesses whom the attorney for the petitioner intends to call in the presentation of the case-in-chief, together with any record of prior convictions of any such witnesses;

(c) Not less than five (5) days prior to any hearing wherein the respondent intends to introduce evidence, the respondent shall provide to the attorney for the petitioner, the attorney for the child, and all other persons entitled to notice and the right to be heard, the following information:

(1) Copies of books, papers, documents, photographs, tangible objects, buildings, or places which are within the possession, custody, or control of the respondent and which the respondent intends to introduce as evidence in chief at the trial;

(2) Copies of any results and reports of physical and/or mental examinations, if any, and copies of scientific tests and/or experiments, if any, made in connection with the particular case, if any of such copies are within the possession or control of the respondent, which the respondent intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the respondent intends to call at the trial when the results and/or reports relate to his or her testimony; and

(3) A written list of the names and addresses of the witnesses the respondent intends to call in the presentation of the case-in-chief.

(d) The disclosure provided for in this rule is not intended to limit the amount or nature of disclosure in these cases. This rule merely establishes the minimum amount of disclosure required.

(e) If, prior to or during any hearing, a party discovers additional evidence or material that should have been disclosed, that party shall promptly notify all other parties and their counsel, persons entitled to notice and the right to be heard, and the court of the existence of the additional evidence or material.

Rule 11. Motion to compel, limit, or deny discovery.

(a) Any party receiving a written request to make information, documents, records, or evidence available for inspection, testing, copying, or photographing shall, within two (2) days, excluding weekends and holidays, comply with the request or provide a written explanation of the reasons for noncompliance to the parties and the court;

(b) A party whose request for discovery is not fully complied with may file a motion for an order compelling discovery. A motion to compel discovery shall set forth the request for discovery, describe why the items or information sought are discoverable, and specify how the request was not in compliance;

(c) A party receiving a discovery request may file a motion to deny discovery or permit a limited response. The motion shall set forth the request for discovery and set forth reasons why the discovery should be denied or the response should be permitted to be limited or subject to conditions; and

(d) The court shall hear and rule on a discovery motion within seven (7) days after it is filed. Among other things, the court may:

(1) Grant the requested discovery and specify the time within which it must be provided;

(2) Order reciprocal discovery;

(3) Order appropriate sanctions for any clear misuse of discovery or arbitrary delay or refusal to comply with a discovery request; and

(4) Deny, limit, or set conditions on the requested discovery.

Rule 12. Judicial management of discovery.

(a) Upon its own motion or upon the request of a party, the court may limit discovery methods and specify its overall timing and sequence provided that each party shall be allowed a reasonable opportunity to obtain information needed for the preparation of his or her case.

(b) Any party moving for a continuance on the ground that discovery is likely to delay a hearing set by the court shall promptly send written notice to the court stating the need for the discovery and the extent of the likely delay.

Rule 13. Preservation of records and exhibits.

The proceedings shall be recorded and transcripts produced according to the provisions of W. Va. Code § 49-4-601(k). Exhibits admitted into evidence shall be retained by the court for two (2) years or until dismissal of the proceedings from the court's docket, whichever occurs later, unless preservation of the exhibit is impractical or the parties agree that it is no longer necessary.

Rule 14. Telephone or video conferences.

The court may hear motions and conduct conferences relating to discovery, service of process, or case scheduling by telephone or video conference call. By agreement of the parties or motion filed in accord with Rule 17(c), the court may hear testimony by telephone or video conference call.

Rule 15. Visitation and other communication with child.

If at any time the court orders a child removed from the custody of his or her parent(s) and placed in the custody of the Department or of some other responsible person, the court may make such provision for reasonable visitation, telephone or video calls, letters, email, or other communication as is consistent with the child's well-being and best interests. The court shall assure that any supervised visitation shall occur in surroundings and in a safe place, dignified, and suitable for visitation, taking into account the child's age and condition. The person requesting visitation shall set forth his or her relationship to the child and the degree of personal contact previously existing with the child. In determining the appropriateness of granting visitation rights to the person seeking visitation, the court shall consider whether or not the granting of visitation would interfere with the child's case plan and the overall effect granting or denying visitation will have on the child's best interests. The visitation order of the circuit court shall be enforceable upon entry unless a stay of execution of said order is issued by the circuit court or the Supreme Court of Appeals. The effect of entry of an order of termination of parental rights shall be, *inter alia*, to prohibit all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents,[21] unless the Court finds the child consents and it is in the best interest of the child to retain a right of visitation. Visitation between the child and his siblings shall continue, and a plan for regular contact between siblings, where they are not placed together, shall be incorporated into the permanent plan for the child whenever possible, unless the court finds it is not in the best interest of both the child and his siblings to retain a right of visitation.

[21] This rule is intended to neither increase nor decrease any rights of the grandparents as set forth in W. Va. Code §§ 49-4-601, et seq. and 48-10-101, et seq.

Rule 16. Emergency custody.

(a) *Emergency custody pending filing of petition*. Proceedings for emergency custody of a child before a petition is filed and without a circuit court order shall be governed by the provisions of W. Va. Code §§ 49-4-301 (emergency custody by law enforcement), 49-4-302 (emergency custody ordered by family court), and 49-4-303 (emergency removal by the Department).

(b) *Continuation or transfer of emergency custody upon filing of petition*. Proceedings for continuation of or temporary transfer of emergency custody at the time the petition is filed shall be governed by the provisions of W. Va. Code § 49-4-602.

(c) *Transfer of custody following filing of petition*. If at any time during the pendency of child abuse and/or neglect proceedings, the court determines the child is in imminent danger, as defined by W. Va. Code § 49-1-201, the court may order the child placed into the custody of the Department or a responsible person in accordance with the provisions of W. Va. Code § 49-4-602. If custody has been taken pursuant to this provision after the conclusion of the final adjudicatory hearing, custody of the child may continue in the Department or a responsible person pending conclusion of the final disposition hearing.

(d) *Requirement of hearing on emergency custody taken during the pendency of child abuse and neglect proceeding*. Regardless of whether the court has previously granted the Department legal custody of a child, if the Department takes physical custody of a child during the pendency of a child abuse and neglect case (also known as removing the child) due to a change in circumstances and without a court order issued at the time of the removal, the Department must immediately notify the court, and a hearing shall take place within 10 days to determine if (1) there is imminent danger to the physical well-being of the child and (2) there is no reasonably available alternative to removal of the child.

(e) *Findings in removal order*. An order removing a child from his or her home and placing the child in the custody of the Department must state (1) that there is reasonable cause to believe that the child is in imminent danger; (2) that continuation in the home is contrary to the welfare of the child, setting forth the reasons; (3) whether the Department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home or that an emergency situation made such efforts unreasonable or impossible; and (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made.

Rule 16a. Required Entry of Support Orders.

(a) *Entry of Support Orders*. Every order in a child abuse and neglect proceeding that alters the custodial and decision-making responsibility for a child and/or commits the child to the custody of the Department of Health and Human Resources must impose a support obligation upon one or both parents for the support, maintenance and education of the child, pursuant to W. Va. Code § 49-4-801, *et seq.*

(b) *Use of Guidelines*. Any order establishing a child support obligation in an abuse and neglect proceeding must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq*. The *Guidelines* may be disregarded, or the calculation of an award under the *Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

(c) *Modifications*. Any order establishing a child support obligation in a child abuse and neglect proceeding may be modified by the court upon motion of any party. An order granting modification of a support obligation must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq*.

(d) *Transfer to family court prohibited*. No portion of a child abuse and neglect proceeding may be transferred or remanded to a family court for assessment of a child support obligation.

Rule 17. Pleadings allowed, Form of motions and other papers.

(a) *Pleadings*. There shall be a verified petition and a verified answer. Upon mutual consent of the co-petitioners, the verified petition may have co-petitioners, in which case each petitioner must indicate which allegation(s) he/she verifies in the petition. If one of the petitioners is a parent, then that parent shall be appointed counsel pursuant to W. Va. Code § 49-4-601(f), separate from the prosecuting attorney. The Department, a parent, or reputable person may move to be joined as a co-petitioner after the filing of the initial petition. No other pleading shall be allowed except by permission of the court. The petition shall not be taken as confessed. Other than in a criminal prosecution for false swearing, evidence shall not be given against an accused of any statement made by him in any pleadings filed pursuant to these rules.

(b) *Verified answer*. Each respondent shall file and serve a verified answer upon the petitioner or counsel therefor and all other persons entitled to notice and the right to be heard no later than 10 days after being served with the notice and petition required by law except that a respondent served by publication or other substituted service shall file and serve such answer within the time prescribed by such substituted service. The child or children are not required to file or serve an answer.

Each answer shall admit or controvert the allegations of the petition, state the relationship of the child or children to the respondent and respond to such other matters as are alleged therein.

No preliminary hearing need be continued because an answer has not been served nor shall any appearance at a preliminary hearing or the service or contents of any answer filed prevent a respondent from raising in the answer or by timely motion any issue formerly raised by special appearance or by a pleading filed before an answer.

(c) *Motions and other papers*. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

The requirement of writing is fulfilled if the motion is made in a written notice of the hearing on the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11 of the Rules of Civil Procedure.

(4) All motions must be accompanied by or contained within a notice of hearing setting forth the date and time of hearing on the motion.

(5) At the time of first hearing, the court shall require the parents to complete financial statement forms for determination of Title IV-D and Title IV-E eligibility, the necessary forms to be provided by the Department of Health and Human Resources, and those forms necessary to determine both indigence and/or possible child support obligations. No portion of the case may be transferred or remanded to family court for this purpose.

Rule 18. Contents of petition.

The petition shall be verified in accordance with W. Va. Code § 49-4-601(b) and shall include the following:

(a) Citations to statutes relied upon in requesting the intervention of the court and how the alleged misconduct or incapacity comes within the statutory definition of neglect and/or abuse;

(b) A description of all of the children in the home or in the temporary care, custody, or control of the alleged offending parent(s), including name, age, sex, and current location, unless stating the location would endanger the child or seriously risk disruption of the current placement;

(c) A statement of facts justifying court intervention which is definite and particular and describes:

(1) The specific misconduct, including time and place, if known, or incapacity of the parent(s) and other person(s) responsible for the child's care; and

(2) Any supportive services provided by the Department or others to remedy the alleged circumstances.

(d) The relief sought; and

(e) Information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, W. Va. Code § 48-20-101 *et seq*.

Rule 18a. Appointments; responsibilities of guardian ad litem.

(a) *Appointment*. W.Va. Code § 49-4-601(f) and the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules govern the appointment of a child's guardian *ad litem* in a child abuse and neglect proceeding. In the initial order resulting from the filing of an abuse and neglect petition, the circuit court appoints a guardian *ad litem* to represent a child from a list of qualified attorneys who have completed the required guardian *ad litem* training. A guardian *ad litem* may be appointed to represent more than one child unless the representation of more than one child creates a conflict of interest.

(b) *Responsibilities of guardian ad litem*. A guardian *ad litem* should adhere to the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules and submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the requirements set forth in Section D(8) of the Guidelines and Appendix B of these Rules. Upon petition of the guardian *ad litem*, the court, in its discretion, may seal the report or redact information contained in the report.

Rule 19. Amendments to petition.

(a) *Amendments prior to adjudicatory hearing*. The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment.

(b) *Amendments after the adjudicatory hearing*. If new allegations arise after the final adjudicatory hearing, the allegations should be included in an amended petition rather than in a separate petition in a new civil action, and the final adjudicatory hearing shall be re-opened for the purpose of hearing evidence on the new allegations in the amended petition.

(c) *Amendments based on allegations against a co-petitioner*. If allegations arise against a co-petitioner during the pendency of the case, then the petition may be amended, including a realignment of the parties.

(d) *Amendments after preliminary hearing in which the Department has been given temporary custody*. If the petition is amended after the conclusion of a preliminary hearing in which custody has been temporarily transferred to the Department or a responsible person, it shall be unnecessary to conduct another preliminary hearing.

Rule 20. Notice of first hearing.

The petition and notice of the first hearing shall provide at least ten (10) days notice, unless the first hearing is a preliminary hearing regarding emergency custody pursuant to W. Va. Code § 49-4-602, in which case the parties and all persons entitled to

notice and the right to be heard must be provided at least five (5) days actual notice. The notice of hearing shall specify the time and place of the first hearing, the right of parties to counsel, and the fact that the proceeding can result in the permanent termination of parental, custodial or guardianship rights. The court shall send a copy of the petition and notice of first hearing to the appropriate CASA representative, if one is appointed.

Rule 21. Effect of personal service on only one parent.

The judge may permit the child abuse and neglect proceeding to go forward after one parent personally is served, if it is established on the record that there have been diligent but unsuccessful efforts to serve all other parties and requisites of W. Va. Code § 49-4-601 have been met. When a child is found in this state and is under the protection of the court and no parent or custodian has been found within this jurisdiction, the court may order service of the notice by publication and proceed with the proceeding. No adjudicatory hearing may be held until the time for answer is set forth in the order of publication shall have expired. Such a proceeding shall be effective against the interests to parents and custodians to the extent permissible under general law.

Rule 22. Preliminary hearing.

(a) *Timing of preliminary hearing*. If at the time the petition was filed, the court placed or continued the child in the emergency custody of the Department or a responsible person, a preliminary hearing on emergency custody shall be initiated within ten (10) days after the continuation or transfer of custody is ordered as required by W. Va. Code § 49-4-602.

(b) *Transfer of custody after the filing of the petition*. If the court does not transfer custody at the time the petition is filed, but believes at any time in the proceeding that the child is in imminent danger, as defined in W. Va. Code § 49-1-201, the court may transfer temporary custody as provided in W. Va. Code § 49-4-602 or Rule 16(c). If the court has continued or transferred temporary custody to the Department or a responsible person following the preliminary hearing and further amendments and additions are made to the petition or further facts are developed which support temporary custody, another preliminary hearing is not required.

(c) *Waiver or stipulation of preliminary hearing*. A preliminary hearing may be waived or stipulated if the court determines (1) that the parties and persons entitled to notice and the right to be heard understand the content and consequences of the waiver or stipulation and voluntarily consent, and (2) that the waiver or stipulation of the preliminary hearing meets the purposes of these rules and controlling statutes and is in the best interests of the child. The court shall hear any objection to the waiver or stipulation of the preliminary hearing by any party or person entitled to notice and the right to be heard. The waiver or specific stipulations shall be incorporated into the order reflecting the preliminary hearing.

Rule 23. Preadjudicatory improvement period; family case plan; status conference.

(a) *Preadjudicatory improvement period*. At any time prior to the final adjudicatory hearing, including at the preliminary hearing or emergency custody proceedings, a respondent may move for a pre-adjudicatory improvement period in accordance with W. Va. Code § 49-4-610. If the motion is granted, the court shall order the Department to submit the family case plan within thirty (30) days of such order, which family case plan shall contain the information required by W. Va. Code §§ 49-4-408 and 49-4-604. The family case plan shall be formulated with the assistance of all parties, counsel, and the multi-disciplinary treatment team. The family case plan and improvement period order should closely track one another and taken together should constitute a program designed to remedy the circumstances which led to the filing of the petition. Reasonable efforts to place a child for adoption, or with a legal guardian or other permanent placement may be made at the same time.

(b) *Preadjudicatory improvement period status conferences*. For the duration of the preadjudicatory improvement period, in accordance with W. Va. Code § 49-4-610, the court shall convene a status conference within sixty (60) days of the granting of the improvement period or within ninety (90) days of the granting of the improvement period if the court orders the Department to submit a report as to the respondent's progress in the improvement period within sixty (60) days of the order granting the improvement period. At the status conference, the multidisciplinary treatment team shall attend and report as to progress and developments in the case. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and persons entitled to notice and the right to be heard, provided that such reports or statements are provided to all parties. Pursuant to W. Va. Code § 49-4-610, a preadjudicatory improvement period shall not exceed three months. If the respondent(s) fail to comply with the terms and conditions of the improvement period or evidence an inability to remediate the circumstances giving rise to the abuse and/or neglect, any party may file a motion to revoke the improvement period.

Rule 24. Adjudicatory prehearing conference.

(a) *Adjudicatory prehearing conference*. Prior to the final adjudicatory hearing, the court may convene a prehearing conference on its own motion or upon the request of any party.

(b) *Subjects of adjudicatory subjects prehearing conference*. At the adjudicatory prehearing conference, the court may

(1) Review efforts to locate and serve all the parties;

(2) Advise unrepresented parties concerning their right to counsel and to appointed counsel, in which case the conference shall be reconvened at a later date;

(3) Determine whether the child shall be present and testify at adjudication and, if so, under what conditions;

(4) Conclude any unresolved discovery matters;

(5) Identify issues of law and fact for adjudication;

(6) Require the parties to develop a list of possible witnesses and brief summaries of their testimony;

(7) Determine the needs of out-of-town witnesses regarding scheduling; and

(8) Confirm the date and estimate the length of the adjudicatory hearing.

(c) *Additional information*. The parties shall have a continuing obligation to update information provided during the adjudicatory prehearing conference. If the additional information constitutes surprise, the court shall allow the surprised party adequate time and opportunity to prepare and respond.

(d) *Time frame*. The court may schedule a final prehearing conference within five (5) days of the adjudicatory hearing to determine whether the parties or other persons entitled to notice and the right to be heard have notice of the hearing, the number and identity of the witnesses that each party intends to call and the estimated length of their testimony, and any other matter which may affect the conduct of the adjudicatory hearing.

Rule 25. Time of final adjudicatory hearing.

When a child is placed in the temporary custody of the Department or a responsible person pursuant to W. Va. Code § 49-4-602, the final adjudicatory hearing shall commence within thirty (30) days of the temporary custody order entered following the preliminary hearing and must be given priority on the docket unless a preadjudicatory improvement period has been ordered. In all other cases, the final adjudicatory hearing shall commence within thirty (30) days of the filing of the petition or, if a preadjudicatory improvement period has been ordered, as soon as possible, but no later than thirty (30) days, after the conclusion of such preadjudicatory improvement period. Where a respondent has been served, no order adjudicating that such respondent has abused or neglected the child concerned until the time for answer for such respondent has expired and, if the answer is timely served, the respondent has been afforded at least 20 days from the date the answer was filed to prepare for adjudication or has waived such opportunity to prepare. The final adjudicatory hearing shall be conducted in accordance with the provisions of W. Va. Code § 49-4-601(i).

***Rule 26. Stipulated adjudication, uncontested petitions, contents of written reports* and admissions.**

(a) *Required information*. Any stipulated or uncontested adjudication shall include the following information:

(1) Agreed upon facts supporting court involvement regarding the respondent's problems, conduct, or condition; and

(2) A statement of respondent's problems or deficiencies to be addressed at the final disposition.

(b) *Voluntariness of consent*. Before accepting a stipulated or uncontested adjudication, the court shall determine that the parties understand the content and consequences of the admission or stipulation, the parties voluntarily consent, and that the stipulation or uncontested adjudication meets the purposes of these rules and controlling statute and is in the best interests of the child.

(c) *Contents of written reports*. The court may take judicial notice of written reports which constitute public records and, when so admitted into evidence, give thereto such weight as may be appropriate. Any party may request the opportunity to be heard with respect to such reports under Rule 201(e) of the Rules of Evidence. Reasonable efforts should be made by parties and the court to inform all parties and all other persons entitled to notice and the right to be heard of the intention to submit or consider such reports to the end that those parties and other persons desiring to be heard with respect thereto may adequately prepare.

(d) *Effect of admissions by respondents*. Admissions by a respondent properly contained in an answer and any written stipulations made by a respondent may be admitted into evidence at any stage of the proceedings and given such weight by the court as may be appropriate if the court finds that such admissions or stipulations are reliable. If the reliability of such admissions or stipulations is challenged for fraud, duress or other like cause, the court shall determine the issues thus drawn on the record. Extra judicial admissions by a respondent shall be admitted into evidence under any circumstances permitted by the rules of evidence.

Rule 27. Findings; adjudication order.

At the conclusion of the adjudicatory hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to whether the child is abused and/or neglected in accordance with W. Va. Code § 49-4-601(i). The court shall enter an order of adjudication, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing, and the parties and all other persons entitled to notice and the right to be heard shall be given notice of the entry of this order.

Rule 28. Disposition report by Department -- The child's case plan; contents of the child's case plan.

(a) The Department shall prepare a child's case plan as required by W. Va. Code §§ 49-4-408 and 49-4-604, in the format approved by the Supreme Court of Appeals of West Virginia and the Department. If parental rights have not been terminated, the plan should include, where applicable, the requirements of the family case plan. Parents, children capable of expressing their preferences, foster parents or relative caregivers,

and members of the multidisciplinary treatment team should be included in the case plan development. The case plan should include, but need not be limited to, the following:

(1) A statement of the changes needed to correct the problems necessitating Department intervention, with timetables for accomplishing them;

(2) A description of services for the child, parents, and foster parents or relative caregivers that will assist the family in remedying the identified problems, including an explanation of the appropriateness, availability of suggested services, and reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(3) A description of behavioral changes that must be evidenced by the respondents to correct the identified problems;

(4) The permanency plan and concurrent plan for the child, which are designed to achieve timely permanency for the child in the least restrictive setting available. Unless reasonable efforts to prevent removal or to preserve the family are not required, documentation must be provided to show reasonable efforts to prevent removal or to ensure reunification within the timeframes set in the plan, as well as reasonable efforts to work toward the concurrent plan, which may be adoption, minor guardianship, another planned permanent living arrangement (APPLA), or emancipation; and

(5) When the child's permanency plan is APPLA, the Department shall document the efforts to place the child permanently with a parent, relative, or in a guardianship or adoptive placement and the steps taken to ensure that the foster family follows the "reasonable and prudent parent standard" to allow the child regular opportunities to engage in age- or developmentally-appropriate normal childhood activities.

(b) When the child has been in emergency protective care or temporary custody during the proceedings or the Department's recommendation includes placement of the child away from home, the report also shall include the following:

(1) A description of the efforts made by the Department to prevent the need for placement or the circumstances which made the offer of such efforts an unviable option; and

(2) A description of the efforts since placement to reunify the family, including services which were offered or provided or the reasons why such efforts would be unavailing or not in the best interest of the child.

(c) When the Department's recommendation includes placement of the child away from home, whether temporarily or permanently, the report also shall include the following:

(1) An explanation why the child cannot be protected from the identified problems in the home even with the provision of services or why placement in the home is not in the best interest of the child;

(2) Identification of relatives or friends who were contacted about providing a suitable and safe permanent placement for the child;

(3) A description of the recommended placement or type of home or institutional placement in which the child is to be placed, including its distance from the child's home and whether or not it is the least restrictive (most family-like) one available and including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parent's/respondent's home, facilitate return of the child to his or her own home or the permanent placement of the child;

(4) Assurances that the placement of the child takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; that the Department has coordinated with appropriate local education agencies to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement, including provision for reasonable travel; and if remaining in the same school is not in the child's best interests, that the Department and local education agencies have provided immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school;

(5) A suggested visitation plan including an explanation of any conditions to be placed on the visits;

(6) A statement of the child's special needs and the ways they should be met while in placement, including a plan for how the child will have regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(7) The location of any siblings and, if siblings are separated, a statement of the reasons for the separation and the steps required to unite them as quickly as possible and to maintain regular contact during the separation if it is in each child's best interest;

(8) For children aged 14 or older, the plan should specify services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged 17 comes into a case, the Department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17 with special needs comes into a case, he or she is entitled to the appointment of a Department adult services worker to the multidisciplinary treatment team

and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams;

(9) The ability of the parent(s) to contribute financially to placement; and

(10) The current address and telephone number of the parties or a statement why such information is not provided.

(d) When the Department's recommendation is for termination of parental rights, the report shall include those items set forth in subsections (b) and (c) above and also the following:

(1) A description of the efforts made by the Department to prevent the need for placement or the circumstances which made the offer of such efforts an unviable option;

(2) A description of the efforts since placement to reunify the family, including services which were offered or provided or the reasons why such efforts would be unavailing; and

(3) Any objections by any party to the contents of the child's case plan may be raised at the disposition hearing.

Rule 29. Notice of the child's case plan.

Copies of the child's case plan shall be provided to the parties, their counsel, and persons entitled to notice and the right to be heard, at least five (5) judicial days prior to the disposition hearing.

Rule 30. Exchange of information before disposition hearing.

At least five (5) judicial days prior to the disposition hearing, each party shall provide the other parties, persons entitled to notice and the right to be heard, and the court a list of possible witnesses, with a brief summary of the testimony to be presented at the disposition hearing, and a list of issues of law and fact. Parties shall have a continuing obligation to update information until the time of the disposition hearing.

Rule 31. Notice of disposition hearing.

Notice of the date, time, and place of the disposition hearing shall be given to all parties, their counsel, and persons entitled to notice and the right to be heard.

Rule 32. Time of disposition hearing.

(a) *Time frame*. The disposition hearing shall commence within forty-five (45) days of the entry of the final adjudicatory order unless an improvement period is granted pursuant to W. Va. Code § 49-4-610(2) and then no later than sixty (60) days.

(b) *Accelerated disposition hearing.* The disposition hearing immediately may follow the adjudication hearing if:

(1) All the parties agree;

(2) A child's case plan meeting the requirements of W. Va. Code §§ 49-4-408 and 49-4-604 was completed and provided to the court or the party or the parties have waived the requirement that the child's case plan be submitted prior to disposition; and

(3) Notice of the disposition hearing was provided to or waived by all parties as required by these Rules.

Rule 33. Stipulated disposition, contents of stipulation, voluntariness.

(a) *Required information*. Unless otherwise ordered by the court, any stipulated or uncontested disposition shall include the following information:

(1) The legal custody and placement of the child;

(2) The changes needed to end the court's involvement;

(3) Services to be provided to the child and family;

(4) The terms and conditions of the family case plan, unless the stipulated disposition terminates parental rights or places the child in legal guardianship or permanent foster care;

(5) The schedule of multidisciplinary treatment team meetings and permanent placement review conferences, including the first date and time of each;

(6) Restraining orders controlling the conduct of any party who is likely to frustrate the dispositional order;

(7) If a child is to be placed away from home, the proposed stipulated disposition shall also address:

(A) The type of placement;

(B) Terms of visitation and other parental involvement, including information about the child to be provided to the parents;

(C) Steps to meet the child's special needs while in placement; and

(D) If the child is separated from siblings, steps to unite them and/or to maintain regular contact during the separation;

(8) Any other aspect of the case plan the parties want included in the court's order.

(9) A stipulated disposition involving a temporary out-of-house placement cannot be permitted beyond the time allowable by statute for an improvement period.

(b) *Voluntariness of consent.* Before determining whether or not to accept a stipulation of disposition, the court shall determine that the parties and persons entitled to notice and the right to be heard, understand the contents of the stipulation and its consequences, and that the parties voluntarily consent to its terms. The court must ultimately decide whether the stipulation of disposition meets the purposes of these rules, controlling statutes and is in the best interests of the child. The court shall hear any objection to the stipulation of disposition made by any party or persons entitled to notice and the right to be heard. The stipulations shall be specifically incorporated in their entirety into the court's order reflecting disposition of the case.

Rule 34. Rulings on objections to the child's case plan.

If objections to the child's case plan are raised at the disposition hearing, the court shall enter an order:

(a) Approving the plan;

(b) Ordering compliance with all or part of the plan;

(c) Modifying the plan in accordance with the evidence presented at the hearing; or

(d) Rejecting the plan and ordering the Department to submit a revised plan with thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.

Rule 35. Uncontested termination of parental rights and contested termination and contests to the case plan.

(a) *Uncontested termination of parental rights.* If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing:

(1) If the parent is present at the hearing but fails to contest termination of parental rights, the court shall determine whether the parent fully understands the consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(2) If the parent is not present in court and has not relinquished parental rights but has failed to contest the termination, the petitioner shall make a prima facie ("on its face") showing that there is a legal basis for the termination of parental rights and the court shall determine whether the parent was given proper notice of the proceedings.

(3) If the parent is present in court and voluntarily has signed a relinquishment of parental rights, the court shall determine whether the parent fully understands the

consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(4) If the parent is not present in court but has signed a relinquishment of parental rights, the court shall determine whether there was compliance with all state law requirements regarding a written voluntary relinquishment of parental rights and whether the parent was thoroughly advised of and understood the consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(b) *Contested terminations and contests to case plan.*

(1) When termination of parental rights is sought and resisted, the court shall hold an evidentiary hearing on the issues thus made, including the issues specified by statute and make such findings with respect thereto as the evidence shall justify. Upon making such findings, the court shall then determine if the case plan or plans before the court require amendment by reason of the findings of the court and require such modification of the plan or plans as may be appropriate.

(2) The guardian *ad litem* for the children, the respondents and their counsel, and persons entitled to notice and the right to be heard, shall advise at the dispositional hearing and, where termination is sought after the court's findings on the factual issues surrounding termination are announced, whether any such persons seek a modification of the child's case plan as submitted or desire to offer a substitute child's case plan for consideration by the court. The court shall require any proposed modifications or substitute plans to be promptly laid before the court and take such action, including the receipt of evidence with respect thereto, as the circumstances shall require. It shall be the duty of all the parties to the proceeding and their counsel to co-operate with the court in making this information available to the court as early as possible. It shall also be appropriate for the court to require alternative provisions of a case plan to be submitted prior to the taking of evidence in a dispositional hearing to suit alternative possible findings of the court after evidence is taken on any contested issues. Except as to the establishment of grounds for termination and the establishment of other necessary facts, dispositional hearings are not intended to be confrontational hearings; rather such are concerned with the best interests of the abused or neglected children involved.

Rule 36. Findings; disposition order.

(a) *Findings of fact and conclusions of law; time frame*. At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provisions of W. Va. Code § 49-4-604. The court shall enter a disposition order, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing.

(b) *Permanent placement review conference.* In the disposition order the court also shall state the date and time of the first permanent placement review conference required under these rules.

(c) *Contents of disposition order*. The court also may include in the disposition order the following information:

(1) Terms of visitation;

(2) Services to be provided to the child and family;

(3) Restraining orders controlling the conduct of any party who is likely to frustrate the disposition order;

(4) Actions to be taken by the parent(s) to correct the identified problems;

(5) Conditions regarding the child's placement, including steps to meet the child's special needs while in placement;

(6) If the child is separated from siblings, steps to unite them and/or to maintain regular contact during the separation if it is in the best interest of each child; and

(7) Terms and conditions of the family case plan or the child's case plan.

(d) *Notice of permanency hearing*. If a permanency hearing must be conducted pursuant to W. Va. Code § 49-4-608, then the disposition order shall state the date and time of the permanency hearing.

(e) *Interaction with administrative processes of the Department.* The court has exclusive jurisdiction to determine the permanent placement of a child. Placement of a child shall not be disrupted or delayed by any administrative process of the Department, including an adoption review committee or grievance procedure.

Rule 36a. Permanency hearing.

(a) If the court finds at any hearing that the Department is not required to make reasonable efforts to preserve the family, then a permanency hearing must be held within 30 days following entry of the order so finding. The purpose of the permanency hearing is to determine the appropriate permanent placement and plan for the child. All parties, counsel, and persons entitled to notice and the right to be heard, shall be given notice of this hearing at least 5 judicial days in advance thereof.

(b) If the Court finds, at any stage of the proceeding, that reasonable efforts must be made by the Department to preserve the family or any part of it, then a permanency hearing must be conducted within one year from the date the child entered foster care which shall be deemed to be the earlier of the following:

(i) The date of the first judicial finding that the child has been subjected to child abuse or neglect; or

(ii) The date that is 60 days after the date on which the child is removed from the home.

(c) In accordance with Rules 39 to 42, the court shall conduct permanent placement review conferences at least every three months thereafter to determine if the Department has made reasonable efforts to finalize the permanency plan for the child.

Rule 37. Improvement period; status conference.

If an improvement period is ordered following the final adjudicatory hearing or as an alternative disposition pursuant to W. Va. Code §§ 49-4-604(d) and 49-4-610(2) or (3), the court shall order the Department to submit a family case plan within thirty (30) days of such order containing the information required by W. Va. Code §§ 49-4-408 and 49-4-604. The family case plan shall be formulated with the assistance of all parties, counsel and the multi-disciplinary treatment team. Reasonable efforts to place a child for adoption or with a legal guardian or other permanent placement may be made at the same time. In accord with W. Va. Code §§ 49-4-610(2) and (3), the court shall convene a status conference within sixty (60) days of the granting of the improvement period or within ninety (90) days of the granting of the improvement period if the court orders the Department to submit a report as to the respondent's progress in the improvement period within sixty (60) days of the order granting the improvement period. The court shall thereafter convene a status conference at least once every three months for the duration of each improvement period, with notice given to any party and persons entitled to notice and the right to be heard. At the status conference, the multidisciplinary treatment team shall attend and report as to progress and developments in the case. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and the CASA representative provided that such reports or statements are given to all parties.

Rule 38. Hearing after improvement period; final disposition.

No later than thirty (30) days after the end of the alternative disposition improvement period, the court shall hold a hearing to determine the final disposition of the case, including whether the conditions of abuse and/or neglect have been adequately improved in accordance with W. Va. Code § 49-4-604(d). Any party and persons entitled to notice and the right to be heard shall receive notice of the hearing. The court also shall determine the necessary disposition consistent with the best interests of the child. Within ten (10) days of the conclusion of the hearing, the court shall enter a final disposition order in accordance with the provisions of Rule 37.

Rule 39. Permanent placement review.

Rule 6 requires the court to maintain the case on the docket until permanent placement is achieved. Permanent placement is defined in Rule 3(n).

(a) *Court monitoring of permanency plan*. Following entry of a permanency hearing order, the court, with the assistance of the multidisciplinary treatment team, shall continue to monitor implementation of the court-ordered permanency plan for the child.

(b) *Time frame*. At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

(c) *Notice of hearing*. Notice of the time and place of the permanent placement review conference shall be given to counsel of record, and all other persons entitled to notice and the right to be heard at least fifteen (15) days prior to the conference unless otherwise provided by court order. Neither a party whose parental rights have been terminated by the final disposition order nor his or her attorney shall be given notice of or participate in post-disposition proceedings.

(d) *Hearing*. The court shall hold a hearing in connection with such review, and shall not conduct such review by agreed order.

Rule 40. Permanent placement review reports.

At least ten (10) days before the permanent placement review conference, the multidisciplinary treatment team and the Department shall provide to the court and to the parties progress reports describing efforts to implement the permanency plan and any obstacles to permanent placement. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and the CASA representative, provided that such reports or statements are given to all parties prior to the placement review conference.

Rule 41. Permanent placement review conference.

(a) *Subjects of permanent placement review conference.* Unless otherwise provided by court order, matters to be considered at the permanent placement review conference shall include a discussion of the reasonable efforts made to secure a permanent placement, including:

(1) The extent to which problems necessitating Department intervention have been remedied and, if appropriate, the actions that should be taken by the respondent(s) to permit return of the child;

(2) Services and assistance that were offered or provided to the family since the previous hearing or permanent placement review conference; reasonable accommodations provided in accordance with the Americans with Disabilities Act of 1990,

42 U.S.C. § 12101, et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services; and services needed in the future;

(3) Compliance by the respondent and Department with the case plan and with previous orders and recommendations of the court;

(4) Recommended changes in court orders;

(5) The ability and extent of the respondent to contribute financially to the child's placement;

(6) The appropriateness of the current placement, including its distance from the child's home and whether or not it is the least restrictive one (most family-like one) available;

(7) The appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(8) The Department's coordination with appropriate local education agencies to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement, including provision for reasonable travel, or if remaining in the same school is not in the child's best interests, the provision of immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school;

(9) A summary of visitation and any recommended changes;

(10) How the child's special needs were or were not met while in placement, including whether the child had regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(11) The location of any siblings and the steps that have been and will be taken to unite them as quickly as possible and to maintain regular contact during the separation if it is in the best interest of each child;

(12) For children aged 14 or older, the specific services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged 17 comes into a case, the Department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17 with special needs comes into a case, he or she is entitled to the appointment of a Department adult services worker to the multidisciplinary treatment team and coordination

between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams;

(13) When the child's permanency plan is another planned permanent living arrangement (APPLA), the efforts to place the child permanently with a parent, relative, or in a guardianship or adoptive placement; the child's desired permanency outcome; and the steps taken to ensure that the foster family follows the "reasonable and prudent parent standard" to allow the child regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(14) A recommendation and discussion regarding the child's return home either immediately or within the next six months.

(A) If return is recommended, it shall include a summary of:

(i) Necessary steps to make return possible and to minimize the disruptive effects of return;

(ii) The dangers to the child after return; and

(iii) Reunification services needed, including services to minimize any danger to the child after return;

(B) If return is not recommended, a recommendation and discussion regarding adoption of the child. If placement for adoption is recommended, it shall include a discussion of:

(i) The steps needed to bring about a termination of parental rights action; and

(ii) The time necessary to take such steps;

(C) If neither return home nor placement for adoption is recommended, a discussion of the following shall be included:

(i) Awarding legal guardianship or permanent custody to a specific individual or individuals. If recommended, a proposed time table, recommendations concerning the rights and responsibilities the biological parent should retain, and recommendations concerning the rights and responsibilities of the guardian or custodian shall be addressed; and

(ii) Placement of the child permanently in foster care with specific foster parents. If recommended, a time table and recommendations concerning the terms of the permanent foster care agreement, and court order authorizing permanent foster care, and the continuing rights and responsibilities of the biological parents shall be addressed;

(D) If continued foster care is recommended, an explanation of why it continues to be appropriate for the child;

(E) If placement in a group home or institution is recommended:

(i) An explanation of why treatment outside a family environment is necessary, including a brief summary of supporting expert diagnoses and recommendations; and

(ii) A discussion of why a less restrictive, more family-like setting is not practical, including placement with specially trained foster parents;

(F) If emancipation or independent living is recommended for a child who has attained age sixteen (16) years, an explanation of why foster family care is no longer appropriate; a description of the skills needed by the child to prepare for adulthood; and a description of the ongoing support and services to be provided by the agency; and

(G) Concurrent alternative permanency plans.

(H) Any other matter relevant to implementation of the permanency plan.

(b) *Post-termination placement plan*. Within ninety (90) days of the entry of the final termination order or decree for both parents, the Department responsible for placement of the child shall submit a written permanent placement plan to the court, the guardian ad litem, persons entitled to notice and the right to be heard, and other remaining parties, if any, for consideration at the permanent placement review. The plan shall include the following:

(1) A description of the Department's progress toward arranging an adoptive, legal guardianship, or permanent foster care home placement for the child;

(2) Where adoptive, legal guardians, or permanent foster care parents have not been selected, a schedule and a description of steps to be taken to place the child permanently;

(3) A discussion of any special barriers preventing placement of the child for adoption, legal guardianship, or permanent foster care and how they should be overcome; and

(4) A discussion of whether adoption and/or legal guardianship subsidy is needed and, if so, the likely amount and type of subsidy required.

The court shall continue to conduct a permanent placement review at least every three (3) months until permanent placement is achieved. The court shall hold a hearing in connection with such review, and shall not conduct such review by agreed order. Notice of such hearing shall be given to the Department, the child through his guardian ad litem, and persons entitled to notice and the right to be heard.

(c) *Stipulations*. The parties may file written stipulations as to any matters to be considered at the permanent placement review conference but such written stipulations shall not be accepted in lieu of the conducting of the permanent placement review conference.

Rule 42. Findings at permanent placement review; order.

(a) *Findings of fact and conclusions of law; time frame*. Within ten (10) days of the conclusion of the permanent placement review conference, the court shall enter an order determining whether the Department has made reasonable efforts to finalize the permanency plan for the child. The court shall also find whether permanent placement has been fully achieved within the meaning of Rule 6 and stating findings of fact and conclusions of law to support its determination.

(b) *Dismissal*. If the court finds that permanent placement has been achieved, it may order the case dismissed from the docket.

(c) *Continuance*. If the court finds that permanent placement has not been achieved, the court's order shall address those subjects set forth in Rule 41 as appropriate and shall state:

(1) Changes in the terms of the child's case plan it deems necessary to effect a permanent placement of the child, with supporting findings of fact;

(2) Changes in the terms of visitation and other parental involvement, if any;

(3) Changes in services to be provided the parties and the child, if any;

(4) Changes to the educational plan for the child to further the child's educational stability, if any;

(5) Steps to be taken to assist a child aged 14 or older with the development of a transitional plan;

(6) Restraining orders controlling the conduct of any party who is likely to frustrate the court's orders, if any;

(7) Additional actions to be taken by the parties to achieve permanent placement; and

(8) A date and time for the next placement review conference.

(d) Findings when the permanency plan is another planned permanent living arrangement (APPLA). After asking the child for his or her desired permanency outcome, the court shall find whether APPLA is the best permanency plan for the child; review Department efforts to place the child permanently with a parent, relative, or in guardianship or adoptive placement; and find compelling reasons why it is not in the child's best interests to be placed permanently with a parent, relative, or in a guardianship or adoptive placement.

Rule 43. Time for permanent placement.

Permanent placement of each child shall be achieved within twelve (12) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay.

Rule 44. Foster care review.

Nothing in these rules is intended to abrogate the responsibilities of the Department and the court with regard to the foster care case review system established by W. Va. Code §§ 49-4-110 and 49-4-608. Upon the filing of a foster care case review petition by the Department, the court may schedule a foster care case review hearing at the same time as the required permanent placement review conference contemplated by these rules. Such proceedings shall be conducted in accordance with the provisions of the pertinent statute and these rules.

Rule 45. Review following permanent placement; reporting permanent placement changes.

(a) *Discontinuation of permanent placement review*. Permanent placement review shall be discontinued after permanent placement is consummated.

(b) *Reporting changes in permanent placement status.* If the child is removed from an adoptive home or other permanent placement after the case has been dismissed, any party with notice thereof and the receiving agency shall promptly report the matter to the circuit court of origin, the Department, and the child's counsel, and the court shall schedule a permanent placement review conference within sixty (60) days, with notice given to any appropriate parties and persons entitled to notice and the right to be heard. The Department shall convene a multidisciplinary treatment team meeting within thirty (30) days of the receipt of notice of permanent placement disruption.

Rule 46. Modification or supplementation of court order; stipulations.

A child, a child's parent (whose parental rights have not been terminated), a child's custodian, or the Department shall file a motion in the circuit court of original jurisdiction in order to modify or supplement an order of the court at any time; provided, that a dispositional order pursuant to W. Va. Code § 49-4-604(b)(6) shall not be modified after the child has been adopted, pursuant to W. Va. Code § 49-4-606. The court shall conduct a hearing and, upon a showing of a material change of circumstances, may modify or supplement the order if, by clear and convincing evidence, it is in the best interest of the child. *Provided*: an order of child support may be modified if, by the preponderance of the evidence, there is a substantial change in circumstances, pursuant to W. Va. Code § 48-11-105. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent(s) (whose parental rights have not been terminated) or custodian, and to the Department, as well as to other persons entitled to notice and the right to be heard. The court may consider a stipulated modification of an order, provided that the child has not been adopted as aforesaid, if the court determines

that the parties and persons entitled to notice and the right to be heard understand the contents and consequences of the stipulation and voluntarily consent to its terms, that the stipulation meets the purposes of these rules and controlling statutes, and that the stipulation is in the best interest of the child.

Rule 47. Status conference.

The court may convene a status conference, upon its own motion or, if requested, by any party or person entitled to notice and the right to be heard, at any time during the proceedings to allow the parties, the multidisciplinary treatment team, persons entitled to notice and the right to be heard, or representatives of the Department to advise the court of pertinent developments in the case or problems which arose during the formulation and implementation of a case plan. Where it appears to the court that any such issue can not be resolved without the taking of evidence, the court may proceed to take evidence, if appropriate notice has been given in advance, or set such further hearing and require notice thereof to all remaining proper parties or persons entitled to notice and the right to be heard, as the court may be advised. Upon the taking of such evidence, the court shall make such findings in the appropriate post-dispositional order as are required to dispose of the issue thus raised.

Rule 48. Separate hearing on issue of paternity.

If the paternity of a child is at issue at any time during these proceedings, the court may set a special hearing to determine paternity and shall notify the Bureau for Child Support Enforcement office.

Rule 49. Accelerated appeal for child abuse and neglect and termination of parental rights cases.

Appeals of orders under W. Va. Code § 49-4-601, *et seq.*, are governed by the West Virginia Rules of Appellate Procedure. Within thirty (30) days of entry of the order being appealed, the petitioner shall file a notice of appeal, including required attachments and copies, with the Office of the Clerk of the Supreme Court of Appeals of West Virginia, with service provided as prescribed by the Rules of Appellate Procedure. All parties to the proceeding in the court from which the appeal is taken, including the guardian(s) ad litem for the minor children, shall be deemed parties in the Supreme Court, unless the appealing party indicates on the notice of appeal that one or more of the parties below has no interest in the outcome of the matter. An appeal must be perfected within sixty (60) days of entry of the order. The circuit court from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if the notice of appeal was properly and timely filed by the party seeking the appeal. The filing of any motion to modify an order shall not toll the time for appeal. The Supreme Court of Appeals shall give priority to appeals of child abuse and/or neglect proceedings and termination of parental rights cases and shall establish and administer an accelerated schedule in each case, to include the completion of the record, briefing, oral argument, and decision.

Rule 50. Stays on appeal.

The filing of a petition for appeal does not operate to automatically stay the proceedings or orders of the circuit court in abuse, neglect, and/or termination of parental right cases, but the circuit court or the Supreme Court of Appeals may grant a stay upon a showing of good cause. Any party seeking a stay from the Supreme Court of Appeals pursuant to Rule 28 of the Rules of Appellate Procedure pending an appeal of neglect, abuse, and/or termination of parental rights cases shall submit a written motion for the stay and a brief statement explaining the need for the stay, discussing the effect of the stay on the ability of the circuit court to plan for the child and on the best interests of the child. This rule shall not preclude any motion to the circuit court for a stay which includes a brief statement of the issues previously set forth.

Rule 51. Multidisciplinary treatment teams.

(a) *Convening of multidisciplinary treatment teams*. Within thirty (30) days after the petition is filed, the court shall cause to be convened a meeting of a multidisciplinary treatment team assigned to the case, said multidisciplinary treatment team to include those members mandated pursuant to W. Va. Code § 49-4-405, providers of services to the child and/or family, and persons entitled to notice and the right to be heard.

(b) *Access to and confidentiality of information.* The multidisciplinary investigative team created pursuant to W. Va. Code § 49-4-402 and the multidisciplinary treatment team created pursuant to W. Va. Code § 49-4-403, and the community team created pursuant to W. Va. Code § 49-1-207 shall be afforded access to information in the possession of the Department and other agencies and the Department and other offices shall cooperate in the sharing of information as may be provided by W. Va. Code §§ 49-4-402 and 49-5-101, and any other relevant provisions of law. Any multidisciplinary team member who acquires confidential information shall not disclose such information except as provided by statute.

(c) *Responsibilities*. The multidisciplinary treatment team shall submit written reports to the court as required by these rules or by the court; shall meet with the court at least every three months until permanency is achieved for the child, and the case is dismissed from the docket; shall be available for status conferences and hearings as required by the court; and shall not be abrogated by an adoption review committee or other administrative process of the Department.

(d) *Scope of this rule*. This rule is to be construed broadly to effectuate cooperation and communication between all service providers, parties, counsel, persons entitled to notice and the right to be heard, and the court.

Rule 52. Court-appointed special advocate (CASA) representative.

(a) *Appointment of court-appointed special advocate representative*. Where a court-appointed special advocate program, which is in good standing as a member of the National CASA Association and the West Virginia CASA Association, is in place, the court

may, after the filing of a civil petition, appoint a CASA representative to further the best interests of the child until further order of the court or until permanent placement of the child is achieved.

(b) *Duties of CASA representative*. A CASA representative is to be appointed primarily in proceedings involving child abuse and/or neglect. Duties of a CASA representative include an independent gathering of information through interviews and review of records; facilitating prompt and thorough review of the case; protecting and promoting the best interests of the child; follow-up and monitoring of court orders and case plans; making a written report to the court with recommendations concerning the child's welfare; and negotiating and advocating on behalf of the child.

(c) *Access to information*. The court may enter an order granting the CASA representative access to court records and confidential records of state, county, local agencies, and service providers, or the CASA representative may obtain a waiver for the release of such information from the parties as provided by W. Va. Code § 49-5-101, or in accordance with other law. If such an order is entered or such a waiver is obtained, the CASA representative shall be considered a person entitled to notice and the opportunity to be heard and shall be given notice of pleadings, court orders, hearings, and conferences and shall be allowed to attend proceedings to the extent allowed by the court. The CASA representative shall not disclose any confidential information he or she obtains expect as authorized by statute.

(d) *Notification of hearings*. The CASA representative shall be notified of all hearings and changes in hearings, all status conferences, all treatment multidisciplinary team meetings, and all Department administrative reviews.

(e) *Court orders*. The CASA representative shall receive copies of all court orders in the case to which he or she is appointed.

(f) *Termination*. The CASA representative shall stay involved in the case until further order of the court or permanent placement of the child is achieved. The CASA representative shall have access to information in the selection process of adoptive parents, legal guardians or permanent foster care parents. The CASA representative also shall monitor and advocate for services for the permanent placement family until the final order is entered.

(g) *Continued duties of the child's attorney*. The appointment of a CASA representative shall not in any way abrogate the duties and responsibilities imposed by law on the attorney for the child. The duties and responsibilities of a child's guardian ad litem shall continue until such child has a permanent placement, and the guardian ad litem shall not be relieved of his responsibilities until such permanent placement has been achieved.

Rule 53. Case status reporting.

To effectuate the purpose of the rules and to assist the court in complying with the duty to monitor the progress of each abuse and neglect case from filing through the child's permanent placement, the court shall promptly enter required data into the electronic child abuse and neglect database managed by the Administrator of the Supreme Court of Appeals for each abuse/neglect case commencing from the filing of the case until the child involved in the case is situated by way of unconditional permanent return to parent(s), or other permanent placement ratified by court order, or by emancipation.

Rule 54. Transitioning Adults

These rules of procedure pertaining to case reviews and permanency hearings apply to any "transitioning adult" as defined by W. Va. Code § 49-1-202.

APPENDIX A: Guidelines for Children's Guardians

Ad Litem in Child Abuse and Neglect Cases

Introduction

The purpose of the following Guidelines is to provide guardians *ad litem* (GAL) with guidance in representing a child in an abuse and neglect proceeding under W.Va. Code § 49-4-601, *et seq.* The Guidelines are divided into five parts: 1) Section A sets forth the general role of a GAL and the education and training requirements of a GAL; 2) Section B discusses ethical considerations in representation; 3) Section C describes the duties of a GAL as to the initial stages of representation; 4) Section D discusses the duties of a GAL as to the adjudicatory and dispositional stages of representation; and 5) Section E describes the duties of a GAL as to post-dispositional representation.

A. Role of GAL; Education and Training

1. *Role of GAL.* The GAL in a child abuse and neglect case has a dual role, both as an attorney, and to represent the best interests of the child. A GAL has broad discretion in determining what is necessary to protect the best interests of a child. The safety, well-being, and timely permanent placement of a child in an abuse and neglect proceeding are central to all aspects of a GAL's representation.

2. *Education and Training.* An attorney appointed as GAL shall complete a minimum of eight (8) hours of continuing legal education training every two years in child abuse and neglect practice and procedure as provided by the Supreme Court of Appeals of West Virginia.

B. Ethical Considerations in Representation

1. *Rules of Professional Conduct.* The Rules of Professional Conduct apply to a GAL's representation of a child in an abuse and neglect proceeding.

2. *Duty of Confidentiality.* A GAL owes a duty of confidentiality to the child, but this duty is not absolute. A GAL has a duty to disclose a child's confidential communication to the court when the communication implicates a high risk of probable harm to the child.

3. *Conflicts of Interest.* General principles of conflicts of interest apply to a GAL's representation of a child in an abuse and neglect proceeding. Conflicts of interest commonly arising in abuse and neglect proceedings include the following:

1. A GAL determines that there is a conflict of interest in performing both roles as GAL and the child's attorney. In such instance, the lawyer should continue to represent the child as the child's attorney and withdraw as GAL. The lawyer should simultaneously ask the court to appoint a new GAL to represent the best interests of the child. A mere disagreement regarding the best interests of the child does not in itself constitute a basis for withdrawing as counsel.

2. A conflict of interest arises when siblings represented by the same GAL have opposing interests. If the GAL discovers the conflict before commencing representation of the siblings, the GAL shall only accept appointment of one sibling or non-conflicting siblings. If the GAL discovers the conflict of interest after accepting appointment to represent the siblings, the GAL shall request that the court appoint a new GAL to represent the interests of the conflicting sibling or siblings.

3. A conflict of interest arises when a GAL subsequently represents a child's parent, relative, caregiver, foster parent, or pre-adoptive parent in another matter. In such instance, a GAL should not engage in a subsequent representation that compromises the GAL's ability to independently consider the best interests of the child.

C. Duties of GAL as to Initial Stages of Representation

1. When appropriate, promptly notify the child and the child's caretaker of the GAL's appointment and the means by which counsel can be contacted.

2. When appropriate, initiate contact with the caseworker, review the caseworker's file and obtain copies of school, medical, social service, or other records necessary to thoroughly understand and investigate the case.

3. Schedule a face-to-face meeting with the child at a time and place that allows for observation and private consultation with the GAL unless the court specifically determines that such a meeting would be inappropriate given the age, medical and/or psychological condition of the child.

4. When appropriate, counsel the child regarding the subject matter of the proceedings, the specific reasons for the GAL's appointment and the expectations of the court.

5. When a Court Appointed Special Advocate (CASA) has been appointed to the case, work with the CASA volunteer to achieve the goal of representing the best interests of the child.

6. Conduct an independent investigation of the facts of the case.

1. When appropriate, conduct in-home visits during which the GAL can observe the respective living environments of the child's parents or caretakers and their interaction with the child.

2. When appropriate, interview caregivers, caseworkers, therapists, school personnel, medical providers, relatives, siblings, and/or other individuals that have pertinent information regarding the child.

3. Ascertain the child's wishes when possible.

7. Maintain contact with the child throughout the case to monitor whether the child is receiving counseling, tutoring, or any other services needed to provide as much support as possible under the circumstances.

8. When appropriate, keep the child apprised of any developments in the case and actions of the court or parties involved.

D. Duties of GAL as to Adjudicatory and Dispositional Stages of Representations

1. Actively participate in all aspects of litigation, including, but not limited to, discovery, motions practice, court appearances, and the presentation of evidence.

2. Maintain adequate records of documents filed in the case and of all conversations with the child and potential witnesses.

3. When appropriate, evaluate any available improvement periods and actively assist in the formulation of an improvement period and service plans. The GAL is to monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring updates or status reports from agencies involved with the family.

4. Assess whether it is appropriate for the child to participate in court hearings or multi-disciplinary team meetings. The GAL is to participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in an acceptable and emotionally neutral setting.

5. Assess whether it is appropriate for the child to undergo multiple physical or psychological examinations. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature and intrusiveness of the examination requested; (2) the child's age; (3) the resulting physical and/or emotional effects of the examination on the child; (4) the probative value of the examination to the issues before the court; (5) whether the passage of time renders the examination unnecessary or irrelevant; and (6) the evidence already available for the respondent's use.

6. Review any pre-dispositional report prepared for the court prior to the dispositional hearing and submit a factually accurate report if necessary to correct deficiencies.

7. Complete the investigation of the case with sufficient time between the interviews and court appearances to thoroughly analyze the information gleaned to formulate meaningful arguments and written recommendations to the court.

8. Submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the format and content requirements of the "Report of Guardian Ad Litem" set forth in Appendix B of the Rules of Procedure for Child Abuse and Neglect Proceedings. When necessary, petition the court to seal or redact information contained in the report as provided in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. Submit an updated report if necessary to notify the court of any changes in the child's circumstances. Such report

is protected by the attorney-client privilege and the attorney work product privilege. GALs are precluded from testifying as to any aspect of the report.

9. When appropriate, explain to the child the decisions of the court.

10. Ensure that the child/family case plan and subsequent progress reports include appropriate treatment. The GAL is to advocate, when appropriate, for a gradual transition period and take into consideration the educational stability of the child. The GAL is to ensure that the transition plan is intended to foster the child's emotional adjustment.

11. Recommend to the court the appropriateness of establishing, continuing, or collecting a child support obligation from the parents involved in the case.

12. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests.

13. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports to appropriate entities.

E. Duties of GAL as to Post-Dispositional Representation

1. When appropriate, explain to the child the decisions of the court.

2. When appropriate, inform the child of the right to appeal and what that right means. Exercise the appellate rights of the child if under the reasonable judgment of the GAL an appeal is necessary. If the GAL decides to file an appeal, the appeal must fully comply with the requirements set forth in Rule 11 of the Rules of Appellate Procedure.

3. Actively participate and timely file a response in any appeal, extraordinary writ, modification, or action ancillary to the abuse and neglect proceeding including proceedings to address the disruption of a permanent placement which affect the recommendations of the GAL. If an appeal is filed by another party in an abuse and neglect case, the GAL is required to file a respondent's brief or summary response that adheres to the requisite provisions of Rule 11 of the Rules of Appellate Procedure.

4. During the period of representation, evaluate whether it is appropriate to file a motion for modification of the dispositional order if a change in circumstances occurs for the child which warrants a modification.

5. As provided in Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings, a GAL's representation of the child continues until such time as permanent placement of the child has been achieved, or as determined by the Court.

APPENDIX B: Report of Guardian Ad Litem

IN THE CIRCUIT COURT OF COUNTY, WEST VIRGINIA

In the Matter of:

(Child's Name) Case No.:
Judge:

Report of Guardian Ad Litem

As guardian ad litem (GAD for the minor child (child's name). I hereby submit the following report based on my investigation and observations prior to the (type of hearing) scheduled on (date of hearing).

I. General Information

1. Child's Full Name and Date of Birth

2. Parents' Full Names

3. Sibling Information

4. Other parties involved in the abuse and neglect petition

II. History

Provide a brief summary of the procedural posture of the case.

III. GAL's Contact with Child

List the dates of contact with the child and the nature of the contact.

IV. Persons Interviewed

List the name of each person interviewed, the date of the interview, and the person's relationship to the child.

V. Summary of Information Obtained from Interviews/Observations

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' living environments, the child's behavior, and the child's interaction with others.

VI. Summary of Documents Reviewed

List and briefly summarize the documents reviewed during the course of the investigation and attach any documents that are necessary for the court's consideration.

VII. Child's Current Status

1. Placement

2. Visitation

3. Education

4. Medical

5. Services

6. Contact with Siblings/Relatives

VIII. Parents' Current Situation

Provide information regarding each parent's current status and their ability to care for the child.

IX. Child's Expressed Wishes

When appropriate, discuss the child's wishes and any issues that the child requests that the court consider.

X. Recommendation

Analyze any allegations of abuse and neglect and provide a specific recommendation that addresses the best interests of the child with regard to custody, visitation, and permanent placement. Discuss the child's case plan as well as the family case plan. Address any additional factors that are necessary for the court to consider to protect the best interests of the child.

XI. Conclusion

Provide a summary of the most important factors for the court to consider in making its decision and indicate any action that is necessary in order to further the child's best interests.

Respectfully submitted,

(Signature of Guardian Ad Litem) (Date)

DIRECTIONS ON COMPLETING REPORT OF GUARDIAN AD LITEM

The following directions provide guidance to guardians ad litem (GAL) in preparing a report in an abuse and neglect proceeding pursuant to Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. A GAL must submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing. It is the duty of the GAL to determine if the information contained in the report should be sealed or redacted. The GAL is to submit an updated report if necessary to notify the court of any changes in the child's circumstances. The contents of each section and subsection of the report are discussed below.

I. General Information

This section is intended to provide general information regarding the parties involved in the abuse and neglect petition including the following:

1. Child's full name and date of birth;

2. Parents' full names;

3. If applicable, the names and ages of any siblings or half-siblings; information regarding the sibling's parents, and the sibling's current placement.

4. Provide the names of any other parties involved in the abuse and neglect petition such as step-parents, relatives, or a parent's boyfriend or girlfriend. If the child is currently in foster care, list the names of foster parents and any other individuals residing in the child's current placement.

II. History

Briefly describe the procedural posture of the case. Did a parent or parents voluntarily relinquish rights to any other children? Have parental rights been involuntarily terminated to any other children of either parent previously? If so, provide the date, case number, and facts with regard to the previous relinquishment. It is the duty of the GAL to determine what parental information is pertinent to a decision regarding the welfare of the child or children involved in the petition. What circumstances led to the filing of the instant petition? What essential issues need to be addressed by the Court in this proceeding?

III. GAL'S Contact with Child

Indicate the dates of contact with the child, the purpose of the contact, and the duration of the visit. Was the child alone during the visit? If not, who was present? Did the GAL conduct in-home visits and observe the respective living environments of the child's parents or caretakers and their interaction with the child?

IV. Persons Interviewed

List the name of each person interviewed and their relationship to the child. Such persons may include parents or caregivers, caseworkers, therapists, school personnel, medical providers, relatives, and siblings. Also list the date and manner in which the interviews were conducted (e.g., by phone, in person).

V. Summary of Information Obtained from Interviews/Observations

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' respective living environments, the child's behavior, and the child's interaction with parents, siblings, relatives, peers or others.

VI. Summary of Documents Reviewed

List and summarize the documents reviewed during the course of the investigation. Documents may include medical records, school records, police reports, psychological reports, psychiatric reports, and other documents. Attach any necessary documents.

VII. Child's Current Status

Provide the court with information regarding the current status of the child including information regarding the child's placement, visitation, education, medical needs, services, and contact with siblings and relatives.

1. Placement. Describe any observations regarding the child's current placement. Is this environment satisfying the needs of the child? What are the plans for the child's permanency?

2. Visitation. What is the status of parental visitation? Are the child's needs being met with regard to visitation?

3. Education. What is the child's current grade level? What school does the child attend? What are the child's current grades? What is the child's attendance record? Does the child have any special needs that need to be addressed?

4. Medical. Does the child have any medical needs that need to be addressed?

5. Services. Does the child need counseling, tutoring, or any other types of services?

6. Contact with Siblings/Relatives. Are the child's needs being met with regard to contact with siblings and/or relatives?

VIII. Parents' Current Situation

Provide information regarding the fitness of each of the parents and their ability to care for the child including: the parents' work schedules/time available to spend with the child; parents' educational levels: financial resources: family support: home studies/living arrangements; domestic violence issues; substance abuse problems; criminal history; medical, emotional or psychological matters; and the parents' compliance with services and court orders. Include any other information that the GAL determines is pertinent to a decision regarding the welfare of the child or children involved in the petition.

IX. Child's Expressed Wishes

Discuss the child's wishes when appropriate and any issues that the child requests the court to consider.

X. Recommendation

Analyze the factors that are essential for the court to consider when making a determination regarding the allegations of abuse and neglect and custody, visitation, and permanent placement of the child. Discuss the child's case plan as well as the family case plan including the services to be made available to the child and family. Address any other issues that are necessary in order for the court to protect the best interests of the child.

XI. Conclusion

Summarize the most important factors for the court to consider in making its decision, noting all aspects requiring special court direction and indicate any other action that is necessary to further the best interests of the child.

CHAPTER 8:

CASELAW DIGEST CASES

A.N., In re, Nos. 15-0182, 15-0208 (W. Va. Supreme Ct., September 30, 2015 (memorandum decision); 2015 WL 5738019

Aaron H., In re, 229 W. Va. 677, 735 S.E.2d 274 (2012)

Aaron M. (State ex rel.) v. DHHR, 212 W. Va. 323, 571 S.E.2d 142 (2001)

Aaron Thomas M., In re, 212 W. Va. 604, 575 S.E.2d 214 (2002)

Abbigail Faye B., In re, 222 W. Va. 466, 665 S.E.2d 300 (2008)

Alireza D. v. Kim Elaine W., 198 W. Va. 178, 479 S.E.2d 688 (1996)

Alonzo v. Jacqueline F., 191 W. Va. 248, 445 S.E.2d 189 (1994)

Alyssa W., In re, 217 W. Va. 707, 619 S.E.2d 220 (2005)

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

Amy M. (State ex rel.) v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Antonio R.A., In re, 228 W. Va. 380, 719 S.E.2d 850 (2011)

Ashton M., In re, 228 W. Va. 584, 723 S.E.2d 409 (2012)

Ault v. Waid, 654 F. Supp. 2d 465 (N.D.W.Va. 2009)

Austin G., In re, 220 W. Va. 582, 648 S.E.2d 346 (2007)

B.B., In re, 224 W. Va. 647, 687 S.E.2d 746 (2009)

B.C., In re, 233 W. Va. 130, 755 S.E.2d 664 (2014)

B.H., In re, 233 W. Va. 57, 754 S.E.2d 745 (2014)

In re B.L., Nos. 14-0660,14-0714 (W. Va. Supreme Ct., June 10, 2015) (memorandum decision); 2015 WL 3631681

Belinda Kay C. v. John David C., 193 W. Va. 196, 455 S.E.2d 565

(1995) *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988)

Beth Ann B., In re, 204 W. Va. 424, 513 S.E.2d 472 (1998)

Betty J.W., In the Interest of, 179 W. Va. 605, 371 S.E.2d 326 (1988)

Billy Joe M., In re, 206 W. Va. 1, 521 S.E.2d 173 (1999)

Billy Lee C. (DHHR v.), 199 W. Va. 541, 485 S.E.2d 710 (1997)

Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993)

Bobby Lee B., In re, 218 W. Va. 689, 629 S.E.2d 748 (2006)

Boley (DHS v.), 178 W. Va. 179, 358 S.E.2d 438 (1987)

Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984)

Brandon L. (State ex rel.) v. Moats, 209 W. Va. 752, 551 S.E.2d 674 (2001)

Brandon Lee B., In re, 211 W. Va. 587, 567 S.E.2d 597 (2001)

Brandon Lee H.S., In re, 218 W. Va. 724, 629 S.E.2d 783 (2006)

Brenda C. (DHHR v.), 197 W. Va. 468, 475 S.E.2d 560 (1996)

Brian D., In the Matter of, 194 W. Va. 623, 461 S.E.2d 129 (1995)

Brian James D., In re, 209 W. Va. 537, 550 S.E.2d 73 (2001)

Brianna Elizabeth M., In re, 192 W. Va. 363, 452 S.E.2d 454 (1994) *Brooke B. v. Donald C.*, 230 W. Va. 355, 738 S.E.2d 21 (2013)

Bryanna H., In the Matter of, 225 W. Va. 659, 695 S.E.2d 899 (2010)

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984)

C.M., In re, 235 W. Va. 16, 770 S.E.2d 516 (2015)

C.N.S. (State v.), 173 W. Va. 651, 319 S.E.2d 775 (1984)

Carl B. (State v.), 171 W. Va. 774, 301 S.E.2d 864 (1983)

Carlita B., In the Interest of, 185 W. Va. 613, 408 S.E.2d 365 (1991)

Carolyn Jean T., In re, 181 W. Va. 383, 382 S.E.2d 577 (1989)

Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996)

Cecil T., In re, 228 W. Va. 89, 717 S.E.2d 873 (2011)

Cesar L., In re, 221 W. Va. 249, 654 S.E.2d 373 (2007)

Charity H., In re, 215 W. Va. 208, 599 S.E.2d 631 (2004)

Chastity D. (State ex rel. DHHR and) v. Hill, 207 W. Va. 358, 532 S.E.2d 358 (2000)

Cheryl M. (State ex rel. DHS v.), 177 W. Va. 688, 356 S.E.2d 181 (1987)

Chevie V., In re, 226 W. Va. 363, 700 S.E.2d 815 (2010)

Chris Richard S. (State ex rel.) v. McCarty, 200 W. Va. 346, 489 S.E.2d 503 (1997)

Christina L., In re, 194 W. Va. 446, 460 S.E.2d 692 (1995)

Christina W., In re, 219 W. Va. 678, 639 S.E.2d 770 (2006)

Christine Tiara W., In re, 198 W. Va. 266, 479 S.E.2d 927 (1996)

Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)

Clark (DHHR v.), 209 W. Va. 102, 543 S.E.2d 659 (2000)

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)

Czaja (Wright) v. Czaja, 208 W. Va. 62, 537 S.E.2d 908 (2000)

D.B. v. J.R., 235 W. Va. 409, 774 S.E.2d 75 (2015)

D.P., In re, 230 W. Va. 254, 737 S.E.2d 282 (2012)

Daniel D., In re, 211 W. Va. 79, 562 S.E.2d 147 (2002)

Danielle T., In re, 195 W. Va. 530, 466 S.E.2d 189 (1995)

Darla B., In the Interest of, 175 W. Va. 137, 331 S.E.2d 868 (1985)

Darrien B., In re, 231 W. Va. 25, 743 S.E.2d 333 (2013)

David L. (DHHR v.), 192 W. Va. 663, 453 S.E.2d 646 (1994)

David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989)

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)

DeBerry (State v.), 185 W. Va. 512, 408 S.E.2d 91 (1991)

Dejah Rose P., In re, 216 W. Va. 514, 607 S.E.2d 843 (2004)

Delaney (State v.), 187 W. Va. 212, 417 S.E.2d 903 (1992)

Desarae M., In re, 214 W. Va. 657, 591 S.E.2d 215 (2003)

Destiny Asia H., In re, 211 W. Va. 481, 566 S.E.2d 618 (2002)

DHHR (State ex rel.) v. Sims, 230 W. Va. 542, 741 S.E.2d 100 (2013)

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Diva P. (State ex rel.) v. Kaufman, 200 W. Va. 555, 490 S.E.2d 642 (1997)

Doris S. (DHHR v.), 197 W. Va. 489, 475 S.E.2d 865 (1996)

E.H. v. Matin, 201 W. Va. 463, 498 S.E.2d 35 (1997)

Edward B., In re, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Edward Charles L., Sr. (State v.), 183 W. Va. 641, 398 S.E.2d 123 (1990)

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

Elizabeth F., In re, 225 W. Va. 780, 696 S.E.2d 296 (2010)

Elizabeth Jo "Beth" H., In re, 192 W. Va. 656, 453 S.E.2d 639 (1994)

Elmer Jimmy S. v. Kenneth B., 199 W. Va. 263, 483 S.E.2d 846 (1997)

Emily B., In re, 208 W. Va. 325, 540 S.E.2d 542 (2000)

Emily G., In re, 224 W. Va. 390, 686 S.E.2d 41 (2009)

Erica C., In re, 214 W. Va. 375, 589 S.E.2d 517 (2003)

F.S., In re, 233 W. Va. 538, 759 S.E.2d 538 (2014)

Faith C., In re, 226 W. Va. 188, 699 S.E.2d 730 (2010)

Ferguson (State v.), 216 W. Va. 420, 607 S.E.2d 526 (2004)

Fox (State ex rel. DHHR v.), 218 W. Va. 397, 624 S.E.2d 834 (2005)

Frances J.A.S., In re, 213 W. Va. 636, 584 S.E.2d 492 (2003)

George B.W. (State ex rel.) v. Kaufman, 199 W. Va. 269, 483 S.E.2d 852 (1997)

George Glen B., Jr., In re, 207 W. Va. 346, 532 S.E.2d 64 (2000)

George Glen B., Jr., In the Matter of, 205 W. Va. 435, 518 S.E.2d 863 (1999)

Graham (State v.), 208 W. Va. 463, 541 S.E.2d 341 (2000)

Grandparent Visitation of A.P., In re, 231 W. Va. 38, 743 S.E.2d 346 (2013)

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Haller v. Haller, 198 W. Va. 487, 481 S.E.2d 793 (1996)

Harley C., In re, 203 W. Va. 594, 509 S.E.2d 875 (1998)

Haylea G., In re, 231 W. Va. 494, 745 S.E.2d 532 (2013)

Hewitt v. DHHR, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)

Hisman (W. Va. DHHR ex rel.) v. Angela D., 203 W. Va. 335, 507 S.E.2d 698 (1998) *Hunter H., In re*, 227 W. Va. 699, 715 S.E.2d 397 (2011)

Hunter H., In re, 231 W. Va. 118, 744 S.E.2d 228 (2013)

I.T., In re, 233 W. Va. 500, 759 S.E.2d 447 (2014)

Isaiah A., In re, 228 W. Va. 176, 718 S.E.2d 775 (2010)

Isferding (State ex rel.) v. Canady, 199 W. Va. 209, 483 S.E.2d 555 (1997)

J.C., In re, 232 W. Va. 81, 750 S.E.2d 634 (2013)

J.L. In the Interest of, 234 W. Va. 116, 763 S.E.2d 654 (2014)

J.S., In re, 233 W. Va. 394, 758 S.E.2d 747 (2014)

James G., In re, 211 W. Va. 339, 566 S.E.2d 226 (2002)

James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)

James R., II (State v.), 188 W. Va. 44, 422 S.E.2d 521 (1992)

Jamie Nicole H., In the Interest of, 205 W. Va. 176, 517 S.E.2d 41 (1999)

Jamison Nicholas C., In re Adoption of, 219 W. Va. 729, 639 S.E.2d 821 (2006)

Jason S., In re, 219 W. Va. 485, 637 S.E.2d 583 (2006)

Jeanette H. (State ex rel.) v. Pancake, 207 W. Va. 154, 529 S.E.2d 865 (2000)

Jeffrey R.L., In re, 190 W. Va. 24, 435 S.E.2d 162 (1993)

Jessica G., In the Interest of, 226 W. Va. 17, 697 S.E.2d 53 (2010)

Jessica Jane M. (State v.), 226 W. Va. 242, 700 S.E.2d 302 (2010)

Jessica M., In re, 231 W. Va. 254, 744 S.E.2d 652 (2013)

Jessica M. (State v.), 191 W. Va. 302, 445 S.E.2d 243 (1994)

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Jonathan G., In re, 198 W. Va. 716, 482 S.E.2d 893 (1996) *Jonathan Michael D., In re*, 194 W. Va. 20, 459 S.E.2d 131 (1995) *Jonathan P., In the Matter of*, 182 W. Va. 302, 387 S.E.2d 537 (1989) *Joseph A., In re*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

Joseph G., In re, 214 W. Va. 365, 589 S.E.2d 507 (2003)

Julie G. (State v.), 201 W. Va. 764, 500 S.E.2d 877 (1997)

K.H., In re, 235 W. Va. 254, 773 S.E.2d 20 (2015)

K.L., In re, 233 W. Va. 547, 759 S.E.2d 778 (2014)

K.P., In re, 235 W. Va. 221, 772 S.E.2d 914 (2015)

Kaitlyn P., In re, 225 W. Va. 123, 690 S.E.2d 131 (2010)

Kasey M., In re, 228 W. Va. 221, 719 S.E.2d 389 (2011)

Katelyn T., In re, 225 W. Va. 264, 692 S.E.2d 307 (2010)

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Katie S. and David S., In re, 198 W. Va. 79, 479 S.E.2d 589 (1996)

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Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 399 S.E.2d 192 (1990)

Kristin Y., In re, 227 W. Va. 558, 712 S.E.2d 55 (2011)

Kristopher E., In re, 212 W. Va. 393, 572 S.E.2d 916 (2002)

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

Kutil (State ex rel.) v. Blake, 223 W. Va. 711, 678 S.E.2d 310 (2009)

Kyiah P., In re, 213 W. Va. 424, 582 S.E.2d 871 (2003)

L.M., In re, 235 W. Va. 436, 774 S.E.2d 517 (2015)

La Rea Ann C.L. (W. Va. DHS v.), 175 W. Va. 330, 332 S.E.2d 632 (1985)

Lacey P., In re, 189 W. Va. 580, 433 S.E.2d 518 (1993)

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Lilith H., In re, 231 W. Va. 170, 744 S.E.2d 280 (2013)

Lindsey C., In the Matter of, 196 W. Va. 395, 473 S.E.2d 110 (1995)

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M.M., In re, 236 W. Va. 108, 778 S.E.2d 338 (2015)

Maranda T., In re, 223 W. Va. 512, 678 S.E.2d 18 (2009)

Mark M., III, In re, 201 W. Va. 265, 496 S.E.2d 215 (1997)

Marley M., In re, 231 W. Va. 534, 745 S.E.2d 572 (2013)

Mary Ann P. v. William R.P., 197 W. Va. 1, 475 S.E.2d 1 (1996)

Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992)

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990)

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Mechling (State v.), 219 W. Va. 366, 633 S.E.2d 311 (2006)

Megan B., In the Matter of, 224 W. Va. 450, 686 S.E.2d 590 (2006)

Micah Alyn R., In the Interest of, 202 W. Va. 400, 504 S.E.2d 635 (1998)

Michael M. (State v.), 202 W. Va. 350, 504 S.E.2d 177 (1998)

Michael Ray T., In re, 206 W. Va. 434, 525 S.E.2d 315 (1999)

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

Misty D.G., In re Marriage of, 221 W. Va. 144, 650 S.E.2d 243 (2007)

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Randy H., In re, 220 W. Va. 122, 640 S.E.2d 185 (2006)

Rebecca K.C., In re, 213 W. Va. 230, 579 S.E.2d 718 (2003)

Renae Ebony W., In the Interest of, 192 W. Va. 421, 452 S.E.2d 737 (1994)

Richard P., In re, 227 W. Va. 285, 708 S.E.2d 479 (2010)

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S.W., In re, 236 W. Va. 309, 779 S.E.2d 577 (2015)

Samantha S., In re, 222 W. Va. 517, 667 S.E.2d 573 (2008)

Scott C. (DHHR v.), 200 W. Va. 304, 489 S.E.2d 281 (1997)

Scottie D., In the Matter of, 185 W. Va. 191, 406 S.E.2d 214 (1991)

Shanee Carol B., In re, 209 W. Va. 658, 550 S.E.2d 636 (2001)

Shrewsbury (State v.), 213 W. Va. 327, 582 S.E.2d 774 (2003)

Skyelan H., In re, 219 W. Va. 661, 639 S.E.2d 753 (2006)

Smith (DHHR v.), 218 W. Va. 480, 624 S.E.2d 917 (2005)

Snodgrass (State v.), 207 W. Va. 631, 535 S.E.2d 475 (2000)

Stacy (State v.), 179 W. Va. 686, 371 S.E.2d 614 (1988)

Stephen Tyler R., In re, 213 W. Va. 725, 584 S.E.2d 581 (2003)

Summer D., In re, 222 W. Va. 219, 664 S.E.2d 104 (2008)

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T.W., In re, 230 W. Va. 172, 737 S.E.2d 69 (2012)

Tammy B. (DHS v.), 180 W. Va. 295, 376 S.E.2d 309 (1988)

Taylor B., In the Matter of, 201 W. Va. 60, 491 S.E.2d 607 (1997)

Tessla N.M., In re, 211 W. Va. 334, 566 S.E.2d 221 (2002)

Thaxton, In re, 172 W. Va. 429, 307 S.E.2d 465 (1983)

Tiffany Marie S., In the Interest of, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Tiffany P., In re, 215 W. Va. 622, 600 S.E.2d 334 (2004)

Timber M., In re, 231 W. Va. 44, 743 S.E.2d 352 (2013)

Tonjia M., In re, 212 W. Va. 443, 573 S.E.2d 354 (2002)

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Wright (State ex rel.) v. Stucky, 205 W. Va. 171, 517 S.E.2d 36 (1999)

Zachary William R., In the Matter of, 203 W. Va. 616, 509 S.E.2d 897 (1998)

2015 WL 5738019

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: A.N.

Nos. 15-0182 & 15-0208 (Mingo County 13-JA-89)

FILED
September 30, 2015
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

In these two abuse and neglect appeals, the Court issued a Rule to Show Cause against the guardian ad litem, Lauren Thompson, ("Ms. Thompson") to explain why she should not be held in contempt, denied eligibility for guardian ad litem appointments, and subjected to further sanctions after failing to comply with the scheduling orders mandated by this Court. This memorandum decision does not address the merits of the abuse and neglect appeals. It addresses only the Rule to Show Cause in contempt against Ms. Thompson, the guardian ad litem for the child who is the subject of these appeals. Based upon her untimely filing of the response briefs, we find her in contempt. Considering the sanctions to be imposed, Ms. Thompson is hereby denied eligibility for guardian ad litem and any other court appointments until the Office of Disciplinary Counsel's investigation into this matter and any resulting disciplinary action is fully concluded.

Case No. 15-0182 involves the petitioner father's appeal of the termination of his parental rights. Case No. 15-0208 involves the petitioner mother's appeal of the termination of her parental rights. By orders entered on April 16, 2015, in Case No. 15-0182 and March 13, 2015, in Case No. 15-0208, Ms. Thompson was directed to file a respondent's brief or summary response on or before May 20, 2015. Ms. Thompson failed to file the response briefs by the May 20, 2015, deadline.[1]

Accordingly, Notices of Intent to Sanction and Amended Scheduling Orders were entered on May 27, 2015, and by those orders, Ms. Thompson was directed to file the response briefs on or before June 1, 2015. Counsel was reminded that failure to file the response briefs could result in sanctions being imposed under Rule 10(j) of the West Virginia Rules of Appellate Procedure. Again, the response briefs were not filed by the June 1, 2015, deadline.[2]

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[1]On May 22, 2015, the West Virginia Supreme Court's Clerk's Office ("Clerk's Office") called Ms. Thompson and left a message with her office assistant that the response briefs were past due.

[2]The Clerk's Office contacted Ms. Thompson regarding the status of the late response briefs in an effort to receive the response briefs prior to the conclusion of the Court's 2015 Spring Term of Court. On June 5, 2015, the Clerk's Office sent Ms. Thompson an e-mail reminding her that the response briefs were past due. Ms. Thompson responded by e-mail on June 8, 2015, stating, "I have no idea what is going on. I am not scheduled to be in the office today but can make it back there by 2. My assistant left after the long weekend. I was unaware of any of this. I will figure out what has happened today." The Clerk's Office informed Ms.

By two separate orders entered on June 11, 2015, the Court issued a Rule to Show Cause against Ms. Thompson for failure to timely file the response briefs. The Court's orders entered on June 11, 2015, provided that the Rule to Show Cause was returnable at ten o'clock a.m., on Wednesday, September 2, 2015. The Court further directed Ms. Thompson to show cause why she should not be held in contempt of this Court, unless sooner mooted by the filing of the response briefs that fully complied with the Rules of Appellate Procedure.[3]

Despite having nearly three months to comply with the June 11, 2015, orders and despite receiving numerous reminders from the Clerk's Office,[4] Ms. Thompson did not submit her motion and response briefs until September 1, 2015, the day before oral argument on the Rule to Show Cause.[5] Ms. Thompson indicated in her motion that her response briefs were untimely filed due to a calendaring error and repeated staff changes in her office. Ms. Thompson further stated in her motion that the child currently awaits adoption by the child's foster parents, and the parties were not prejudiced by her late filings in these abuse and neglect cases.

By order entered on September 3, 2015, the Court, on its own motion, proceeded to review and consider the imposition of sanctions due to Ms. Thompson's untimely filings. The Court found that Ms. Thompson's justification for the untimely filing of the response briefs in Case Nos. 15-0182 and 15-0208 was unsatisfactory. The Court emphasized that abuse and neglect cases must be considered as expeditiously as possible in order to ensure the timely permanency for the child. The Court issued a second Rule to Show Cause against Ms. Thompson, ordering her to appear at ten o'clock a.m. on Wednesday, September 16, 2015, and to show cause why she should not be held in contempt, denied eligibility for future guardian ad litem appointments, and subjected to further sanctions due to the untimely filings. Ms. Thompson was ordered to file a written response to the second Rule to Show Cause on or before September 9, 2015.[6]

On September 10, 2015, Ms. Thompson submitted a response to the September 3, 2015, order. In her response, she admitted that the reasons supplied in her earlier motion did not "fully

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Thompson by e-mail on June 8, 2015, that she could submit her response briefs by facsimile, together with a motion to file the response briefs out-of-time.

[3]Ms. Thompson personally signed the return receipt confirmation on June 17, 2015, indicating that she received the June 11, 2015, orders.

[4]Telephone messages were left with Ms. Thompson's assistant, "Misty," on July 23, 2015, at 10:54 a.m.; August 14, 2015, at 1:29 p.m.; and August 31, 2015, at 10:30 a.m. Additionally, the Clerk's Office sent Ms. Thompson an e-mail on August 7, 2015, reminding her of her obligation to file response briefs in these matters.

[5]The documents were submitted by facsimile.

[6]The order further provided that the written response did not negate Ms. Thompson's obligation to appear before the Court.

explain the reason behind the failure to file a timely response ….” She articulated two reasons for the delay. First, she cited “action and inaction” by the West Virginia Department of Health and Human Resources (“DHHR”) and its failure to act in accordance with federal guidelines. Ms. Thompson attached her own affidavit in which she detailed her attempts to complain to local officials about staff shortages and “turmoil” at the DHHR. The affidavit included a statement explaining her decision not to file timely response briefs:

> I have spoken to Judge Cummings about the issue. I have spoken with the family of A.N. about these proceedings and my decision not to timely file a response. I have proffered repeatedly about the issues and my decision not to comply in hopes of bringing the issue to this Court. It may seem like foot-stomping and whining but that’s better than the alternative of turning a blind eye. If I did not try to do something then I am failing at my duties. I have been advised that this is not an appropriate means to obtain relief but in the same conversation I have been advised that there is no means to obtain relief. And I find that unacceptable. I lay this issue before the Court and pray there are means to explore the issue and fix it.

Second, she argued that the job of a guardian ad litem is difficult enough without having to deal with an appeal filed on behalf of “disinterested parties.” Ms. Thompson argued that “filers should be required to show that the Petitioners are active, willing participants in their appeal.” She further stated that she “did not foresee any potential damage to the child resulting from her refusal to file a timely response in this matter.”

The Court notes that at no time during the oral argument held in this matter did Ms. Thompson take responsibility for her failure to timely file the response briefs, which resulted in delaying the permanency for the child by at least four months. Following the oral argument in this matter, on September 17, 2015, Ms. Thompson submitted a statement to the Court wherein she asserted as follows: “In retrospect, it was just a missed deadline which *could possibly* have been quickly cured. But at the time, in my mind it became an inevitability and the only opportunity I would have to talk about very serious problems that were occurring.” (Emphasis in original.) She emphasized that her former office assistant failed to inform her of receipt of the Notices of Intent to Sanction and Amended Scheduling Orders entered on May 27, 2015, and she was not aware of this issue until June 8, 2015, when she received an e-mail from the Clerk’s Office reminding her to file the response briefs in the underlying abuse and neglect cases. She further indicated that it was not until after the oral argument in this matter that she realized how the Court viewed her conduct in failing to timely file the response briefs. Rather, Ms. Thompson stated that she believes that she “excel[s]” in oral argument and that “[o]nce [she] realized how things had been interpreted [by the Court,] it became an out of body experience.”

Having reviewed Ms. Thompson’s responses to the September 3, 2015, order and having heard her oral argument in this matter, we find that Ms. Thompson failed to provide sufficient justification for filing the response briefs in an untimely manner.[7] Despite having nearly three

[7]Notwithstanding the Court’s findings with respect to this contempt matter, the response briefs in the underlying abuse and neglect cases are hereby ordered filed. The Court acknowledges that a guardian ad litem’s response is essential to the Court’s consideration of an abuse and neglect appeal. *See* W.Va. R. App. P. 11(h).

months of notice to comply with the Court's orders, and despite repeated communications from the Clerk's Office reminding her of the deadlines, Ms. Thompson's response briefs, which were originally due on May 20, 2015, were not filed until September 1, 2015. Ms. Thompson indicated that she was not aware of the Court's orders until June 8, 2015. Still, at that point, Ms. Thompson could have filed her response briefs before September 1, 2015.

Ms. Thompson's excuse regarding the DHHR's alleged shortcomings in no way mitigates or justifies her failure to comply with this Court's orders. Although Ms. Thompson argued that her intentional delay was the "only way" to remedy her perception that government officials were not carrying out their duties, she could have pursued other remedies. For example, a writ of mandamus is a proper means of relief to require the performance of nondiscretionary legal duties by government bodies. *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966). *See e.g. Hensley v. WV Dep't of Health and Human Res.*, 203 W.Va. 456, 508 S.E.2d 616 (1998) (granting writ of mandamus to compel DHHR to comply with grievance decisions awarding back pay and prejudgment interest).

Most troubling to the Court is Ms. Thompson's lack of concern for the child she represents and the need for permanency in the child's life. We reiterate the importance of full participation of the guardian ad litem in appellate proceedings. *See In Re: B.L., G.W., and I.W.*, No. 14-0660 and *In Re: N.K. and K.K.*, No. 14-0714 (W.Va. Supreme Court, June 10, 2015) (memorandum decision) ("[w]e wish to re-emphasize how vitally important it is for guardians ad litem to comply with Rule 11(h) of the Rules of Appellate Procedure and this Court's orders in a timely fashion so that abuse and neglect appeals can be promptly and efficiently resolved.").

Accordingly, the Court hereby orders that Ms. Thompson be, and hereby is, held in contempt for her willful violations of the orders of this Court. The Court hereby directs the Clerk of this Court to refer this matter to the Office of Disciplinary Counsel for further review[8] and any resulting disciplinary action. Ms. Thompson is hereby denied eligibility for guardian ad litem and any other court appointments until the Office of Disciplinary Counsel's investigation into this matter and any resulting disciplinary action is fully concluded. The Clerk is further directed to provide notice of this sanction to the circuit courts in each county where Ms. Thompson routinely practices.

Sanctions Imposed.

[8]When this Court believes a case before it presents the appearance of conduct that does not comport with the West Virginia Rules of Professional Conduct, Canon 3D(2) of the West Virginia Code of Judicial Conduct requires that we refer the matter to the Office of Disciplinary Counsel for its review and appropriate action. *See* Syl. Pt. 8, *Gum v. Dudley*, 202 W.Va. 477, 505 S.E.2d 391 (1997). To be clear, by making this referral we express no opinion as to whether disciplinary proceedings ultimately should be initiated or how such proceedings should be resolved. It is for the Office of Disciplinary Counsel to determine whether, and/or how, to proceed after it has reviewed this matter.

ISSUED: September 30, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Allen H. Loughry II

229 W. Va. 677, 735 S.E.2d 274

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2012 Term

FILED
November 9, 2012
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-1394

IN RE: AARON H.

Appeal from the Circuit Court of Mercer County
The Honorable Omar J. Aboulhosn, Judge
Civil Action No. 09-JA-78-OA

AFFIRMED

Submitted: September 25, 2012
Filed: November 9, 2012

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Guardian ad litem for Aaron H.

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to a *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely." Syl. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "West Virginia Code § 49-3-1(a)(3) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interest of the child, and the

preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child." Syl. pt. 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

3. By specifying in W. Va. Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances. Syl. pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

Per Curiam:

This is an appeal by the petitioner Robert H.[1] from an order of the Circuit Court of Mercer County placing his grandson, Aaron H. Jr., a child under the age of 18 years, in the home of his foster parents, Alice N. and Gerald N., for the purpose of adoption. The petitioner contends that he should have been considered as an adoptive placement for Aaron H. Jr. For the reasons discussed herein, we affirm the ruling of the Circuit Court of Mercer County that ordered that the child be placed for adoption in the home of the foster parents.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Aaron H. Jr., born December 7, 2007, is the biological child of Jennifer J. and Aaron H. Aaron H. Jr. was the subject of a petition filed in the Circuit Court of Mercer County by the Department of Health and Human Resources (hereinafter "the Department") alleging that he was an abused and/or neglected child. At that time Aaron H. was in the custody of neither biological parent, but instead, with a woman named Diana R. The initial petition alleged that the child had suffered from physical abuse, that

[1] As is our practice in cases involving sensitive matters, we use initials to identify the parties' last names. *See In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991).

his caregiver Diana R. had failed to obtain medical treatment for him and had engaged in other neglectful behaviors. The petition was later amended to include the child's biological parents, Aaron H. and Jennifer J., as respondents. Aaron H. was incarcerated in another state during all times pertinent to this proceeding. The allegations against Jennifer J. included a prior court proceeding in which she lost custody of two other children born prior to Aaron H.

During the course of the proceeding giving rise to this appeal, Diana R. voluntarily relinquished any rights she had to the custody of Aaron H. While she participated in an improvement period, the child's mother, Jennifer J., ultimately voluntarily relinquished her parental rights to the child. The circuit court terminated Aaron H.'s parental rights.

The child has resided in the home of his foster parents, Alice N. and Gerald N., since the filing of the initial petition. At the time initial petition was filed, the child was approximately 18 months old. At the time of the permanency hearing the child was almost four years old and is now almost five years of age. The foster parents have long expressed their desire to adopt Aaron H.

Robert H. (hereinafter "petitioner") is the paternal grandfather of Aaron H. Jr. His involvement in the instant proceedings began well after the initial petition was filed and was limited to being considered as a possible adoptive home for Aaron H. Jr.

once the parental rights of Jennifer J. and Aaron H. were terminated. The petitioner did not have a relationship with Aaron H. Jr. prior to the abuse and neglect proceeding.[2] The circuit court reviewed the request and ordered that a home study be performed on the home of Robert H. in recognition of the statutory preference for relative adoptions contained in W. Va. Code § 49-3-1 (2007). At the time of the entry of the order granting the petitioner a home study, he was staying with his sister in Indiana. The Department implemented the provisions of the Interstate Compact for the Placement of Children (hereinafter "the Compact") and requested that the State of Indiana perform a home study of the residence of Robert H. This request was received by Indiana in February of 2011. The child remained in the care of his foster parents.

The sole issue before the circuit court was the permanent placement of Aaron H. Jr. At the permanency hearing before the circuit court, Megan Shell, a foster care specialist from the State of Indiana, testified about her work on the home study. She testified that the State of Indiana has a strict 60-day time period in which to complete a home study requested through the Compact. She first met with the petitioner on March 4, 2011. At that time the petitioner was asked to complete some paperwork and to gather up documents, including copies of his birth certificate, driver's license, marriage and divorce records and other items. These documents were received sometime toward the end of April, which would have been after the end of the 60-day time period in which the report

[2] The petitioner had visited only once with the child, in April of 2011.

had to be completed. Ms. Shell testified that the petitioner was told of the need for expediency in returning these documents, as well of the time constraints.

Ms. Shell also testified that while the home study was pending, the petitioner changed his mind about where he wanted to live. While he was residing in the home of his sister in Indiana, he contemplated living in an apartment in Kentucky. He later changed his mind about that. As a result of the petitioner's varying residential intentions, Ms. Shell was never able to visit any home of the petitioner because by the time the petitioner completed and returned the initial paperwork, the 60-day period for completion of the home study had elapsed. Ms. Shell then sent to the Department a letter indicating that the petitioner had not successfully completed his home study but that additional time could be requested by West Virginia by submitting another request. No follow-up request was ever received by the State of Indiana.

Also testifying at the permanency hearing was a representative from the Department who had received the correspondence from Indiana regarding the petitioner's home study. This representative, Chris Bell, testified that he received a four-page facsimile transmission (hereinafter "fax") from Indiana about this home study. On the first page of the fax was a section that contained three possible choices for the home study: under consideration, approved or denied. The fax from Indiana was marked "denied." Based upon his review of only the first page of the fax, Mr. Bell stated that he recommended that Aaron H. be adopted by his foster parents. Some time elapsed before

Mr. Bell read the remainder of the fax, which included information that the home study was denied because there was not any more time in which to complete the evaluation after 60 days passed. He likewise did not request additional time in which to allow Indiana to complete the home study. At the hearing, Mr. Bell testified that he "saw no point in delaying permanency for this child."

The petitioner testified at the permanency hearing about the difficulties he had in complying with the requests of Indiana regarding documentation of life events. He stated that divorce records were available in Indianapolis, but because the divorce records were older, they were only available on microfilm. He testified that he would have had to take a bus to Indianapolis to retrieve those records. Likewise, retrieving records regarding his arrest, which happened decades ago, was impossible because the records had been destroyed.

At the conclusion of the permanency hearing, the circuit court granted the request of the Department to place Aaron H. Jr. in the home of his foster parents, Alice and Gerald N. The circuit court found that the petitioner did not successfully complete his home study, and thus, was not a suitable placement for the child. The circuit court found that the actions of the Department were 'appalling" in that it had not requested additional time in which to complete the petitioner's home study, but further found that Aaron H. Jr. had lived two-thirds of his young life with his foster parents and that it was not in his best interests to be removed from that household.

The petitioner filed the instant appeal, seeking to be named as the adoptive home for Aaron H. Jr.

II.

STANDARD OF REVIEW

The issue presented in this appeal focuses on the preference afforded grandparents to adopt their grandchildren after the parental rights of the grandchildren have been terminated through an abuse and neglect proceeding pursuant to W. Va. Code 49-6-1 (2007). Our standard of review in abuse and neglect matters is as follows:

> Although conclusions of law reached by a circuit court are subject to a de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely.

Syllabus point 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

With this standard in mind we proceed to the merits of the petitioner's appeal.

III.

ANALYSIS

As noted, the sole issue before this Court in this abuse and neglect proceeding is whether, with respect to the permanent placement of the child, the circuit court erred in placing the child with his foster parents for adoption rather than with his grandfather in view of the statutory preference for grandparent placement contained in W. Va. Code 49-3-1 (2007).[3] The grandparent preference statute states,

> [f]or purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based upon the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

This Court has previously addressed this statutory preference in the case of *In re Napoleon S.*, 217 W. Va. 254, 617 S.E.2d 801 (2005). We held that placement with

[3] The grandparent preference is also contained in the Department's internal regulations, specifically DHHR Adoption Policy § 7.3, which states, in part, that a grandparent or an adult relative with a positive home study certifying the home adoption must be given preference over the non-relative home even if the non-relative home has the appearance of a better placement choice. This policy is more fully discussed in *Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011).

a grandparent of a child whose parents' parental rights have been terminated is presumptively in the best interests of that child. Therein, we held,

> West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child whose parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

Syl. pt. 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). Such a preference, however, necessarily implies that the home of the prospective adoptive grandparent be a fit and suitable one.

> By specifying in W. Va. Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances.

Id. at Syl. pt. 5.

In the recent case of *In re Elizabeth F.*, 225 W. Va. 780, 696 S.E.2d 296 (2010), we recently addressed whether the grandparent preference creates an absolute or unrebuttable presumption. In that case, the children were placed in the adoptive home of their maternal grandmother, despite some issues with the grandmother's home. The circuit court approved the placement of Elizabeth F. and her sister in this grandmother's

home, but noted its hesitation in the order when it stated that "[a]bsent the grandparent preference, the Court doubts that his decision would be the same." *Id.* at 786, 696 S.E.2d at 300. This Court reversed the circuit court, reiterating that the best interests the child must always be considered. We stated that

> [o]ur prior holdings in *Napoleon* are critically important insofar as we explicitly recognized that a crucial component of the grandparent preference is that the adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper.

Id. Therefore, the grandparent preference must be tempered by a court's consideration of the child's best interests. If on balance, the grandparent placement fails to serve the best interests of the child, the child may be placed elsewhere. We believe this is one such case.

Reviewing the entire record, we find that the current case does not turn simply on whether there was an unsuccessfully completed home study caused by the Department's failure to read through a fax. There is more. First, we simply cannot ignore the lack of contact between the petitioner and his grandchild, both prior to the child coming into the Department's custody and during the pendency of this proceeding. Furthermore, responsibility for the inability of Indiana to complete the petitioner's home study must be borne in part by the petitioner. While he may have had difficulty in obtaining certain records, the petitioner never stated with sufficient specificity where it

was that he intended to reside with the child. Without a specific address, there was no way for anyone to visit the intended home. In addition, there was sufficient evidence that the petitioner's seeming transient nature, all while awaiting a home study, supported the perception of the Department that the petitioner did not successfully complete his home study. Finally, the petitioner himself did not request an extension of time in which to complete the report, even after the time considerations were explained to him by the Indiana social workers.

While we believe that the petitioner is sincere in his desire to undertake the responsibility for raising his grandson, which is commendable, we cannot ignore the totality of the record. The circuit court weighed all of these factors, and while it found fault with the Department for not reading through all of the fax from Indiana, it ultimately weighed all of the factors in consideration of the child's best interests and found that such interests would not be furthered by an adoption by the petitioner. We find no error in the circuit court's reasoning or conclusions.

IV.

CONCLUSION

While the failure of the Department to ensure that the petitioner received a completed home study is problematic, we cannot conclude that the circuit court erred in

approving the adoption of Aaron H. Jr. by his foster parents. The circuit court's decision was not based solely on the lack of a completed home study but on other factors, including the length and quality of time the child has lived in the home of Alice and Gerald N. For the foregoing reasons, the September 28, 2011, order of the Circuit Court of Mercer County is hereby affirmed.

Affirmed.

212 W. Va. 323, 571 S.E.2d 142

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
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OF WEST VIRGINIA

January 2001 Term

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

No. 28468

STATE OF WEST VIRGINIA EX REL. AARON M. AND ANTHONY H.,
Petitioners

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent

Petition for Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: January 9, 2001
Filed: May 3, 2001

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS

"A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Per Curiam:

This case is before this Court upon a petition for a writ of mandamus filed by the petitioners, Aaron M.[1] and Anthony H., against the respondent, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"). The petitioners seek an order to compel the DHHR to pay for the therapeutic services of Denise Flint, a specialist in attachment disorders. We issued a rule to show cause, and now, for the reasons set forth below, grant the writ as moulded.

I.

On September 15, 1994, the Circuit Court of Hancock County determined that Aaron M., born on July 10, 1990, and Anthony H., born on January 15, 1992, were abused and neglected children. Subsequently, the court terminated the parental rights of their mother, Retha M., and granted permanent custody of the children to their maternal grandmother, Monica C. The court further ordered the DHHR to provide medical care, treatment, and services for the physical, emotional, and psychological needs of the children.

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[1]We follow our past practice in cases involving sensitive facts and do not use the last names of the parties. *In the matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

Since 1995, the children's placement has been reviewed by the circuit court every six months. Because of the abuse and neglect suffered by the children while in their mother's care, they have received therapy from Wellspring Family Services (hereinafter "Wellspring"). These services were paid through the children's Medicaid card. In 1998, the children's therapist at Wellspring advised the children's Multidisciplinary Treatment Team (hereinafter "MTT") that she did not believe that she had sufficient expertise to provide appropriate therapy for the children. Anthony had been hospitalized in November 1997, at a psychiatric facility for children in St. Clairsville, Ohio, after starting a fire in his grandmother's home. He was diagnosed with attention deficit hyperactivity disorder, fetal alcohol syndrome, depression, sexual abuse as a child, pyromania, and attachment disorder. Aaron was demonstrating similar, but less severe, problems. Given the therapist's concern, the MTT determined that Anthony should be evaluated by Denise Flint, a child therapist with Coddington & Associates, who was known to have expertise in attachment disorders.

In a report dated September 10, 1999, Ms. Flint advised that Anthony had serious problems and that she agreed with the prior diagnoses of reactive attachment disorder, attention deficit hyperactivity disorder, and fetal alcohol syndrome. Ms. Flint recommended that Anthony work with her for two hours, biweekly, to resolve his past life trauma, grief, and loss. The MTT, which included at least two representatives of the DHHR, agreed with Ms. Flint's recommendation and a hearing was scheduled with the circuit court for approval.

At a hearing held on September 17, 1999, the circuit court reviewed Ms. Flint's report and the recommendation of the MTT. Thereafter, the circuit court ordered that Anthony receive therapy from Ms. Flint, biweekly, for two hours per session, at the rate of $75.00 per hour, and that the DHHR provide prompt and regular payments for her services.

In February 2000, the guardian ad litem for the children was informed by Ms. Flint's office that there was an outstanding bill for services rendered to Anthony in the amount of $2,522.50, and that they would have to cease treating him until the bill was paid. The guardian ad litem tried to resolve the matter but ultimately filed a motion for contempt against the DHHR on March 6, 2000. Prior to a hearing on the motion, the DHHR paid the bill and promised to provide prompt payment in the future. As a result, the motion for contempt was withdrawn.

A court review was held on March 24, 2000, and the guardian ad litem presented to the circuit court a report from Ms. Flint regarding Aaron. Ms. Flint diagnosed Aaron with post-traumatic stress disorder, attention deficit disorder, and reactive attachment disorder. The MTT recommended that Ms. Flint provide treatment to Aaron at the DHHR's expense. The court approved the therapy for Aaron on a biweekly basis, in two-hour sessions, at the rate of $90.00 per hour.

In August 2000, the guardian ad litem was again notified by Ms. Flint's office that Anthony's account was delinquent, this time in the amount of $1,530.00. The guardian ad litem contacted the DHHR regarding the bill and was informed that the DHHR would only pay Ms. Flint's bills at the

Medicaid rate. Thereafter, the guardian ad litem filed this petition for a writ of mandamus with this Court on behalf of the petitioners.

II.

We begin our analysis of this case by noting that a "[a] writ of mandamus will not issue unless three elements coexist–(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). As set forth above, the petitioners request that this Court grant a writ of mandamus and order the DHHR to pay for the therapeutic services of Ms. Flint at the rates approved by the circuit court. However, the DHHR contends that Ms. Flint is not entitled to reimbursement in excess of the Medicaid rate for services she provided to Aaron and Anthony. We agree.

Documents submitted in this case indicate that Ms. Flint works out of the offices of R. Dean Coddington, M.D. & Associates, Inc. Dr. Coddington has executed an agreement with the DHHR to accept Medicaid rates for his services and thus, is an approved Medicaid provider. Dr. Coddington's Medicaid provider agreement states that: "The provider shall provide for the compliance of any subcontractors with applicable federal requirements and assurances."

With respect to payment for services rendered by a Medicaid provider, 42 C.F.R. § 447.15 (1985) states, in pertinent part:

> A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amount paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual.

In accordance with this requirement, W.Va. Code § 16-29D-4 (1991) provides, in pertinent part:

> (a) Except in instances involving the delivery of health care services immediately needed to resolve an imminent life-threatening medical or surgical emergency, the agreement by a health care provider to deliver services to a beneficiary of any department or division of the state which participates in a plan or plans developed under section three [§ 16-29D-3] of this article shall be considered to also include an agreement by that health care provider:
>
> * * *
>
> (2) To accept as payment in full for the delivery of such services the amount specified in plan or plans or as determined by the plan or plans. In such instances, the health care provider shall bill the division or department, or such other person specified in the plan or plans, directly for the services. The health care provider shall not bill the beneficiary or any other person on behalf of the beneficiary and, except for deductibles or other payments specified in the applicable plan or plans, the beneficiary shall not be personally liable for any of the charges, including any balance claimed by the provider to be owed as being the difference between that provider's charge or charges and the amount payable by the applicable department or divisions.

Thus, a Medicaid provider cannot bill another source for the difference between the allowable Medicaid rate and the provider's customary rate.

Although the parties disagree as to whether Ms. Flint is an employee of Coddington & Associates or an independent contractor, it is clear that Dr. Coddington's Medicaid provider agreement along with the applicable federal regulation and state statute cited above prohibit Ms. Flint from being paid

for her services in excess of the Medicaid rate. Thus, this Court finds that the circuit court erred by ordering the DHHR to pay Ms. Flint for services at the rate of $75.00 per hour for Anthony and $90.00 per hour for Aaron.

Given the facts in this case, it is clear that the petitioners required the services of Ms. Flint. Moreover, the DHHR is required to provide such supportive services in abuse and neglect proceedings. W.Va. Code § 49-6-1 (1998). However, because Ms. Flint was working out of the offices of Dr. Coddington, a Medicaid provider, she is not entitled to payment for her services in excess of the Medicaid rate. Therefore, we grant the requested writ of mandamus, but direct the DHHR to pay Ms. Flint's invoices for therapeutic services rendered to the petitioners at the Medicaid rate applicable at the time the services were or are hereafter rendered.[2]

Writ granted as moulded.

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[2]We note that the DHHR paid some of Ms. Flint's invoices in excess of the Medicaid rate applicable at the time the services were rendered. In satisfying Ms. Flint's unpaid invoices, the DHHR is entitled to a credit for those overpayments.

212 W. Va. 604, 575 S.E.2d 214

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
November 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30600

RELEASED
November 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: AARON THOMAS M., DELTA DAWN M., AND LUKE BRIAN M.

Appeal from the Circuit Court of Wood County
Honorable Jeffrey B. Reed, Judge
Juvenile Abuse and Neglect Nos.
01-JA-20; 01-JA-21; and 01-JA-22

AFFIRMED

Submitted: November 6, 2002
Filed: November 27, 2002

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT, deeming himself disqualified, did not participate in the decision of this case.

JUDGE EAGLOSKI, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syllabus point 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966).

3. "As a general rule the least restrictive alternative regarding parental rights to custody of a child . . . will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it

appears that the welfare of the child will be seriously threatened[.]" Syllabus point 1, in part, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

4. "Termination of parental rights . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, in part, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Per Curiam:

The appellant herein and respondent below, Christina L.[1], appeals from the January 8, 2002, order of the Circuit Court of Wood County terminating her parental rights to her minor children Aaron Thomas M., Delta Dawn M., and Luke Brian M. upon a finding of abuse and neglect. Before this Court, Christina L. asserts that the circuit court erred by (1) finding that she had used controlled substances in her children's presence; (2) concluding that her alleged use of controlled substances in her children's presence constituted abuse; (3) requiring her to testify during the adjudicatory hearing; and (4) terminating her parental rights. Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we affirm the ruling of the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts upon which the circuit court based its decision are as follows. On June 14, 2001, the appellee herein and petitioner below, the West Virginia Department of Health and Human Resources [hereinafter referred to as the "DHHR"], filed a petition in the Circuit

[1]"We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names." *In re Jeffrey R.L.*, 190 W. Va. 24, 26 n.1, 435 S.E.2d 162, 164 n.1 (1993).

Court of Wood County alleging that Aaron Thomas M.,[2] Delta Dawn M.,[3] and Luke Brian M.[4] were abused and/or neglected children pursuant to W. Va. Code § 49-1-3 (1999) (Repl. Vol. 2001).[5] In particular, the petition alleged fifteen counts of abuse and/or neglect by the children's mother, Christina L. Included in the petition was an allegation that on December 11, 2000, school officials confiscated a marijuana pipe from Aaron. It was further alleged that Aaron "effectively demonstrate[d] how to use, take apart, and clean the pipe." Aaron also stated that "sometimes his five-year-old sister smokes his mother's cigarettes when she doesn't know it." The petition additionally averred that Christina L. repeatedly tested positive for marijuana use and failed to attend or otherwise comply with various substance abuse rehabilitation programs, parenting classes, and counseling services, which the DHHR indicated were necessary to maintain custody of her children. Furthermore, a DHHR official observed Aaron ad Delta playing unsupervised in the street in front of their home. Finally, it was alleged that Aaron had approximately thirty-two unexcused absences from school during the 2000-01 academic year. The unexcused absences resulted in the filing of a truancy petition for

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[2]Aaron was seven years old at the time the subject petition was filed.

[3]Delta was five years old when the instant proceedings were initiated.

[4]Luke was two years old when DHHR filed the abuse and neglect petition.

[5]Prior to the instant petition being filed, DHHR had previously been involved with Christina L. During the adjudicatory hearing in this case there was testimony that DHHR tried to work with Christina L. in 1999. During that time Christina L. was referred for assistance with the Intensive Out-Patient Group, Positive Parenting and Recovery Group and Individual Therapy. As a result of Christina L.'s noncompliance with DHHR's initial efforts to stabilize her family, services to her were terminated in April of 2000.

educational neglect. By order entered June 14, 2001, the circuit court found the children to be in imminent danger and transferred them to the temporary custody of the DHHR pending further adjudication.

An adjudicatory hearing was held, after which the circuit court, on August 27, 2001, entered an order adjudicating the three children to be abused and/or neglected based upon the above-described allegations. Specifically, the court concluded that "not getting a seven year old child to school so that he can obtain a proper education is neglect" and "using a pipe enough times in the presence of a seven-year-old for him to acquire the information that this seven-year-old has acquired . . . is abuse." The circuit court further found that Christina L.'s continued "use of marijuana has affected the Respondent Mother's ability to supervise and care for these children and as a result they are abused and neglected children."

Following the adjudicatory hearing, the DHHR recommended, and the circuit court granted, on September 20, 2001, Christina L. a six-month post-adjudicatory improvement period. The terms of this improvement period required Christina L. to attend in-patient substance abuse treatment, Alcoholics Anonymous/Narcotics Anonymous meetings, outpatient counseling, and parenting classes; to report such attendance to the DHHR; to submit to random drug screens; to apply to HUD for housing assistance; to maintain adequate housing for the children; to cooperate with in-home services designed to improve her parenting skills; to attend GED classes in order to qualify for the West Virginia works program; to ensure the

children go to school; and to sever her relationship with a certain Raymond J. if he does not, among other requirements, receive treatment and counseling for substance abuse and domestic violence. During this improvement period, Christina L. retained physical custody of her children. Upon Christina L.'s ultimate failure to comply with the terms of her improvement period, the circuit court, by order entered November 28, 2001, terminated such improvement period and transferred custody of the minor children to the DHHR.

Thereafter, a dispositional hearing was held, and, on January 8, 2002, the circuit court entered a dispositional order terminating Christina L.'s parental rights. In its order, the circuit court observed that Christina L. "exhibited a pattern of continued drug use . . . and a lack of cooperation to comply with any of the terms or conditions of the improvement period." The court further found that "the Respondent Mother is addicted to controlled substances or drugs to the extent that proper parenting skills have been impaired[,] and the Respondent Mother has not responded to or followed through with the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning." Accordingly, the circuit court finally concluded that, "pursuant to West Virginia Code, § 49-6-5(b), there is no reasonable likelihood that the conditions of abuse and neglect can be corrected in the near future," and that "it is necessary for the welfare of the children to terminate the parental rights" of Christina L. From this dispositional order, Christina L. appeals to this Court.

II.

STANDARD OF REVIEW

In appeals of abuse and neglect cases we apply the following standard of review:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With this standard in mind, we proceed to consider the parties' arguments.

III.

DISCUSSION

Before this Court, Christina L. raises four assignments of error: (1) the circuit court erred by finding that she had used controlled substances in her children's presence; (2) the circuit court improperly concluded that her alleged use of controlled substances in her children's presence constituted abuse; (3) the circuit court erroneously required her to testify during the adjudicatory hearing; and (4) the circuit court improperly terminated her parental

rights. We will address each of these issues in turn.

A. Use of Controlled Substances in Children's Presence

Christina L. first complains that the circuit court erred by finding that there was clear and convincing evidence that she had used controlled substances in the presence of her children. This Court observed in Syllabus point 1, in part, of *In re of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981), that W. Va. Code § 49-6-2(c) requires DHHR, "in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.'" *See* Syl. pt. 3, *State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1997). We made clear in *Julie G.* that "[t]he burden of proving that a child is abused or neglected is placed upon the DHHR." *Julie G.*, 201 W. Va. at 774, 500 S.E.2d at 886.

The evidence relied upon by the trial court to find that Christina L. used drugs in the presence of her children came, in part, from statements made by Aaron, regarding the marijuana pipe found in his possession.[6] In its adjudicatory order, the circuit court found that the evidence established that "Aaron had been around the use of that pipe enough times to be able to demonstrate how to use it, take it apart and clean the pipe[.]" In addition, there was conclusive evidence that Christina L. had a drug problem.

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[6]Christina L. asserted that the marijuana pipe in question was not hers, but belonged to a friend. However, Aaron indicated that the pipe belonged to his mother.

We agree with the trial court's determination that Aaron, at seven years old, could not learn how to take apart and clean a marijuana pipe, absent repeated exposure to this. In addition, the fact that Christina L. was a drug user leads to a reasonable inference that she repeatedly used the marijuana pipe in Aaron's presence, "if not all three of the children." In view of these facts, we have no difficulty in holding that the circuit court was not clearly erroneous in finding Christina L. used drugs in the presence of her children.

B. Use of Drugs in Children's Presence Constitutes Abuse

Christina L. next claims that the DHHR failed to prove by clear and convincing evidence that her alleged use of controlled substances in front of her children caused physical, mental, or emotional injury to the children. We have previously noted that "W. Va. Code § 49-1-3(a), in pertinent part, defines abused child to mean a child whose welfare or health is harmed or threatened by '[a] parent . . . who knowingly or intentionally inflicts . . . physical injury or mental or emotional injury, upon the child[.]'" *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 566, 490 S.E.2d 642, 653 (1997).

The circuit court's adjudicatory order found that "using a pipe enough times in the presence of a seven-year-old for him to acquire the information that this seven-year-old has acquired . . . is abuse." The DHHR asserts that Christina L.'s substance abuse caused emotional injury to her children, evidenced, in part, by a statement Aaron made concerning whether his mother was still smoking. It was also pointed out by DHHR that one of the

dispositive factors found in the termination of parental rights in *W.V.D.H.H.R. ex rel. Mills v. Billy Lee C.*, 199 W. Va. 541, 545 n.2, 485 S.E.2d 710, 714 n.2 (1997), was that "both parents drank alcohol and smoked marijuana in the presence of the children." We believe that the circuit court was not clearly erroneous in finding the children were emotionally abused by Christina L.'s repeated drug use in their presence.

C. Requiring Christina L. to Testify under Immunity

Christina L. additionally argues that, despite her attempts to assert her constitutional right not to incriminate herself,[7] the circuit court nevertheless required her to answer a question during the adjudicatory hearing that she deemed self-incriminating. Christina L. asserts that the circuit court lacked the authority to grant her "use immunity"[8] for the purpose of compelling her to answer the question.

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[7]"The Fifth Amendment privilege against self-incrimination is not limited to the context of criminal trials but can be claimed in any proceeding, whether it is criminal or civil, administrative or judicial, investigatory or adjudicatory." Syl. pt. 1, *State ex rel. Osburn v. Cole*, 173 W. Va. 596, 319 S.E.2d 364 (1983).

[8]"Use immunity refers to an order of court that compels a witness to give self-incriminating testimony while at the same time prohibiting the use of such testimony in a subsequent prosecution of the witness. Use immunity protects a witness only against the actual use of the compelled testimony and evidence derived directly or indirectly from such testimony." *State v. Simpson*, 587 N.W.2d 770, 772 (Iowa 1998). *See Braswell v. United States*, 487 U.S. 99, 117, 108 S. Ct. 2284, 2294-95, 101 L. Ed. 2d 98, 114 (1988) ("Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively." (citations omitted)).

A review of the record indicates that the state asked Christina L. if Aaron had asked her if she was still smoking (marijuana). Defense counsel initially objected on the grounds that a response to the question would be self-incriminating. After the objection, the following exchange occurred between the attorneys and the court:

> The Court: Are you willing to offer her immunity in this case?
>
> The State: In regard to the behavior that I'm referring to from the incident yesterday, answering that question I'm not going to use that in future prosecution, no, Your Honor?
>
> The Court: Mr. Albright?
>
> Defense Counsel: I don't know that he spoke the magic words. But if the Court's going to grant immunity based on that, I'm sure that would overcome my objection.

The circuit court went on to grant Christina L. use immunity, and she answered the question by responding that she did tell Aaron she was still smoking. In this appeal, the State correctly points out that any error in requiring Christina L. to answer the question was invited and therefore waived. We agree.

The decisions of this Court have been quite clear in holding that "[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. pt. 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966). *See* Syl. pt. 4, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996). That is, "[a] litigant may not . . . actively contribute to such error, and then raise that error as a reason for reversal on appeal."

Syl. pt 1, in part, *Maples v. West Virginia Dep't. of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996). In the instant case, defense counsel expressly approved of Christina L. waiving her right against self-incrimination, if the circuit court granted her immunity. Therefore, Christina L. cannot now complain on appeal that the circuit court did not have authority to grant her immunity.

We agree with Christina L. that no statutory authority existed for the trial court to grant her immunity in a civil abuse and neglect proceeding.[9] Further, for the sake of

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[9]The record is not clear, but it appears that the trial court relied upon W. Va. Code § 57-2-3 (1965) (Repl. Vol. 1997), as the source of authority to grant immunity. This statute states:

> In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.

Id. Christina L. correctly points out that we have held that "[t]he language of [the statute] addresses only the admissibility of a statement in court, and does not address a statement's possible 'use' for other purposes related to a criminal investigation or prosecution."*State ex rel. Wright v. Stucky*, 205 W. Va. 171, 174-75, 517 S.E.2d 36, 39-40 (1999), *disapproved on other grounds, In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002).

The actual general immunity statute in this State is applicable only to testimony given in a criminal proceeding. *See* W. Va. Code § 57-5-2 (1923) (Repl. Vol. 1997) ("In *any criminal proceeding* no person shall be excused from testifying or from producing documentary or other evidence upon the ground that such testimony or evidence may criminate or tend to criminate him, if the court in which he is examined is of the opinion that the ends of justice may be promoted by compelling such testimony or evidence. And if, but for this section, the person would have been excused from so testifying or from producing such evidence, then if the person is so compelled to testify or produce other evidence and if such

(continued...)

argument, had this issue been properly preserved we would deem the error harmless.[10] The testimony given by Christina L. merely affirmed that she made a statement to Aaron indicating that she was still smoking. The statement itself was introduced into evidence independent of Christina L.'s confirmation that it was made by her. Consequently, had there been no purported grant of immunity and Christina L. had not responded to the question, our cases permitted the circuit court to "consider . . . [her] silence as affirmative evidence of . . . culpability." Syl. pt. 2, in part, *W.V.D.H.H.R. ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996). *See also Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558, 47 L. Ed. 2d 810, 821 (1976) ("[T]he prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]").

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[9](...continued)
testimony or evidence is self-criminating, such self-criminating testimony or evidence shall not be used or receivable in evidence against him in any proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and he shall have complete legal immunity in regard thereto." (emphasis added)). *See also* Syl. pt. 1, *Committee on Legal Ethics of West Virginia State Bar v. Graziani*, 157 W. Va. 167, 200 S.E.2d 353 (1973) ("It is generally held that immunity statutes apply only to criminal prosecutions.").

[10]The actual "harm" that could have resulted from this error would have arisen if the State brought a criminal action against Christina L., based upon her answer to the question in the abuse and neglect proceeding. If that had occurred, we would then have to determine whether such a criminal action could follow based upon an erroneous grant of immunity in the civil abuse and neglect proceeding. However, that specific issue is not before us.

D. Termination of Parental Rights

Christina L. lastly asserts that the circuit court's termination of her parental rights was improper. She contends that her use of marijuana and her failure to ensure one child's attendance at school during one school year do not amount to child abuse so as to require the termination of her parental rights. This Court has held that "[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child . . . will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]" Syl. pt. 1, in part, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). We have made clear that "[t]ermination of parental rights . . . may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, in part, *In re R. J. M. See In re Emily*, 208 W. Va. 325, 337, 540 S.E.2d 542, 553 (2000).

In the instant case, the circuit court found that the children were abused and that it was in their best interest to terminate Christina L.'s parental rights. The parental termination decision was made from a combination of evidentiary factors. For instance, the circuit court found that Christina L. "is addicted to controlled substances or drugs to the extent that proper parenting skills have been impaired[.]" It was found that Christina L. failed to "follow[] through with the recommended and appropriate treatment which could have improved the capacity for

adequate parental functioning." The circuit court also determined that Christina L. "has not responded to or followed through with a reasonable family case plan or rehabilitative efforts . . . designed to reduce and prevent the abuse and neglect of the children[.]" The DHHR correctly points out that under W. Va. Code § 49-6-5(b) (1998) (Repl. Vol. 2001), drug abuse and failure to comply with a family case plan are grounds for terminating parental rights.[11] *See*

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[11]The relevant provisions under W. Va. Code § 49-6-5(b) (1998) (Repl. Vol. 2001) provide as follows:

> (b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through [with] the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;
>
> (2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;
>
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or

(continued...)

In re of Micah Alyn R., 202 W. Va. 400, 406, 504 S.E.2d 635, 641 (1998) ("[I]f the abusing parent willfully refused or is presently unwilling to cooperate in the development of a family case plan, a finding of 'no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected' under the statute is warranted."); *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 713, 356 S.E.2d 464, 467 (1987) ("[T]he legislature has stated expressly that the 'conditions of neglect or abuse' which constitute grounds for termination of parental rights include . . . '[t]he abusing parent or parents have habitually abused or are addicted to alcohol . . . to the extent that proper parenting skills have been seriously impaired[.]'"). Insofar as the evidence supported a statutory basis for terminating Christina L.'s parental rights, we affirm the trial court's decision.

IV.

CONCLUSION

The January 8, 2002, order of the Wood County Circuit Court terminating Christina L.'s parental rights in her minor children, Aaron Thomas M., Delta Dawn M., and Luke Brian M. is affirmed.

Affirmed.

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[11](...continued)
insubstantial diminution of conditions which threatened the health, welfare or life of the child[.]

222 W. Va. 466, 665 S.E.2d 300

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

No. 33716

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: ABBIGAIL FAYE B.

Appeal from the Circuit Court of Cabell County
Honorable John Cummings, Judge
Civil Action No. 07-CIGR-1

AFFIRMED

Submitted: April 16, 2008
Filed: May 23, 2008

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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

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

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

3. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

4. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full

force and effect." Syllabus point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

5. "This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Syllabus point 2, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).

6. Pursuant to the plain language of W. Va. Code § 44-10-3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. "However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian." W. Va. Code § 44-10-3(a).

7. Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit

court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

8. "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

9. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus point 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

10. "Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the

children." Syllabus point 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

11. "But the court is in no case bound to deliver the child into the custody of any claimant, but may leave it in such custody as the welfare of the child at the time appears to require." Syllabus point 4, *Green v. Campbell*, 35 W. Va. 698, 14 S.E. 212 (1891).

12. "While courts always look to the best interests of the child in controversies concerning his or her custody, such custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syllabus point 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).

Davis, Justice:

The appellants herein and petitioners below, Gala P. (hereinafter "Gala")[1] and Brent P. (hereinafter "Brent"), appeal from an order entered July 9, 2007, by the Circuit Court of Cabell County. By that order, the circuit court denied the petitioners' request for guardianship of their minor grandchild, Abbigail Faye B. (hereinafter "Abbigail"), and returned the child's custody to her biological parents, Autumn S. B. (hereinafter "Autumn") and Josh B. (hereinafter "Josh"). On appeal to this Court, Gala and Brent contend that the circuit court erred by concluding that they had failed to meet their burden of proving that (1) Abbigail was abused or neglected and that (2) Autumn was not capable of being a fit parent. The appellants argue further that the circuit court's order denying their request for Abbigail's guardianship is contrary to her welfare and best interests. Upon a review of the parties' arguments, the pertinent authorities, and the record designated for appellate consideration, we affirm the decision of the Cabell County Circuit Court.

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[1]In light of the Legislature's admonition that the records of guardianship proceedings shall remain confidential and the sensitive nature of the facts involved in this case, we will refer to the parties by their last initials rather than by their full last names. *See* W. Va. Code § 44-10-3(e) (2006) (Supp. 2007) (directing that, "[o]ther than court orders and case indexes, all other records of a guardian proceeding involving minor children are confidential"); *In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007) (observing that, "[i]n light of the sensitive nature of the facts at issue in this proceeding, we follow our prior practice in similar cases and refer to the parties by their last initials" (citation omitted)).

I.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts are largely undisputed by the parties. The minor child at issue in these proceedings, Abbigail Faye B., was born on August 3, 2006, to Autumn S. and Josh B. At the time of the child's birth, Autumn was seventeen years old[2] and resided with her mother, Gala, and her stepfather, Brent. Josh, who was also approximately seventeen years old at that time, resided on the property of Gala and Brent in rooms located above their shop. Abbigail's birth certificate did not list Josh as her father, and the parties disagree as to the reason for this: Gala suggests that Autumn did not want to list Josh as the child's father for fear she would lose custody, while Autumn represents that Gala would not allow her to list Josh's name as the baby's father. In any event, Josh ultimately acknowledged paternity in February 2007.

Approximately three weeks after Abbigail was born, Autumn and Josh attended a family reunion in Paducah, Kentucky, leaving Abbigail in the care of Gala and Brent.[3] Upon returning from that trip, Autumn claimed that Josh had raped her while they were in Kentucky, but she later recanted. Also following their return, Josh moved off of

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[2]Autumn's birth date is December 2, 1988.

[3]Autumn indicated that she had planned to take Abbigail on this trip with her, but because Abbigail had a severe case of thrush, Gala and Brent had said they would care for Abbigail and encouraged Autumn to continue with her travel plans.

Autumn's parents' property. Autumn subsequently returned to high school and continued to reside with her parents.

From the beginning of Abbigail's young life, Gala and Brent appear to have played a very active role in taking care of their grandchild. Although Autumn resided in their home, it seems that she relied heavily upon her parents to help her with Abbigail's care or to actually provide such care for her. Autumn's grandmother, Alice F. (hereinafter "Alice"), also provided substantial care for Abbigail. While Autumn attended high school,[4] Gala and Alice would care for Abbigail. Gala contends that she did not believe that Autumn was properly looking after Abbigail's health concerns and states that when Autumn and Josh went to Kentucky, she decided to take over. The record indicates that Abbigail had various health issues, including gastroesophageal reflux disease, problems with her right leg which required physical therapy, and auditory and tactile sensory issues that affected her ability to tolerate new textures and impacted her willingness to eat a variety of foods. Gala suggests that even though Abbigail had these various medical conditions, Autumn did not actively participate in her special feeding routine or follow through with Abbigail's therapy at home.[5] Gala also indicates that Josh did not heed Abbigail's feeding requirements and often played with her inappropriately following her

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[4]*See* note 9, *infra*.

[5]During this time, Abbigail and Autumn were receiving services through the West Virginia Birth to Three program and Team for West Virginia Children.

feedings by holding her upside down and not holding her upright for thirty minutes after she had eaten. Additionally, Gala reports that Josh had very limited interaction with Abbigail and often just stared at the child without talking to her or touching her.

In the early morning hours of February 20, 2007, Autumn moved out of her parents' home without their knowledge; Autumn left Abbigail in Gala and Brent's care while she established a new residence. On that same date, Autumn filed a domestic violence petition in the Magistrate Court of Cabell County on behalf of Abbigail and against Gala alleging that Gala would not return Abbigail to her. Also on February 20, 2007, Gala filed a pro se petition for appointment of guardian, pursuant to W. Va. Code § 44-10-3 (2006) (Supp. 2007), in the Circuit Court of Cabell County, alleging that "Mother has ranaway [sic] & left the baby Abbigail with the materal [sic] Grandparents. The where abouts [sic] of the mother are unknown." The next day, February 21, 2007, Gala filed a domestic violence petition in the Magistrate Court of Cabell County on behalf of Abbigail and against Autumn. Thereafter, Gala and Brent obtained counsel and, by counsel, filed an amended petition for guardianship on March 1, 2007, which amendments include allegations of the abuse and neglect of Abbigail by Autumn and Josh. Among other things, the amended guardianship petition included allegations that Autumn and Josh were not fit parents because they refuse to acknowledge Abbigail's various medical conditions and neither of them has a valid driver's license; since the child's birth, Autumn has twice "left the home and abandoned the child to the grandparents"; Autumn has

accused Josh of being violent towards her and raping her; and Josh allegedly uses illegal drugs and "has a significant criminal history."

All three of these cases, the two domestic violence petitions filed in magistrate court and the petition for guardianship filed in circuit court, were referred to the Family Court of Cabell County and heard together on February 27, 2007.[6] A Guardian ad Litem was appointed for the minor child, and a hearing was held in the family court on March 2, 2007, after which the court entered an order. In its order of March 2, 2007, the family court awarded temporary custody of Abbigail to Gala and Brent and, as a result of the allegations of abuse and neglect contained in the amended petition for guardianship, continued and removed the case to the Circuit Court of Cabell County[7] and further referred

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[6]Although not named as a party to the proceedings instituted in the family court, Josh acknowledged his paternity of Abbigail prior to the family court's first hearing and has participated in all proceedings in this matter, having been represented by counsel for Autumn.

[7]Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court directs, in pertinent part,

> [i]f a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship

(continued...)

the matter to the Child Protective Services Division of the Department of Health and Human Resources (hereinafter "CPS"). The family court also dismissed the two domestic violence petitions for lack of sufficient evidence to support the issuance of a domestic violence protective order as to either petition. In addition to these rulings, the parties represent that the family court, during the progress of the underlying hearing, also recognized Josh as a party to these proceedings[8] and granted supervised visitation to Autumn and Josh, although such rulings are not contained in the above-referenced order.

On April 26, 2007, CPS filed its investigation report. It concluded that Abbigail was not an abused or neglected child and that she did not need further CPS services while she remained in her grandparents' care. The CPS worker opined, however, that while Autumn and Josh had not abandoned Abbigail, there was a moderate risk of abuse and/or neglect if she were reunited with her parents. Thus, CPS suggested that if Autumn and Josh regained Abbigail's custody, community services be provided to them.

The circuit court then held hearings on May 7, 2007; May 25, 2007; and June

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[7](...continued)
order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues.

For the complete text of Rule 48a and further discussion of its application to the case *sub judice*, see Section III.B., *infra*.

[8]*See supra* note 6.

8, 2007.[9] By order entered July 9, 2007, the circuit court denied Gala and Brent's petition for guardianship of Abbigail

> find[ing] that the Petitioners [Gala and Brent] have failed to meet their burden in this matter to show that Abbigail Faye B[.] is an abused or neglected child as defined by the West Virginia Code, nor that Autumn S[.], the natural mother of Abbigail, is not capable of being a fit parent.

The court then placed Abbigail with her parents, Autumn and Josh,[10] through the use of a transitional period. Gala and Brent were awarded visitation with Abbigail. From this ruling, Gala and Brent appeal to this Court.

II.

STANDARD OF REVIEW

In this case, we are asked to review the circuit court's order denying Gala and Brent's petition for guardianship of Abbigail. We previously have held, in cases seeking the custody of a child, that

> [t]he exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless

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[9]During these hearings, evidence was presented to show that Josh had had various arrests for traffic offenses and that he had illegally used alcohol and other drugs, which, in turn, led to at least one arrest for possession. It is unclear whether Josh has a current driver's license or if his license is still suspended. With respect to Autumn, evidence was introduced to show that she does not have a valid driver's license or learner's permit, and, when she moved out of her parents' house in February 2007, she quit high school and has not yet obtained her GED.

[10]The record indicates that Autumn and Josh were married on July 4, 2007.

> that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.

Syl. pt. 2, *Funkhouser v. Funkhouser*, 158 W. Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989). Moreover, to the extent that the circuit court's decision involved the interpretation and application of the guardianship statute, W. Va. Code § 44-10-3, to the facts of this case, our review is plenary. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). *Accord* Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). Guided by these standards, we proceed to consider the errors assigned by the parties.

III.

DISCUSSION

On appeal to this Court, Gala and Brent complain that the circuit court erred by refusing their petition for guardianship of Abbigail. In ruling upon said petition, the circuit court concluded that the petitioners had not met their burden of proving that Abbigail was an abused or neglected child or that Autumn was not a fit parent. Assigning

error to the circuit court's ruling, Gala and Brent contend that they sustained their burden of proving that Autumn is not a fit parent and that Abbigail's best interests would be served by awarding her guardianship to Gala and Brent. They further argue that the circuit court erred by requiring them to prove that Abbigail was an abused or neglected child. Both Autumn and Josh, as well as Abbigail's Guardian ad Litem, respond that Autumn and Josh are fit parents and that Abbigail's best interests would be promoted by returning her custody to her biological parents, Autumn and Josh. The Guardian ad Litem further contends that the circuit court did not err by requiring Gala and Brent to prove abuse and neglect by clear and convincing evidence insofar as their petition for guardianship contained such allegations and served as the impetus for removing the case from family court to circuit court in accordance with Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court.

A. W. Va. Code § 44-10-3 (2006) (Supp. 2007)

The case *sub judice* originated with the filing, by Gala and Brent, of a petition for the guardianship of Abbigail pursuant to W. Va. Code § 44-10-3 (2006) (Supp. 2007).[11] This statute provides:

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[11]Although it is apparent from the facts of this case that Gala and Brent actually were seeking to obtain physical custody of Abbigail, it was proper for them to proceed under the provisions of the guardianship statute, W. Va. Code § 44-10-3, as they did in this case. The statutory provisions relating to guardians and wards generally, W. Va. Code § 44-10-1, *et seq.*, have frequently been relied upon by this Court when (continued...)

> (a) The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.
>
> (b) Within five days of the filing of a petition for the appointment of a guardian, the circuit clerk shall notify the

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[11](...continued)
making custodial determinations. *See, e.g.*, W. Va. Code § 44-10-4 (2004) (Repl. Vol. 2004) (permitting child fourteen years of age or older to nominate his/her guardian); Syl. pt. 7, in part, *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357 (1981) (holding that "an adolescent fourteen years of age or older . . . has an absolute right under *W. Va. Code*, 44-10-4 [1923] to nominate his own guardian"). Moreover, those statutes dealing specifically with child custody, W. Va. Code § 48-9-101, *et seq.*, "set[] forth principles governing the allocation of custodial and decision-making responsibility for a minor child when the parents do not live together." W. Va. Code § 48-9-101(a) (2001) (Repl. Vol. 2004). In the case *sub judice*, however, neither the biological parents' living arrangements nor their marital status was a precipitating factor for the filing of the guardianship petition. Rather, Gala and Brent averred that Autumn was not a fit parent and that Abbigail's best interests required that her guardianship be awarded to Gala and Brent. Additionally, since said petition was filed, Autumn and Josh have married each other and are residing together in the same household. Thus, the statutory provisions governing child custody determinations do not apply to the facts of this case. Finally, Autumn and Josh have argued that this case involves issues of grandparent visitation. It is clear from the record in this case and the arguments asserted by Gala and Brent that they did not file a petition for grandparent visitation but instead seek much greater privileges and responsibilities vis-a-vis Abbigail than the limited rights an award of grandparent visitation would grant them. *See generally* W. Va. Code § 48-10-101, *et seq.* Therefore, we will decide this case in accordance with the statutory provisions concerning the guardianship of minors. Because our case law has often treated custodial and guardianship terminology interchangeably, we will consider also those authorities addressing child custody when necessary to our consideration of the guardianship matters at issue herein. *See, e.g.*, *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357; *State ex rel. Cash v. Lively*, 155 W. Va. 801, 187 S.E.2d 601 (1972); *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d 798 (1969); *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

court. The court shall hear the petition for the appointment of a guardian within ten days after the petition is filed.

(c) The court, the guardian or the minor may revoke or terminate the guardianship appointment when:

(1) The minor reaches the age of eighteen and executes a release stating that the guardian estate was properly administered and that the minor has received the assets of the estate from the guardian;

(2) The guardian or the minor dies;

(3) The guardian petitions the court to resign and the court enters an order approving the resignation; or

(4) A petition is filed by the guardian, the minor, an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian.

(d) A guardianship may not be terminated by the court if there are any assets in the estate due and payable to the minor: Provided, That another guardian may be appointed upon the resignation of a guardian whenever there are assets in the estate due and payable to the minor.

(e) Other than court orders and case indexes, all other records of a guardian proceeding involving a minor are confidential and shall not be disclosed to anyone who is not a party to the proceeding, counsel of record for the proceeding or presiding over the proceeding absent a court order permitting examination of such records.

Id.

In order to assess the correctness of the circuit court's order denying Gala and Brent's petition for guardianship, we must first consider the language of the statute

under which Gala and Brent filed their petition and upon which the lower tribunal based its ruling. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). After considering the legislative intent, we next must examine the precise words used by the Legislature. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). *See also DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed." (citations omitted)); Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). *But see* Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992) ("A statute that is ambiguous must be construed before it can be applied."); Syl. pt. 1, *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.").

The operative language of W. Va. Code § 44-10-3 that is at issue in this case is set forth in subsection (a):

> The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.

We have had few prior occasions upon which to consider this statutory language. Most of our prior opinions citing W. Va. Code § 44-10-3 have done so only in passing while discussing guardian-ward relationships in general rather than giving this statute in-depth treatment. *See, e.g.*, *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 222, 617 S.E.2d 760, 769 (2005); *In re Clifford K.*, 217 W. Va. 625, 637, 619 S.E.2d 138, 150 (2005); *Idleman v. Groves*, 89 W. Va. 91, 95-96, 108 S.E. 485, 486-87 (1921). *See also Provident Life & Accident Ins. Co. v. Little*, 88 F. Supp. 2d 604, 608 (S.D. W. Va.), *aff'd*, 238 F.3d 414 (4th Cir. 2000) (unpublished table decision).

However, in the case of *In re Custody of Woolfolk*, 170 W. Va. 238, 293 S.E.2d 316 (1982) (per curiam), this Court specifically did address the language of W. Va. Code § 44-10-3 in rendering its decision. *Woolfolk* involved the distinction between a minor child's two guardians: one who was appointed as "guardian of the [minor child's] property," 170 W. Va. at 238, 293 S.E.2d at 316 (internal quotations and citation omitted), and one who, being the child's natural father, was appointed for "the sole purpose of . . . giv[ing] permission for medical treatment for said infant," 170 W. Va. at 239, 293 S.E.2d

at 317 (internal quotations and citation omitted). In determining the scope of each guardian's authority over the child, the Court considered W. Va. Code § 44-10-3 and held, in the sole Syllabus point, that

> "[t]he county court of any county in which any minor resides . . . may . . . appoint as guardian for him some suitable person, preferring first the father or the mother; but in every case the competency and fitness of the person, and the welfare and best interest of the minor, shall govern the court in making the selection." *W. Va. Code*, 44-10-3 (1923).

170 W. Va. 238, 293 S.E.2d 316.

While directly on point with the facts and issues involved in the instant appeal, this syllabus point is somewhat problematic, though, insofar as it was adopted in a per curiam opinion. We previously have held that "[t]his Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Syl. pt. 2, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). Thus, it is apparent that the announcement of a new point of law regarding W. Va. Code § 44-10-3 should have occurred in a signed opinion and not in a per curiam opinion such as was the case in *Woolfolk*. Comparing the version of W. Va. Code § 44-10-3 that was at issue in *Woolfolk* with the legislative amendments to that section that have been adopted since our decision therein, we find the differences to be only slight and not demonstrative of a substantial change in the fundamental meaning or intent of that statute. We further conclude that the language employed in the

current version of W. Va. Code § 44-10-3 is plain and does not require further construction. Therefore, consistent with our prior decision in *Woolfolk* but in keeping with the present statutory language, we hold that, pursuant to the plain language of W. Va. Code § 44-10-3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. "However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian." W. Va. Code § 44-10-3(a).

B. Allegations of Child Abuse and Neglect in Guardianship Petitions

In applying W. Va. Code § 44-10-3(a) to determine whether Gala and Brent should be appointed as Abbigail's guardians, the circuit court also incorporated the clear and convincing standard of proof applicable to abuse and neglect proceedings. *See* W. Va. R. Prac. & Proc. for Fam. Ct. 48a(a) ("[A]llegations of child abuse and neglect must be proven by clear and convincing evidence."). *See also* W. Va. Code § 49-6-2(c) (2006) (Supp. 2007) (requiring the findings of abuse and neglect must be "proven by clear and convincing proof"); Syl. pt. 3, *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006) ("'*W. Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing

proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)."). Although either the family court or the circuit court of the county in which the minor resides may hear a petition for guardianship, W. Va. Code § 44-10-3(a), if the petition is filed in the family court and contains allegations of abuse and neglect, Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires the proceeding to be transferred to the circuit court and further requires the circuit court, in turn, to apply the clear and convincing standard of proof that is applicable to abuse and neglect cases generally.

Rule 48a directs:

> (a) *Removal by family court to circuit court of infant guardianship cases involving child abuse and neglect.* — If a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues. At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence. Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of

> the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va. Code § 44-10-3 and to the Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va. Code § 49-6A-2.
>
> (b) *Investigation of abuse and neglect.* — Upon removal of the infant guardianship petition, the circuit court may utilize the investigative and mandamus process and related procedures set forth in Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings if the court deems it necessary or appropriate under the circumstances presented. The circuit court shall allow the petitioner for infant guardianship to appear as a co-petitioner on the petition filed by the Department of Health and Human Services pursuant to W. Va. Code § 49-6-1, et seq., or a prohibition against the filing of a W. Va. Code § 49-6-1, et seq., petition by the petitioner for infant guardianship should the Department show cause why it will not file such a petition.

At issue herein is the language contained in subsection (a) requiring a family court to remove guardianship cases alleging child abuse and neglect to the circuit court for further proceedings. Reading this rule in conjunction with the language of W. Va. Code § 44-10-3, we find the directives to be clear. Accordingly, we hold that Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is

required to remove the petition to circuit court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

The initial guardianship petition filed pro se by Gala and Brent alleged as grounds therefor that "Mother has ranaway [sic] & left the baby Abbigail with the materal [sic] Grandparents. The where abouts [sic] of the mother are unknown." After obtaining counsel, Gala and Brent filed an amended petition for guardianship alleging, in part, that since the child's birth, "the biological mother, Autumn S[.], has lived in the home [of Gala and Brent] but on two occasions since the child's birth, she has left the home and abandoned the child to the grandparents." Both of these petitions were filed in the Circuit Court of Cabell County, assigned to the Family Court of Cabell County, and, following a hearing thereon, removed to the circuit court based upon the allegations of abuse and neglect contained therein. Despite these allegations in the lower tribunals, on appeal to this Court, Gala and Brent vehemently argue that Abbigail was not an abused and neglected child while she was in their care, and that, consequently, the circuit court erred by applying the clear and convincing burden of proof. Their argument fails to appreciate, however, that the issue is not whether Abbigail was abused and neglected while she was in *their* care, but rather whether she was abused and neglected while she was in *Autumn's* care. It goes without saying that persons accused of abusing and neglecting a child would

have no business petitioning a court to be that child's guardian. Rather, the operative inquiry is whether the person from whom the petitioners are attempting to wrest the child's guardianship has committed such malfeasance; here, because Gala and Brent are seeking to obtain guardianship by divesting Autumn of the same, the question is whether Abbigail suffered abuse and neglect while in Autumn's care. Therefore, we must determine whether the allegations contained in Gala and Brent's amended petition for guardianship rose to the level of allegations of abuse and neglect such that the circuit court was required to review the evidence under the clear and convincing standard.

The phrase used in Rule 48a(a), "child abuse and neglect," is defined by W. Va. Code § 49-1-3(d) (2006) (Supp. 2006)[12] as "physical injury, mental or emotional injury, sexual abuse, sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child." Here, Gala and Brent alleged in both their initial and amended petitions for guardianship that Autumn had abandoned her child. Either of these allegations, apart from several of the other allegations contained in the petitions, is suggestive of "negligent treatment . . . of a child by a parent . . . who is responsible for the child's welfare, under

[12]Since the time of the events at issue in the case *sub judice*, W. Va. Code § 49-1-3 has been amended. However, those amendments do not affect the statutory language considered in this opinion. *Compare* W. Va. Code § 49-1-3 (2006) (Supp. 2006) *with* W. Va. Code § 49-1-3 (2007) (Supp. 2007).

circumstances which harm or threaten the health and welfare of the child," W. Va. Code § 49-1-3(d), because an infant who was either three weeks old, at the time Autumn went to Paducah, Kentucky, or who was six months old, at the time Autumn left her parents' home, was incapable of caring for him/herself.[13] In light of these allegations, the family court correctly removed the petition to the circuit court for further proceedings. Furthermore, because the guardianship petition alleged that the subject child had been abused and neglected, the circuit court was obligated to consider the evidence presented in accordance with the standard of proof for abuse and neglect cases generally, *i.e.*, clear and convincing evidence, and it correctly did so. *See* W. Va. R. Prac. & Proc. for Fam. Ct. 48a(a). Consequently, we do not find that the circuit court erred in this regard.

C. Parental Priority if Competent and Fit

Turning now to the circuit court's rulings denying Gala and Brent's petition for guardianship, W. Va. Code § 44-10-3(a) permits a court to appoint a guardian for a minor child if the proposed guardian is competent and fit, but requires the court to accord priority to the child's mother or father. *See* W. Va. Code § 44-10-3(a) ("The father or mother shall receive priority."). Under the facts of the case *sub judice*, the circuit court determined that "the Petitioners [Gala and Brent] have failed to meet their burden in this

[13]As will be discussed in greater detail in Section III.C., *infra*, although these allegations raise a red flag that abuse and neglect has been alleged such to require removal of the guardianship petition from family court to circuit court, we do not find that Autumn abused and neglected Abbigail.

matter to show . . . that Autumn S[.], the natural mother of Abbigail, is not capable of being a fit parent." Before this Court, Gala and Brent argue that they offered sufficient proof of Autumn's unfitness, including her lack of bonding with Abbigail and her unwillingness to help with child care duties, such that they should have been awarded Abbigail's guardianship. We disagree.

Divesting a child's biological parent of his/her guardianship, or custody,[14] is a very serious matter. This Court repeatedly has recognized the inherent rights parents have to the custody of their own children, and any party seeking to interfere with such rights must bear a heavy burden. In our earliest cases on the subject, we adopted the then-prevailing views evidencing a presumption in favor of the child's father. For example, in Syllabus point 3 of *Green v. Campbell*, 35 W. Va. 698, 14 S.E. 212 (1891), we held that "[t]he father is the natural guardian of his infant children, and, in the absence of good and sufficient cause shown, is entitled to their custody." *Accord* Syl. pt. 2, *Hurley v. Hurley*, 71 W. Va. 269, 76 S.E. 438 (1912) ("The father is legally entitled to the custody of his infant child, if fit for the trust, and the same should not be denied him unless the child's welfare or other considerations clearly outweigh his legal right."); Syl. pt. 3, in part, *Mathews v. Wade*, 2 W. Va. 464 (1868) ("By the Code of Virginia, 1860, a lawfully appointed guardian has the custody of his ward . . . but the father of the minor, if living,

[14]*See supra* note 11.

and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor[.]"). As our law evolved, we gradually appreciated the corresponding rights of a child's mother to the custody of her child: "With reference to the custody of very young children, the law favors the mother if she is a fit person, other things being equal . . . ." Syl. pt. 2, in part, *Settle v. Settle*, 117 W. Va. 476, 185 S.E.2d 859 (1936), *superseded by statute as stated in David M. v. Margaret M.*, 182 W. Va. 57, 61, 385 S.E.2d 912, 916 (1989) (recognizing that 1980 amendments to W. Va. Code § 48-2-15 (1980) (Repl. Vol. 1980) and prior decision in *Garska v. McCoy*, 167 W. Va. 59, 70, 278 S.E.2d 357, 363 (1981), "abolished the gender-based presumption" of "maternal preference" in child custody matters).

Through the continued development of the law in this area, though, we gradually recognized parental rights as more generally applicable to either parent. One of our first such cases defining the scope of such parental rights is *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960), in which we held, in the single Syllabus point:

> A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

Accord Syl., *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d 798 (1969). We

also have appreciated that such rights are not just constructs of the courts, but that they are basic liberties secured by the state and federal constitutions:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

The facts of this case, like many of our domestic law cases, suggest a familial situation in which a child is fortunate to have many people who love her and who want to take care of her. While a child may have many different types of caretakers, only a select few may be awarded his/her guardianship. We appreciate the concerns of Gala and Brent regarding their perceptions of Autumn's and Josh's abilities to parent their child. Nevertheless, the relief they seek is not a remedy that we bestow lightly. Although there are circumstances in which parents should not serve as the guardians for their child(ren), the vast majority of those cases are handled through the child abuse and neglect process to ensure that parents' rights are not unnecessarily trammeled.

In the case *sub judice*, the circuit court heard testimony presented both by Gala and Brent and by Autumn and Josh, and was charged with assessing the credibility of the various witnesses. Having reviewed the transcripts of those hearings, we agree with

the circuit court's assessment of the evidence and its ultimate conclusion that Autumn is capable of being a fit parent. The standard by which we typically determine parental fitness is that set forth in *Whiteman v. Robinson*, which directs a court to consider the following factors: "misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody." Syl., 145 W. Va. 685, 116 S.E.2d 691. Applying these factors to the facts before us, there do not appear to be any allegations that Autumn is guilty of misconduct or immorality, that she has waived her parental rights, or that she has transferred, relinquished, or surrendered custody of Abbigail.

With respect to Gala and Brent's allegations that Autumn had twice abandoned her child, we do not find that those two instances are sufficient to divest Autumn of Abbigail's guardianship. On the first alleged occasion of abandonment, it appears that Autumn and Josh had planned a trip to a family reunion and that they had planned to take Abbigail with them. However, at the time of their departure, Abbigail was sick, and it appears that Autumn was encouraged to proceed with her travel plans while Gala and Brent cared for Abbigail.[15] It goes without saying that leaving a child in another's care after having made such care arrangements does not constitute abandonment. The second alleged instance of abandonment apparently followed a heated discussion

[15]*See* note 3, *supra*.

between Autumn and Gala and Brent. It seems that Autumn moved out of her parents' residence and left Abbigail in their care until she could establish a new residence for herself and her daughter. Although she left earlier in the day than was customary, Autumn was, at this point, still attending high school and left Abbigail at the home of Gala and Brent and in their care on a daily basis. Moreover, Gala and Brent filed their petition for guardianship the same day that Autumn moved out. By filing their guardianship petition, the animosities between the parties undoubtedly had escalated such that Autumn likely would not have been permitted to remove Abbigail from Gala and Brent's home. We do not find this isolated incident, under the particular facts of this case, to be sufficient upon which to base a change of a Abbigail's guardianship.

Lastly, we do not find that Autumn either neglected Abbigail or that she was otherwise derelict in any other of her parental duties. Autumn was a new mother, and a relatively young new mother at that. She lived in her parents' home, and her grandmother lived next door. Autumn received substantial help from both her mother and her grandmother in caring for her child, and both Autumn's mother and grandmother provided a significant amount of care for Abbigail to allow Autumn to continue attending high school. However, when questioned during the hearings in this matter, both Autumn and Gala were critical of the other's participation in Abbigail's care: Autumn indicated that she was made to feel inadequate when attending to Abbigail's needs while Gala suggested that Autumn lacked initiative in caring for Abbigail. Absent further evidence to indicate

that Autumn is not a fit and competent person to serve as Abbigail's guardian, we find the circuit court correctly accorded priority to Autumn, as Abbigail's mother, in determining the minor's guardianship and affirm the circuit court's ruling in this regard.

As a final matter, we note that although Josh has participated in these proceedings, the initial guardianship petition was filed against Autumn only. Thus, it appears that the circuit court, in its final order, limited its ruling on parental fitness to apply only to Autumn even though the amended guardianship petition also challenged Josh's fitness as a parent. While the circuit court did not specifically state in its order that it also found Josh to be a fit and competent person to serve as Abbigail's guardian, neither did it find that Josh was unfit or incompetent to be the child's guardian. Nevertheless, Josh's fitness may be inferred from the court's inclusion of Josh in its plan of reunification insofar as it placed Abbigail with both of her parents. Upon a review of the record evidence, we reiterate our conclusion that not only was Autumn a relatively young new mother, but also Josh was a relatively young new father. We do not disagree that Josh's background is not perfect. Allegations of Josh's traffic citations, underage drinking, and use of marijuana are contained in the record. It also is apparent that there is much animosity between Gala and Brent and Josh, and that this acrimony may have prevented Josh from visiting and interacting with Abbigail while she resided in Gala and Brent's home. Be that as it may, Josh's participation in these guardianship proceedings since their commencement indicates a strong commitment on his part to participate in his child's life,

and he has taken steps towards that end by marrying his child's mother and establishing a home for his family. While we are not unmindful of Josh's past transgressions, unless and until we are presented with more solid evidence indicating that he is not fit or competent to serve as Abbigail's guardian, we will accord him, as the child's father, the statutory preference mandated by W. Va. Code § 44-10-3(a).

D. Welfare and Best Interests of Minor

According a preference to Abbigail's parents, Autumn and Josh, is not conclusive of our determination of Abbigail's guardianship unless such a placement also serves her "welfare and best interests," W. Va. Code § 44-10-3(a). The circuit court neglected to reference Abbigail's welfare and best interests in its final order, but, during its June 8, 2007, hearing, the court acknowledged that the best interests of the child "must be the controlling factor" in rendering a decision in this case. Therefore, we will presume that the circuit court found that a denial of Gala and Brent's guardianship petition and that placement of Abbigail in Autumn's and Josh's care satisfied the child's welfare and best interests.

As we previously have indicated, even though parents have substantial rights in guardianship matters, so do the children involved. In fact, we specifically have held that, "[a]lthough parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children." Syl. pt.

3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Moreover, we typically have been reluctant to change a child's custodial placement unless such a change will materially promote the child's best interests. In one of this Court's earliest cases, we specifically recognized that the child's welfare is the dispositive factor in child custody matters: "But the court is in no case bound to deliver the child into the custody of any claimant, but may leave it in such custody as the welfare of the child at the time appears to require." Syl. pt. 4, *Green v. Campbell*, 35 W. Va. 698, 14 S.E. 212 (1891). *Accord* Syl. pt. 1, *Frame v. Wehn*, 120 W. Va. 208, 197 S.E. 524 (1938) ("'"In contest over the custody of an infant, the welfare of the child is the polar star by which the discretion of the court is to be guided." *State ex rel. Palmer v. Postlethwaite*, 106 W. Va. 383, 145 S.E. 738 [(1928)].' *State ex rel. Cooke v. Williams*, 107 W. Va. 450, 148 S.E. 488 [(1929)]; *Reynolds v. Reynolds*, 109 W. Va. 513, 155 S.E. 652 [(1930)]."). *See also* Syl. pt. 2, *Cloud v. Cloud*, 161 W. Va. 45, 239 S.E.2d 669 (1977) (per curiam) ("To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child.").

Gala and Brent have argued at length that Abbigail's best interests would best be served by awarding them her guardianship. In support of their claims, Gala and Brent reference how much Abbigail has bonded with them, how involved they have been in her therapy, and how a drastic change of her environment could wreak havoc on her

delicate state in light of her numerous medical conditions.[16] We do not doubt that Gala and Brent could provide a fine home for Abbigail as they have already done so for Autumn and her siblings. Nevertheless, "[w]hile courts always look to the best interests of the child in controversies concerning his or her custody, such custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syl. pt. 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).

Here, we agree with the circuit court's assessment that Abbigail's best interests require her to be placed with her parents, Autumn and Josh. Although Abbigail has bonded significantly with Gala and Brent, she should also be afforded the opportunity to bond with her biological parents, Autumn and Josh. Simply because Gala and Brent have been in a position to provide substantial care for Abbigail, at times to the exclusion of Autumn and Josh, does not presumptively make them a better placement for Abbigail. The record before us suggests that Autumn and Josh also are capable of providing a suitable home for Abbigail. In fact, in response to the concerns raised in this case, the Child Protective Services Division of the West Virginia Department of Health and Human Resources conducted a preliminary investigation of Autumn and Josh, and their home, and did not find any conditions necessitating further proceedings. Absent evidence that

[16]*See* Section I, *supra*.

Abbigail's safety would be endangered by awarding her guardianship to her parents, we cannot find any justification in the record to indicate that her welfare and best interests would not be served by placing her with her parents, Autumn and Josh, particularly in light of our prior findings that they are fit and competent to serve as her guardians and have, thus, been accorded a statutory preference pursuant to W. Va. Code § 44-10-3(a). Accordingly, we find that the circuit court did not abuse its discretion and affirm the lower court's ruling on this point.

IV.

CONCLUSION

For the foregoing reasons, the July 9, 2007, order of the Circuit Court of Cabell County is hereby affirmed.

Affirmed.

198 W. Va. 178, 479 S.E.2d 688

Supreme Court Of Appeals Of West Virginia

ALIREZA D., Plaintiff Below, Appellee

v.

KIM ELAINE W., Defendant Below, Appellant

No. 23420

Submitted: September 24, 1996

Filed: November 18, 1996

SYLLABUS BY THE COURT

1. "Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, Nichols v. Nichols, 160 W. Va. 514, 236 S.E.2d 36 (1977).

2. "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." Syl. pt. 2, Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977).

3. "Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) (1991), the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court." Syl. pt. 3, Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

David W. Johnson, Charleston, West Virginia, Attorney for the Appellant

Christopher S. Butch, Joseph Cometti, Charleston, West Virginia, Attorneys for the Appellee

Per Curiam:

This action is before this Court See footnote 1 upon an appeal from the final order of the Circuit Court of Kanawha County, West Virginia, entered on January 24, 1995. The final order modified the parties' 1990 divorce decree which awarded custody of the parties' two children to the appellant, Kim Elaine W. Pursuant to the

final order, custody of the older child was awarded to the appellee, Alireza D. See footnote 2 The appellant contends that the modification was error.

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons stated below, the final order is reversed, and the circuit court is directed to restore custody of the older child to the appellant. Moreover, as detailed below, this action is remanded to the circuit court for further proceedings.

I

The record in this action consists of hundreds of pages of orders, pleadings, transcripts and exhibits, and the briefs before this Court are lengthy. Unfortunately, those documents describe a bitter and long-standing dispute in the aftermath of the 1990 divorce concerning the parties' children.

The appellant and the appellee were married in 1975 and last cohabited in Charleston, Kanawha County, West Virginia. The parties had two children during the marriage: Ali, born on October 15, 1979, and Bijan, born on July 20, 1983. The parties separated in 1989, and the appellee filed a complaint for divorce in the Circuit Court of Kanawha County. On January 8, 1990, that court entered a divorce decree which incorporated the parties' separation agreement.

Pursuant to the terms of the divorce decree, the appellant was awarded custody of the two children, and the appellee was ordered to pay a total of $675 per month for child support. The level of child support was computed in accord with this State's Guidelines for Child Support Awards, the current authority for which is found in W. Va. Code, 48A-1B-1 [1996], et seq. In addition, the appellee was ordered to provide full medical, hospitalization and other health insurance for the children. Moreover, the divorce decree provided that the parties would not "adversely influence the minor children against the other parent."

Following the divorce, the appellee sought employment at various locations beyond the State of West Virginia in the course of his career as a computer programmer. The appellant, on the other hand, remained in the Kanawha County area and remarried in August 1990.

In February 1992, the appellee filed the first of several petitions in the Circuit Court of Kanawha County seeking custody of the parties' two children. Thereafter, the action was referred to a family law master who conducted a series of evidentiary hearings upon the issue of custody and upon other issues raised by the parties.

The evidence adduced at the family law master level was voluminous. The evidence indicated that, to some extent, both the appellant and the appellee had violated the admonition expressed in the divorce decree that the parties would not adversely influence the minor children against the other parent. Nevertheless, the evidence concerning the conduct of the appellee was clearly more damaging. That evidence demonstrated that, following the entry of the divorce decree, the appellee engaged upon a course of conduct, over a considerable period of time, designed to alienate the children from their mother, the appellant. The appellee's conduct included instructing the children to be disruptive while in the appellant's care and coaching them to continuously proclaim to others a desire to live with the appellee. See footnote 3 The appellee's actions were particularly directed toward the older son, Ali, who is presently seventeen years old.

In analyzing the evidence, the family law master ultimately focused upon the conclusions of two Charleston area psychiatrists who considered the custody issue. The psychiatrists were Dr. Russell I. Voltin and Dr. John P. MacCallum. As set forth in his 1992 deposition, Dr. Voltin interviewed Bijan and the appellant and concluded that the appellee had been guilty of "emotional abuse" toward the children in terms of the conduct described above. Consequently, Dr. Voltin recommended that the appellant retain custody of both sons. On the other hand, Dr. MacCallum, who interviewed both parties, the two children and the appellant's current husband, concluded that, although the appellee had, in fact, sought to alienate the children from their mother, the appellee was not an unfit parent. Moreover, Dr. MacCallum was reluctant to conclude that the appellee's conduct constituted "emotional abuse." Noting that the older child, Ali, had expressed a desire to live with his father, the appellee, Dr. MacCallum was in agreement with Dr. Voltin that Ali's statement in that regard was, no doubt, simply reflective of the appellee's wishes. Nevertheless, affording some weight to Ali's desire to live with his father and considering all relevant circumstances, including Ali's age, Dr. MacCallum recommended that the appellee be awarded custody of Ali and that the appellant retain custody of Bijan.

After further proceedings, the family law master filed a recommended decision with the circuit court. As stated in that decision, the family law master found, inter alia, that the older child, Ali, has been residing with the appellee since August 1993 and that Ali had stated to the family law master that he wanted to live with his father. Moreover, noting that Dr. Voltin never interviewed Ali, the recommended decision restated the findings of Dr. MacCallum and concluded, as did Dr. MacCallum, that Ali should remain with the appellee. In particular, the recommended decision stated that the remarriage of the appellant, the relocation of the appellee, the fact that Ali has resided with the appellee since August 1993 and the expressed desire of Ali to live with his father, "all constitute a material change in the circumstances" of the parties relative to the issue of custody, and that a

change in custody, as to Ali, would be in that child's best interests.

Following various hearings conducted in the circuit court in September 1994, the circuit court, pursuant to the final order entered on January 24, 1995, adopted the recommended decision of the family law master and awarded custody of the older child, Ali, to the appellee. This appeal followed.

II

This Court has often observed that a recommended decision of a family law master is reviewable by a circuit court pursuant to statute, W. Va. Code, 48A-4-16 [1993], W. Va. Code, 48A-4-20 [1996], and pursuant to this Court's Rules of Practice and Procedure for Family Law. As we recently stated in syllabus point 1 of Stephen L. H. v. Sherry L. H., 195 W. Va. 384, 465 S.E.2d 841 (1995): "A circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard." See also Banker v. Banker, ___ W. Va. ___, 474 S.E.2d 465 (1996). With regard to findings of fact, this Court noted in syllabus point 3 of Stephen L. H.: "Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." See also syl. pt. 1, Higginbotham v. Higginbotham, 189 W. Va. 519, 432 S.E.2d 789 (1993). Of course, the final order of a circuit court in such cases is reviewable by this Court. Magaha v. Magaha, 196 W. Va. 187, ___, 469 S.E.2d 123, 126 (1996); Hinerman v. Hinerman, 194 W. Va. 256, 259, 460 S.E.2d 71, 74 (1995); Marilyn H. v. Roger Lee H., 193 W. Va. 201, 204, 455 S.E.2d 570, 573 (1995). See generally syl. pt. 4, Burgess v. Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996); Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995); syl. pt. 1, Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995).

Here, the appellant contends that the circuit court committed error in awarding custody of Ali to the appellee. As this Court held in the syllabus point of Nichols v. Nichols, 160 W. Va. 514, 236 S.E.2d 36 (1977): "Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." See also Carter v. Carter, ___ W. Va. ___, ___, 470 S.E.2d 193, 198 (1996); syl. pt. 2, Michael v. Michael, 196 W. Va. 155, 469 S.E.2d 14 (1996); syl. pt. 1, Marilyn H., supra. It is in the context of circuit court discretion in such cases that we also observe this Court's holding in syllabus point 2 of Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977). That syllabus point states: "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." See also W. Va. Code, 48-2-15 [1996]; syl. pt. 1, Donohew v. Donohew, 193 W. Va. 184,

455 S.E.2d 553 (1995); syl. pt. 2, Robert Darrell O. v. Theresa Ann O., 192 W. Va. 461, 452 S.E.2d 919 (1994); syl. pt. 1, Lesavich v. Anderson, 192 W. Va. 553, 453 S.E.2d 387 (1994).

As indicated in the recommended decision, one of the factors considered by the family law master in modifying custody was the expressed desire of the older child, Ali, to live with his father. Although both Dr. Voltin and Dr. MacCallum discounted Ali's choice as being influenced by the appellee, Dr. MacCallum and the family law master afforded the choice some degree of weight. In particular, the family law master relied upon W. Va. Code, 44-10-4 [1931], which states: "If the minor is above the age of fourteen years, he may in the presence of the county court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, nominate his own guardian, who, if approved by the court, shall be appointed accordingly [.]" That statute has been cited often by this Court with regard to custody issues in domestic relations actions. Judith R. v. Hey, 185 W. Va. 117, 120, 405 S.E.2d 447, 450 (1990); syl. pt. 1, Shimp v. Shimp, 179 W. Va. 215, 366 S.E.2d 663 (1988); syl. pt. 1, Busch v. Busch, 172 W. Va. 229, 304 S.E.2d 683 (1983); syl. pt. 1, S H. v. R. L. H., 169 W. Va. 550, 289 S.E.2d 186 (1982); syl. pt. 7, Garska v. McCoy, 167 W. Va. 59, 278 S.E.2d 357 (1981); syl. pt. 3, J. B. v. A. B., 161 W. Va. 332, 242 S.E.2d 248 (1978). See also Rule 16, W. Va. Rules of Practice and Procedure for Family Law; D. W. O'Neill, Annotation, Child's Wishes as Factor in Awarding Custody, 4 A.L.R.3d 1396 (1965); 92 W. Va. L. Rev. 355, 387-88 (1990).

As indicated above, Ali is presently seventeen years old and has been residing with the appellee since August 1993. Accordingly, Dr. MacCallum and the family law master correctly suggested that Ali's desire to live with his father must be considered. Nevertheless, the evidence in this action also reveals that the appellee has made an unrelenting effort, dating at least from the entry of the divorce decree in 1990, to alienate the children, and particularly Ali, from their mother. As Dr. MacCallum acknowledged concerning Ali's choice: "[T]he more significant question is does he have the capacity to separate out his own values from those of his father and objectively evaluate the differences? And the answer to that question is, no, he does not and he may not have that for a long time."

This Court has indicated that the right of a child above the age of fourteen to nominate his or her guardian, under W. Va. Code, 44-10-4 [1931], is not without limitations. In Judith R., supra, the absence of evidence of "unfitness" of the parent selected was a relevant consideration. Similarly, in Busch, supra, where a father appealed a denial of his petition for custody of his fourteen-year-old son, this Court noted that, not only had the son expressed a desire to live with his father, no allegation had been made that the father was an unfit parent. Accordingly, this Court reversed and remanded the action to the circuit court with directions to enter

an order awarding custody to the father. In so holding, this Court observed, in Busch, that the mother did not oppose the change of custody. In the circumstances of this action, Ali's choice must be viewed in the totality of the appellee's efforts to influence his older son.

The record in this action demonstrates that, following the 1990 divorce, neither the conduct of the appellant nor the conduct of the appellee was exemplary with regard to the children. Each tended to litigate every conceivable aspect of the childrens' status ad infinitum. Nevertheless, although the family law master found neither party to be an unfit parent, the record clearly shows the actions of the appellee to be particularly egregious. As stated above, the appellee's conduct included instructing the children to be disruptive while in the appellant's care and coaching them to continuously proclaim to others a desire to live with him. That conduct occurred over a considerable period of time. As a result, the children have been harmed. See footnote 4 In his report of August 9, 1993, Dr. MacCallum stated:

> [The appellee] appears to have consciously manipulated the family circumstances on numerous occasions to discredit his wife, or to demonstrate the children would be better off in his custody. His methods involve subtle but persistent suggestions to the children about their mother, or about behavior they should pursue. . . . [The appellee] has undermined [Ali's] relationship with his mother to the extent that it may never actually be fully healed or repairable. . . . It has been my observation under such circumstances that those parents who are least defensive, most neutral in their statements about others, and most objective in their statements about themselves, are usually most given to the truth and willing to accept the responsibility for their actions and thoughts. With regard to this extended group of people, [the appellant] and [the step-father] fall into this category but [the appellee] does not.

As stated above, Dr. Voltin recommended that the appellant retain custody of both sons, whereas Dr. MacCallum recommended that custody of Ali be awarded to the appellee. However, when asked whether the modification of custody was in Ali's best interests, Dr. MacCallum admitted: "I can't make what is really a choice in the best interests of this older child because of the circumstances that have already been created [.]" Dr. Voltin and Dr. MacCallum were, in fact, in agreement upon several matters: (1) that the appellee had engaged in a course of conduct designed to alienate the children from their mother, (2) that, consequently, the children had been traumatized psychologically and (3) that the children would benefit from therapy. Moreover, Dr. MacCallum recommended that, assuming custody of Ali would be awarded to the appellee, a plan of supervised visitation be

developed with regard to Bijan, in order to preclude further psychological harm to that child. See footnote 5

The family law master is accurate in stating that the remarriage of the appellant, the relocation of the appellee, the fact that Ali has been residing with the appellee and has expressed a desire to continue to do so constitute changes in circumstances relative to Ali's status. However, syllabus point 2 of the Cloud case, supra, requires more than a change of circumstances. Rather, the clear directive of Cloud and its progeny requires the additional showing that a change of custody will materially promote the welfare of the child. This Court is of the opinion that such a showing has not been made in this action and that, specifically, the circuit court abused its discretion in modifying the divorce decree in awarding custody of Ali to the appellee.

Certainly, this Court is not unmindful of Ali's age and the length of time he has resided with the appellee. However, neither of the two experts in this action, Dr. Voltin and Dr. MacCallum, could state unequivocally that the modification of custody would materially promote that child's welfare. Instead, the evidence, on balance, tended to indicate that the modification could result in further harm. See footnote 6

Upon further consideration, this Court is of the opinion that both therapy for the children conducted by a child psychiatrist or child psychologist and supervised visitation are warranted in this action. In fact, as we observed in Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992), therapy and supervised visitation are, at times, mutually dependent, in that proper therapy or counseling can reduce the need for supervised visitation. 190 W. Va. at 347, 438 S.E.2d at 527. Here, the issue of therapy was not addressed by the family law master or the circuit court even though Dr. Voltin and Dr. MacCallum indicated that it would be beneficial in helping the children cope with the appellee's conduct. As this Court recently stated in Mary Ann P. v. William R. P., ___ W. Va. ___, ___, 475 S.E.2d 1, ___ (1996):

> When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such counseling and may in its discretion determine how the cost of such counseling shall be paid.

See also White v. Williamson, 192 W. Va. 683, 694, 453 S.E.2d 666, 677 (1994).

Accordingly, upon remand, the circuit court shall consider and formulate an appropriate program concerning both children for counseling to be conducted by a child psychiatrist or a child psychologist. The cost of the program shall be paid by the appellee, and the parties and the stepfather shall also participate in the program if practicable. Similarly, upon remand, the circuit court shall consider and formulate an appropriate plan for supervised visitation concerning the children. In Mary D., supra, this Court indicated that supervised visitation is authorized in this State under W. Va. Code, 48-2-15(b)(1), which provides, generally, for visitation in divorce actions. Syllabus point 3 of Mary D. holds:

> Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) (1991), the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

See also Weber v. Weber, 193 W. Va. 551, 554 n. 6, 457 S.E.2d 488, 491 n. 6 (1995).

Of course, in addition to therapy and supervised visitation, the circuit court will need to address the issue of child support concerning the children. In particular, evidence of year to year fluctuations in the appellee's income as a computer programmer following the 1990 divorce are relevant, under the circumstances of this action, in establishing the level of child support to be ordered. Syl. pt. 1, Ball v. Wills, 190 W. Va. 517, 438 S.E.2d 860 (1993).

Finally, the appellant contends that the circuit court committed error in failing to find that the appellant is entitled to reasonable attorney fees. Specifically, the appellant asserts that, subsequent to the entry of the divorce decree on January 8, 1990, she incurred in excess of $20,000 in attorney fees, primarily because of the misconduct of the appellee concerning custody of the children. Furthermore, the appellant indicates that, at all times relevant to this action, her income was substantially below that of the appellee. The appellee, however, contends that the denial of attorney fees was within the circuit court's discretion and that, in any event, the amount sought by the appellant was not itemized with sufficient particularity.

Generally, the relative degree of fault of a party in divorce related matters has been held by this Court to be a consideration in the award of attorney fees. Syl. pt. 5, Rogers v. Rogers, No. 23075, ___ W. Va. ___, ___ S.E.2d ___, (July 11, 1996); syl. pt. 4, Banker, supra; Hillberry v. Hillberry, 195 W. Va. 600, 606-07, 466 S.E.2d 451, 457-58 (1995). In this action, the record contains ample evidence, as outlined above, supportive of the appellant's assertions concerning the appellee's attempts to alienate the children from their mother. In addition to the psychological harm imposed upon the children as a result, that conduct was in violation of the admonition expressed in the divorce decree that the parties would not adversely influence the minor children against the other parent. The appellant's lack of financial resources, compared to the resources of the appellee, is also shown in the record. Accordingly, the appellant is entitled to an award of reasonable attorney fees, and, upon remand, a determination shall be made as to the specific amount to which the appellant is entitled. See Kinney v. Kinney, 172 W. Va. 284, 304 S.E.2d 870 (1983).

Upon all of the above, the final order of the Circuit Court of Kanawha County, entered on January 24, 1995, is reversed, and this action is remanded to that court for the entry of an order restoring custody of the older child of the parties to the appellant. In addition, upon remand, the circuit court shall enter an appropriate order or orders concerning counseling for both children, supervised visitation, child support and an award of attorney fees to the appellant, all in accord with the principles of this opinion.

Reversed and remanded.

Footnote: 1 The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996 and continuing until further order of this Court.

Footnote: 2 We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P., 182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote: 3 In one instance, Patrolman Jeff Williamson of the South Charleston Police Department was present at the appellant's residence when the children were being returned following visitation with the appellee. On that occasion, the children expressed a reluctance to return to their mother. However, as Patrolman Williamson testified before the family law master:

Each time the children would say that they didn't want to go back to the mother's residence, they would glance up to the father and glance at the police officer and glance to me and then back to the father as if to be . . . looking for his approval[.]

Moreover, Sergeant Kay West of the child abuse unit of the South Charleston Police Department testified before the family law master as follows, in reference to another occasion:

The older boy, Ali, had stated to me that whenever they would go to their father's to stay with their father, that his Dad was encouraging them to misbehave and be disruptive at home and to cause problems at home and it was like he was encouraging them or coaching them to do that.

Footnote: 4 In a letter dated September 15, 1992, to counsel for the appellant, Dr. Voltin stated:

I had the opportunity to evaluate Bijan on July 2, 1992. During this evaluation I questioned Bijan on behaviors that had been causing problems at home, specifically, running away from home, cursing at his mother, refusing to obey his mother or step- father. Bijan told me that while he was in Lexington with his father and Ali, he was told to call his mother and tell her that he and his brother did not wish to come home. He also told me that his father told him to run away from home . . . . With regard to Bijan's oppositional behavior noted by his mother and step- father and by the description of the interactions that have been occurring between Bijan and his father, it is my medical opinion that within a reasonable degree of psychiatric certainty, Bijan is being subjected to emotional abuse by his father. It is also my opinion, that should this abuse continue it may cause irreparable damage. I have not had the opportunity to evaluate Bijan's brother Ali [;] however, by Bijan's descriptions, it appears that Ali too is suffering from emotional abuse.

Footnote: 5 During his deposition, Dr. MacCallum stated as follows:

I feel certain that the same thing would happen to the younger child that has happened to the older if [the appellee] is allowed unsupervised visitation.

. . . .

So, realistically speaking, I can't recommend to the Court that [Bijan] be supervised in his visitations with his father until he is eighteen. But I would

certainly strongly recommend to the Court that supervision continue so long as there is a potential influence and I would leave the decision about when that occurs up to the people who are supervising the visitation.

Footnote: 6 It should be noted that on August 16, 1996, the appellant filed a motion to supplement the record herein with various educational and juvenile records concerning alleged acts of misconduct committed by Ali while residing with the appellee. This Court denied the motion to supplement but granted leave to proceed upon a similar motion in circuit court.

191 W. Va. 248, 445 S.E.2d 189

SUPREME COURT OF APPEALS OF WEST VIRGINIA

SHARON ALONZO, Plaintiff Below, Appellee

v.

JACQUELINE F., ADULT, RICK F., ADULT, Defendants Below, Appellees
PHILLIP F., INFANT, AND THE WEST VIRGINIA DEPARTMENT OF HEALTH ANDHUMAN RESOURCES, Defendants Below, Appellants
MARK E. GORMAN AND SHERRY B. GORMAN, Intervenor Appellees

NO. 22181
Submitted: May 11, 1994
Filed: May 20, 1994

SYLLABUS BY THE COURT

1. W. Va. Code, 49-6-5(a)(6), which deals with the disposition by a court of a case involving a neglected or abused child, provides, in part: "No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

2. Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

3. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syllabus Point 4, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

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Miller, Justice:

In this appeal, we are asked to determine if the natural mother of a young child can sign a consent to adopt after a petition for abuse and neglect has been filed against her and the circuit court has ordered temporary custody of the child placed in the Department of Health and Human Resources (Department).See footnote 1

The salient facts are as follows. On February 11, 1992, the Department filed a petition against Jacqueline F. and Rick F. It asked that their three-month-old child named Phillip F. be removed immediately from their home. This petition was based on allegations of abuse and neglect and the fact that the child was in imminent danger of physical harm. The circuit court on the same date ordered the child's removal and gave temporary custody to the Department.

An adjudicatory hearing was held on March 13, 1992, with an additional hearing being held on March 30, 1992. The circuit court, at this latter hearing, entered an order finding the child to be neglected and abused. It ordered that temporary custody remain with the Department and that the mother be given a psychiatric evaluation. The mother also was given a six-month noncustodial improvement period. A further hearing was set for May 4, 1992.

At that hearing, the Department filed a family case plan. The Department had placed temporary custody of the child with James and Alphia Ihle, who were approved foster parents. Mark E. and Sherry B. Gorman appeared by counsel at that hearing and asked leave to intervene. In March of 1991, Mr. and Mrs. Gorman adopted another child of Jacqueline F. They now sought to adopt Phillip. The circuit court allowed Mr. and Mrs. Gorman the right to attend future hearings, but advised that they were not to be considered as parties.

Two further status hearings were held with regard to the mother's improvement period. At the first hearing on October 5, 1992, the Department showed that the mother had not made any significant progress. However, the mother did express the desire to make a more diligent effort, and the circuit court extended the improvement period for three months. The second status hearing was held on

February 1, 1993. At that time, Mr. and Mrs. Ihle appeared by counsel and requested the right to intervene as they desired permanent guardianship of Phillip.

At a hearing on June 7, 1993, the Department presented evidence that the mother's improvement period was unsuccessful. Its recommendation was that Phillip's reunification with his natural parents would not be successful. The Department also recommended that permanent custody be placed with the Department in order that it might arrange for Phillip's adoption. The mother offered evidence to dispute the Department's contention that her improvement period was not satisfactorily completed. She also testified that if she could not regain custody of Phillip, she desired that Mr. and Mrs. Gorman be given custody.

The matter was continued to June 24, 1993, as Mr. and Mrs. Gorman's counsel indicated he wished to offer evidence that the mother had satisfactorily completed her improvement period. At this hearing, Mr. and Mrs. Gorman's attorney produced a written consent to adopt executed by the mother permitting Mr. and Mrs. Gorman to adopt Phillip. The circuit court decided that the mother's consent to adopt extinguished her parental rights. It held that this action mooted the question of whether she had satisfactorily completed her improvement period. The circuit court did not rule on Mr. and Mrs. Gorman's motion that Phillip be placed with them as foster parents pending his adoption.

At a subsequent hearing on September 10, 1993, the natural father of Phillip filed a consent to terminate his parental rights as authorized by W. Va. Code, 49-6-7 (1977).See footnote 2 The circuit court ruled that this termination vested the father's rights as the natural parent with the Department. The Department requested that it be given permanent custody of Phillip with leave to place the child for adoption. The circuit court declined to do this and awarded only temporary custody. It ruled that Mr. and Mrs. Gorman had an interest in the matter because of the mother's consent to adopt, but the Gormans were not parties to the proceedings. Therefore, the case was dismissed, and this appeal followed.

The Department argues that the mother's consent to adopt should be treated as a consensual termination of parental rights under W. Va. Code, 49-6-7.See footnote 3 This section is part of an article dealing with procedures for parental child abuse and neglect cases in W. Va. Code, 49-6-1, et seq. It is apparent that this type of an agreement placed as it is in the abuse and neglect article primarily is designed to permit a parent charged with abuse and neglect to surrender his parental rights to the Department rather than contest the charges. This type of termination was done by the natural father in this case who surrendered his parental rights to the Department.

The mother's consent to the adoption of Phillip by the Gormans must be viewed as a consent to adopt under W. Va. Code, 48- 4-3 (1985), which relates to procedures for the adoption of a child. Under W. Va. Code, 48-4-3(a), the consent of the mother and legal or determined father to adopt the child ordinarily is required. In W. Va. Code, 48-4-3(c), it is recognized that parental consent is not required if they "have been deprived of the custody of the person of such child by law[.]"See footnote 4 This section goes on to enumerate the persons who may give such consent. The logical inference is that where custody has been removed by law from a parent, consent is not only unnecessary, but legally insufficient. In this case, custody of Phillip was granted to the Department at the time of the filing of the abuse and neglect petition, which was before the consent to adopt was signed.

Of perhaps greater significance is the following language in W. Va. Code, 49-6-5(a)(6), which deals with the disposition by a court of a case involving a neglected or abused child and provides, in part: "No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final." This language is designed to forestall any attempt by anyone to obtain custody of an abused or neglected child through adoption until there is a final disposition of the abuse and neglect case by the circuit court. Thus, the consent to adopt given by Jacqueline F. is a nugatory act until the final disposition of this case.

From the foregoing provisions, we conclude that where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

In this case, the circuit court was correct in determining that the mother's rights to the child were terminated. This termination was not because of the consent to adopt, but because of the evidence from the Department that the mother could not demonstrate the capacity to correct the conditions that led to the initial abuse and neglect of Phillip.

On remand, the circuit court should place permanent custody of Phillip with the Department. It should direct the Department to consider whether the best interests of Phillip would be served by permitting him to be adopted by the foster parents, the Ihles, or to be adopted by the Gormans who previously adopted his sibling.

In the event that the Department determines that permanent placement with the Ihles is in the best interests of Phillip, an additional issue which should be considered is the right of Phillip to continued association with his sibling who was previously adopted by the Gormans. As this Court first recognized in Honaker v. Burnside, 182 W. Va. 448, 452, 388 S.E.2d 322, 325 (1989), the need for

"continued contact with other significant figures in . . . [a child's] life," may require the establishment of visitation rights between a child and other persons who qualify as "significant figures." (Footnote omitted). We explained that "'[v]isitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well being by permitting partial continuation of an earlier established close relationship.'" 182 W. Va. at 452, 388 S.E.2d at 325, quoting Looper v. McManus, 581 P.2d 487, 488 (Okla. Ct. App. 1978).

We expanded on these concepts in James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), by holding in Syllabus Point 4:

> "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact."

Similarly, in the event that Phillip and his sibling are not placed with the same family, the circuit court should consider whether it would be in the best interests of Phillip to establish and order a right to visitation between Phillip and his sibling in the interest of facilitating continued association between these two siblings.

Obviously, this is not an easy task, especially in a situation such as this where two competing sets of parents have strong emotional feelings invested in this child. But in such event, the Department and these parents should struggle mightily to put aside all rancor and work to foster a continued relationship between these children, with the Department providing continued services such as counseling to help facilitate this goal.

For the foregoing reasons, we affirm, in part, and reverse, in part, the final order of the Circuit Court of Jackson County and remand this case for further proceedings consistent with this opinion.

Affirmed, in part,
reversed, in part,
and remanded.

Footnote: 1This case is styled in the name of Sharon Alonzo who is the social worker for the Department that filed the initial petition in the circuit court. Due to

the sensitive nature of the allegations, we use initials instead of the last names of the parents and the child. See State v. George W.H., ___ W. Va. ___, ___ n.1, 439 S.E.2d 423, 427 n.1 (1993).

Footnote: 2W. Va. Code, 49-6-7, provides: "An agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud."

Footnote: 3For the text of W. Va. Code, 49-6-7, see note 2, supra.

Footnote: 4W. Va. Code, 48-4-3(c), states:

"If all persons entitled to parental rights of the child sought to be adopted are deceased or have been deprived of the custody of the person of such child by law, then and in such case, the written consent, acknowledged as aforesaid, of the legal guardian of such child or those having at the time the legal custody of the child shall be obtained and so presented, and if there be no legal guardian nor any person having the legal custody of the child, then such consent must be obtained from some discreet and suitable person appointed by the court or judge thereof to act as the next friend of such child in the adoption proceedings."

216 W. Va. 266, 607 S.E.2d 372

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

No. 31711

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: AMBER LEIGH J. & JAMES JACK J.

Appeal from the Circuit Court of Marion County
Honorable Fred L. Fox, II, Judge
Civil Action Nos. 01-JA-53, 02-JA-46 and 02-JA-47

AFFIRMED

Submitted: September 8, 2004
Filed: November 1, 2004

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

3. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened ....' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. "'Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991)." Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

5. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child

under W.Va.Code, 49-1-3(a) (1994)." Syllabus Point 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Marion County entered on June 5, 2003. Pursuant to that order, the circuit court terminated the parental rights of the appellant, Rose J.,[1] and her husband, Troy J. to their daughter, Amber Leigh J. Although the court did not terminate the parental rights of Rose and Troy to their son, James Jack J., the court did order that he remain in the legal and physical custody of the West Virginia Department of Health and Human Resources (hereinafter "DHHR"). The court further provided that Rose and Troy would be permitted to have supervised visitation with James. In this appeal, Rose contends that the circuit court erred by terminating her parental rights to Amber and granting permanent custody of James to the DHHR.[2]

This Court has before it the petition for appeal, the entire record, and the briefs of counsel. For the reasons set forth below, the final order is affirmed.

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989). For ease of reading this opinion, after the parties are initially identified, they will thereafter be referred to by their first name only.

[2]Troy appealed the circuit court's final order on February 25, 2004, and this Court refused his petition for appeal on June 24, 2004.

I.

FACTS

The DHHR began providing services to Rose and Troy in 1998, after receiving several reports that their children, Amber, born September 6, 1992, and James, born November 4, 1988, were suffering from chronic lice, were missing numerous days of school as a result thereof, and generally appeared dirty and unkempt. Upon visiting the family home, the DHHR found the house filthy with rotten food and beer cans everywhere. The house was also infested with roaches and black flies. Within a couple days, Rose improved the cleanliness of the home. However, approximately one month later, the DHHR received another referral concerning the family. This time it was reported that school books had been sent home with the children and were returned full of bugs. Over the next few years, the DHHR continued to receive similar reports.[3] Several attempts were made to help the family rectify the lice problem, but the parents refused the assistance offered to them by school personnel and the DHHR.

Finally, on December 18, 2001, the DHHR filed a petition alleging that both children had been the victims of chronic neglect since 1998. The DHHR sought legal but not

[3]There was an allegation made in 1999, that a bag a marihuana was found on top of the refrigerator in the home. The record also indicates that the parents have a history of alcohol abuse.

physical custody of the children at that time. An adjudicatory hearing was held on February 5, 2002, and the court found that Amber had been neglected.[4] However, the petition with regard to James was dismissed because there was no clear and convincing evidence that he had been abused or neglected.

Thereafter, on March 21, 2002, the DHHR was advised that Amber was still attending school while infested with lice. The DHHR concluded that the lice problem had escalated since the filing of the petition. Accordingly, Amber was removed from the home and placed in foster care.

Subsequently, on June 24, 2002, the DHHR was advised that Amber told her foster mother that she had been sexually abused. An investigation commenced. Amber indicated that she had been sexually abused by her mother, Rose, her father, Troy, her brother James, and a friend of her brother, Steven H. Amber was interviewed by two experts with several years experience in the field of child abuse. Her reports of being sexually abused were found to be credible. As a result, the DHHR amended its petition, adding allegations of sexual abuse of Amber. The DHHR also requested that James be removed from the home and placed in foster care because he was at risk of being sexually abused.

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[4]The evidence showed that Amber had chonic lice and enuresis. She had missed twenty-four days of school between September and December 2001.

A second adjudicatory hearing was held on September 12, 2002. The court made a finding of abandonment on the part of the parents since they had left the State after the children had been removed from their home and not maintained contact with the DHHR.[5] Nonetheless, the court granted a 90-day improvement period.

The disposition hearing was held on April 1, 2003. The court found that the parents had abandoned the children and refused to participate in a reasonable family case plan. The court concluded that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future. Accordingly, Rose and Troy's parental rights to Amber were terminated. In addition, James was placed in the permanent custody of the DHHR. However, pursuant to James' request, the parental rights of Rose and Troy to James were not terminated, and the court ordered that James could request supervised visits with his parents. The court also provided that visits between James and Amber would be permitted when Amber felt comfortable with the visitation.[6] The court's final order was entered on June 5, 2003, and this appeal followed.

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[5]Apparently, Rose and Troy left West Virginia because of Troy's job. He was transferred to another location out of state.

[6]Amber and James were placed in different foster homes because Amber reported that James had sexually abused her.

II.

STANDARD OF REVIEW

This Court explained in *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000) that, "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." Also, in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

We will discuss Rose's assignments of error as they relate to each child.

A. Amber

Rose first asserts that the circuit court erred by finding that she sexually abused Amber. She contends that Amber's statements about the sexual abuse are "suspect and unbelievable." In support of this contention, Rose notes that Amber told psychologist John Todd that her mother fondled her one time, but she told a DHHR worker that it happened several times. Rose points out that Amber's physical exam was normal, and that Amber never reported any sexual abuse until she was placed in foster care with another sexually abused child. Thus, Rose asserts that the court's finding that she sexually abused Amber was erroneous.

Having thoroughly reviewed the record in this case, we believe that there was clear and convincing evidence that Amber was sexually abused. In that regard, testimony was provided at the adjudicatory hearing by two experts in the field of child sexual abuse, Kerry Jones and John B. Todd. Each expert had several years experience interviewing and

evaluating sexually abused children.[7] Both experts opined that Amber had been sexually abused by her mother, father, brother, and a friend of her brother. The experts testified that they reached this conclusion based upon the details Amber provided. They explained that Amber gave specific and concrete details as to what happened, demonstrating that she had sexual knowledge that she could not have had unless she was abused.

Although Amber's physical examination was normal, both experts stated that this did not indicate that the sexual abuse had not occurred. The experts also pointed out that Amber suffers from enuresis, which is common among children who have been sexually abused. Finally, Amber's disclosure of the abuse to various persons was generally consistent. She did tell Kerry Jones that her mother fondled her many times, but indicated to John Todd that it happened only once. Nonetheless, both experts said they believed that Rose had sexually abused Amber. Furthermore, both experts testified that Amber told them that her mother knew that her father and brother were sexually abusing her, but did not try to stop them. Based on all the above, we cannot say that the court erred by finding that Rose sexually abused Amber or knowingly permitted such abuse to occur.

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[7]Kerry Jones has been employed by the West Virginia University Department of Pediatrics for seven years. He is Coordinator of the Child Abuse Services Team and routinely evaluates sexually abused children. John B. Todd is a licensed psychologist in private practice. He has twenty years of experience in the field of child abuse.

Likewise, we do not believe the court erred by terminating Rose's parental rights to Amber. This Court has held that:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

In addition, this Court has declared that:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened ...." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Finally,

> "Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

As set forth above, Rose has and continues to deny that Amber was sexually abused by her or anyone else despite clear and convincing evidence to the contrary. In *Doris S.*, this Court explained that:

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

197 W.Va. at 498, 475 S.E.2d at 874. Consequently, it is clear that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future.

Moreover, Rose did not utilize any of the services offered to her by the DHHR, nor did she participate in the family case plan. In fact, after her children were removed from her home, Rose left West Virginia because her husband obtained employment in another state. She did not maintain contact with the DHHR or even attempt to get in touch with her children. She did not attend any hearings until the final disposition, and she failed to appear at the multidisciplinary team meetings. Rose simply did not make any effort to be reunited with her children.

It is clear to this Court that Amber's welfare would be seriously threatened if she were returned to her mother's custody. Thus, we affirm the circuit court's order terminating Rose's parental rights to Amber.

B. James

Rose also contends that the court erred by adjudicating James as an abused and neglected child based on abandonment. Following the adjudicatory hearing held on September 12, 2002, the court entered an order finding that James was "an abandoned child as defined by the W.Va. Code." Rose contends that there was no evidence that she ever intended to forego all duties and relinquish all parental claims to James. She only left West Virginia to go live with her husband who had a job in Kansas[8] after James was removed from her custody. Thus, Rose concludes that the court erred by finding that she abandoned James.

[8]The record indicates that Rose and Troy also resided in North Carolina and Ohio during the course of these proceedings.

While Rose may not have "abandoned" James as defined by statute,[9] the record still supports a finding that James was an abused child. As discussed above, there was clear and convincing evidence presented at the adjudicatory hearing showing that Amber was sexually abused. While there was no evidence that James was also a victim of sexual abuse by his parents, this Court has held that:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Syllabus Point 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Thus, we affirm the circuit court's finding that James was abused within the meaning of W.Va. Code § 49-1-3(a).[10]

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[9]W.Va. Code § 49-6-9 (1980) defines "abandoned" as "to be without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child[.]" As noted above, Rose did not leave West Virginia until after James was removed from her custody. Therefore, we cannot say that she had abandoned her son at the time the amended petition was filed in this case.

[10]"This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syllabus Point 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Finally, Rose asserts that the circuit court abused its discretion by placing James in the permanent custody of the DHHR. Rose points out that James said that he wanted to return to his parents' home and that he did not want his parents' parental rights terminated. She further maintains that there was no evidence of abuse or neglect with regard to James, and it was not in his best interests to be placed in permanent foster care.

"In the Court's analysis of child abuse and neglect cases, we must take into consideration the rights and interests of all of the parties in reaching an ultimate resolution of the issues before us." *In re Jeffrey R.L.*, 190 W.Va. 24, 32, 435 S.E.2d 162, 170 (1993). Of course, "the best interests of the child are paramount." *Id.* In this case, the circuit court abided by James' wishes and did not terminate Rose's parental rights to him. In doing so, the Court relied upon W.Va. Code § 49-6-5(a)(6) (2002) which provides that, "Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights."[11]

Having considered all the facts and circumstances of this case as well as the applicable statutory and case law, we agree with the circuit court's decision not to terminate Rose's parental rights to James. We also agree with the circuit court's decision to place

[11]At the time of the disposition hearing, James was fourteen years old.

James in the permanent custody of the DHHR. As with Amber, we believe that James would be at risk for further abuse and neglect if he were returned to Rose's custody. Furthermore, as discussed above, Rose never made any effort to be reunited with her children. The circuit court's decision does allow Rose to continue visitation with James, thereby preserving the parent-child relationship. Thus, we cannot say that the circuit court erred by placing James in permanent foster care.

IV.

CONCLUSION

For the reasons set forth above, the final order of the Circuit Court of Marion County entered on June 5, 2003, is affirmed.

Affirmed.

217 W. Va. 707, 619 S.E.2d 220

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32520

IN RE: ALYSSA W. & SIERRA H.

Appeal from the Circuit Court of Mineral County
Honorable Phil Jordan, Judge
Civil Action Nos. 00-JA-37 & 38

REVERSED

Submitted: June 7, 2005
Filed: July 6, 2005

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE ALBRIGHT dissents and reserves the right to file a dissenting opinion.
JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS

"When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In Re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

In this case, Appellant Mildred H.[1] appeals the September 1, 2004, order of the Mineral County Circuit Court that granted a resumption of post-termination visitation of her child, Sierra H., with Sierra H.'s father, Appellee Robert H. For the reasons that follow, we reverse.

I.

FACTS

On December 15, 2000, the Department of Health and Human Resources (hereafter "DHHR") received information that Appellee Robert H. had sexually molested Alyssa W., who is the stepdaughter of Robert H. and the daughter of Appellant Mildred H. Alyssa W. is also the half-sister of Sierra H., who is the daughter of both Mildred H. and Robert H. At the time the abuse allegations came to light, Alyssa W. was nine years old and Sierra H. was about a year and two months old. The DHHR case worker who investigated the abuse allegations gave the following testimony in which she related her conversation with Alyssa concerning the alleged abuse:

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[1]We follow our practice in cases involving sensitive matters of using initials to identify the parties rather than their full names. *Matter of Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

> She told me that her stepfather, Bob, had pulled his pants down, laid [sic] on the couch and told her to sit on his legs. While she was sitting on his legs, he told her to put her hands on his penis, then told her to put her mouth on his penis. She stated that he also put his hands on his penis. She stated that his penis had hair around it. She described in detail what she had seen. She stated that something white had squirted out of his penis into her mouth and also got onto her hands. She stated that, I asked her what happened next and she said I went into the kitchen, and I asked her why she went to the kitchen, and she, she got tears in her eyes, tears welled up in her eyes, and she said to wash that stuff off of my hands. And, she said that it happened on Saturdays while her mother was working.

Also, according to the case worker, Alyssa W. told her that Robert H. had threatened to kill her if she told anyone. Further, Alyssa W. indicated that these instances of sexual abuse had occurred on at least two occasions.

Mildred H. initially did not believe these allegations and, as a result, the DHHR removed both Alyssa W. and Sierra H. from her home. Shortly thereafter, however, Mildred H. moved out of the home she shared with Robert H. She also received counseling and attended parenting classes as part of an improvement plan. Consequently, both Alyssa W. and Sierra H. were returned to Mildred H.

The circuit court found by clear and convincing evidence that Robert H.

sexually assaulted Alyssa W. Because Sierra H. lived in the same household as Alyssa W.,[2] and after finding that it was in Sierra H.'s best interests, the circuit court terminated Robert H.'s parental rights to Sierra H. by order of May 21, 2002. Subsequently, by order of July 19, 2002, the circuit court ordered that Robert H. would have post-termination supervised visitation with Sierra H. for three hours on three Saturdays a month.[3]

In 2001, Robert H. had been charged with one count of first degree sexual

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[2]According to W.Va. Code § 49-1-3 (1999),

> (a) "Abused child" means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child *or another child in the home*; or (2) Sexual abuse or sexual exploitation[.] (Emphasis added).

In Syllabus Point 2 of *In Re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court held:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994).

[3]The circuit court's order notes that Mildred H. would agree to one visit each month on Friday for two hours, but contended that each weekend was too frequent. At a May 29, 2002 hearing, counsel for Mildred H. indicated to the circuit court that his client "reluctantly agreed" to visitation one time per month for two hours, but that Robert H.'s pending criminal trial was a factor that should be considered on the issue of visitation.

assault, one count of first degree sexual abuse, and two counts of sexual abuse by a custodian resulting from his abuse of Alyssa. W. On March 26, 2003, he entered a plea of guilty to six counts of third degree sexual abuse and was sentenced to 90 days incarceration on each of the six counts to be served consecutively. He was incarcerated from August 4, 2003, to June 15, 2004. His last visitation with Sierra H. was just prior to his date of incarceration.

Following Robert H.'s release from incarceration, he moved for reinstatement of his visitation with Sierra H. which was opposed by Mildred H. After two hearings on the matter, the circuit court, by order of September 1, 2004, granted Robert H.'s motion for resumption of visitation with the visits to take place on the first and third Sundays of each month from 3:00 p.m. until 6:00 p.m., beginning on September 12, 2004. In its order, the circuit court held that Mildred H. had the burden of proof to show why visits between Sierra H. and Robert H. should not resume as previously ordered. In support of its decision to resume visitation, the circuit court found in part:

> (a) Visits between [Sierra H.] and Robert [H.] are in the best interests of [Sierra H.] This was shown from evidence that [Sierra H.] had always been excited about seeing her father, Robert [H.], for past visitation, so much so that [Sierra H.] would sometimes cry when she had to leave him or when she thought visitation was going to be cancelled or postponed. Evidence was also presented that during those visits [Sierra H.] and Robert [H.] played and interacted appropriately, got along well, and seemed to enjoy themselves. [Sierra H.] never showed any signs of being afraid of Robert[H.]
> (b) There was only a weak showing that visits between [Sierra H.] and Robert [H.] would be harmful to [Alyssa W.], considering that no one had spoken to [Alyssa W.] in the last

> year about her feelings concerning [Sierra H.] visiting with Robert [H.] Secondly, [Alyssa W.'s] past emotional and behavioral issues were not caused simply due to the continued interaction between [Sierra H.] and Robert [H.] Additionally, there was evidence that any fear that [Alyssa W.] had about [Sierra H.] visiting Robert [H.] could be alleviated by full disclosure of the visitation, trust-building between [Alyssa W.] and the supervisor of visitation, and further counseling.

Mildred H. appealed the circuit court's order. On September 9, 2004, this Court stayed visitation between Robert H. and Sierra H. pending resolution of this appeal.

II.

STANDARD OF REVIEW

Concerning our standard of review in abuse and neglect cases, in Syllabus 1 of *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

III.

DISCUSSION

To begin with, we find that the circuit court erred as a matter of law when it placed the burden on Mildred H. to show why visits between Sierra H. and Robert H. should not resume upon Robert H.'s release from incarceration. In the United States Supreme Court case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the Court held that a Washington state statute providing that any person could petition for visitation at any time, allowing the court to order visitation rights for any person when visitation served the best interests of the child, violated the substantive due process rights of the child's mother. The Court explained, "[t]he problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." 530 U.S. at 69, 120 S.Ct. at 2062. This Court recently explained *Troxel* as follows:

> Thus, *Troxel* instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis. It must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis.

In Re Grandparent Visitation of Cathy L. v. Brent R., No. 31864, slip op. at 18-19 (May 11, 2005). When we apply the legal principle in *Troxel* to the instant facts, we find that not only did the circuit court fail to give special weight to the determination of Mildred H., the fit

parent herein, regarding Sierra H.'s best interests, but it also improperly placed the burden on her to disprove that Robert H.'s visitation with Sierra H. is not in Sierra H.'s best interests.

In support of her determination that continued post-termination visitation of Robert H. with Sierra H. is not in Sierra H.'s best interests, Mildred H. avers that continued visitation would negatively impact Sierra H.'s relationship with her half-sister Alyssa W., the victim of Robert H.'s sexual abuse. In addition, Mildred H. asserts that continued visitation will unreasonably interfere with Sierra H. and Alyssa W.'s permanent placement with her. Finally, Mildred H. argues that a strong emotional bond has not been established between Sierra H. and Robert H. due to Sierra's age and the fact that she has not seen Robert H. for more than a year.

We agree with Mildred H. Concerning post-termination visitation, this Court held in Syllabus Point 5 of *In Re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995) that,

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

This Court's holding in *Christina L.* is a simple recognition that "even where termination of parental rights is justified, a continued relationship between parent and child by means of post-termination visitation may be valuable to the child's emotional well-being." *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 260, 470 S.E.2d 205, 214 (1996) (citation omitted). To that end, it should be emphasized that post-termination visitation "could be ordered not as a right of the parent, but rather as a right of the child." *In Re Christina L.*, 194 W.Va. at 455 n. 9, 460 S.E.2d at 701 n. 9 (citations omitted). Specifically, "[i]t is the right of the child to continued association with those with whom he shares an emotional bond which governs the decision." *In Re Billy Joe M.*, 206 W.Va. 1, 5 n. 10, 521 S.E.2d 173, 177 n. 10 (1999). Finally, this Court has stated that post-termination visitation should be allowed if it is in the children's best interest and "would not unreasonably interfere with their permanent placement." *State ex rel. Amy M.*, 196 W.Va. at 260, 470 S.E.2d at 214.

Regarding the issue of whether Sierra H. has established a strong emotional bond with Robert H., we are left with the definite and firm conviction that the circuit court committed error. The circuit court merely found, as set forth above, that,

> [Sierra H.] had always been excited about seeing her father, Robert [H.], for past visitation, so much so that [Sierra H.] would sometimes cry when she had to leave him or when she thought visitation was going to be cancelled or postponed. Evidence was also presented that during those visits [Sierra H.] and Robert [H.] played and interacted appropriately, got along well, and seemed to enjoy themselves. [Sierra H.] never showed any signs of being afraid of Robert [H.]

We believe that the evidence relied upon by the circuit court is inadequate to establish that Sierra H. developed a close emotional bond with Robert. H.[4] Frankly, the fact that Sierra was only fourteen months old when the instant proceedings commenced below and the fact that her subsequent contact with Robert H. was limited to regular visits are alone sufficient to cast serious doubt on the notion that Sierra H. developed the enduring and emotionally intimate relationship with Robert H. inherent in the phrase "close emotional bond."

Our cases indicate that a close emotional bond generally takes several years to develop. Thus, the possibility of post-termination visitation is usually considered in cases involving children significantly older than Sierra H. For example, in *In Re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996), this Court found that the circuit court was required to determine whether post-termination visitation should be granted where the child was five

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[4]Sierra H.'s guardian ad litem, who recommends continued visitation, although reduced from that ordered by the circuit court, opines in her brief to this Court:

> After visits three times per month from May 31, 2002 until August 4, 2003, certainly one can surmise that a bond had already formed by the time Robert H. was incarcerated, if it hadn't already, keeping in mind that Robert H. lived with Sierra H. from her birth until she was removed from the home at fourteen months of age. Although there is no evidence submitted by the service providers, common sense would tell you that children form bonds with their parents from birth. Robert H. had consistent contact with Sierra from birth until he was incarcerated.

Such speculation simply does not support a resumption of post-termination visitation under the facts of this case.

years of age. In *In the Matter of Elizabeth A.D. v. Hammack,* 201 W.Va. 158, 494 S.E.2d 925 (1997), this Court determined that the circuit court's denial of post-termination visitation was clearly erroneous in light of evidence of a close emotional bond between a 13-year-old child and her mother. Finally, in *In Re Billy Joe M., supra*, we found that remand was proper for an additional evaluation regarding the potential for post-termination visitation where one child was 12 and the other was 10 years of age at the time the neglect and abuse petition was filed.

Also, as set forth above, before ordering post-termination visitation, a circuit court should consider whether such visitation would unreasonably interfere with the child's permanent placement. It is apparent to this Court that continued visitation would unreasonably interfere with the household in which both Sierra H. and Alyssa W. reside with their mother. According to Alyssa W.'s guardian ad litem, she has indicated that she does not believe that Robert H. should have any further contact with her half-sister, Sierra H.[5] This is certainly understandable. Frankly, it is difficult for this Court to imagine that Sierra H.'s continued visitation with Robert H., the man who sexually abused Alyssa W., would not cause considerable and unreasonable stress and be disruptive to the sibling relationship shared by Sierra H. and Alyssa W. Obviously, such stress and disruption would negatively impact the entire household to the detriment of both Sierra H. and Alyssa W.

[5]Alyssa W.'s guardian ad litem has recommended that visitation between Sierra H. and Robert H. not be continued.

IV.

CONCLUSION

Therefore, based on our discussion above, this Court finds that there is an insufficient showing of a close emotional bond established between Sierra H. and Robert H. to support the resumption of post-termination visitation. Also, giving special weight to the determination of Mildred H., the fit parent herein, regarding Sierra H.'s best interests, and considering the unreasonable interference continued visitation is likely to have on Sierra H.'s permanent placement, we conclude that continued post-termination visitation is not appropriate in this case. Accordingly, we reverse the September 1, 2004, order of the Circuit Court of Mineral County that directed the resumption of post-termination visitation of Robert H. with Sierra H.

Reversed.

No. 32520 - *In re: Alyssa W. and Sierra H.*

FILED
July 7, 2005
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Chief Justice, concurring in part and dissenting in part:

I concur with the majority's conclusion that the trial court abused its discretion by placing the burden upon Mildred H. to demonstrate why visitation should not be resumed between the Robert H. and Sierra H. There is no basis upon which the trial court may impose such a burden. It was improper.

I dissent, however, to the extent that this Court has substituted its own judgment for that of the trial court on the issue of the best interests of the child. The trial court engaged in substantial investigation of the best interests of Sierra regarding potential *supervised* visitation with her father. The trial court sought to assure that the safety of the child would be protected by ordering that the visitation be supervised.[1] This Court has consistently cautioned that substantial discretion must be vested in trial courts and that this Court should not merely substitute its own judgment for that of the trial court in such discretionary matters. That is the essence of the abuse of discretion standard, a model given lip service by the majority but then hastily cast aside when the majority chose an opposite

[1]I note with disdain that the DHHR originally permitted Robert H.'s former girlfriend to serve as the supervisor of visitation. There is absolutely no justification for such a decision.

conclusion. Whether in the context of this case or the myriad of others confronted by this Court, this Court's variable application of the abuse of discretion standard is paralyzing that standard's effectiveness. As Justice Cleckley once observed, "the abuse of discretion standard has many faces and, in our application of the standard, it can range anywhere from careful scrutiny to almost no scrutiny." *State v. Head*, 198 W.Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Cleckley, J., concurring).

The question is not what this Court would have done if sitting on the trial court bench. The question is whether the trial court abused its discretion in the action it took. *See Bartles v. Hinkle*, 196 W.Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996) ("the question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction"). In *Gribben v. Kirk*, 195 W.Va. 488, 466 S.E.2d 147 (1995), this Court explained the abuse of discretion standard as follows: "Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." 195 W.Va. at 500, 466 S.E.2d at 159; *see also Gentry v. Mangum*, 195 W.Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995) ("In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them").

Aside from the initial use of a former girlfriend to supervise visitation, nothing in the record suggests that the trial court made a clear error of judgment in allowing such supervised visitation or that the trial court exceeded permissible choices, ignored a material factor, relied upon an improper one, or made a serious mistake in weighing the proper factors.

Accordingly, I dissent from the judgment of this Court depriving the trial judge of his discretion without cause.

216 W. Va. 266, 607 S.E.2d 372

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

No. 31711

FILED
November 1, 2004
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: AMBER LEIGH J. & JAMES JACK J.

Appeal from the Circuit Court of Marion County
Honorable Fred L. Fox, II, Judge
Civil Action Nos. 01-JA-53, 02-JA-46 and 02-JA-47

AFFIRMED

Submitted: September 8, 2004
Filed: November 1, 2004

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

3. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened ....' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. "'Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991)." Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

5. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child

under W.Va.Code, 49-1-3(a) (1994)." Syllabus Point 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Marion County entered on June 5, 2003. Pursuant to that order, the circuit court terminated the parental rights of the appellant, Rose J.,[1] and her husband, Troy J. to their daughter, Amber Leigh J. Although the court did not terminate the parental rights of Rose and Troy to their son, James Jack J., the court did order that he remain in the legal and physical custody of the West Virginia Department of Health and Human Resources (hereinafter "DHHR"). The court further provided that Rose and Troy would be permitted to have supervised visitation with James. In this appeal, Rose contends that the circuit court erred by terminating her parental rights to Amber and granting permanent custody of James to the DHHR.[2]

This Court has before it the petition for appeal, the entire record, and the briefs of counsel. For the reasons set forth below, the final order is affirmed.

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989). For ease of reading this opinion, after the parties are initially identified, they will thereafter be referred to by their first name only.

[2]Troy appealed the circuit court's final order on February 25, 2004, and this Court refused his petition for appeal on June 24, 2004.

I.

FACTS

The DHHR began providing services to Rose and Troy in 1998, after receiving several reports that their children, Amber, born September 6, 1992, and James, born November 4, 1988, were suffering from chronic lice, were missing numerous days of school as a result thereof, and generally appeared dirty and unkempt. Upon visiting the family home, the DHHR found the house filthy with rotten food and beer cans everywhere. The house was also infested with roaches and black flies. Within a couple days, Rose improved the cleanliness of the home. However, approximately one month later, the DHHR received another referral concerning the family. This time it was reported that school books had been sent home with the children and were returned full of bugs. Over the next few years, the DHHR continued to receive similar reports.[3] Several attempts were made to help the family rectify the lice problem, but the parents refused the assistance offered to them by school personnel and the DHHR.

Finally, on December 18, 2001, the DHHR filed a petition alleging that both children had been the victims of chronic neglect since 1998. The DHHR sought legal but not

[3]There was an allegation made in 1999, that a bag a marihuana was found on top of the refrigerator in the home. The record also indicates that the parents have a history of alcohol abuse.

physical custody of the children at that time. An adjudicatory hearing was held on February 5, 2002, and the court found that Amber had been neglected.[4] However, the petition with regard to James was dismissed because there was no clear and convincing evidence that he had been abused or neglected.

Thereafter, on March 21, 2002, the DHHR was advised that Amber was still attending school while infested with lice. The DHHR concluded that the lice problem had escalated since the filing of the petition. Accordingly, Amber was removed from the home and placed in foster care.

Subsequently, on June 24, 2002, the DHHR was advised that Amber told her foster mother that she had been sexually abused. An investigation commenced. Amber indicated that she had been sexually abused by her mother, Rose, her father, Troy, her brother James, and a friend of her brother, Steven H. Amber was interviewed by two experts with several years experience in the field of child abuse. Her reports of being sexually abused were found to be credible. As a result, the DHHR amended its petition, adding allegations of sexual abuse of Amber. The DHHR also requested that James be removed from the home and placed in foster care because he was at risk of being sexually abused.

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[4]The evidence showed that Amber had chonic lice and enuresis. She had missed twenty-four days of school between September and December 2001.

A second adjudicatory hearing was held on September 12, 2002. The court made a finding of abandonment on the part of the parents since they had left the State after the children had been removed from their home and not maintained contact with the DHHR.[5] Nonetheless, the court granted a 90-day improvement period.

The disposition hearing was held on April 1, 2003. The court found that the parents had abandoned the children and refused to participate in a reasonable family case plan. The court concluded that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future. Accordingly, Rose and Troy's parental rights to Amber were terminated. In addition, James was placed in the permanent custody of the DHHR. However, pursuant to James' request, the parental rights of Rose and Troy to James were not terminated, and the court ordered that James could request supervised visits with his parents. The court also provided that visits between James and Amber would be permitted when Amber felt comfortable with the visitation.[6] The court's final order was entered on June 5, 2003, and this appeal followed.

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[5]Apparently, Rose and Troy left West Virginia because of Troy's job. He was transferred to another location out of state.

[6]Amber and James were placed in different foster homes because Amber reported that James had sexually abused her.

II.

STANDARD OF REVIEW

This Court explained in *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000) that, "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." Also, in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

We will discuss Rose's assignments of error as they relate to each child.

A. Amber

Rose first asserts that the circuit court erred by finding that she sexually abused Amber. She contends that Amber's statements about the sexual abuse are "suspect and unbelievable." In support of this contention, Rose notes that Amber told psychologist John Todd that her mother fondled her one time, but she told a DHHR worker that it happened several times. Rose points out that Amber's physical exam was normal, and that Amber never reported any sexual abuse until she was placed in foster care with another sexually abused child. Thus, Rose asserts that the court's finding that she sexually abused Amber was erroneous.

Having thoroughly reviewed the record in this case, we believe that there was clear and convincing evidence that Amber was sexually abused. In that regard, testimony was provided at the adjudicatory hearing by two experts in the field of child sexual abuse, Kerry Jones and John B. Todd. Each expert had several years experience interviewing and

evaluating sexually abused children.[7] Both experts opined that Amber had been sexually abused by her mother, father, brother, and a friend of her brother. The experts testified that they reached this conclusion based upon the details Amber provided. They explained that Amber gave specific and concrete details as to what happened, demonstrating that she had sexual knowledge that she could not have had unless she was abused.

Although Amber's physical examination was normal, both experts stated that this did not indicate that the sexual abuse had not occurred. The experts also pointed out that Amber suffers from enuresis, which is common among children who have been sexually abused. Finally, Amber's disclosure of the abuse to various persons was generally consistent. She did tell Kerry Jones that her mother fondled her many times, but indicated to John Todd that it happened only once. Nonetheless, both experts said they believed that Rose had sexually abused Amber. Furthermore, both experts testified that Amber told them that her mother knew that her father and brother were sexually abusing her, but did not try to stop them. Based on all the above, we cannot say that the court erred by finding that Rose sexually abused Amber or knowingly permitted such abuse to occur.

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[7]Kerry Jones has been employed by the West Virginia University Department of Pediatrics for seven years. He is Coordinator of the Child Abuse Services Team and routinely evaluates sexually abused children. John B. Todd is a licensed psychologist in private practice. He has twenty years of experience in the field of child abuse.

Likewise, we do not believe the court erred by terminating Rose's parental rights to Amber. This Court has held that:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

In addition, this Court has declared that:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened ...." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Finally,

> "Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

As set forth above, Rose has and continues to deny that Amber was sexually abused by her or anyone else despite clear and convincing evidence to the contrary. In *Doris S.*, this Court explained that:

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

197 W.Va. at 498, 475 S.E.2d at 874. Consequently, it is clear that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future.

Moreover, Rose did not utilize any of the services offered to her by the DHHR, nor did she participate in the family case plan. In fact, after her children were removed from her home, Rose left West Virginia because her husband obtained employment in another state. She did not maintain contact with the DHHR or even attempt to get in touch with her children. She did not attend any hearings until the final disposition, and she failed to appear at the multidisciplinary team meetings. Rose simply did not make any effort to be reunited with her children.

It is clear to this Court that Amber's welfare would be seriously threatened if she were returned to her mother's custody. Thus, we affirm the circuit court's order terminating Rose's parental rights to Amber.

B. James

Rose also contends that the court erred by adjudicating James as an abused and neglected child based on abandonment. Following the adjudicatory hearing held on September 12, 2002, the court entered an order finding that James was "an abandoned child as defined by the W.Va. Code." Rose contends that there was no evidence that she ever intended to forego all duties and relinquish all parental claims to James. She only left West Virginia to go live with her husband who had a job in Kansas[8] after James was removed from her custody. Thus, Rose concludes that the court erred by finding that she abandoned James.

[8]The record indicates that Rose and Troy also resided in North Carolina and Ohio during the course of these proceedings.

While Rose may not have "abandoned" James as defined by statute,[9] the record still supports a finding that James was an abused child. As discussed above, there was clear and convincing evidence presented at the adjudicatory hearing showing that Amber was sexually abused. While there was no evidence that James was also a victim of sexual abuse by his parents, this Court has held that:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Syllabus Point 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Thus, we affirm the circuit court's finding that James was abused within the meaning of W.Va. Code § 49-1-3(a).[10]

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[9]W.Va. Code § 49-6-9 (1980) defines "abandoned" as "to be without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child[.]" As noted above, Rose did not leave West Virginia until after James was removed from her custody. Therefore, we cannot say that she had abandoned her son at the time the amended petition was filed in this case.

[10]"This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syllabus Point 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

Finally, Rose asserts that the circuit court abused its discretion by placing James in the permanent custody of the DHHR. Rose points out that James said that he wanted to return to his parents' home and that he did not want his parents' parental rights terminated. She further maintains that there was no evidence of abuse or neglect with regard to James, and it was not in his best interests to be placed in permanent foster care.

"In the Court's analysis of child abuse and neglect cases, we must take into consideration the rights and interests of all of the parties in reaching an ultimate resolution of the issues before us." *In re Jeffrey R.L.*, 190 W.Va. 24, 32, 435 S.E.2d 162, 170 (1993). Of course, "the best interests of the child are paramount." *Id.* In this case, the circuit court abided by James' wishes and did not terminate Rose's parental rights to him. In doing so, the Court relied upon W.Va. Code § 49-6-5(a)(6) (2002) which provides that, "Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights."[11]

Having considered all the facts and circumstances of this case as well as the applicable statutory and case law, we agree with the circuit court's decision not to terminate Rose's parental rights to James. We also agree with the circuit court's decision to place

[11]At the time of the disposition hearing, James was fourteen years old.

James in the permanent custody of the DHHR. As with Amber, we believe that James would be at risk for further abuse and neglect if he were returned to Rose's custody. Furthermore, as discussed above, Rose never made any effort to be reunited with her children. The circuit court's decision does allow Rose to continue visitation with James, thereby preserving the parent-child relationship. Thus, we cannot say that the circuit court erred by placing James in permanent foster care.

IV.

CONCLUSION

For the reasons set forth above, the final order of the Circuit Court of Marion County entered on June 5, 2003, is affirmed.

Affirmed.

196 W. Va. 251, 470 S.E.2d 205

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA EX REL. AMY M., SHANE B., II, JESSE B., MATTHEW B., AND TRAVIS B., Petitioner

v.

HONORABLE TOD J. KAUFMAN, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, BETTY JO B., AND SHANE B., Respondents

No. 23212

Submitted: February 6, 1996

Filed: April 8, 1996

SYLLABUS BY THE COURT

1. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

2. Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code 49-6-2(b) and 49-6-5(c) (1995).

3. There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

For the State of West Virginia:

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For Amy M., Shane B. II, Jesse B., and Travis B.:

Mary H. Sanders, Kathleen H. Jones, Huddleston, Bolen, Beatty, Porter & Copen, Charleston, West Virginia

For Betty Jo B.:

Herbert L. Hively II, Johnson Law Offices, Charleston, West Virginia
Dina H. Mohler, Kay, Casto, Chaney, Love & Wise, Charleston, West Virginia

For Shane B.:

Robin Godfrey, Charleston, West Virginia

Workman, Justice:
This case is before the Court on a petition for a writ of prohibition and mandamus against the Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, by the Petitioners, Amy M., Shane B., II, Jesse B., Matthew B., and Travis B., See footnote 1 all children who are the subjects of the underlying abuse and neglect proceedings, and the State of West Virginia. Betty Jo B. and Shane B., parents of the petitioning minors, are also named as Respondents. Both the State and the children's guardian ad litem See footnote 2 seek relief from a November 20, 1995 order, in which the Respondent judge ordered a post-adjudicatory improvement period for the Respondent mother, Betty Jo B. Petitioners contend that an additional improvement period is not in the best interests of the children. They ask this Court to prohibit the circuit court from enforcing the order granting a post-adjudicatory improvement period, and to order the circuit court to set this matter immediately for final disposition pursuant to West Virginia Code 49-6-5 (1995). We agree with the petitioners' contentions, and award the writ requested.

I.
FACTS

Betty Jo B. is a twenty-three-year-old mother of five, now pregnant with her sixth child. The children range in age from two to seven. Shane B. is the father of four of the children, and is alleged to be the father of the fifth as well. The parents are separated, and have not lived together since shortly after the birth of the youngest children, who are twins. Shane B. has had no contact with any of the children since June, 1994.

From the standpoint of legal intervention, this case began on February 1, 1994, when the police responded to a call from a family friend, who stated that he was caring for two of the children and refused to do so any longer. The friend related that Mrs. B. had asked him to watch the children while she went out to cash a check. When she had not returned by the following day, he called the police. The

police found the children living in conditions they described as "beyond belief," including human excrement in the toilet, all over a potty chair and smeared on the walls; broken glass, trash, food, and dirty diapers strewn throughout the house; a filthy bathroom; urine-stained beds with no sheets; and a large kitchen knife on the bedroom floor. The children, then aged eight months to five years, had no food, and what little clothing they had was extremely dirty. All were badly infested with head lice, and ill to varying degrees. The police took emergency custody of the children immediately.

Prior to this incident, the West Virginia Department of Health and Human Resources ("DHHR") had documented several incidents of police, medical, and social service intervention dating back to April 15, 1991. Relatives and neighbors had taken the children to local hospitals more than once, posing as Betty Jo B. Apparently the mother was afraid to seek medical attention for them, fearing reprisals from the welfare authorities. At one time the older children were sleeping on a box on the floor, while the infant twins, who had no cribs, slept in a car seat and a baby swing. There were also reports of numerous abandonments for days at a time without adequate provision for food, diapers, or supervision of the children. A child protective services worker who was sent to the home in July, 1993, testified to deplorable living conditions at that time, including no beds, no food, ill children, and generally unsanitary conditions. A nurse who examined Amy M. in November, 1993, testified that the child had a urinary tract infection so severe that it had the potential for serious long-term consequences. To make matters worse, she was wearing dirty clothing and "filthy little underpanties," and was accompanied to the emergency room by a mother who was so obviously intoxicated that the nurse felt it necessary to call a neighbor and a cab just to get the child home safely.

The Circuit Court of Kanawha County granted an initial pre-adjudicatory improvement period, then extended it on three subsequent occasions, so that eventually improvement periods spanned almost two years, from February 10, 1994, through November 1, 1995. We review the conditions and results of those improvement periods in some detail here, as these facts are relevant to our decision.

The circuit court issued its first order on February 10, 1994, ten days after the children were removed from the home and six days after a petition alleging abuse and neglect was filed. Both parents were represented by counsel, and both waived their right to a preliminary hearing. The Circuit Court granted temporary custody to DHHR, directed DHHR to prepare a family case plan to identify existing problems and propose a course of action within thirty days, and ordered a psychological evaluation of the mother, substance abuse evaluations of both parents, parenting classes for the mother, and medical and psychological

evaluations of each of the children. The court granted the parents' motion for an improvement period, to begin February 10, 1994, and end May 10, 1994. During this time, the parents were directed to comply with the investigations and evaluations outlined in the order, and were granted supervised visitation with the children for one hour each week.

The court held a status review on May 27, 1994, soon after the end of the first improvement period. The court observed that both parents had visited the children consistent with the original order, that the mother had obtained a psychological evaluation and had been participating in parenting classes, and that the father had obtained a substance abuse evaluation. Based on this progress, the court expanded both parents' visitation with the children to include in-home unsupervised overnight visitation when DHHR found it to be in the best interests of the children. The circuit court then extended the improvement period for an additional six months, to expire on November 30, 1994, with a status review on June 29, 1994.

The record does not include any documentation from the conference scheduled for June 29, but the next order entered, on November 2, 1994, near the end of the second improvement period, indicates deterioration in the parents' progress toward reunification with their children. Betty Jo B. continued to visit the children, but her participation in parenting class had tapered off. Shane B. had not attended parenting classes at all, and had not visited the children since June. During one unsupervised visit around this time, Betty Jo B. left six-year-old Amy and the one-year-old twins at her mother's house while she took Jesse, age two, and Shane, age four, to a bar. Amy went out on her own, searching for her mother in the bars. The children also reported seeing a boyfriend strike their mother, and the twins returned from one visit with unexplained knots on their heads. The court in the November order tightened up the restrictions on visitation considerably, and set out definite goals to be accomplished prior to the expiration of the improvement period. See footnote 3 It again extended the improvement period, but scheduled an adjudicatory hearing on January 13, 1995. Until this point, the circuit court appears to have adequately monitored the case, and timely reviewed ongoing progress. See footnote 4

There was no adjudicatory hearing on January 13, 1995, but the next order entered, dated March 25, 1995, recites that the improvement period was extended. In the March order, Judge Kaufman found that Betty Jo B. had complied with the terms set out in the November order, and directed her to enroll in a counseling program at DHHR's expense. He also directed continuation of in-home services through Children's Home Society. The judge increased Ms. B's visitation to two hour-long visits per week, with additional overnight visits at least twice each month. In connection with the overnight visits, the court ordered DHHR to provide suitable bedding for the children, and to assist the mother in arranging for

structured activities.

Unfortunately, the court's optimism turned out to be unmerited. The following month, after an overnight visit on April 13-14, 1995, the assistant prosecuting attorney for Kanawha County filed a motion to terminate overnight visitation and to set the matter down for adjudication. The motion alleged that although Ms. B. had indicated that she had a playpen for the younger children to sleep in, she did not, and that the children slept on the bare floor despite the efforts of DHHS to have them sleep on blankets. In addition, Jesse had an asthma attack triggered by exposure to cigarette smoke, and the mother was not even present for the whole visit.

It was not until August 29, 1995, four months after the alleged incident, that an adjudicatory hearing was held. See footnote 5 The record before us suggests that this was the first and only evidentiary hearing in a matter that has now gone on for over two years. See footnote 6 At this hearing, Judge Kaufman heard the testimony of Betty Jo B. and witnesses for the State. Based on the evidence adduced at the adjudicatory hearing, the court appears to have concluded that the mother's inability to obtain suitable housing was at the heart of the problem. He ordered DHHR to pay $906 to the public housing authority to cover the cost of damages See footnote 7 to housing she had occupied before becoming homeless. Rather than terminate the improvement period (which had been in effect since February 10, 1994, and was now apparently open-ended), the court directed the State to continue to allow weekly visits by the mother (and the father "if he wishes") and to arrange additional weekend visits with the mother. The order does not specify whether these visits should be supervised. The court took the issue of abuse and neglect under advisement, pending an additional hearing set for September 26, 1995, for arguments of counsel based on the evidence adduced. No hearing took place, however, until November 1, 1995.

Finally, on November 20, 1995, fully one year and nine months after the children were removed from the home, and having exhausted nearly every possibility of parent education and rehabilitation with little or no improvement apparent upon the record, the court made a finding of neglect under West Virginia Code 49-6-2(c) (1995). On the same day, over the vehement objection of both the State and the guardian ad litem, the judge granted a post-adjudicatory improvement period of unspecified duration and with no direction regarding terms or conditions. See footnote 8 Counsel for the State and the guardian ad litem represented to this Court during oral argument that motions were made to reconsider the ruling and to proceed to final disposition, along with requests to present further evidence, including the testimony of a therapist who has been working with the three oldest children. According to counsel, during oral argument before this Court, these motions were denied. See footnote 9

II.
CRITERIA FOR AWARDING A WRIT OF PROHIBITION

Prohibition is an appropriate remedy in cases in which the lower court has no jurisdiction over the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers. W.Va. Code 53-1-1 (1994). Here, the trial court has jurisdiction, so we look to syllabus point one of Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979):

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Id. at 112, 262 S.E.2d at 745. Thus "prohibition may be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy." State ex rel. Chafin v. Halbritter, 191 W.Va. 741, 743-44, 448 S.E.2d 428, 430-31 (1994) (citations omitted). Further, this Court has recognized that "[o]ur modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irremediable prejudice may result from lack of an adequate interlocutory review." McFoy v. Amerigas, Inc., 170 W.Va. 526, 532, 295 S.E.2d 16, 22 (1982); accord, Chafin, 191 W.Va. at 744, 448 S.E.2d at 431.

As we said in In re Carlita B., 185 W.Va. 613, 623, 408 S.E.2d 365, 375 (1991), the early, most formative years of a child's life are crucial to his or her development. There would be no adequate remedy at law for these children were they permitted to continue in this abyss of uncertainty. We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement. The legislature has recognized this by limiting the extent and duration of improvement periods a court may grant in an abuse and neglect case. See W.Va. Code 49-6-2(b). Because the lower court violated this clear statutory mandate, and irremediable prejudice may result from the delays inherent in waiting to appeal a final disposition, we find that prohibition is an appropriate remedy in this case. Thus, prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code 49-6-2(b) and 49-6-5(c) (1995).

III.

IMPROVEMENT PERIOD

At issue in this case is whether improvement periods in abuse and neglect cases, through extensions and procedural delays, in the face of little evidence indicating real progress, can eventually become so protracted that they violate "clear statutory, constitutional, or common law mandate." Hinkle, 164 W.Va. at 112, 262 S.E.2d at 745, Syl. Pt. 1. West Virginia Code 49-6-2(b) (1995), in effect during this case, authorizes any parent or custodian to request "an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based." (emphasis added). Further, the statute during the time period relevant to these proceedings directed the court to "allow one such improvement period unless it finds compelling circumstances to justify a denial thereof . . . ." (emphasis added). This provision sets out a clear statutory mandate that a pre-adjudicatory improvement period not exceed a maximum of twelve months. See footnote 10

Furthermore, we find it important to note that House Bill 4138, passed by the West Virginia Legislature on March 9, 1996, and effective June 8, 1996, revises our law regarding improvement periods by amending West Virginia Code 49-6-2(b) and 49-6-5(c), and adding new 49-6-12. The Legislature's enactment of these provisions establishes a clear statutory mandate to limit pre-adjudicatory improvement periods to three months, and post-adjudicatory improvement periods to six months, with a three-month extension of a post-adjudicatory improvement period possible under certain defined circumstances.

The goal of an improvement period is to facilitate the reunification of families whenever that reunification is in the best interests of the children involved. Both the statute and our case law grant trial courts considerable flexibility in developing meaningful improvement periods designed to address the myriad possible problems causing abuse and neglect. We have held repeatedly, however, that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . ." Syl. Pt. 1, in part, In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980); accord, In re Carlita B., 185 W.Va. 613, 629, 408 S.E.2d 365, 381 (1991).

As we explained in West Virginia Dept. of Human Serv. v. Peggy F., 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting." Thus, a judgment regarding the success of an improvement period is within the court's discretion regardless of

whether or not the individual has completed all suggestions or goals set forth in family case plans.

The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute, . . . the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan.

Carlita B., 185 W.Va. at 626, 408 S.E.2d at 378 (quoting, in part, Peggy F., 184 W.Va. at 64, 399 S.E.2d at 464).

When one year had passed from the time the children in this case were removed from the home, this matter was ripe for adjudication. See footnote 11 At that time, although Betty Jo B. had attended her visitations and sporadically attended court-ordered parenting classes, she had made little progress toward being able to provide the children with a safe and healthy living environment. At some point during the improvement period she became homeless. Toward the end of that first year, unsupervised visitation was not going smoothly, and the circuit court still felt the need to place detailed restrictions on visitation, as evidenced by the November 2, 1994, order. When the court set an adjudicatory hearing for January 13, 1995, it acted appropriately.

The problem, as pointed out in Carlita B., is the tendency of cases such as these to fall through the cracks, as this one did. 185 W.Va. at 623, 408 S.E.2d at 375. As noted above, no evidentiary hearing was held in this case until eight months after it was originally scheduled, and the determination of neglect came two months later, on November 20, 1995. Such delays are in clear contravention of the directive in West Virginia Code 49-6-2(d) and case law that matters involving the abuse and neglect of children take precedence over almost every other matter with which a court deals on a daily basis, and such proceedings must be resolved as expeditiously as possible. See In re Carlita B., 185 W.Va. at 625, 408 S.E.2d at 377.

To further postpone any permanency decision with regard to these children would be unconscionable. The legislature provided for a pre-adjudicatory improvement period of three to twelve months, and, if appropriate, a post-adjudicatory improvement period of up to twelve months. W.Va. Code 49-6-2(b) & 49-6-5(c). Thus, the pre-adjudicatory improvement period should not have been extended beyond a total of twelve months under any circumstances.

Instead, in this case, five young children have lived in foster care limbo since February 1, 1994, more than two years of their young lives. The relationship between the foster parents and the Respondent mother has grown hostile. The

children's behavior has deteriorated in recent months as they feel the uncertainty surrounding their situation. The circuit court's almost total focus on housing in the latter part of the improvement period appears to have ignored more significant parenting problems. Betty Jo B. had housing when this proceeding was initiated, and it did not appear to have aided her parenting skills. The greater concern should have been the mother's ambivalent feelings toward at least one of the children, her pattern of absenting herself from them during visitations, and her lack of cooperation with the plan designed to reunify her with her children. The father's lack of interest seems even more compelling. Upon remand, these and other issues relating to parenting ability should be examined closely.

Because the circuit court's grant of an extended pre-adjudicatory improvement period violated the clear statutory mandate of West Virginia Code 49-6-2(b), because its handling of this case violated the clear mandate of this Court in Carlita B. that matters involving the abuse and neglect of children shall take precedence over almost every other matter and must be resolved as expeditiously as possible, see 185 W.Va. at 626, 408 S.E.2d at 378, and because the record demonstrates the children's emotional well-being is rapidly deteriorating, we grant the writ of prohibition to prevent the circuit court of Kanawha County from enforcing its order of an additional post-adjudicatory improvement period in this case. Although West Virginia Code 49-6-5(c) allows a court to grant a post-adjudicatory improvement period of up to twelve months, See footnote 12 the Respondent mother in this case has, as a practical matter, already been granted a total improvement period in excess of the maximum combined pre- and post-adjudicatory improvement periods, and is therefore not entitled to any further improvement periods.

A circuit judge overseeing a case such as this has an immensely difficult task, for in many abuse and neglect cases there is a genuine emotional bond as well as the natural biological bond between parent and child which courts are understandably hesitant to break if there is hope of meaningful change. In most abuse and neglect cases, the parent(s) may have redeeming qualities that create such hope that they will be able to make the necessary changes to become adequate parents. As we said in Carlita B.,

> Certainly many delays [in abuse and neglect cases] are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied overnight. The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them.

> The bulk of the most aggravated procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children--the most voiceless segment of our society--aren't left to languish in a limbo-like state during a time most crucial to their human development.
>
> 185 W.Va. at 623, 408 S.E.2d at 375.

Although it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.

Justice Cleckley's recent opinion in In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995), helped forge the way for courts to recognize that, even where termination of parental rights is justified, a continued relationship between parent and child by means of post-termination visitation may be valuable to the child's emotional well-being. 194 W.Va. at 448, 460 S.E.2d at 694, syl. pt. 5. In the event the court below determines that the parental rights are to be terminated, it may still consider such a continued relationship if it is in the child's or children's best interests, and would not unreasonably interfere with their permanent placement.

IV.
ADDITIONAL EVIDENCE

A second issue is presented by the guardian ad litem's representation during oral argument before this Court that on November 20, 1995, the date the court issued its finding of neglect and ordered the post-adjudicatory improvement period, the respondent judge denied the guardian ad litem's motion to reconsider and her offer to adduce additional evidence. See footnote 13 As we said in Christina L.:

> There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. W.Va. Code, 49-6-5 (1992), states that the circuit court shall give "both the petitioner and respondents an opportunity to be heard" when proceeding to the

> disposition of the case. . . . This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

194 W.Va. at 453, 460 S.E.2d at 699. In Christina L., we held that the trial court's refusal to allow the guardian ad litem to submit a proposed dispositional plan at the close of a dispositional hearing was reversible error. Id. at 454, 460 S.E.2d at 700.

Specific guidelines for guardians ad litem in abuse and neglect cases were set out by Justice McHugh in In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162, (1993). Included in those guidelines are the following:

> 16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.
>
> . . .
>
> 25. File a motion for modification of the dispositional order if a change of circumstances occurs for the child which warrants a modification or represent the child if said motion for modification is filed by any other party.

Id. at 41-42, 435 S.E.2d at 179-80. A trial court should not unreasonably deny a guardian the opportunity to fulfill these responsibilities. However, we do not reach this issue in the instant case, because it was not properly raised prior to oral argument, and because such evidence can be taken on remand.

Based on the foregoing, we hereby issue the writ of prohibition, prohibiting the Circuit Court of Kanawha County from enforcing its order of a post-adjudicatory improvement period in this case, and ordering it hear evidence and to proceed to final disposition as soon as possible pursuant to West Virginia Code 49-6-5. Should the court conclude that termination of parental rights is necessary, it should consider whether post-termination visitation is in the children's best interests.

Writ Granted as Moulded.

Footnote 1 We follow our past practice in domestic and juvenile cases that involve sensitive facts, and do not use the last names of the parties. See State ex rel. West

Virginia Dep't of Human Servs. v. Cheryl M., *177 W.Va. 688, 689, 356 S.E.2d 181, 182 n.1 (1987).*

Footnote 2 We have previously indicated that a guardian ad litem "must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children[,]" including "exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary." Syl. Pt. 3, in part, In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991) (emphasis in original). Guardians ad litem, however, frequently fail to carry out this responsibility. The guardian ad litem in the instant case is to be commended for being aggressive in her representation of these children.

Footnote 3 The November 2, 1994, order provided:
Visitation with the respondent mother may be supervised by the persons providing in-home parenting class, if necessary for the supervision of the children. Further the visitations shall take place at the Department if the persons providing in-home parenting determine that the home is unfit for visitation. However, the visits may be conducted in the home if Ms. B[][.] renders the home safe for the children in the home. During the visitation, Ms. B[][.] shall demonstrate the following:

1. *She shall show adequate supervision of all children;*
2. *She shall have food available for the children;*
3. *Jeff Blizzard [Ms. B.'s boyfriend] shall not be present at the time of the visitation;*
4. *The mother shall insure that the home is safe f or the children; and*
5. *The mother shall not consume or permit any other person to consume alcohol in the presence of the children.*

Footnote 4 "Subsequent to the initial formulation of the improvement plan and family case plans, it is imperative that the progress of the parent(s) toward the achievement of enumerated goals be monitored closely." In re Carlita B., 185 W.Va. 613, 625, 408 S.E.2d 365, 377 (1991). The circuit court initially adhered to this requirement, but eventually lapsed into a pattern of continuing to extend the improvement period even when evidence of any real improvement was clearly diminishing.

Footnote 5 *The term "adjudicatory hearing" refers to the hearing at which the court determines whether a child is "abused or neglected." See W. Va. Code 49-6-2(c) (1995).*

Footnote 6 *The parents in this case waived their right to a preliminary hearing. Ordinarily, the preliminary hearing would be the first opportunity for both sides to present evidence in a custody case. See W.Va. Code 49-6-3(a); 49-6-1 (1995). This case illustrates one of the difficulties created by the continuation of pre-adjudicatory improvement periods beyond the period the statute permits.*

Footnote 7 *There was difficulty in obtaining housing for the mother because the public housing authority refused to have her as a tenant due to extensive damages to the apartment she had previously rented from them.*

Footnote 8 *On December 22, 1995, the day after a petition for a writ of prohibition was filed in this Court, the court issued a second order granting a 90-day improvement period to begin on the date of the November hearing, and directing that visitation shall be supervised. The court also directed DHHR to continue in its efforts to obtain suitable housing for Betty Jo B.*

Footnote 9 *In addition, counsel offered affidavits indicating that Amy M. returned from a Thanksgiving visit with her mother upset and crying, because Betty Jo B. had told Amy she didn't want her anymore; that the mother openly insults the children's foster parents, calls them names, and has threatened to blow up their house; that Amy, age 7, has become so insecure she is asking for a baby bottle; and that Jessie's behavior has become extremely aggressive. Counsel represented during oral argument that the circuit court refused to allow them to introduce this and other evidence.*

Footnote 10 *In addition, West Virginia Code 49-6-5(c) (1995) provides that the court may, after a finding of abuse or neglect, allow the parents or custodians a post-adjudicatory improvement period not to exceed twelve months as an*

alternative to terminating parental rights. The latter statute specifically states that "[n]o more than one such post-dispositional improvement period may be granted."

Footnote 11 Twelve months was the statutory maximum for improvement periods. It is quite possible that this case was ready for adjudication sooner, notably at the time of the November 2, 1994, hearing.

Footnote 12 As noted earlier, a recent enactment will restrict post-adjudicatory improvement periods to six months, with a possible three-month extension.

Footnote 13 This evidence, which according to counsel was to include the testimony of a therapist who has been providing services for the three older children, would have given the court insight into the emotional status of the children. Any decision regarding their fate must necessarily take into account the effect upon these children of this protracted period of indecision, and of recent events both in and out of the courtroom.

228 W. Va. 380, 719 S.E.2d 850

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2011 Term

No. 101559

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

IN RE ANTONIO R.A.

Appeal from the Circuit Court of Harrison County
The Honorable Thomas A. Bedell, Judge
Civil Action No. 09-FIG-1

AFFIRMED WITH DIRECTIONS

Submitted: September 28, 2011
Filed: November 23, 2011

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

2. " 'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W. Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989)." Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

3. "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase

or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

4. "Pursuant to the plain language of W. Va. Code § 44–10–3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. 'However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W. Va. Code § 44–10–3(a)." Syl. Pt. 6, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

5. A family or circuit court's authority to appoint a suitable person as a guardian for a minor, including a minor above the age of fourteen, is derived from West Virginia Code § 44-10-3 (2010), which grants courts discretion in determining when the appointment of a guardian for a minor is appropriate. West Virginia Code § 44-10-4 (2010), which entitles a minor above the age of fourteen to nominate his or her own guardian, applies only after a court has determined, pursuant to West Virginia Code § 44-10-3, that a particular circumstance warrants the appointment of a guardian.

6. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

7. "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

8. " 'While courts always look to the best interests of the child in controversies concerning his or her custody, such custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syllabus point 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)." Syl. Pt. 12, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

9. "A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W. Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

10. "In exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W. Va. Code § 48-9-103 (2001) (Repl. Vol. 2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." Syl. Pt. 4, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

11. "Although custody of minor child should be with the natural parent absent proof of abandonment or some form of misconduct or neglect, the child may have a

right to continued visitation rights with the stepparent or half-sibling." Syl. Pt. 2, *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989).

WORKMAN, C.J.:

This case calls upon the Court to interpret West Virginia law governing the appointment of guardians for minors. Specifically, this case involves a minor above the age of fourteen who has nominated a third party, his grandmother, to be his guardian. The guardianship is contested by the minor's non-offending, biological mother. The grandmother contends that West Virginia Code § 44-10-4 (2010) and the case law interpreting it require courts to appoint any guardian nominated by a minor above the age of fourteen, unless the guardian is "unfit." The Circuit Court of Harrison County, West Virginia, refused to interpret the statute in such a manner, however, holding instead that appointing a third party as a guardian for a minor over the objection of a non-offending, biological parent would violate that parent's constitutional right to the custody of his or her own child. Because the petitioners' interpretation of the relevant law is misguided, and because the circuit court did not abuse its discretion in this matter, the ruling below is affirmed.

I. FACTS AND PROCEDURAL HISTORY

The child at issue in this case, Antonio R. A.,[1] was born on February 22, 1994. For most of his childhood, from age three until approximately age thirteen, Antonio resided

[1]"As in all sensitive matters involving the rights of children, we use only initials in reference to the last names of the individuals involved." *Visitation of Cathy L.(R.)M. v. Mark Brent R.*, 217 W. Va. 319, 321 n.1, 617 S.E.2d 866, 868 n.1 (2005).

with his maternal grandmother, Carol G., in Harrison County, West Virginia. His father, Jorge A., currently resides out-of-state. Antonio visits his father regularly but has never resided with him. Antonio's mother, Gina H., currently resides in Upshur County, West Virginia, with her husband, Sidney H., and Antonio's two half-siblings born to a prior marriage of Gina H. to Barry B.

In the summer of 2006, when Antonio was approximately thirteen years old, Gina H. brought him to live with her, Sidney H., and Antonio's two half-siblings in Upshur County. This living arrangement lasted approximately three years, until October 25, 2009, when Antonio's former step-father, Barry B., obtained an emergency domestic violence protective order on behalf of Antonio and his half-siblings, removing them from Gina and Sidney H.'s home. At that time, Antonio returned to Carol G.'s home and expressed a desire to have Carol G. become his permanent legal guardian.

On October 29, 2009, Carol G. filed a "Petition for Permanent Guardianship and Emergency Temporary Guardianship" in the Family Court of Harrison County, West Virginia. In that petition, she argued that, pursuant to West Virginia Code § 44-10-4 and Rule 6 of the West Virginia Rules of Practice and Procedure for Minor Guardianship Proceedings, Antonio should be permitted to nominate his own guardian as he is over the age of fourteen. She asserted that she would be a "fit" guardian, as required by statute, and

indicated that Antonio's father, Jorge A., intended to waive his priority right to appointment under West Virginia Code § 44-10-3 (2010). Carol G. additionally filed a document entitled "Nomination of Guardian," signed by Antonio and notarized, in which Antonio "nominates and requests" that Carol G. be appointed as his guardian.

On November 16, 2009, the family court ordered that Antonio remain in Carol G.'s care temporarily, until the petition for guardianship could be resolved. On December 9, 2009, Carol G. filed an amended petition for guardianship including allegations of abuse and neglect against Gina and Sidney H.[2]

In the meantime, as a result of the allegations forming the basis for the emergency protective order, the West Virginia Department of Health and Human Resources, Division of Child Protective Services, conducted an investigation into the alleged abuse and neglect of all three of Gina H.'s children. In a report submitted to the family court on November 30, 2009, Alison Daugherty, a Child Protective Services worker, concluded that the allegations did not rise to the level of abuse or neglect. She recommended that all three children be returned to the custody of Gina and Sidney H. and that the family participate in family counseling and other family support services.

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[2]In the amended guardianship petition, Carol G. alleged that Gina H. had failed to seek certain types of medical care for Antonio and that Sidney H. had engaged in physically aggressive discipline.

In late December, the family court appointed Amy Lanham as Guardian ad Litem for Antonio. On January 29, 2010, Ms. Lanham submitted a report, recommending that Carol G. be appointed as Antonio's guardian, and that Antonio and his mother, Gina H., participate in family counseling. Ms. Lanham asserted that Carol G. would be a "fit" guardian as required by West Virginia Code §§ 44-10-3 & 4.

Following briefing by all parties, the family court, on April 29, 2010, entered an order denying Carol G.'s petition for permanent guardianship. As a basis for its ruling, the family court stated that "this court is not convinced that West Virginia Code § 44-10-4 applies to the granting of guardianship to a third party when the child's parents are alive and fit." The family court concluded that "to claim that a teenager may nominate any person to be his guardian, against his fit parents' wishes, is not only unsupported by the law but it is also unsupported by good sense." The family court then ordered that Antonio be returned to Gina H. following the conclusion of the school year.

Carol G. and Ms. Lanham (hereinafter "the petitioners") filed a joint petition for appeal to the circuit court. On July 8, 2010, the circuit court entered a lengthy order denying the petition for appeal. The circuit court cited *In re Abigail Faye*, 222 W. Va. 466, 665 S.E.2d 300 (2008), for the proposition that "fit" parents have a right to the custody of their own children. The circuit court recognized that Carol G. "has provided a loving and

nurturing home for much of Antonio's life," but concluded that there is "no basis in law for a child, of any age, to take away his or her own fit parent's right to custody and nominate a third-party guardian . . . ." Thus, it affirmed the family court's order.

The petitioners now ask this Court to reverse the circuit court's order. In addition to briefs filed by the petitioners and the respondent, Gina H., a letter has been filed pro se by Antonio's father, Jorge A., who is also named as a respondent in this case. In that letter, Jorge A. indicates that he supports Antonio's efforts to have Carol G. appointed as his permanent guardian.

II. STANDARD OF REVIEW

This Court's standard of review for appeals arising from family court decisions is as follows:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo.*

Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). With regard to custody decisions, including petitions for guardianship, this Court has held:

> The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's

> ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.

Abbigail Faye B., 222 W. Va. 466, 665 S.E.2d 300, Syl. Pt. 1 (quoting Syl. Pt. 2, *Funkhouser v. Funkhouser*, 158 W. Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989)).

Here, the circuit court affirmed the family court's denial of Carol G.'s guardianship petition on the basis that courts are not permitted to appoint a permanent guardian for a minor child when doing so would effectively divest a non-offending, biological parent of their right to custody. Pursuant to the standards set forth above, this Court will review the lower courts' interpretation of the relevant statutes and case law de novo, but will review the ultimate decision to deny the guardianship petition and return custody of Antonio to Gina H. for abuse of discretion.

III. DISCUSSION

A. Guardianship Statutes

The statutes governing guardianship appointments are found at West Virginia Code §§ 44-10-3 & 4.[3] West Virginia Code § 44-10-3, provides, in relevant part,

[3]These guardianship statutes are contained within Chapter 44 of the West Virginia Code, which pertains to the "Administration of Estates and Trusts," Article 10, which governs "Guardians and Wards Generally." This Court has previously recognized that these

> The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.

Id. at § 44-10-3(a). Thus, West Virginia Code § 44-10-3 provides courts with authority to appoint a "suitable person" as a minor's guardian. *Id.* As this Court has previously acknowledged, however, "[t]he statute does not describe the types of situations in which such appointments are appropriate . . . ." *Richard P.*, 227 W. Va. at ___, 708 S.E.2d at 485.

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sections of the Code apply to situations involving custodial guardianship appointments for minor children. *See, e.g., Abigail Faye B.*, 222 W. Va. at 473 n.11, 665 S.E.2d at 307 n.11 ("The statutory provisions relating to guardians and wards generally, W. Va. Code § 44–10–1, *et seq*., have frequently been relied upon by this Court when making custodial determinations."). Moreover, the West Virginia Rules of Practice and Procedure for Minor Guardianship Proceedings specifically provide that these Code sections apply to guardianships of either "the person or estate of a minor, or both." *Id.* at Rule 2(a).

Although these statutes have long been utilized by the courts of this State to appoint guardians for minors in custodial matters, it is clear that these statutes were originally drafted, more than one hundred years ago, with an eye towards the administration of trusts and estates. The statutes simply do not adequately address guardianship issues in modern-day, custodial matters. This Court has previously recognized these inadequacies and urged the Legislature to address these statutes. *See In re Richard P.*, 227 W. Va. 285, ___, 708 S.E.2d 479, 488 (2010) (Davis, C.J., concurring) ("I feel compelled to write separately to reiterate my concerns regarding the inadequacy of the guardianship statutes currently in place that fail to consider the unique circumstances of modern-day families . . . ."). Having had to apply these statutes yet again in a matter that they are not fully adequate to address, we again urge the Legislature to examine the need for a statutory framework for resolving guardianship issues relating to custody, as opposed to guardianships in the context of fiduciary responsibilities to minors.

West Virginia Code § 44-10-4, entitled "Right of minor to nominate guardian," provides:

> (a) *If the minor is above the age of fourteen years, he or she may* in the presence of the circuit or family court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, *nominate his or her own guardian, who, if approved by the court, shall be appointed accordingly.*
>
> (b) If the guardian nominated by the minor is not appointed by the court, or if the minor resides outside the state, or if, after being summoned, the minor neglects to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years.

Id. (emphasis added). This statute, therefore, extends to children fourteen years or older the right to nominate their own guardians. Like West Virginia Code § 44-10-3, however, nothing in this statute describes the circumstances under which such a nomination may be made.

The petitioners argue that under the plain language of these statutes and the cases interpreting them, Antonio is entitled to nominate Carol G. as his guardian and this Court must accept such nomination. In support of this position, the petitioners rely on several cases which have interpreted West Virginia Code § 44-10-4 as *requiring* a court to appoint a guardian who has been nominated by a minor above the age of fourteen unless the court finds the proposed guardian to be "unfit."

In syllabus point seven of *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357 (1981), a case involving a custody dispute between two biological parents, this Court interpreted West Virginia Code § 44-10-4 as giving a minor over the age of fourteen "an absolute right" to nominate his or her own guardian. The Court in *Garska*, however, was merely considering the language contained in West Virginia Code § 44-10-4 in order to determine the meaning of the phrase "a child of tender years," a concept sometimes considered in making custody determinations for young children. *Id.* To that end, the Court stated that "[t]he concept of a 'child of tender years' is somewhat elastic; obviously an infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not, as he has an absolute right under W. Va. Code, 44-10-4 (1923) to nominate his own guardian. . . ." *Id.* at Syl. Pt. 7, in part.

A year after *Garska* was issued, the Court clarified that while a child over the age of fourteen may have an absolute right to *nominate* his or her own guardian, a court is not bound to *appoint* such guardian. *S. H. v. R. L. H.*, 169 W. Va. 550, 289 S.E.2d 186 (1982). Notably, in *S.H.*, the Court considered the language of this statute in the context of a custody dispute between *two biological parents*, rather than a biological parent and a third party. The Court explained that

> [t]he use of the word "nominate" in *Code*, 44-10-4 [1923] means that *unless the court finds the nominee unfit to serve as guardian, the nominee should be confirmed by the court*. . . . Certainly the court is not required to confirm a child's

> nomination of an "unfit" parent as his guardian, and when a child nominates an unfit parent as his guardian it is the obligation of the court to award the custody to the other parent.

169 W. Va. at 555, 289 S.E.2d at 189-90 (emphasis added). It therefore held that

> [t]he word "nominate" as used in syl. pt. 7 of *Garska v. McCoy*, ___ W. Va. ___, 278 S.E.2d 357 (1981) means that a child has a right to suggest a guardian to the court, and that the court is obliged to confirm the nomination of that particular guardian unless the court specifically finds such guardian to be unfit to serve in such capacity under the general rules governing unfitness outlined in *Garska v. McCoy*, *supra*.

Id. at Syl. Pt. 2.

The petitioners in the instant case have understandably seized upon the language in *Garska* and *S. H.* to argue that the Court is *obligated* to appoint Carol G. as Antonio's guardian, given that Antonio is above the age of fourteen and there is no evidence that Carol G. would be an "unfit" guardian. Having closely considered this issue, however, the Court finds that the petitioners' interpretation of West Virginia Code § 44-10-4, and their reliance on *S. H.*, is misguided.

This Court has long recognized that statutes that relate to the same subject matter must be read in consideration of one another.

> Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.

> Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). Here, West Virginia Code §§ 44-10-3 and -4 are statutes which clearly relate to the same subject matter, i.e., the appointment of guardians for minor children. Thus, the two statutes must "be regarded in *pari materia* to assure recognition and implementation of the legislative intent." *Fruehauf Corp.*, 159 W. Va. 14, 217 S.E.2d 907, Syl. Pt. 5.

West Virginia Code § 44-10-3 grants authority to family and circuit courts to appoint guardians for minors and gives courts discretion in determining when such appointments are necessary and who to appoint as a guardian in an individual case. The plain language of the statute provides that a "circuit court or family court . . . *may* appoint as the minor's guardian a suitable person." *Id.* at § 44-10-3(a) (emphasis added). We reiterated the discretionary nature of the language of this statute in *Abbigail Faye B.*, holding:

> Pursuant to the plain language of W. Va. Code § 44–10–3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. "However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian." W. Va. Code § 44–10–3(a).

Abbigail Faye B., 222 W. Va. 466, 665 S.E.2d 300, Syl. Pt. 6. More specifically, this Court has explained that, under well-settled principles of statutory construction, "[b]y stating that family and circuit courts *may*, rather than must, appoint a suitable person as a guardian for a minor, the Legislature granted family and circuit courts discretion in determining when the appointment of a guardian is appropriate." *Richard P.*, 227 W. Va. at ___, 708 S.E.2d at 486.

West Virginia Code § 44-10-4, on the other hand, merely clarifies that, when the minor for whom a guardian is to be appointed is above the age of fourteen, such minor is entitled to have a say in who the court appoints. *See S.H.*, 169 W. Va. 550, 289 S.E.2d 186, Syl. Pt. 2. This statute does not independently authorize courts to appoint guardians for minors, nor does it alter the discretion afforded to courts in West Virginia Code § 44-10-3 to determine when a guardianship appointment for a minor is appropriate. Rather, West Virginia Code § 44-10-4 simply reduces a court's discretion in choosing the person to appoint as guardian when the minor is above the age of fourteen. The statute does not, as the petitioners contend, require courts to appoint any guardian nominated by a minor above the age of fourteen if such guardian is found to be "fit."

Thus, the Court now holds that a family or circuit court's authority to appoint a suitable person as a guardian for a minor, including a minor above the age of fourteen, is derived from West Virginia Code § 44-10-3 (2010), which grants courts discretion in

determining when the appointment of a guardian for a minor is appropriate. West Virginia Code § 44-10-4 (2010), which entitles a minor above the age of fourteen to nominate his or her own guardian, applies only after a court has determined, pursuant to West Virginia Code § 44-10-3, that a particular circumstance warrants the appointment of a guardian. Accordingly, the circuit court properly concluded that it was not obligated under West Virginia Code § 44-10-4 to appoint Carol G. as Antonio's guardian, despite his age and Carol G.'s fitness.

B. Parent's Constitutional Rights to Custody of Children

Because family and circuit courts have discretion in determining whether to appoint a guardian for a minor, we must next consider whether the lower courts abused their discretion in denying the guardianship petition in this case. Specifically, the circuit court affirmed the family court's refusal to appoint Carol G. as Antonio's guardian, finding that "there is no basis in law for a child, of any age, to take away his or her own fit parent's right to custody and nominate a third-party guardian. . . ."

A biological parent's right to the custody of his or her child is rooted in the due process clauses of both the West Virginia and the United States' Constitutions:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected

> and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. Pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).[4] Of course, a biological parent's constitutional right to the custody of his or her child is not unfettered. This Court has held that, in any case involving child custody, "[t]he controlling principle . . . is the welfare of the child and . . . in a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 405, 168 S.E.2d 798, 799 (1969). To this end, we have held that a parent's natural right to the custody of his or her child is limited in cases in which the parent is found to be abusive, neglectful or otherwise unfit:

> A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

Syllabus, *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

Admittedly, striking a balance between a biological parent's constitutional rights and the child's best interests can be difficult. This Court specifically considered this

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[4]Although this Court has historically used the term "natural parent" when referring to a "biological parent," the terms are interchangeable in their legal meaning and the term "biological" more accurately describes the status of a parent who has contributed biologically to the conception and delivery of a child.

delicate balance in *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989). In that case, a non-offending, "fit," biological father sought custody of his daughter. *Id.* at 450, 388 S.E.2d at 323-24. From an early age, the child had lived with her biological mother, step-father and half-sibling. *Id.* at 450, 388 S.E.2d at 323. Following the mother's tragic death, and pursuant to the mother's last will and testament, the child's step-father was appointed as her guardian. *Id.* at 450, 388 S.E.2d at 323-24. The biological father filed a petition arguing that "an unoffending natural parent should be entitled to custody of his or her child if such parent has not abandoned such child nor has in any manner been proven unfit." *Id.* at 450, 388 S.E.2d at 324. The circuit court agreed, granting custody to the biological father, despite the step-father's contention that the child's best interests would be served by allowing the child to continue to live with him and the child's half-sibling. *Id.* at 450-51, 388 S.E.2d at 324.

On appeal, this Court recognized that the child's best interest "is of immeasurable importance," but further acknowledged the right of a biological parent to raise his or her own child. *Id.* at 451, 388 S.E.2d at 324. It stated that

> [a]lthough the polar star concept is adhered to by this Court in child custody cases, we have "refused to apply it in cases where the parents have not abandoned the child or have in no manner been proved to be unfit to have the care and custody of such child." *Hammack v. Wise*, 158 W. Va. 343, 347, 211 S.E.2d 118, 121 (1975). This concept "will not be invoked to deprive an unoffending parent of his natural right to the custody of his child." *Hammack*, 158 W. Va. at 347, 211 S.E.2d at 121.

Id. Moreover, the Court recognized that " 'a strong presumption' " exists that " 'the welfare of the child is well protected when he is in the custody of an unoffending natural parent.' " *Id.* at 451, 388 S.E.2d at 324-25 (quoting *Hammack*, 158 W. Va. at 347, 211 S.E.2d at 121). Accordingly, the Court in *Honaker* affirmed the lower court's decision to return custody to the biological father, utilizing a lengthy transitional period.

In the instant case, Gina H. argues that, because the allegations of abuse and neglect were found to be unsubstantiated, she too is a non-offending, fit, biological parent, who has a constitutional right to the custody of her minor child. The petitioners, on the other hand, contend that the circuit court erred by focusing solely on Gina H.'s constitutional rights, without giving due consideration to Antonio's best interests. They argue that not only is the best interest analysis the polar star of all child custody proceedings, West Virginia Code § 44-10-3 specifically requires consideration of the child's best interests in guardianship cases.

In 2008, this Court squarely addressed the tension between a child's best interests and a biological parent's right to the custody of his or her child in the context of a guardianship petition filed by a third party. *Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300. In that case, an infant, Abbigail, was born to a teenage mother, Autumn, who was still residing with her parents. *Id.* at 470, 665 S.E.2d at 304. The grandparents contributed

significantly to Abbigail's care from her birth until her mother moved out, approximately six months later. *Id.* at 470-71, 665 S.E.2d at 304-05. When Autumn decided to move out and take Abbigail with her, the grandparents filed a petition for guardianship, alleging that Autumn had abandoned Abbigail at various times and that she was not properly caring for Abbigail's special needs. *Id.* at 471, 665 S.E.2d at 305.

Following an investigation, Child Protective Services determined that Abbigail was not an abused or neglected child and that Autumn had not abandoned her. *Id.* at 472, 665 S.E.2d at 306. The circuit court conducted a hearing on the petition for guardianship and concluded that the grandparents had failed to prove that abuse or neglect had occurred or that Autumn was not a "fit" parent. *Id.* Thus, the circuit court denied the grandparent's petition for guardianship and returned custody of Abbigail to Autumn. *Id.*

On appeal, this Court found that West Virginia Code § 44-10-3 "permits a court to appoint a guardian for a minor child if the proposed guardian is competent and fit, but requires the court to accord priority to the child's mother or father." 222 W. Va. at 477, 665 S.E.2d at 311. The Court then noted that "[d]ivesting a child's biological parent of his/her guardianship, or custody, is a very serious matter. This Court repeatedly has recognized the inherent rights parents have to the custody of their own children, and any

party seeking to interfere with such rights must bear a heavy burden." *Id.* at 478, 665 S.E.2d at 312 (footnote omitted).

After reviewing and affirming the circuit court's findings that Abbigail had not been abused or neglected and that Autumn was a fit parent, this Court turned to the issue of the child's best interests. *Id.* at 478-79, 665 S.E.2d at 312-13. The Court explained that " '[a]lthough parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children.' " *Id.* at 480, 665 S.E.2d at 314 (quoting Syl. Pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)). The Court found, however, that "we typically have been reluctant to change a child's custodial placement unless such a change will materially promote the child's best interests." 222 W. Va. at 480, 665 S.E.2d at 314. In considering the facts of the case before it, the Court recognized that the grandparents could provide a "fine home" for Abbigail, and that they had been very involved in her care. *Id.* at 481, 665 S.E.2d at 315. Nevertheless, " '[w]hile courts always look to the best interests of the child in controversies concerning his or her custody, *such custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care.*' " *Id.* at Syl. Pt. 12 (quoting Syl. pt. 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)) (emphasis added). Thus, the Court concluded that:

> we agree with the circuit court's assessment that Abbigail's best interests require her to be placed with her parents, Autumn and

> Josh. Although Abbigail has bonded significantly with [the grandparents], she should also be afforded the opportunity to bond with her biological parents, Autumn and Josh. Simply because [the grandparents] have been in a position to provide substantial care for Abbigail, at times to the exclusion of Autumn and Josh, does not presumptively make them a better placement for Abbigail. . . . Absent evidence that Abbigail's safety would be endangered by awarding her guardianship to her parents, we cannot find any justification in the record to indicate that her welfare and best interests would not be served by placing her with her parents, Autumn and Josh, particularly in light of our prior findings that they are fit and competent to serve as her guardians and have, thus, been accorded a statutory preference pursuant to W. Va. Code § 44–10–3(a).

222 W. Va. at 481, 665 S.E.2d at 315.

As the circuit court noted, the facts of the instant case are very similar to those of *Abbigail Faye B.* and many of the same legal principles apply. A court may not divest Gina H., Antonio's biological mother, of her custodial rights simply because Carol G. would be a "fit" guardian. Undoubtedly, Carol G. has played a very important role in Antonio's life, but the fact that she "might possibly furnish the child a better home or better care," is not sufficient to divest Gina H. of her rights as Antonio's biological parent. *See id.* at Syl. Pt. 12. Moreover, because Antonio had been living with Gina H. for the three years prior to the filing of the guardianship petition, the lower courts were properly reluctant to change Antonio's custodial placement. *See id.* at 480, 665 S.E.2d at 314. Accordingly, the circuit court correctly concluded that Gina H.'s constitutional rights as Antonio's biological mother would be violated by appointing a third party as Antonio's guardian.

C. Psychological Parent Analysis

The petitioners do not dispute that Gina H. has certain rights as a biological parent. Nevertheless, they contend that the lower courts erred by failing to consider Carol G.'s role as Antonio's psychological parent.

> A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W. Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified.

Syl. Pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005). This Court has previously held that "[i]n exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W. Va. Code § 48-9-103 (2001) (Repl. Vol. 2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." *Id.* at Syl. Pt. 4.

Here, the petitioners contend that Carol G. is Antonio's psychological parent, as she is the person he lived with for over ten years of his life and is the person he would choose to live with now. Relying on a recent Memorandum Decision issued by this Court in *In the Interest of Robert H.*, Slip. Op. 101469 (W. Va. filed April 1, 2011), the petitioners

contend that, as Antonio's psychological parent, Carol G. should be appointed as his guardian.

In *Robert H.*, a biological father appealed a circuit court's order granting guardianship of his son to the child's maternal great-aunt and great-uncle. *Id.* at 1. The child, Robert H., first went to live with his great-aunt and great-uncle after his mother lost custody due to drug problems. *Id.* Although his father, the petitioner, was granted custody at that time, the father made an arrangement with the great-aunt and great-uncle to care for Robert H., as the father was frequently away for long periods of time as a result of his employment as a long-haul truck driver. *Id.* After several years of this living arrangement, the great-aunt and great-uncle filed a petition for guardianship alleging that they were Robert H.'s psychological parents. *Id.* at 2. While the circuit court found the petitioner had not abandoned Robert H. or otherwise engaged in abuse or neglect, it found that Robert H. had bonded with the great-aunt and great-uncle, that he was thriving in their care, and that they were his psychological parents. *Id.* Thus, the circuit court appointed the great-aunt and great-uncle as Robert H.'s permanent guardians. *Id.*

On appeal, the father argued that, as the child's biological parent who has not been found to be abusive or neglectful, he is entitled to the custody of Robert H. *Id.* This Court, however, upheld the circuit court's ruling, finding that the father had "voluntarily

transferred custody" of Robert H. to the great-aunt and great-uncle, thereby relinquishing his natural right to the custody of his child under *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691, Syllabus ("A parent has the natural right to the custody of his or her infant child and, unless the parent . . . has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts."). Slip. Op. 101469 at 3. After concluding that the great-aunt and great-uncle were, in fact, the child's psychological parents, the Court affirmed the appointment of the great-aunt and great-uncle as Robert H.'s guardians, noting that such arrangement was in the child's best interests. *Id.*

The petitioners in the instant case argue that, like the great-aunt and great-uncle in *Robert H.*, Carol G. should be appointed as Antonio's guardian. Unlike the child in *Robert H.*, however, Antonio had been living with his mother, Gina H., for the three years preceding the filing of the guardianship petition. While Carol G. might have been able to succeed under this theory during the approximately ten years that Antonio lived with her, at this point in time, this Court cannot find that Gina H. has voluntarily transferred or relinquished custody of Antonio.

Nevertheless, the Court is sympathetic to Antonio's desire to have a continued relationship with his grandmother, who appears to have been his psychological parent for

many years. While the lower courts did not err in denying Carol G.'s petition for guardianship, Antonio may be entitled to visitation with her. As previously discussed, this Court ruled in *Honaker v. Burnside* that the biological father of the child at issue was entitled to custody. 182 W. Va. at 451, 388 S.E.2d at 325. It further held, however, that the best interests of the child may, in certain cases, necessitate visitation with other parties: "[a]lthough custody of minor child should be with the natural parent absent proof of abandonment or some form of misconduct or neglect, the child may have a right to continued visitation rights with the stepparent or half-sibling." *Id.* at Syl. Pt. 2. Likewise, Antonio has a right to continued visitation with his grandmother, Carol G., who appears to have served as his psychological parent for much of his life. Moreover, Article 10 of Chapter 48 of the West Virginia Code sets forth specific procedures governing court ordered visitation for grandparents and grandchildren. Consequently, although Gina H. has properly been awarded custody of Antonio, several other legal avenues exist by which Carol G. may seek to protect her relationship with her grandson. The family court should schedule a hearing as soon as possible to establish a schedule for visitation between Antonio and Carol G.

As a final matter, representations made by the parties during oral argument indicate that Gina H. continues to have a strained relationship with her son, Antonio. Consequently, if given the opportunity, the family court should consider ordering further

counseling for Antonio and Gina H. to aid them in establishing a better parent-child relationship.

IV. CONCLUSION

For the reasons set forth herein, the lower courts did not abuse their discretion in denying Carol G.'s petition for guardianship; accordingly, the Court affirms the July 8, 2010, final order of the Circuit Court of Harrison County, West Virginia.

Affirmed with directions.

No. 101559 - *In re: Antonio R.A.*

FILED
December 1, 2011
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring:

I concur in the result of the majority opinion affirming the denial of the infant guardianship requested by Antonio R.A.'s grandparent. As the majority opinion duly explains, this was an appeal of the denial of an infant guardianship proceeding by the grandparent. This was not a petition for grandparent visitation. This Court affirmed these denials, but placed in its opinion certain directives requiring implementation of grandparent visitation by the family court. The majority opinion references the statutory procedure for the grandmother to request grandparent visitation with Antonio R.A., but circumvents that procedure by directing that "[t]he family should schedule a hearing as soon as possible to establish a schedule for visitation between Antonio and Carol G."

I am concerned that the granting of grandparent visitation by this Court without the procedural safeguards inherent in our statutory and case law is supplanting the important role of the family court in determining whether visitation is in the child's best interests. Therefore, while I agree with the affirmation of the lower court's denial of the guardianship, I disagree that this Court can order visitation without the benefit of a petition by the grandmother seeking this visitation and without adhering to the statutory guidelines for establishment thereof.

228 W. Va. 584, 723 S.E.2d 409

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2012 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-0755

IN RE ASHTON M.

Appeal from the Circuit Court of Webster County
The Honorable Jack Alsop, Judge
Civil Action No. 11-JA-4

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 24, 2012
Filed: February 28, 2012

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN concurs in part and dissents in part and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. pt. 1, *In re Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010).

2. "'The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, Sec. 2; art. 3, Sec. 2; art. 9, Sec. 1.' Syl. Pt. 2, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 279 (1979)." Syl. pt. 3, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

3. "In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va.Code § 49-6-10 (1996) that prosecutors must *cooperate* with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings." Syl. pt. 3, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

4. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

Per curiam:

The petitioner, Michelle M.,[1] appeals the March 31, 2011, order of the Circuit Court of Webster County terminating her parental rights. The appeal is premised on the arguments of the petitioner that the prosecuting attorney failed to recommend only the termination of the petitioner's custodial rights as recommended by the respondent, Department of Health and Human Resources (DHHR), and that the circuit court was in error in terminating her parental rights instead of just her custodial rights. After a thorough review of the record presented for consideration, the briefs, the legal authorities cited, and the arguments of the petitioners and the respondent, we find that the circuit court erred in terminating Michelle M.'s parental rights by failing to comply with the procedural requirements of Rule 34 of the Rules of Procedure for Child Abuse and Neglect Proceedings and by failing to acquire and consider the wishes of the child, Ashton M., as to the termination of Michelle M.'s parental rights as required by W. Va. Code § 49-6-5(a)(6) (2011). We therefore reverse the circuit court's termination of Michelle M.'s parental rights and remand to the circuit court so that it may allow DHHR to revise its case plan and hold a new hearing in compliance with Rule 34. In the event that the revised plan recommends termination of Michelle M.'s parental rights, the court should determine and consider Ashton M.'s wishes in reaching a decision as to Michelle M.'s parental rights as required by W. Va.

[1]We follow our traditional practice in child abuse and neglect matters, as well as other cases involving sensitive facts by abbreviating the last names of the parties. *See, e.g.*, *In re Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010).

Code § 49-6-5(a)(6) (2011).

I.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2011, DHHR filed a petition alleging the abuse and neglect of Ashton M., a sixteen-year-old minor, by her mother, Michelle M., and her mother's live-in boyfriend, Terry H. Through the petition, DHHR requested that the Circuit Court of Webster County enter an emergency protective order granting DHHR custody of Ashton M. In support of its petition, DHHR included findings it gathered from interviews with Ashton M., Michelle M., and Terry H.

According to the petition, Ashton M. claimed that beginning in 2003 or 2004 when she was eight or nine years old and continuing until the filing of the petition, Terry H. engaged in contact such as touching her breasts and vagina, fondling her, and watching her shower. She stated that she informed her mother of these alleged abuses.

As noted in its petition, DHHR's interview with Michelle M. revealed the following:

> i. Michelle [M.] stated that she had once given Terry [H.] permission to examine the child's breasts, when she had complained about them being sore, because she did not

> know what to look for and that she believed Terry did know from having previously examined his teenage daughters' breasts.
>
> ii. Michelle [M.] reported that the child had never stated anything to her about being "fingered" and that she did not believe the child when she reported being watched in the shower.[2]
>
> iii. Michelle [M.] reported that she once allowed Terry [H.] to examine the child's vaginal area when the child reported having an unknown discharge.

Also noted in the petition, DHHR's interview with Terry H. shows that he admitted to examining Ashton M.'s breasts on one occasion and also to "maybe once stating that he would give her a cell phone if she would show him her breasts."

After a preliminary hearing on February 2, 2011, the circuit court entered an order on February 3, 2011, placing Ashton M. into the custody of DHHR. In the order, the circuit court found that the statements of Michelle M. and Terry H. confirmed that the alleged abuses occurred and that Michelle M. failed to protect Ashton M. from abuse.

An adjudicatory hearing was held on February 18, 2011, at which time the circuit court took judicial notice of the evidence previously adduced at the preliminary

[2]In her testimony during the dispositional hearing on March 11, 2011, Michelle M. stated again that she did not believe Ashton M.'s allegations regarding Terry H. and that she intended to continue living with Terry H.

hearing, and the court heard testimony. The circuit court found that Michelle M. and Terry H. were abusive and neglectful parents and that Ashton M. was an abused and neglected child under the meaning of the law.

At the dispositional hearing on March 11, 2011, the circuit court terminated Michelle M.'s parental rights, despite the recommendation of DHHR, given through the testimony of DHHR caseworker Sheila Ware[3] and DHHR's case plan for the child, that only Michelle M.'s custodial rights be terminated. During the hearing, the court discussed the termination of parental rights with the prosecuting attorney, Dwayne Vandevender, and Michelle M.'s attorney, Howard Blyler:

> MR. VANDEVENDER: Your Honor, as far as the Adult Repondents, Mr. [H.] and Ms. [M.], they don't want custody. Ms. [M.'s] testimony is that she doesn't believe what happened. She still lives with Mr. [H.] and she states that her actions will continue to not protect Ashton, Your Honor. So we believe that the termination recommended by the Department is --
>
> THE COURT: Well, let me ask you; in light of the overwhelming evidence in this case and in light of the absolute refusal of the mother to acknowledge the truth of that, and based on the desires of the infant to maintain a relationship, why should I not permanently terminate parental rights based on the Supreme Court's decision. I mean, why should I not permanently terminate?

[3]The petitioner correctly states in her brief that the transcript of the dispositional hearing incorrectly refers to Sheila Ware as "Sheila Winter."

> MR. VANDEVENDER: Your Honor, I see no reason why you shouldn't. Post-termination visitation I believe should be at Ashton's discretion. She wants visitation. After the last hearing she asked if she could see her mother supervised for a few minutes and so I believe she wants that. And I believe that the Court should allow it as per the previous court order. But I see no reason why you shouldn't terminate.
>
> * * *
>
> MR. BLYLER: . . . [F]or the Department's Attorney to now stand up and take a position contrary to what we had been advised puts me in a difficult position because we haven't presented any witnesses and haven't gotten into that. We relied on that. The Guardian ad Litem has relied on that.
>
> * * *
>
> THE COURT: They first made the recommendation only after I made inquiry based on the case law in this state did the Prosecutor state that he didn't know of any reason why I shouldn't under case law.

At the dispositional hearing, the parties also discussed Ashton M.'s feelings toward her mother and her wishes going forward. In regard to Ashton M.'s wishes as to the termination of her mother's parental rights, the judge stated, "I just don't know what the desires of the child are."

The court entered its order with its findings from the dispositional hearing on March 31, 2012. The order terminated Michelle M.'s parental rights. Michelle M. now appeals this order.

II.

STANDARD OF REVIEW

The petitioner requests that this Court reverse the circuit court's order terminating her parental rights. In abuse and neglect proceedings, questions of fact are reviewed for clear error, and questions of law are reviewed *de novo*:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)."

Syl. pt. 1, *In re Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010).

III.

DISCUSSION

Michelle M. asserts two assignments of error. First, she argues that the

prosecuting attorney inappropriately failed to recommend termination of her custodial rights, rather than her parental rights, contrary to the recommendation of DHHR. Second, she argues that the circuit court improperly terminated her parental rights instead of only her custodial rights. As to this second assignment of error, Michelle M. alleges that the circuit court failed to comply with both the W. Va. Code and the Rules of Procedure for Child Abuse and Neglect Proceedings. We now address each of her arguments in turn.

A.

Prosecutorial Duty

Whether the prosecuting attorney acted appropriately in this case requires an evaluation of prosecutorial duties in abuse and neglect cases. We have established that "'[a] prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, Sec. 2; art. 3, Sec. 2; art. 9, Sec. 1.' Syl. Pt. 2, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 279 (1979)." Syl. pt. 3, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997). This Court has addressed the role of the prosecuting attorney in abuse and neglect cases in syllabus point 4 of *State ex rel. Diva P.*:

> In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va.Code § 49-6-10 (1996) that prosecutors must

> *cooperate* with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

(Emphasis in original).

In the case before us now, Michelle M. argues in her brief to this Court that "the Prosecuting Attorney who is charged with representing the best interest of the Department in this case failed to appropriately make the recommendations that his client set forth on the stand in his argument to the Court." She also states,

> I cannot imagine a private attorney representing a private individual in a civil or criminal matter or even an attorney representing a Respondent in an abuse and neglect petition standing up and saying to the court that it doesn't matter what my client wishes the Court to do and make a recommendation contrary to the best interest of his client.

We agree with Michelle M. that an attorney-client relationship existed between the prosecuting attorney and DHHR, and as such, the prosecuting attorney had a duty to represent DHHR's recommendation of termination of custodial rights only, not termination of parental rights, to the circuit court. However, after reviewing the transcript of the

dispositional hearing, we disagree with Michelle M.'s conclusion that the prosecuting attorney failed to meet his obligations.

During the dispositional hearing, the prosecuting attorney presented evidence through the testimony of the DHHR caseworker that DHHR recommended termination of Michelle M.'s custodial rights. At no point in the hearing did the prosecuting attorney recommend to the circuit court that it terminate Michelle M.'s parental rights. We believe Michelle M. mischaracterizes the statements of the prosecuting attorney in his responses to the circuit court's questions regarding termination of parental rights. Rather, the circuit court attempted to clarify the prosecuting attorney's responses by stating that the prosecuting attorney recognized that the circuit court had the legal authority to terminate parental rights despite DHHR's recommendation that only Michelle M.'s custodial rights be terminated.

We also note that in DHHR's original petition to the circuit court to remove Ashton M. from the custody of Michelle M. and Terry H. and place her in DHHR's custody, DHHR included the following: "The [DHHR] would further pray that in the event the Court deems it appropriate, the Court order the *termination of the parental or custodial rights* and/or responsibilities of the abusing parents and commit said infant to the permanent custody of the [DHHR] . . . ." (Emphasis added). At no point after filing this petition did DHHR seek to clarify that it no longer sought the termination of parental rights. Therefore,

even if the prosecuting attorney had actively recommended that the circuit court terminate parental rights instead of custodial rights, he still would not have been violating his duty to his client. Therefore, we find that the prosecuting attorney did not act inappropriately during the dispositional hearing.

B.

Rejection of the Case Plan

Michelle M. alleges that the circuit court's dispositional hearing order terminating her parental rights must be reversed because it does not comply with Rule 34 of the Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 34 states,

> If objections to the child's case plan are raised at the disposition hearing, the court shall enter an order:
> (a) Approving the plan;
> (b) Ordering compliance with all or part of the plan;
> (c) Modifying the plan in accordance with the evidence presented at the hearing; or
> (d) Rejecting the plan and ordering [DHHR] to submit a revised plan within thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.[4]

Michelle M. relies on subsection (d) to support the proposition that, upon the circuit court's objection to the child's case plan recommending the termination of custodial rights, the

[4]The "case plan" described in this rule is formed by combining the "family case plan" as described in W. Va. Code § 49-6D-3 (1998) with additional information required by and described in § 49-6-5(a) (2011).

circuit court should have scheduled another dispositional hearing and ordered DHHR to create a revised plan.

None of the parties cites to case law to support or refute Michelle M.'s application of this rule. We have only discussed Rule 34 in one case: *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001). In that case, DHHR submitted a case plan recommending that the mother receive an improvement period with the ultimate goal of reunification of the children with the mother. The circuit court did not agree that the mother should receive an improvement period and entered an order terminating her parental rights to one of her children. This Court found that "[t]he lower court, through its disposition order, implicitly rejected the case and permanency plan submitted by the DHHR."

Like *In re Edward B.*, the circuit court in the case at bar did not follow the DHHR case plan recommendation and terminated the parental rights of the petitioner. In doing so, the circuit court implicitly rejected that case plan. Therefore, as Michelle M. argues, under Rule 34(d), the circuit court should have scheduled a subsequent dispositional hearing and should have ordered that DHHR create a revised case plan.

During oral argument, Michelle M. argued that W. Va. Code § 49-5D-3a(a) (2004) should also apply in this case, but that there appears to be a conflict between Rule 34

and this statute. Michelle M. referred to § 49-5D-3a to support her proposition that the circuit court acted prematurely in terminating her parental rights. Section 49-5D-3a(a) reads,

> In any case in which a multidisciplinary treatment team develops an individualized service plan for a child pursuant to the provisions of section three of this article, the court shall review the proposed service plan to determine if implementation of the plan is in the child's best interests. If the multidisciplinary team cannot agree on a plan or if the court determines not to adopt the team's recommendations, it shall, upon motion or sua sponte, schedule and hold within ten days of such determination, and prior to the entry of an order placing the child in the custody of the department or in an out-of-home setting, a hearing to consider evidence from the team as to its rationale for the proposed service plan. If, after hearing held pursuant to the provisions of this section, the court does not adopt the teams's recommended service plan, it shall make specific written findings as to why the team's recommended service plan was not adopted.

Specifically, Michelle M. contends that § 49-5D-3a(a) required the circuit court to schedule a hearing to reevaluate the case after a ten-day period. Michelle M. noted that this ten-day requirement appears to conflict with the forty-five day requirement of Rule 34.

The conflict Michelle M. believes exists is easily resolved. Section 49-5D-3a(a) and Rule 34 do not refer to the same thing; Rule 34 refers to a case plan developed according to § 49-6-5(a). Section 49-5D-3a(a) refers to an individualized service plan

created by a multidisciplinary team (MDT) according to § 49-5D-3 (2007).[5] In this case, the record shows that the MDT did make a recommendation as to Michelle M.'s rights, but the record does not show that a multidisciplinary team created an individualized service plan for Ashton M. Therefore, § 49-5D-3a(a) does not apply in this case.

Although § 49-5D-3a(a) does not apply, Rule 34 does apply to the instant case. DHHR created a case plan that was rejected by the circuit court, and DHHR was not given the opportunity to revise the case plan before the circuit court entered its order terminating Michelle M.'s parental rights. Under the *de novo* review of this legal issue, we find that the circuit court committed reversible error by failing to comply with Rule 34.

C.

Consideration of the Child's Wishes

In arguing that the circuit court erred in terminating her parental rights, Michelle M. also references W. Va. Code § 49-6-5(a)(6)(C) (2011), which requires the court to "give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." In her brief to this Court, the Guardian ad Litem references *In re Jessica*

[5]Pursuant to § 49-5D-3(a), individualized service plans are only created "for children who are victims of abuse or neglect and their families when a judicial proceeding has been initiated involving the child or children for juveniles and their families involved in status offense or delinquency proceedings."

G., 226 W. Va. 17, 697 S.E.2d 53 (2010), to support the proposition that Ashton M.'s wishes regarding the termination of her mother's parental rights should have been considered before Michelle M.'s parental rights were terminated.

The pertinent facts of *In re Jessica G.* are similar to the those of the case at bar. In that case, the parent's parental rights were also terminated in an abuse and neglect proceeding. Unlike here, in *In re Jessica G.*, the circuit court had been presented with evidence that the child, a thirteen-year-old, did not wish for her father's rights to be terminated. The Court found,

> After reviewing the circuit court's order terminating the Appellant's parental and custodial rights, as well as a review of the transcript of the dispositional hearing, we find that the circuit court failed to adequately explain why Jessica G.'s, who was thirteen years old at the time of the dispositional hearing (and is now fourteen years old), was not "otherwise of an age of discretion," *Id.*, and why her wishes were not factored into whether termination of the Appellant's parental rights, and the concomitant bond between Jessica G. and her father, might be contrary to Jessica G.'s best interest and emotional well-being. We are particularly concerned with the complete absence of *any* testimony at the dispositional hearing by a licensed mental health care provider as to the possible psychological consequences to Jessica G. by terminating her father's parental rights.
>
> In Syllabus Point 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001) we held that:
>
> > Where it appears from the record that the process established by the Rules of Procedure for Child

> Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

In re Jessica G., 226 W. Va. 17, 22, 697 S.E.2d 53, 58 (2010).

The facts in the record demonstrate that the circuit court, in deciding to terminate Michelle M.'s parental rights, did not have before it Ashton M.'s wishes regarding the termination of her mother's parental rights when it made its decision. During the dispositional hearing, none of the parties expressed what Ashton M.'s wishes were in regard to the termination of Michelle M.'s parental rights. It appears from the record that the parties had only acquired Ashton M.'s wishes as to the termination of Michelle M.'s custodial rights and not the termination of Michelle M.'s parental rights. Also, the circuit court noted that it did not know what the desires of Ashton M. were. Finally, there is no discussion of the wishes of the child regarding the termination of Michelle M.'s parental rights in the circuit court's March 31, 2011, order.

Upon *de novo* review of the circuit court's March 31, 2011, order, we find that the circuit court failed to determine or consider Ashton M.'s wishes regarding the termination of her mother's parental rights as required by W. Va. Code § 49-6-5(a)(6).

IV.

CONCLUSION

For the reasons set forth above, this Court reverses the circuit court's order entered March 31, 2011, which terminates the petitioner's parental rights. This case is remanded to the Circuit Court of Webster County so that it may comply with the requirements of Rule 34 of the Rules of Procedure for Child Abuse and Neglect Proceedings. In the event that DHHR's revised case plan recommends termination of parental rights, the circuit court shall determine and consider the wishes of Ashton M. pursuant to W. Va. Code § 49-6-5(a)(6)(C).

Reversed and remanded with directions.

No. 11-0755 - *In re Ashton M.*

FILED
February 28, 2012
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I dissent to the majority's conclusion that the lower court failed to consider the wishes of the child, Ashton M., pursuant to West Virginia Code § 49-6-5(a)(6)(C)(2009 & Supp. 2011)[1] regarding disposition, and to their finding that the circuit court did not comply with the requirements of Rule 34 of the Rules of Procedure for Child Abuse and Neglect. I concur with the majority regarding the determination "that the prosecuting attorney did not act inappropriately during the dispositional hearing[,]" when the prosecutor recognized that the circuit court had the legal authority to terminate the Petitioner mother's parental rights despite the DHHR's recommendation that only her custodial rights be terminated.

I.

The majority looks almost silly in reaching the conclusion that the circuit court failed to consider Ashton's wishes, because an examination of the record of the dispositional

[1]West Virginia Code § 49-6-5(a)(6)(C) requires the court to "give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." *Id.*

hearing makes it abundantly clear that the circuit court gave careful consideration to the child's wishes and fashioned a disposition that would protect her from further abuse, but still honored her wishes to have continued contact with her mother. At the dispositional hearing, the guardian ad litem argued to the circuit court that as long as Ashton could maintain contact and a relationship with her mother, she would be "*happy*" with the circuit court's decision. (Emphasis added). Specifically, after the circuit court brought up the possibility that it would terminate the Respondent mother's rights, the guardian ad litem argued as follows:

MS. MORTON: Your Honor, perhaps there's a distinction without a difference. Ashton does want to maintain a relationship and contact with her mother. *The reason I did call her in here to discuss this matter of legal verus parental rights is that she is 16.* What she wants to accomplish is the continued contact with her mother.

Now, the way I understood termination of custodial rights was that Michelle would be forever barred from having physical custody of Ashton. Now if her parental rights were terminated, parental legal rights were terminated, that would also bar any inheritance by Ashton from her mother or –

THE COURT: I don't know where that comes from. As a matter of fact, I don't know any case that addresses that issue. With regard to that, certainly the issue of support is not terminated by the termination of parental rights.

But again, my question is the Supreme Court has said that with a person of teenage years if it causes some emotional impact upon the child, that termination of parental rights, *the Court should consider the wishes of the child in that regard.*

Now that may be in some way the distinction without a difference, if I understand what you're saying; *that I can terminate parental rights if it doesn't have any adverse impact upon the child but still meets the desires of the child by permitting post-termination visitation*. Where I can designate that visitation is that when you look to the decision by the Supreme Court that indicates that in terms of the parental rights that have been terminated up to [sic] adoption, any party can file a motion for modification.

It clearly says in that case that if the parental rights have been terminated, then the parents don't have the right to do that. But if the parental rights have not been terminated then that would give the mother the right to come in and seek a modification prior to disposition subject to termination of parental rights. So I think there is a significant legal difference. I just don't know what the desires of the child are.

MS. MORTON: It would be significant for Ashton, not 18.

THE COURT: She's not 18, she's 16.

MS. MORTON: I mean she's 16, which means she's very close. If she were a child of 2 or 6 – Your Honor, she's out in the hall and I could bring her in. It's just very difficult for her to come into these proceedings. It's hard. *What I'm saying to you is this; I don't know that she would understand the legal distinction that the Court just made and obviously I didn't understand it all either because I misspoke. However, as long as the maintenance of contact and visitation continues with her mother, however that is accomplished, is intact I think the child will be happy.*

* * *

MS. MORTON: Like I said, *I think so long as that means is accomplished and maintained I think she's going to be happy. As far as the child is concerned it's*

the end that is important, not the means or way which we get there.

* * *

THE COURT: The Court finds that the Respondent Mother has failed to adequately protect the child; that she failed to take reasonable action to protect the child in light of clear and convincing evidence to the contrary. *The Court is further of the opinion that she desires to maintain contact and a relationship with Mr. H[][.] [the Respondent's boyfriend] over maintaining custodial rights of the child.*

The Court finds there is no reasonable grounds to believe that the conditions of the abuse and neglect that have arisen can be reasonably corrected within the foreseeable future**.** *There is absolutely no evidence before this Court that the termination of the Respondent Mother's parental rights will adversely affect the child. In fact, the desires of the child set forth in the record in this case indicates that the child's interests can be adequately protected by the Court granting the Respondent Mother supervised post-termination visitation with the child in accordance with the child's desires.*

Therefore, the parental rights of the Respondent Mother are hereby permanently terminated and the Court will grant supervised post-termination visitation with the child to be supervised by the grandmother at a reasonable time provided the child will never be out of the presence of the grandmother with the mother and pursuant to the desires of the infant child.

(Emphasis added).

Obviously, neither the Petitioner mother's counsel nor the guardian ad litem seemed to understand that even when parental rights are terminated, visitation and contact can continue. This Court first enunciated the concept of post-termination visitation in *In re Christina L*, 194 W. Va. 446, 460 S.E.2d 692 (1995). The circuit court understood the law and fashioned thereunder a means to protect Ashton from further abuse while still permitting her continued contact with her mother in a safe setting and even made specific findings regarding the child's wishes as can be seen from this portion of the transcript in which the circuit court states:

> *Therefore, the parental rights of the Respondent Mother are hereby permanently terminated and the Court will grant supervised post-termination visitation with the child to be supervised by the grandmother at a reasonable time provided the child will never be out of the presence of the grandmother with the mother and pursuant to the desires of the infant child.*

(Emphasis added). And although the guardian ad litem did not know the correct terminology, she stated the child's wishes very clearly on the record, and the judge not only considered, but also honored them.

Exacerbating the problem with the majority turning a part of its decision on this issue is that neither the Petitioner mother nor the guardian ad litem even assigned as error the circuit court's alleged failure to consider the wishes of the child, but merely argued it within the context of the assignment of error relating to termination. Consequently, the majority has

elevated an argument to "assignment of error" status. This Court has consistently found that assignments of error nor raised on appeal are deemed waived. *See Covington v. Smith*, 213 W. Va. 309, 317 n.8, 582 S.E.2d 756, 764 n.8 (2003) (stating that casual mention of an issue in a brief is insufficient to preserve the issue on appeal); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) (finding that "[i]ssues not raised on appeal or merely mentioned in passing are deemed waived." (citation omitted)); *State v. Lilly*, 194 W.Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (finding that "'casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.'" (internal quotations and citation omitted)). Nor did the guardian ad litem and mother state an objection for the record on this issue. Consequently, the majority takes an alleged error that was not preserved by any party before the circuit court or made the subject of an assignment of error here and reverses the circuit court on that basis.

Moreover, nothing in *In re Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010), or in West Virginia Code § 49-6-5(a)((6), which is relied upon by the majority in reversing the circuit court on this issue, can be construed "to imply that the wishes of a child who is fourteen years or older, or who is an age of discretion as determined by the court, must control a court's decision on whether to terminate parental rights." *In re Jessica G.*, 226 W. Va. at 23, 697 S.E.2d at 59 (Workman, J., concurring). Again, West Virginia Code § 49-6-5(a)(6) only provides that "[n]otwithstanding any other provision of this article, the court

shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." *Id*. Thus, the child's only right emanating from the foregoing statute is to express his or her wishes regarding the termination of the parental rights. "The ultimate decision [concerning termination of parental rights] remains squarely within the circuit court's discretion; however, the best interests of the child remains the paramount consideration." 226 W. Va. at 23, 697 S.E.2d at 59. In the instant case, it is clear from the hearing below that the guardian ad litem expressed Ashton's desires to maintain a relationship with her mother, and that so long as permitted to do so, that was all that mattered to Ashton. The circuit court considered this desire in granting supervised post-termination visitation.

II.

Rule 34 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides:

> If objections to the child's case plan are raised at the disposition hearing, the court shall enter an order:
>
> (a) Approving the plan;
>
> (b) Ordering compliance with all or part of the plan;
>
> (c) Modifying the plan in accordance with the evidence presented at the hearing; or
>
> (d) Rejecting the plan and ordering the Department to submit a revised plan within thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.

Id. That rule was examined in *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001), wherein the Court held in syllabus point five that

> [w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been *substantially disregarded or frustrated*, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Id. at 624, 558 S.E.2d at 623 (emphasis added).

The only difference in the DHHR's recommendation and the circuit court's disposition is one of semantics. Thus, the circuit court Order did not substantially disregard or frustrate the disposition process recommendation as required by *In re Edward B.* *Id*. Instead, after hearing argument of counsel (and providing an opportunity for evidence to be taken if any party desired to do so), the circuit court modified the plan in accordance with the hearing. *Id*.

Upon remand, the circuit court will surely once again hear the child's wishes and act as is his prerogative as the presiding circuit court judge in terminating rights and allowing post-termination visitation. This result is not only reasonable, compassionate and legally sound, it also protects this child from further abuse. It should be noted that the Petitioner mother continued to maintain her boyfriend's innocence of sexual abuse of her

child, even in light of his own admissions to sexual abuse. A mother's choice of a boyfriend over her child in this type of scenario clearly reflects a lack of basic maternal instinct and ability to protect. Absent termination of legal rights, this mother could return to court and seek to regain full legal rights to this child. The circuit court wanted to see to it that the child's wishes were honored, but also wanted to protect her from further abuse.

Perhaps the majority will yawn, and say, oh well, this is just a per curiam opinion and this child will be eighteen soon anyway. But it must be remembered that the law set forth by the majority will have precedential value[2] and may be cited as legal support in future cases where there is not the potentially imminent protection of a child reaching age eighteen.

[2]*See* Syl. Pts. 3 and 4 of *Walker v. Doe*, 210 W. Va. 490, 558 S.E.290 (2002)(holding that "[p]er curiam opinion have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases[,]" and "[a] per curiam opinion may be cited as support for a legal argument.").

654 F. Supp. 2d 465

United States District Court,
N.D. West Virginia.
Stoney W. AULT, Petitioner,
v.
Teresa WAID, Warden, Respondent.

Civil Action No. 2:07cv88.
Sept. 16, 2009.

Stoney W. Ault, St. Mary's, WV, pro se.

Robert D. Goldberg, Attorney General's Office, Charleston, WV, for Respondent.

ORDER

ROBERT E. MAXWELL, District Judge.

It will be recalled that on April 8, 2009, Magistrate Judge Kaull filed his Report and Recommendation, wherein the Petitioner was directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation. On June 8, 2009, the Court, after having granted the Petitioner an extension of time within which to file his objections, received Petitioner's objections.

Upon examination of the report from the Magistrate Judge, it appears to the Court that all matters raised and suggested by Magistrate Judge Kaull in his Report and Recommendation are appropriate. Upon examination of the report from the Magistrate Judge, it appears to the Court that the issues raised by the Petitioner in his Petition For Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, wherein Petitioner alleges several state trial court errors during the trial leading to his conviction, were thoroughly considered by Magistrate Judge Kaull in his Report and Recommendation, as were the Respondent's Motion for Summary Judgment and the Petitioner's response thereto. Moreover, the Court, upon an independent *de novo* consideration of all matters now before it, is of the opinion that the Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in this action. Furthermore, upon consideration of the Petitioner's objections, it appears to the Court that the Petitioner has not raised any issues that were not thoroughly considered and accurately addressed by Magistrate Judge Kaull in his Report and Recommendation. Therefore, it is

ORDERED that Magistrate Judge Kaull's Report and Recommendation be, and the same hereby is, accepted in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is hereby

ORDERED that Respondent's Motion for Summary Judgment (docket # 25) be, and the same hereby is, **GRANTED.** It is further

ORDERED that Stoney Ault's Petition in this matter be, and the same hereby is, **DENIED, DISMISSED WITH PREJUDICE** and **STRICKEN** from the docket of this Court. It is further

ORDERED that the Clerk shall enter judgment for the Respondent. It is further

ORDERED that, if Petitioner should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within

thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4, Federal Rules of Appellate Procedure. The $5.00 filing fee for the notice of appeal and the $450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, Petitioner may, in accordance with the provisions of Rule 24(a), Federal Rules of Appellate Procedure, seek leave to proceed *in forma pauperis* from the United States Court of Appeals for the Fourth Circuit.

OPINION/REPORT AND RECOMMENDATION

JOHN S. KAULL, United States Magistrate Judge.

This § 2254 was transferred from the Southern District of West Virginia on October 30, 2007. It was received by this Court on November 1, 2007.

On December 21, 2007, the respondent was directed to file a response to the petition on the limited issue of timeliness. The respondent filed her answer on January 17, 2008.

Because the respondent provided sufficient evidence to verify the timeliness of the petition, on August 25, 2008, the respondent was directed to show cause why the petition should not be granted.

On September 9, 2008, the petitioner was granted permission to supplement his petition. As a result, the respondent was given additional time to review the supplement and file a response.

The respondent filed a Motion for Summary Judgment and Memorandum in Support on November 5, 2008. Because the petitioner is proceeding *pro se,* the Court issued a *Roseboro* Notice on November 7, 2008, advising the petitioner of his right to file responsive material.

The petitioner filed his response on December 8, 2008.

I. *Procedural History*

A. *Petitioner's Conviction and Sentence*

On November 14, 2000, the petitioner was indicted by the Circuit Court of Grant County, West Virginia, of three counts Sexual Assault in the First Degree in violation of W.Va.Code § 61-8B-3, and two counts of Sexual Abuse by a Parent, Guardian or Custodian in violation of W.Va.Code § 61-8D-5(a). Resp't Ex. 1.

The case against the petitioner proceeded to trial on June 3, 2002. Resp't. Ex. 8. On June 4, 2002, a Grant County petit jury found the petitioner guilty of First Degree Sexual Abuse (a lesser included offense of Count One) and guilty of count four, Sexual Abuse by a Custodian. *Id.* at 346. The petitioner was acquitted on counts two, three and five. Resp't Ex. 2.[FN1]

On October 8, 2002, the petitioner was sentenced to one to five years imprisonment on Count One, and ten to twenty years on Count 4, sentences to run concurrent. Resp't Ex. 3.

B. *Direct Appeal*

On April 21, 2003, the petitioner appealed his conviction and sentence to the West Virginia Supreme Court of Appeals ("WVSCA"). Resp't Ex. 4. On ap-

peal, the petitioner asserted the following assignments of error:

(1) the trial court misapplied the Rape Shield Law, W.Va.Code § 61-8b-11(b);

(2) the trial court erred in allowing the child victim to testify using two-way television in a manner that did not adhere to the State statutory provisions for such testimony;

(3) the conviction cannot stand as the child victim's uncorroborated testimony is inherently incredible;

(4) the trial court erred in denying the defendant's Rule 29 motion;

(5) The trial court erred in failing to give a jury instruction proffered by the defendant; and

(6) the trial court erred by giving a lesser included offense instruction for First Degree Sexual Assault.

Id.

Petitioners' direct appeal was refused on October 2, 2003. *Id.*

C. *Petitioner's State Habeas Petition*

The petitioner filed a *pro se* state habeas petition with the Circuit Court of Grant County on June 17, 2005. Resp. Ex. 5. In his state habeas petition, the petitioner asserted the following grounds for relief:

(1) the trial court misapplied the Rape Shield Law to exclude evidence of the victim's previous sexual experience;

(2) the trial court erred by not following the statutory procedures for using closed-circuit television testimony;

(3) the trial court erred in admitting the victim's uncorroborated testimony because it was inherently unreliable;

(4) the trial court erred by denying the petitioner's Rule 29 motion for acquittal;

(5) the trial court erred by failing to give the jury a *Payne* instruction;

(6) the trial court erred by instructing the jury on sexual abuse, a lesser included offense of sexual assault, and allowing the jury to convict him of the lesser offense;

(7) he was denied his constitutional right to a speedy trial;

(8) he was denied a fair trial due to prosecutorial misconduct;

(9) the trial court erred by having improper communications with the jury;

(10) he was denied counsel at his preliminary hearing;

(11) the trial court violated his constitutional right against double jeopardy;

(12) the trial court erred by being influenced by judicial bias during his sentencing and by allowing impermissible considerations to be included in his presentence report;

(13) the trial court erred by failing to require the State to prove that he was custodian for the purpose of the crime of sexual abuse by a custodian;

(14) the trial court erred by allowing a biased juror to remain on the jury;

(15) the trial court erred in allowing the jury to consider improper information about his criminal record;

(16) he was denied his constitutional right to freedom of speech because his girlfriend was not allowed to park in the Court parking lot;

(17) he was denied his constitutional right to effective assistance of counsel; and

(18) even if none of the above errors alone suffices to overturn his conviction, the cumulative error from the trial does.

Resp't Ex. 5; Ex. 6 at 161-162.

The state court held an omnibus evidentiary hearing on August 3, 2006. Resp't Amd. Ex. 6 (dckt. 38) at 158. In a ninety-one page order entered on August 10, 2006, the state court denied the petitioner's state habeas petition. *Id.* at 246. The petitioner filed an appeal of that decision to the WVSCA on February 26, 2007. Resp't Ex. 7. The WVSCA refused the petitioner's appeal on September 11, 2007. *Id.*

D. *Petitioner's Federal Habeas Petition*

In his federal habeas petition, the petitioner asserts the following grounds for relief:

(1) the trial court erred by giving an instruction on sexual abuse, a lesser included offense, when the victim's testimony did not support anything other than the greater offense of sexual assault, which offense the petitioner denied committing;

(2) he was denied his constitutional right to effective assistance of trial counsel;

(3) the trial court denied him due process of law by allowing his prior criminal record to be viewed by the jury;

(4) the trial court abused its discretion by blindly and mechanically applying the Rape Shield Law;

(5) the trial court erred in allowing the child victim to testify using two-way television in the manner done;

(6) the victim's testimony was uncorroborated and inherently incredible;

(7) the trial court erred in denying his Rule 29 motion for judgment of acquittal;

(8) the trial court erred in failing to give a jury instruction proffered by the defendant;

(9) the trial court erred by giving the lesser included offense instruction for First Degree Sexual Assault; and

(10) the appellate court should have applied the cumulative error doctrine.

On September 4, 2008, the petitioner raised the following supplemental grounds for relief:

(11) plain error; faulty, illegal and amended indictment to convict; and

(12) ineffective assistance of appellate counsel.

E. *Respondents' Contentions*

The respondent denies that any violation of the petitioner's rights has occurred. Moreover, in support of her motion for summary judgment, the respondent asserts that there are no genuine issues of material fact with respect to the claims raised in the petition and that she is entitled to judgment as a matter of law. In addition, the respondent asserts that federal relief is available only for claims of constitutional dimension. Therefore, to the extent that the petitioner's claims allege violations of state law, the respondent argues that those claims are not cognizable on federal habeas review. Finally, the respondent asserts that the petitioner has failed to state a claim for which relief can be granted and that the petitioner is not entitled to relief on any of his claim.

F. *The Petitioner's Reply*

In his reply, the petitioner reargues the claims raised in the petition in an attempt to rebut the arguments made by the respondent in her motion.

II. *Standards of Review*

A. *Summary Judgment*

The Supreme Court has recognized the appropriateness of Rule 56 summary judgment motions in habeas cases. *See Blackledge v. Allison,* 431 U.S. 63, 80, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). So too has the Fourth Circuit Court of Appeals. *Maynard v. Dixon,* 943 F.2d 407 (4th Cir.1991). Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Motions for summary judgment impose a difficult standard on the moving party; for it must be obvious that no rational trier of fact could find for the nonmoving party. *Miller v. Federal Deposit Ins. Corp.,* 906 F.2d 972, 974 (4th Cir.1990). However, the "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To withstand such a motion, the nonmoving party must offer evidence from which a "fair-minded jury could return a verdict for the [party]." *Id.* "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir.1987). Such evidence must consist of facts which are material, meaning that the facts might affect the outcome of the suit under applicable law, as well as genuine, meaning that they create fair doubt rather then encourage mere speculation. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. It is well recognized that any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. *Federal Habeas Review Under 28 U.S.C. § 2254*

Notwithstanding the standards which govern the granting of a motion for summary judgment, the provisions of 28 U.S.C. § 2254 must be examined to determine whether habeas relief is proper. Title 28 U.S.C. § 2254 requires a district court to entertain a petition for habeas corpus relief from a prisoner in State custody, but "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Regardless, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). However, the federal court may not grant habeas relief unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254(d)(1) and (2); *see also Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

[1] The Fourth Circuit Court of Appeals has determined that "the phrase 'adjudication on the merits' in section 2254(d) excludes only claims that were not raised in state court, and not claims that were decided in state court, albeit in a summary fashion." *Thomas v. Taylor,* 170 F.3d 466, 475 (4th Cir.1999). When a state court summarily rejects a claim and does not set forth its reasoning, the federal court independently reviews the record and clearly established Supreme Court law. *Bell v. Jarvis,* 236 F.3d 149 (4th Cir.2000) *cert. denied,* 534 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001) (quoting *Bacon v. Lee,* 225 F.3d 470, 478 (4th Cir.2000)). However, the court must still "confine [it's] review to whether the court's determination 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' " *Id.* at 158.

A federal habeas court may grant relief under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently that this Court has on a set of materially indistinguishable facts." *Williams,* 529 U.S. at 413, 120 S.Ct. 1495. A federal court may grant a habeas writ under the "unreasonable application" clause, "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "An unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410, 120 S.Ct. 1495.

When a petitioner challenges the factual determination made by a state court, "federal habeas relief is available

only if the state court's decision to deny post-conviction relief was 'based on an unreasonable determination of the facts.' " 28 U.S.C. § 2254(d)(2). In reviewing a state court's ruling on post-conviction relief, "we are mindful that 'a determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.' " *Tucker v. Ozmint,* 350 F.3d 433, 439 (4th Cir.2003).

However, habeas corpus relief is not warranted unless the constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Richmond v. Polk,* 375 F.3d 309 (4th Cir.2004). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Brecht, supra.*

Here, the petitioner's claims were properly presented to the courts of the State. Because the petitioner's claims were adjudicated on the merits in State court, the State's findings of fact and conclusions of law are due the appropriate deference.

III. *Analysis*

[2][3] Although *pro se* petitions are to be liberally construed as set forth in *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), habeas petitions must meet heightened pleading requirements. *McFarland v. Scott,* 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994). "[N]otice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." *Blackledge v. Allison,* 431 U.S. 63, 75, n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (internal quotations omitted). A habeas petitioner must come forth with evidence that a claim has merit. *Nickerson v. Lee,* 971 F.2d 1125, 1136 (4th Cir.1992), *cert. denied,* 507 U.S. 923, 113 S.Ct. 1289, 122 L.Ed.2d 681 (1993). Unsupported, conclusory allegations do not entitle a habeas petitioner to relief. *Id.*

A. *Ground One-Giving of Instruction on Lesser Included Offense of Sexual Abuse*

[4] In this ground, the petitioner asserts that the trial court erred by giving an instruction on sexual abuse, a lesser included offense of sexual assault, when the victim's testimony did not support anything other than the greater offense of sexual assault and the petitioner denied committing the alleged offenses. In support of this claim, the petitioner asserts that the victim's testimony clearly met the requirements of the greater offense of sexual assault in that she testified to both intrusion and intercourse. The petitioner alleges that no where in the victim's testimony did she allege the elements of sexual abuse. Moreover, the petitioner asserts that he denied all of the accusations against him and that there was no evidentiary conflict which supported giving an instruction on the lesser included offense. The petitioner asserts that although the State requested the charge, it was not entitled to such charge, especially in light of the defendant's objection. Additionally, the petitioner asserts that the trial court failed to

apply the appropriate standard for determining whether the charge was warranted.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove that the trial court's inclusion in its jury instruction and on the verdict form of sexual abuse, a lesser included offense of sexual assault as charged in the indictment, denied the Petitioner his right to a fair trial or his right to be informed of the nature and cause of the accusations against him ...
>
> 'A defendant does not have the right to preclude the State from seeking a lesser included offense instruction where it is determined that the offense is legally lesser included and that such an instruction is warranted by the evidence.' Syl. Pt. 4, *State v. Wallace,* 175 W.Va. 663, 337 S.E.2d 321 (1985).
>
> 'An offense, in order to be a lesser included offense, must be a less serious crime in terms of its classification and degree.' *State v. Penwell,* 199 W.Va. 111, 116, 483 S.E.2d 240, 245 (1996).
>
> The test for determining whether a particular offense is a lesser included offense is that the lesser included offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syl. Pt. 4, *State v. Bell,* 211 W.Va. 308, 565 S.E.2d 430 (2002) ...
>
> To prove sexual assault in the first degree, the State must show that a defendant, at least fourteen years old, engaged in sexual intercourse or sexual intrusion with a child under the age of twelve. W.Va.Code § 61-8B-3. The statute defines sexual intercourse as any act between persons involving penetration, however slight, of the female sex organ by the male sex organ, or involving contact between sex organs of one person and the mouth or anus of another person. *Id.* The statute defines sexual intrusion as any act between persons involving penetration, however slight, of the female sex organ, or of the anus of any person, by an object, for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desires of either party. *Id.*
>
> To prove sexual abuse in the first degree, the State must show that a defendant, at least fourteen years old, subjected a child under the age of twelve to sexual contact. W.Va.Code § 61-8B-7. The statute defines sexual contact as any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of a person, or the breasts of a female, or the intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purposes of gratifying the sexual desire of either party. *Id.*
>
> Both first degree sexual assault and first degree sexual abuse require that

a defendant, at least fourteen years old, engage in a sexual act with the victim under the age of twelve. First degree sexual assault requires that the sexual act be sexual intercourse or sexual intrusion. First degree sexual abuse requires only that the sexual act be sexual contact. To prove penetration as required for first degree sexual assault, the perpetrator must necessarily make sexual contact with the victim. Therefore, all of the requirements for first degree sexual abuse must be shown to commit the offense of first degree sexual assault. First degree sexual assault, however, requires the additional element of penetration. Consequently, first degree sexual abuse constitutes a lesser included offense of first degree sexual assault.

The petitioner knew that the victim had accused him of committing sexual acts against her. He had the statement she gave to the police and Lynn Foley prior to the trial. In her statement, the victim accuses the Petitioner of both penetration and mere sexual contact. [*State v. Ault,* No. 00-F-22 p. 66, Transcript of Interview Taken August 4, 2001]. Therefore, the Petitioner knew the nature of the accusations against him.

As stated above, the Court may instruct the jury that if they do not find a defendant guilty of the charge for which he was indicted, the jury may, nevertheless, find the defendant guilty of a lesser included charge. In this case, the Court correctly instructed the jury of the requirement for sexual assault in the first degree and its lesser included charge of sexual abuse in the first degree. The jury found sufficient evidence to convict the Petitioner of sexual abuse in the first degree. The Court did not violate the Petitioner's right to a fair trial or his right to know the nature of the accusations against him by instructing the jury on the lesser included charge of sexual abuse in the first degree and allowing the jury to convict the Petitioner of the same.

Resp't Amd. Ex. 6 (Order Denying State Habeas Petition) at 189-92.

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground one was not contrary to clearly established federal law as neither the petitioner, the respondent, nor the undersigned, can find a Supreme Court case which forbids a trial court from giving a lesser included offense instruction if the charge is supported by the evidence.

[5] Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground one involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. As noted by the state habeas court “[t]he test for determining whether a particular offense is a lesser included offense is that the lesser included offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the

greater offense." Resp't Ex. 6 at 190 (citing Syl. Pt. 4, *State v. Bell,* 211 W.Va. 308, 565 S.E.2d 430 (2002)). Moreover, based on the statutory definitions of sexual assault in the first degree, and first degree sexual abuse, it is clear that one cannot commit first degree sexual assault without first committing first degree sexual abuse. The petitioner's argument that the two are separate and distinct charges because Sexual Assault in the First Degree requires an element (penetration) not found in First Degree Sexual Abuse, is off the mark. Sexual Assault in the First Degree is the *greater* offense. The test for determining whether a charge is a lesser included offense is whether the *lesser* offense contains an element which is not required in the greater offense.

Accordingly, the undersigned recommends that ground one be denied.

B. *Ground Two-Ineffective Assistance of Trial Counsel*

In this ground, the petitioner asserts three incidents of ineffective assistance of trial counsel. First, the petitioner asserts that trial counsel was ineffective for agreeing to allow the child victim's Guardian at Litem ("GAL") to be present in the testimony room with the victim during her closed-circuit television testimony. Second, the petitioner asserts that counsel was ineffective for failing to strike a juror for cause, or to use a peremptory strike, on a juror who knew the victim and one of the prosecution's witnesses. Third, the petitioner asserts that counsel was ineffective for allowing a copy of his prior criminal record to be admitted to the jury for their consideration.

1. *Allowing GAL in Testimony Room with Victim*

In support of this ground, the petitioner asserts that pursuant to W.Va.Code § 62-6b-4(b)(1), the only persons permitted to be in the testimony room for closed-circuit television testimony, are the prosecuting attorney, the defendant's attorney, the witness and the equipment operator. Thus, the petitioner asserts that his rights were violated when the GAL was allowed in the testimony room with the victim, and counsel was ineffective for agreeing to such an arrangement. In particular, the petitioner notes that the GAL patted the victim reassuringly during her testimony and verbally coached the victim by telling her she was doing a good job, and by telling her to "tell them what you remember." The petitioner asserts that the presence of the GAL tainted and influenced the victim's testimony, thus, her presence in the testimony room was highly prejudicial and should have been prevented.

2. *Failing to Strike Juror who Knew Victim and One of Prosecution's Witnesses*

In support of this ground, the petitioner asserts that trial counsel failed to properly *voir dire* Juror Martin. The petitioner asserts that during *voir dire,* Juror Martin revealed that she knew the victim in this case and one of the prosecution's witnesses. Juror Martin informed the court that she had been the victim's 4-H leader for a period of two months, about two months prior to the trial, and that her children attended the same school as the victim. In addition, Juror Martin informed the Court that she also knew one of the prosecution's witnesses through the 4-H. Further, the petitioner asserts that although Juror Martin stated

that she did not know either the victim or the other witness very well, she also did not unequivocally state that she could render an impartial verdict. In fact, the petitioner asserts that Juror Martin stated that she did not know if she could be impartial.

3. *Allowing Jury to See Copy of Petitioner's Prior Criminal Record*

In support of this ground, the petitioner asserts that evidence of his prior criminal record was inadvertently given to the jury. Moreover, the jury clearly considered that evidence because it specifically asked the Court what "CDW" meant.[FN2] When the jury requested information on what CDW stood for, counsel for the petitioner was concerned that the jury would think that CDW involved children and would be highly prejudicial to the petitioner. Counsel for the petitioner requested that the Court explain to the jury that his CDW arrest had nothing to do with children. That motion was denied.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove his trial counsel was ineffective in violation of his right to counsel as guaranteed by the U.S. Const. Amend. VI and the WV Const. Art. III § 14.
>
> * * *
>
> 'In West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d [L.Ed.2d] 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' Syl. Pt. 1, *State v. Frye,* [221 W.Va. 154], 650 S.E.2d 574, 2006 WL 386363 (WVSC Feb. 17, 2006).
>
> 'In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance which at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.' Syl. Pt. 2, *Id.* ...
>
> 'The strong presumption that counsel's actions were the result of sound trial strategy ... can be rebutted only by clear record evidence that the strategy adopted by counsel was unreasonable.' *Coleman,* 215 W.Va. at 596 [600 S.E.2d 304], *supra* p. 23.
>
> * * *
>
> **1. The Petitioner argues that his counsel acted ineffectively when they failed to strike a potentially bias juror from his jury panel.** [*Ault v. Haines:* No. 05-C-39, Petition for Writ of Habeas Corpus p. 5(a)].
>
> The Petitioner asserts that Juror Martin, who testified during voir dire

that she led a 4-H club which the victim had briefly attended, prejudiced the entire jury against him. [*Id.*] The Petitioner claims that his counsel should have moved to strike this juror for cause based on her association with the victim and her foster family. [*Id.*].

As discussed in ground fourteen, *supra,* the Court determined that Juror Martin sufficiently indicated that she would decide the case only on the evidence provided at trial and the instructions given by the Court. The juror said she would not be influenced by her very brief acquaintance with the victim. Therefore, even had defense counsel moved to strike her for cause, the Court likely would have properly denied their request.

Defense counsel could have used one of the Petitioner's strikes to remove the juror from the jury if the Petitioner worried that she would prejudice the jury against him. The court assumes, and the Petitioner has provided no evidence to the contrary, that defense counsel and the Petitioner discussed whom to strike from the jury and determined that Juror Martin need not be stricken. Therefore, defense counsel did not act ineffectively by failing to strike Juror Martin from the jury.

* * *

12. The Petitioner asserts that his counsel acted ineffectively by introducing into evidence the case submission report which contained the Petitioner's criminal history and which was sent back to the jury room and seen by the jury during deliberations. [*Ault v. Haines,* No. 04-C-2, Petition for Writ of Habeas Corpus p. 11].

As discussed in ground fifteen, *supra,* the Court agrees that the Petitioner's criminal history should not have been introduced into evidence in any manner. Defense counsel did err in neglecting to remove the Petitioner's criminal history from the forensic case submission report. However, as the Court has already discussed, any error caused by the introduction of the Petitioner's criminal history was cured by the Court's curative instruction. The Court is not convinced that the outcome of the trial would have been any different if this error had not occurred. Therefore, the Petitioner is not entitled to habeas corpus relief based on this ground alone.

Resp't Amd. Ex. 6 at 225-26, 228-29, 238 (emphasis in original).

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground two was not contrary to clearly established federal law. The state court cited the appropriate standard of review, *Strickland v. Washington, supra.* Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground two involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Failure to Strike Juror Martin

[6] Although Juror Martin was acquainted with the child victim and one of the prosecution's witnesses, she did not have a close relationship with either party. Moreover, Juror Martin stated, although not unequivocally, that she did not think that her acquaintance with those parties would influence her decision in this case. In fact, it is quite clear that the jury, as a whole, took its role as the trier of fact very seriously. The jury deliberated for a long time, at one point questioning the Court on the procedure for a hung jury. In addition, the jury acquitted the defendant of the majority of the charges and only found him guilty on ground one as to the lesser included offense. Thus, assuming that defense counsel should have requested to strike Juror Martin, the petitioner has not shown that such motion would have been granted, nor that any prejudice occurred as a result of Juror Martin's presence on the jury.

Allowing the Jury to see Criminal Record

[7][8] The undersigned agrees that in this case, the Petitioner's criminal history should not have been introduced into evidence and that defense counsel erred by neglecting to remove said criminal history from the forensic case submission report. However, the undersigned also agrees that this error was harmless. When it was discovered that the petitioner's criminal history was inadvertently left on the forensic case submission report and that the jury had noticed it, the Court gave the jury an instruction to disregard that history as irrelevant and not to consider it in their deliberations. The jury is presumed to do as instructed. *Richardson v. Marsh,* 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (requiring an overwhelming probability to rebut the presumption that a jury will follow the court's instruction to disregard irrelevant evidence). Moreover, the jury did not question the petitioner's criminal history further. Thus, the undersigned does not believe that but for counsel's error, the outcome of the proceedings would have been different.

Allowing GAL in Testimony Room

[9] The issue of counsel's ineffective with regard to the GAL was not raised in the petitioner's state habeas petition. However, the Court did address whether allowing the GAL in the testimony room with the child victim was appropriate. In so deciding, the state habeas court found:

> The Petitioner also agreed to allowing the GAL to be present in the room with the victim while she testified and stated that it might even be helpful. [*Id.* at p. 8 line 12-p. 9 line 22]. Even if the GAL's presence did reassure the victim, as the defense counsel pointed out, the GAL would have been able to be present in the courtroom if the victim had testified from the witness chair and the GAL would have had the same reassuring effect. [*Id.*].
>
> Resp't Ex. 6 at 176.

Thus, in essence, the state habeas court found that it was not error to allow the GAL in the testimony room, and even if it was, the petitioner was not prejudiced by that error. Therefore, if it was not error to allow the GAL in the testimony room, counsel's agreeing to such allowance was not deficient and

his performance cannot be deemed ineffective. Alternately, even if counsel should have objected to the GAL being in the testimony room, the petitioner was not prejudiced by that error and counsel was not ineffective.

Although allowing the GAL in the testimony room with the victim was not the normal procedure under the statute, the undersigned is not convinced that it was error for defense counsel to agree to allow the GAL in the testimony room with the child victim. Moreover, the undersigned agrees with the state court that allowing the GAL in the testimony room was at best, harmless error. The petitioner provides no evidence, other than his own self-serving speculation, to show that the GAL's presence in the testimony room had any effect on the jury. In addition, the trial court explained the presence of the GAL to the jury which rendered her presence innocuous.[FN3]

Accordingly, ground two should be denied.

C. *Ground Three-Allowing Prior Criminal Record to be Viewed by Jury*

[10] In this ground, the petitioner asserts that the trial court denied him due process of law by allowing his prior criminal record to be viewed by the jury. In support of this claim, the petitioner asserts that upon the motion of his trial counsel, the court admitted into evidence, a form which contained his prior criminal record. Specifically, the form noted that the petitioner had been arrested for disorderly conduct and CDW (carrying a dangerous weapon). The petitioner asserts that there was absolutely no reason for his prior criminal record to be submitted to the jury. Moreover, the petitioner asserts that the jury considered such record as evidenced by its question to the court asking what CDW meant. The petitioner asserts that because there is no way to know if his conviction was predicated in part on the jury's knowledge of his prior criminal record, his right to a fair trial was violated.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove that the trial court's curative instruction to the jury not to consider the Petitioner's criminal record insufficiently rectified the error at trial as to violate the Petitioner's right to a fair trial by due process of law as guaranteed by the U.S. Const. Amends. V and XIV and the WV Const. Art. III § 10.
>
> * * *
>
> 'Ordinarily where objections to question or evidence by a party are sustained by the trial court during the trial and the jury [is] instructed not to consider such matter, it will not constitute reversible error.' Syl. Pt. 7, *State v. Catlett,* 207 W.Va. 747, 536 S.E.2d 728 (2000).
>
> 'Where the trial court erroneously permits inadmissible matters to be introduced into evidence, such error does not create a manifest necessity for a mistrial.' Syl. Pt. 6, *Id.*
>
> 'Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to

determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction an analysis must then be made to determine whether the error had any prejudicial effect on the jury.' Syl. Pt. 3, *Moss v. Trent,* 216 W.Va. 192, 603 S.E.2d 656 (2004).

* * *

Neither the State nor the Court argue that the Petitioner's criminal history was properly left on the forensic case submission report. All participants in the Petitioner's case agree that the information about the Petitioner's prior crimes should have been removed from the exhibit before submitting it to the jury. However, as soon as the Court became aware of the mistake, the Court issued a curative instruction to the jury that the Petitioner's criminal history was irrelevant to this case and should not be considered in their deliberations. The Petitioner offers no evidence that the jury disregarded the Court's instruction and considered the impermissible evidence in its deliberations.

Furthermore, although defense counsel mistakenly introduced the improper evidence in this case, under the test set forth above for determining the effect of improper evidence submitted by the State, any error suffered by the Petitioner was harmless. Without the evidence of the Petitioner's criminal history, the State's case still consists of sufficient evidence to convict the Petitioner of the crimes charged. In fact, the Petitioner's criminal history, as the Court stated, is irrelevant to this case and does not change the evidence showing that the Petitioner sexually abused the victim. There is no evidence or indication that the Petitioner's criminal history influenced the jury in any way other than by sparking their curiosity as to the meaning of "C.D.W." Therefore, the Court did not err in upholding the Petitioner's convictions despite his criminal history's admission into evidence.

Moreover, the Petitioner failed to raise the inclusion of his criminal history as improper evidence as error in his appeal. Therefore, this ground should not be considered in a petition for writ of habeas corpus.

Resp't Amd. Ex. 6 at 219-222.

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground three was not contrary to clearly established federal law. *See Brecht v. Abrahamson,* 507 U.S. at 637, 113 S.Ct. 1710 (an error is harmful only if it had a "substantial and injurious effect or influence in determining the jury's verdict") (internal quotation omitted).

Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground three involved an unreasonable application of clearly established federal

law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. During deliberations, the jury sent a note to the judge asking what "CDW" meant. Resp't Ex. 8 (Trial Transcripts) at 323-34. After consulting with the prosecution and defense counsel, the trial judge drafted the following response: "To the jurors: You are not permitted to consider the Defendant's criminal history. That portion of the form should have been deleted. It is irrelevant to this case." *Id.* at 325. It is presumed, therefore, that the jury followed the court's instructions and disregarded the irrelevant evidence and the petitioner provides no evidence to overcome that presumption. *See Richardson v. Marsh, supra.* Consequently, any error in allowing the jury to view the petitioner's prior criminal history was harmless.

Accordingly, ground three should be denied.

D. *Ground Four-Improper Application of West Virginia Rape Shield Law*

[11] In this ground, the petitioner asserts that the trial court improperly applied West Virginia's Rape Shield Law. In support of this claim, the petitioner asserts that the trial court blindly and mechanically applied the rape shield statute when it disallowed exculpatory and credibility evidence which would have contradicted the uncorroborated testimony of the child victim. Specifically, the petitioner asserts that the jury should have heard evidence of the victim's prior sexual abuse, her sexual acting out and the medical evaluation by Dr. Scarce, the doctor that examined the child victim when she was taken to the emergency room. The petitioner asserts that this evidence contradicted the victim's testimony that the petitioner sexually assaulted and abused her.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove that the trial court's application of the Rape Shield law to evidence of the victim's sexual history violated the Petitioner's right to due process of law as guaranteed by the U.S. Const. Amends. V and XIV and the WV Const. Article III § 10.
>
> * * *
>
> 'Evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible ... [except] solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial introducing evidence with respect thereto.' W.Va.Code § 61-8B-11(b).
>
> 'The provisions of W.Va.Code, 61-8B-11, limiting the defendant's right to present evidence of the victim's prior sexual conduct are constitutional under the provisions of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.' Syl. Pt. 5, *State v. Guthrie,* 205 W.Va. 326, 518 S.E.2d 83 (1999).

'The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defenses.' Syl. Pt. 6, *Id.*

'Statements about sexual activity involving an alleged victim which are not false are evidence of the alleged victim's sexual conduct, even though such conduct was involuntary-and such evidence is *per se* within the ordinary scope of rape shield laws.' *State v. Quinn,* 200 W.Va. 432, 437-438, 490 S.E.2d 34, 39-40 (1997) ...

The Petitioner argues that by refusing to allow evidence of the victim's previous sexual conduct, the Court allowed the jury to infer that the victim learned her precocious sexual knowledge from the Petitioner. He suggests that had the evidence been presented to the jury, the jury would have seen that the victim's previous sexual knowledge gave her the tools to fabricate the allegations against the Petitioner. [*Id.,* Petition for Writ of Habeas Corpus pp. 5(h)-5(i), filed 6/17/05]. At the omnibus hearing on August 3, 2006, the Petitioner further argued that he did not wish to introduce evidence of the victim's past sexual conduct to tarnish the child's reputation as is forbidden by the Rape Shield law. Rather, the Petitioner wanted to introduce the evidence to show that the victim had the knowledge to fabricate the allegations made against the Petitioner.

The evidence the Petitioner sought to introduce concerned the prior sexual conduct and sexual history of the victim. There was no indication, and the Petitioner did not argue, that the victim's previous allegations of sexual abuse were false. Therefore, evidence of the previous abuse is barred by the Rape Shield statute. *Quinn,* 200 W.Va. At 437-438, 490 S.E.2d at 39-40.

The evidence of the victim's prior sexual conduct, such as masturbation and attempts to insert objects into her vagina, is also barred by the Rape Shield statute. Not only are the acts irrelevant to the charges against the Petitioner, but they also would be highly prejudicial to the State and to the victim's testimony. The Court conducted a pretrial hearing and concluded the same:

> Upon consideration of the arguments made, the Court would now find as follows:
>
> 1. That the four areas listed by the Defendant in one of its Motions are acts of sexual conduct which are covered by the Rape Shield Statute.
>
> 2. The Defendant would not suffer any manifest injustice to his 6th Amendment Rights by denying the Defendant the opportunity to either cross examine witnesses or present independent witnesses with regard to the issues set forth in their Motion.

3. It would be more prejudicial to the victim and the State's interest than it would be probative to permit the Defendant to raise the various previous acts of sexual conduct of the alleged victim.

Therefore, the Court does grant the Guardian ad Litem's Motion in Limine. The Defendant will not be permitted to introduce any of said evidence or cross examine any witnesses with regard to same.

[*State v. Ault,* No. 00-F-22 at p. 270, Order entered 11/1/01].

Furthermore, the Petitioner's argument that the Court should have allowed him to introduce the victim's past sexual abuse to demonstrate her knowledge enabling her to fabricate the charges against him has no merit. W.Va.Code § 61-8B-11(b) clearly states that evidence prohibited by the Rape Shield statute can only be introduced to impeach the credibility of the victim. The statute does not provide an exception to the evidence's inadmissibility to show a victim's precocious sexual knowledge.

At trial, the State did not present any evidence of the victim's prior sexual conduct and therefore the excluded evidence could not be introduced to impeach the victim's credibility. Moreover, there is no discussion in the trial transcript about where the victim learned her sexual knowledge, and the phrases the victim used in describing the events were rudimentary and not indicative of abnormal sexual knowledge for a child that are. [*Id.,* Testimony of [A.C.], transcribed by County Court Reporters, *passim,* filed 1/29/03]. And, despite the Court's ruling on the evidence's admissibility, the Petitioner's counsel did argue that the victim could have fabricated the charges against him. [*Id.,* Trial Transcript, p. 313 lines 20-24, filed 1/13/03].

Resp't Amd. Ex. 6 at 164-68.

[12] Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground four was not contrary to clearly established federal law. Absent "circumstances impugning fundamental fairness or infringing specific constitutional protections," admissibility of evidence does not present a federal question. *Grundler v. North Carolina,* 283 F.2d 798, 802 (4th Cir.1960). The Supreme Court has narrowly defined "the category of infractions that violate 'fundamental fairness.' " *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). With regard to the application of West Virginia's Rape Shield Law, the Fourth Circuit has found that a mechanistic exclusion of evidence under the statute may deny a defendant his right to confront and cross-examine his accuser. *Barbe v. McBride,* 521 F.3d 443, 458 (4th Cir.2008).

[13] "The trial court's consideration of the probative value versus the prejudicial effect of particular pieces of evidence, absent extraordinary circumstances, will not be disturbed." *Beasley v. Holland,* 649 F.Supp. 561, 565 (S.D.W.Va.1986) (citing *United States v. MacDonald,* 688 F.2d 224 (4th Cir.1982)). "[B]ecause a fundamental-

fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must 'tread gingerly' and exercise 'considerable self-restraint.' " *Duckett v. Mullin,* 306 F.3d 982, 999 (10th Cir.2002)(quoting *United States v. Rivera,* 900 F.2d 1462, 1477 (10th Cir.1990)).

Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground four involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Prior to trial, the state court heard argument and examined the proposed evidence which involved sexual acts subject to the rape shield law. Resp't Ex. 10. With regard to this issue, the trial court found:

> The Defendant would not suffer any manifest injustice to his 6th Amendment Rights by denying the Defendant the opportunity to either cross-examine witnesses or present independent witnesses with regard to the issues set forth in the Motion ...
>
> It would be more prejudicial to the victim and the State's interest than it would be probative to permit the Defendant to raise the various previous acts of sexual conduct of the alleged victim.
>
> Resp't Ex. 10 at 3-4.

Thus, the trial court did not blindly and mechanistically apply West Virginia's Rape Shield Law in this case. Instead, the court appropriately balanced the interests of the parties and considered the probative versus prejudicial value of the evidence. To the extent that the petitioner argues that the decision of the trial court was wrong, the petitioner has failed to present extraordinary circumstances which would permit this court, on federal habeas review, to reweigh the evidence presented to the trial court and disturb the factual and evidentiary findings made by that court.

Accordingly, ground four should be denied.

E. *Ground Five-Improperly Allowing Child Victim to Testify Using Two-Way Television*

[14] In this ground, the petitioner asserts that the trial court erred in allowing the child victim to testify using two-way television in the manner done. In support of this ground, the petitioner asserts that the statute which allows testimony by closed-circuit television sets forth specific procedures to be followed in determining whether such testimony is necessary so that the defendant's constitutional rights are not trampled. The petitioner asserts that the trial court failed to follow the appropriate procedures and did not comply with the statute in finding that closed-circuit television was appropriate in this case. Thus, the petitioner asserts that his right to a fair and impartial trial was violated.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

The Court concludes that the Petitioner failed to prove that the trial court's allowance of the victim to testify via closed-circuit television violated his right to confront witnesses against him as guaranteed by the U.S. Const. Amend. VI and the WV Const. Art. III § 14.

* * *

'The Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public poverty and the necessities of the case.' *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 3165 [111 L.Ed.2d 666] (1990).

'Use of the ... closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.' *Id.* at 852, [110 S.Ct. at] 3167.

'Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting the child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant. *Id.* at 855, [110 S.Ct. at] 3169.

'The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the [ ] closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.' *Id.*

'The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant ... the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus, i.e.,* more than 'mere nervousness or excitement or some reluctance to testify.' *Id.* at 856, [110 S.Ct. at] 3169.

'We conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.' *Id.* at 857, [110 S.Ct. at] 3170.

'Prior to ordering that the testimony of a child witness may be taken

through the use of live, two-way closed circuit television, the circuit court must find by clear and convincing evidence, after conducting an evidentiary hearing on the issue, that:

1) The child is otherwise competent;

2) Absent the use of live, two-way closed-circuit television, the child witness will be unable to testify due solely to being required to be in the physical presence of the defendant while testifying;

3)The child witness can only testify if live, two-way closed-circuit television is used in the trial; and

4) The state's ability to proceed against the defendant without the child witness' live testimony would be substantially impaired or precluded.' W.Va.Code § 62-6B-3(b).

'In determining whether to allow a child witness to testify through live, two-way closed-circuit television the court shall appoint a psychiatrist, doctoral-level psychologist or a licensed clinical social worker with at least five years of significant clinical experience in the treatment and evaluation of children who shall serve as an advisor or friend of the court to provide the court with an expert opinion as to whether, to a reasonable degree of professional certainty, the child witness will suffer severe emotional harm, be unable to testify based solely on being in the physical presence of the defendant while testifying and that the child witness does not evidence signs of being subjected to undue influence or coercion.' W.Va.Code § 62-6B-3(d).

'When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.' *State v. Johnson,* 210 W.Va. 404, 411, 557 S.E.2d 811, 818 (2001) ...

The Petitioner argues that the Court violated his Sixth Amendment right to confrontation by not adhering to the statutory provisions for allowing a witness to testify by closed-circuit television. [*Ault v. Haines,* No. 05-C39, Supplemental Petition for Writ of Habeas Corpus]. Specifically, the Petitioner contends that the Court failed to hold a hearing on allowing the victim to testify by closed-circuit television; that the Court took no evidence regarding the victim's ability to testify in court; and that the GAL was in the room with the victim while she testified although the statute did not provide for the GAL to be there. [*Id.* at pp. 6, 9-10]. The Petitioner states that the GAL's presence reassured the victim and made cross-examination less effective. [*Id.*]. The Petitioner also argues that allowing the victim to testify via closed-circuit television permitted the jury to make the impermissible inference that the closed-circuit television testimony was necessary to protect the child from Petitioner. [*Id.,* Petition for Writ of Habeas Corpus p. 5(g)]. At the omnibus hearing on August 3, 2006, the Petitioner voiced the above objections to the Court's allowance of closed-circuit testimony and also argued that the Court should not have permitted it because the GAL moved for closed-circuit testimony when the statute provides that only the State may do so.

The fact that the GAL filed the motion to used (sic) closed-circuit testimony instead of the State is inconsequential. The statute does not mention a GAL's ability to file the motion because the statute does not contemplate the appointment of a GAL. However, in this case the Court correctly appointed a GAL to represent the interest of a young child subjected to sexual abuse. The GAL properly fulfilled her role by filing motions to protect the physical, mental, and emotional well-being of the child. One of such motions was the motion to permit the victim to testify via closed-circuit television. If the GAL had not brought this motion, the Court is convinced that the State would have filed the motion and the same outcome would have resulted.

Contrary to the Petitioner's belief, the Court did hold a hearing, at which he was present and represented by counsel, on whether to permit the victim to testify by closed-circuit television. [*State v. Ault,* No. 00-F-22 p. 279, Order entered 2/19/02]. At that hearing, the Court received evidence from not one, but two master level psychologists, who both stated that the victim would be unable to communicate in the presence of the Petitioner. [*Id.*]. In the Order from the hearing, the Court made the requisite findings under the statute:

> The Court would find as follows:
>
> 1. That the alleged victim is competent to testify as a witness.
>
> 2. That due to the alleged victim's post traumatic stress syndrome, the size variance between she and the Defendant; her mental, emotional, and physical maturity level; her regression into former adverse behaviors after unintentionally seeing the Defendant in the community; her regression upon seeing men of similar physical description as the Defendant; and other factors set forth in the record, the witness would be unable to testify, absent the use of live, two-way closed-circuit television, due solely to being in the physical presence of the Defendant.
>
> 3. That due to the child witness' vulnerability; maturity level; mild mental retardation; ADHD, traumatic stressors in her life; and other factors set forth in the record, the witness can only testify if closed circuit television is used. **Further, the psychologist who evaluated the witness for the Defendant also arrived at the same conclusions.**
>
> 4. That the evidence would indicate that the victim's testimony is absolutely necessary in order for the State to fully proceed in the prosecution of the case. Absence of her testimony may preclude prosecution.
>
> In consideration of all of which, the Court would grant the Motion to permit the child witness to testify by closed-circuit television.

(Emphasis added). [*Id.*].

Although the Petitioner is correct that the Court did not follow the statutory

procedures exactly, defense counsel agreed to the changes enacted by the Court. Specifically, in regards to using master level psychologists instead of a doctoral-level psychologist or social worker with five years experience, the Court and the attorneys had the following conversation:

> GUARDIAN AD LITEM M. ZELENE HARMAN: 'The new statute provides that either it's a doctorate level psychologist or a licensed clinical social worker, which of course, a licenced clinical psychologist falls somewhere in between ... there was a stipulation that Greg Trainor could provide that information ... I think we all recognize and acknowledged in the last matter that certainly Mr. Trainor has far more experience and education than a licensed clinical social worker with five years experience. That is allowed ...'
>
> DEFENSE ATTORNEY GARRETT: 'I would agree with that. I would definitely agree with that Your Honor, I mean ...'
>
> GAL: 'That, that is allowed to make that assessment and recommendation as a friend of the Court. And so certainly, it just didn't specify a licensed clinical psychologist. Either it was doctor's level psychologist or licensed clinical social worker. And there's a large, you know, space in there between that Mr. Trainor does fall into and he's had, I believe, twenty plus years experience in working with children.'
>
> [*Id.,* Transcript of Pre-Trial Hearing on May 28, 2002, p. 4 line 17-p. 5 line 11, filed 1/13/03]. The Petitioner also agreed to allowing the GAL to be present in the room with the victim while she testified and stated that it might even be helpful. [*Id.* at p. 8 line 12-p. 9 line 22]. Even if the GAL's presence did reassure the victim, as the defense counsel pointed out, the GAL would have been able to present in the courtroom if the victim had testified from the witness chair and the GAL would have had the same reassuring effect. [*Id.*].

Moreover, as in *Maryland v. Craig,* 497 U.S. 836 [110 S.Ct. 3157], *supra* p. 14, at trial, the victim was under oath to tell the truth. The defense counsel cross-examined the victim. The jury could see the victim and judge her demeanor while she testified. The jury watched the victim as they could any other witness testifying.

As for the jury's possible inference that the victim had to testify via closed-circuit television due to the Petitioner, the Court read the jury a cautionary instruction before the victim testified. In that instruction, the Court did not say that the victim was testifying via closed-circuit television because of the Petitioner; rather, the Court just said generally that sometimes children are afraid of the whole courtroom setting and therefore must testify via closed-circuit television. [*State v. Ault,* No. 00-F-22, Trial Transcript, p. 36 line 17-p. 37 line 15]. Therefore, the Court did not violate the Petitioner's right to confrontation by allowing the victim to testify via closed-circuit television.

Resp't Amd. Ex. 6 at 169-176 (emphasis in original).

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground five was not contrary to clearly established federal law. *See Maryland v. Craig,* 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).[FN4]

[15] Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of the ground five involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.[FN5] Prior to trial, the state court conducted a hearing to determine the child victim's competency and ability to testify in open court. The court heard evidence from two different master level psychologists, both of which found the child victim competent to testify, but unable to testify in open court with the petitioner present. The trial court made the appropriate findings of fact and determined that closed-circuit television testimony was necessary. To the extent that the trial court deviated from the statutory requirements for closed-circuit television testimony, those deviations either were with the consent of defense counsel or had no adverse effect on the petitioner's right of confrontation.

Accordingly, ground five should be denied.

F. *Ground Six-Victim's Testimony was Uncorroborated and Inherently Incredible*

[16] In this ground, the petitioner asserts that his conviction cannot stand because it was based on the uncorroborated and inherently incredible testimony of a child victim. In support of this ground, the petitioner asserts that the child victim's testimony had no real or factual evidence to support it and that the testimony was coached and contradictory.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove that the victim's testimony was inherently unreliable or the result of suggestive interrogation techniques to the extent that it violated the Petitioner's right to a fair trial by due process of law as guaranteed in the U.S. Const. Amends. V and XIV and the WV Const. Art. III § 10.
>
> * * *
>
> 'In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying.' W.Va.Code § 61-8B-11(c).
>
> 'It is the role of the jury, and not the court on appeal or on review of a habeas corpus petition, to determine the credibility of witnesses.' *State ex rel. Corbin v. Haines,* 218 W.Va. 315, 624 S.E.2d 752 (2005).
>
> 'A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.'

Syl. Pt. 3, *Coleman v. Painter,* 215 W.Va. 592, 600 S.E.2d 304 (2004) ...

The Petitioner argues that the Court should not have allowed the victim to testify at trial because her testimony was unreliable due to unfair interrogation techniques and her psychiatric and medical problems. [*Ault v. Haines:* No. 05-C-39, Supplemental Petition for Writ of Habeas Corpus p. 5-6]. The Petitioner also contends that the victim's testimony was further improper because the Court did not require an assessment of the child based on her known problems. [*Id.* at p. 8]. At the omnibus hearing on August 3, 2006, the Petitioner argued that the Court should have held a pretrial hearing to determine if the victim was competent to testify.

In support of his claim that suggestive interrogation techniques were used on the victim, the Petitioner provides no evidence. The only exhibit presented to this effect is the transcript of an interview with the victim conducted by Lynn Foley on August 4, 2000. [*Id.,* Petition for Writ of Habeas Corpus Exhibit A]. At the omnibus hearing, the Petitioner testified that he felt Ms. Foley used suggestive interrogation techniques because she would ask the victim the same question, repeatedly, until Ms. Foley 'got the answer she wanted.' The Court finds that this interview does not contain suggestive interrogation techniques. Lynn Foley is certified to question child victims of sexual abuse and the methods she used aimed at that end and not at leading the child to a foregone conclusion. Furthermore, in the assessment of the victim's capacity to testify via closed-circuit television, Mr. Trainor found that 'there is no evidence that [A.C.'s] statements have been coerced and the emotional reactions that she has are consistent with experiencing a traumatic event.' [*State v. Ault:* No. 00-F-22 p. 221, Consult on [A.C.'s] Ability to Testify in Open Court Versus Being Able to Testify by Closed Circuit Television].

The Petitioner also contends that the medications the victim was taking prior to and during the incident on August 2, 2000 caused her to be vulnerable to suggestive prompting and to manipulation by adults. In support of this theory, the Petitioner presents a self compiled list of all of the possible side effects of the drugs which the victim took and how they could have possibly affected her mind. [*Ault v. Haines:* No. 05-C-39, Petition for Writ of Habeas Corpus Exhibit C 2]. However, the Petitioner offers no evidence that the victim suffered from any of these side effects or that they impaired her ability to think for herself in any way. There is no evidence that the medications made the victim susceptible to brainwashing, coaching, suggestive interrogation techniques, or memory replacement.

Furthermore, the Court did have the victim assessed by a licensed psychologist who reported that she would be able to testify reliably, accurately, and truthfully. The Court also held a hearing on the victim's ability to testify and found the victim to be competent to testify. [*State v. Ault:* No. 00-F-22 p. 206, Order entered 4/27/01]. Moreover, at that hearing the judge also conducted a West Virginia Rules of Evidence Rule 403 balancing test and

determined that the victim's testimony was more probative to the charges than prejudicial to the Petitioner's case. [*Id.*].

As stated in the legal authorities above, the jury must judge the credibility of a witness' testimony. The victim testified under oath and was subject to cross-examination by the defense. The jury could see the victim as she testified and could observe her outward demeanor and the tone in which she answered questions. The Court did not err in allowing the victim to testify at trial especially considering the psychological evaluation done before trial, the pretrial hearing finding the victim competent to testify, and defense counsel's vigorous cross-examination of the victim at trial.

Resp't Amd. Ex. 6 at 176-181.

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground six was not contrary to clearly established federal law. *See Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) (it is not within the province of the court to make credibility determinations).

Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground six involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Prior to trial, the victim was ordered to undergo a psychological evaluation to determine her competency and ability to testify. Resp't Ex. 13. The child victim was examined by a licensed psychologist who found that she was capable of receiving accurate impressions of the assault and that she was able to communicate them. Resp't Ex. 14. The licensed psychologist determined that the child victim knew the difference between telling the truth and a lie and that she was competent to testify as a witness at trial. *Id.* At trial, the jury heard the victim's testimony and was able to judge her credibility. Thus, the undersigned agrees with the state habeas court that the petitioner has failed to prove that the victim's testimony was inherently incredible.

Accordingly, ground six should be denied.

G. *Ground Seven-Trial Court Erred in Denying Rule 29 Motion for Acquittal*

[17] In this ground, the petitioner asserts that the trial court erred in denying his Rule 29 Motion. In support of this ground, the petitioner asserts that the petitioner made a proper Rule 29 Motion for Acquittal. The petitioner's motion was denied. The petitioner asserts that the denial of his motion was in error as the prosecution never presented any evidence that the petitioner was the individual accused of the crime. Because the petitioner was never identified as the perpetrator of the crime, he asserts that the state failed to prove an element of the prima facie case for which he was charged. In addition, the petitioner asserts that even taking the evidence in the light most favorable to the prosecution, the State failed to present enough

evidence to uphold the trial court's denial of his Rule 29 motion.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to assert a constitutional right violated by the trial court's denial of the Petitioner's motion for acquittal. Furthermore, the Petitioner failed to show that the Court erred in denying his Rule 29 Motion for Acquittal.
>
> * * *
>
> 'A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.' Syl. Pt. 6, *State v. McCracken,* 218 W.Va. 190, 624 S.E.2d 537 (2005).
>
> 'A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.' Syl. Pt. 3, *Coleman,* 215 W.Va. 592 [600 S.E.2d 304], *supra* p. 23.
>
> 'A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.' Syl. Pt. 2, *Quinones* [*v. Rubenstein*], 218 W.Va. 388 [624 S.E.2d 825 (2005)], *supra* p. 7....
>
> The Petitioner argues that the Court erred in denying his motion for acquittal because there was no identification of the defendant by any witness, including the child-victim, either at the time of trial or pretrial. [*Ault v. Haines:* No. 05-C-39, Supplemental petition for Writ of Habeas Corpus p. 8]. The Petitioner also contends that the Court should have granted the motion for acquittal because he is actually innocent and the only evidence against him came from the uncorroborated testimony of a 'medicated, impaired little girl with a seizure disorder and fetal alcohol syndrome who had suffered sexual abuse in the past with no forensic evidence and a doctor's report indicating only prior abuse that the Petitioner could not possibly have committed.' [*Id.* at p. 9].
>
> This ground for habeas relief does not present a possible constitutional violation, and therefore, it should not be considered by the Court in a petition for writ of habeas corpus. However, even if the ground did present a potential constitutional violation, the Petitioner still would not be entitled to relief on this ground.
>
> The alleged victim testified that the Petitioner sexually abused her. [*State v. Ault;* No. 00-F-22, Testimony of [A.C.], transcribed by County Court Reporters, p. 10 line 19]. She identi-

fied her perpetrator as Stoney, and Rock, the petitioner's nickname. [*Id.* at p. 7 lines 3-10]. During opening arguments, defense counsel alerted the jury to the Petitioner's nickname of Rock. [*Id.,* Trial Transcript, p. 23 lines 3-5]. Furthermore, the investigating officer further testified that the victim indicated to him that Rock had sexually abused her, and the officer clearly stated on the record that Rock is a nickname for the Petitioner, Stoney Ault: ...

Based on the testimony given during the State's case in chief, the State presented ample evidence to identify the Petitioner as the perpetrator.

At the omnibus hearing on August 3, 2006, the Petitioner testified that he did not believe he had been identified because the victim did not point to him during trial and say, 'he did it.' A conviction does not require this type of identification.

Furthermore, as stated above, a conviction for sexual abuse can be obtained solely on the testimony of the victim unless the victim's testimony in (sic) inherently unreliable. Syl. Pt. 3, *Coleman,* 215 W.Va. 592 [600 S.E.2d 304], *supra* p. 23. The Court held a competency hearing on the victim's ability to testify reliably and accurately. [*Id.* at p. 206, Order entered 4/27/01]. The psychological evaluation, completed at the request of the Petitioner, concluded that the victim could accurately and truthfully testify as to the events that took place. [*Id.*]. The credibility of the victim is a matter to be decided by the jury. Based on the victim's testimony, the Court did not err in denying the Petitioner's motion for a directed verdict.

Resp't Amd. Ex. 6 at 181-184

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground seven was not contrary to clearly established federal law. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (when reviewing a claim of the sufficiency of the evidence in federal habeas review, the district court is required to view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt); *see also Wiggins v. Corcoran,* 288 F.3d 629 (4th Cir.), *cert. denied in part by,* 537 U.S. 1027, 123 S.Ct. 556, 154 L.Ed.2d 441 (2002) (resolving conflicting facts and determining the credibility of the witnesses is for the jury, not the court).

Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground seven involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. At trial, the child victim testified that the petitioner took her to the "pink room" where he pulled down her pants and underwear, set her on a machine, pulled down his own pants and got on top of her. Resp't Ex. 8 (Trial Transcripts) at 58-59. Thereafter, the victim alleged that the

petitioner put his “weenie” in her “front” and his finger in her butt. *Id.* at 60. These events allegedly happened in the petitioner's home in Grant County, West Virginia, at a time when the petitioner was 51 years old and the child victim was seven. Moreover, at the time of the alleged incident, neither the petitioner nor the victim was married to anyone.

Also testifying at trial was Betty Puffenbarger, a case manager from the Potomac Center. *Id.* at 123-24. Ms. Puffenbarger testified that the petitioner and his girlfriend had been approved by the Potomac Center as a foster/respite home. *Id.* at 124. As part of their application, petitioners' girlfriend was listed as the primary caregiver and the petitioner as a secondary caregiver. *Id.* at 126-27. Moreover, Ms. Puffenbarger testified that at the time the child victim was allegedly assaulted, she was staying in the petitioner's home through his contract with the Potomac Center and that he was her custodian at that time. *Id.* at 126-30.

Based on this testimony alone, it is clear that there is sufficient evidence to support the jury's finding of guilt. The petitioner's identity was never an issue in this case. The child victim clearly and repeatedly alleged that the petitioner committed the crime. Indeed, it was never disputed that the alleged act took place in the petitioner's house during a time when the petitioner was acting as the victim's respite care provider through his contract with the Potomac Center. The key issue in this case was whether or not the jury believed that the victim had been sexually assaulted or abused by the petitioner. The victim testified that the petitioner did sexually abuse her, while the defendant testified that he did not. Thus, in order to render a verdict, the jury had to judge the credibility of the witnesses and resolve those issues of fact. Such determinations are properly the job of the jury and not within the province of federal habeas review.

Accordingly, ground seven should be denied.

H. *Ground Eight-Failure to Give a Jury Instruction Proffered by the Defendant*

[18] In this ground, the petitioner asserts that the trial court erred in failing to give a jury instruction proffered by the defense. In support of this claim, the petitioner asserts that defense counsel requested a *Payne* instruction. *See State v. Payne,* 167 W.Va. 252, 280 S.E.2d 72, 77-78 (1981). According to the petitioner, a *Payne* instruction was necessary because the only witness to the crime was the child victim whose testimony was uncorroborated and failed to identify the petitioner as the perpetrator of the crime.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> The Court concludes that the Petitioner failed to prove that the trial court's failure to give the jury the *Payne* instruction denied the Petitioner of [his] right to a fair trial by due process of law.
>
> * * *
>
> ‘Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently in-

structed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion.' Syl. Pt. 4, *Corbin,* 218 W.Va. 315 [624 S.E.2d 752], *supra* p. 22.

'A *Payne* instruction concerns identification of the defendant. A *Payne* instruction does not concern the acts alleged to be perpetrated by the defendant.' *State v. Williams,* 206 W.Va. 300, 305, 524 S.E.2d 655, 660 (1999) ...

The Petitioner argues that the jury should have been given a jury instruction based on the *Payne* case because no witness identified him at trial and the child victim's testimony was uncorroborated. He contends that the Court's failure to give this instruction denied the Petitioner of his right to a fair trial. [*Ault v. Haines;* No. 04-C-2, Petition for Writ of Habeas Corpus, p. 6, filed 1/12/ 04].

In *Payne,* the WVSC held that the trial court should have instructed the jury to scrutinize for veracity the uncorroborated identification testimony of the victim. *State v. Payne,* 167 W.Va. 252, 263, 280 S.E.2d 72, 79 (1981). The victim in *Payne* identified her assailant under the following circumstances:

> The record discloses that the prosecuting witness did not see her assailant until they were in a secluded, shaded area on the night the assault occurred. The record also disclosed that she gave [a] description of her assailant, prior to identifying the defendant, which were (sic) inconsistent with the defendant's physical appearance. We also note that the assault occurred on March 28, 1973, but the defendant was not identified as the assailant until May 9, 1973. There are indications in the record that the prosecuting witness may have been subjected to pressure by her father and the police to identify someone as her assailant between March 28 and May 9. Her initial identification of the defendant amounted to a statement that she 'believed' Robert Payne to be her assailant.

Id. at 260-261, [280 S.E.2d at] 77. Furthermore, in *Payne,* the defendant was prevented from testifying. *Id.*

In *Ronnie R. v. Trent,* 194 W.Va. 364, 460 S.E.2d 499 (1995), the defendant was accused of sexually molesting his oldest child from when the child was six years old until the child was eleven years old. On appeal of a habeas corpus petition, the defendant argued that the trial court erred in not declaring a mistrial for failure to give a *Payne* instruction. *Id.* The WVSC found that the trial court correctly determined that the *Payne* instruction would not have made a difference to the decision of the jury. *Id.* ...

The facts of the Petitioner's case do not mirror those of the defendant in *Payne;* however, they are similar to the facts in *Ronnie R.* As in *Ronnie R.,* the victim knew the Petitioner prior to the abuse. Furthermore, the Petitioner testified at trial and refuted the allegations of abuse. As in *Ronnie R.,* the Petitioner's identity is not at issue. The question was not WHO sexually abused the victim, but WHAT did the Petitioner do.

As discussed in ground four, *supra,* the State offered sufficient evidence to identify the Petitioner as the perpetrator of the sexual abuse. Furthermore, the Petitioner does not allege that someone else was alone with the victim when the abuse took place or that someone else could have perpetrated the abuse. [*State v. Ault;* No. 00-F-22, Trial Transcript p. 235 line 1-p. 266 line 24]. The only people around the victim at the time of the abuse where (sic) the Petitioner and the victim's little brother. Moreover, the Petitioner's counsel had the opportunity to argue and did argue that the *Payne* case applied; however, the Petitioner and his counsel did not convince the judge that the *Payne* instruction was a correct statement of law for this case. Finally, in its charge to the jury, the Court sufficiently instructed the jury on how to judge the credibility of witnesses. [*Id.,* p. 276 line 7-p. 278 line 5]. Therefore, the Court did not violate the Petitioner's right to a fair trial by due process of law in failing to deliver the *Payne* instruction to the jury.

Resp't Amd. Ex. 6 at 185-188 (emphasis in original).

[19][20] Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground eight was not contrary to clearly established federal law. The Fourth Circuit has held that, "[o]rdinarily, 'instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues,' and are therefore not reviewable in a federal habeas proceeding." *Nickerson v. Lee,* 971 F.2d 1125, 1137 (4th Cir.1992)(quoting *Grundler v. North Carolina,* 283 F.2d at 802), *abrogation on other grounds recognized, Yeatts v. Angelone,* 166 F.3d 255 (4th Cir.1999). "A federal court may grant habeas relief only when the challenged instruction 'by itself so infected the entire trial that the resulting conviction violates due process.' " *Id.* at 1137 (quoting *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). "A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. While this does not mean that an instruction by itself may never rise to the level of constitutional error it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp v. Naughten, supra.*

[21][22] In *Neder v. United States,* 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the Supreme Court held "that the omission [of an element of an offense or an error in a jury instruction] is subject to harmless error analysis. As noted previously, under the harmless error standard, habeas relief must be granted if the error had 'substantial and

injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson,* 507 U.S. at 623, 113 S.Ct. 1710. "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Id.* at 637, 113 S.Ct. 1710. "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch,* 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Additionally, in light of the evidence presented in the state court proceedings, the undersigned does not believe that the state court's adjudication of ground eight involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Syl. Pt. 5 of *State v. Payne,* 280 S.E.2d at 73 states:

> Where the State's case is based upon the uncorroborated and uncontradicted *identification testimony* of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution.

(Emphasis added). Moreover, the application of *Payne* has been limited to identification testimony. *See State v. Williams,* 206 W.Va. 300, 524 S.E.2d 655 (1999). Here, as noted by the state habeas court, the petitioner's identity was never in question. Thus, a *Payne* instruction was not appropriate.

Accordingly, ground eight should be denied.

I. *Ground Nine-Giving Lesser Included Offense Instruction for First Degree Sexual Assault*

In this ground, the petitioner asserts that the trial court erred by giving the lesser included offense instruction for first degree sexual assault. In support of this claim, the petitioner asserts that he was found guilty of the lesser included offense. Thus, the jury verdict shows disbelief in the child victim's testimony. Therefore, if the lesser offense instruction had not been given, the petitioner asserts that there would have been no conviction for First Degree Sexual Abuse or Sexual Abuse by a Custodian because the petitioner asserts that the jury's questions show that they were confused by the instructions. Moreover, the petitioner asserts that giving the instruction constitutes reversible error because it was an additional crime charged by the instructions that was not charged in the indictment. Finally, the petitioner asserts that the trial court inaccurately applied the law in finding that you must have sexual contact to have sexual intercourse or sexual intrusion.

The state habeas court's findings on the lesser included offense instruction are noted in ground one above. Moreover, as found in ground one, *infra,* the

trial court did not err in giving the lesser included offense instruction for first degree sexual assault. Accordingly, ground nine should be denied.

J. *Ground Ten-Cumulative Error Should have been Applied on Appeal*

[23] In this ground, the petitioner asserts that the appellate court should have applied the cumulative error doctrine in this case. In support of this ground, the petitioner asserts that his conviction should have been set aside because even if the court found harmless error in the issues raised, the cumulative effect of those errors renders his trial fundamentally unfair.

After the petitioner's Omnibus Evidentiary Hearing, the state habeas court found:

> Petitioner argues that the errors and omissions of his counsel should be considered cumulatively. He contends that the cumulative effect of his ineffective assistance of counsel, along with the numerous trial errors and prosecutorial misconduct, so prejudice the Petitioner's right to a fair trial that the result was a miscarriage of justice and a grievous wrong against the Petitioner. He states that the sum total and cumulative weight of these errors and misconduct are such that they should bar retrial, especially in the context of the irreparable damage and taint to the child by highly suggestive interrogation techniques. [*Ault v. Haines;* No. 05-c-39, Petition for Writ of Habeas Corpus p. 5(k)] ...
>
> 'Cumulative error occurs where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.' Syl. Pt. 5, *State v. Smith,* 156 W.Va. 385, 193 S.E.2d 550 (1972) ...
>
> The only error committed in the Petitioner's case, pretrial, during trial, or post trial, was his attorney's mistake in allowing the Petitioner's criminal history to be submitted to the jury on the forensic case submission report. The Court found that this error was harmless as the Court gave a curative instruction telling the jury that the information was irrelevant to the trial. Therefore, the Court finds that there is no cumulative error in the Petitioner's case which results in a miscarriage of justice.
>
> Resp't Amd. Ex. 6 at 242-243.

Upon an independent review of the record, the undersigned finds that the state court's adjudication of petitioners' ground ten was not contrary to clearly established federal law. *See Fisher v. Angelone,* 163 F.3d 835, 853 n. 9 (4th Cir.1998) ("legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error"); *see also United States v. Rivera,* 900 F.2d 1462, 1469 (10th Cir.1990) ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility.").

Additionally, in light of the evidence presented in the state court proceed-

ings, the undersigned does not believe that the state court's adjudication of ground ten involved an unreasonable application of clearly established federal law, nor do the state court's findings result in a decision that is based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. At best, the petitioner has established only one error, the submission of his prior criminal history to the jury. Further, the undersigned has determined that such error was harmless. Thus, the cumulative error analysis does not apply in this instance.

Accordingly, ground ten should be denied.

K. *Ground Eleven-Plain Error; Faulty, Illegal and Amended Indictment*

[24] In this ground, the petitioner asserts that a faulty, illegal and amended indictment was used to convict him. In support of this ground, the petitioner asserts that the instructions given to the jury do not appropriately charge the crimes as identified in the petitioner's indictment. Thus, the petitioner asserts that he was found guilty of crimes not charged in the indictment and his constitutional rights were violated.

[25] This ground was not raised on direct appeal or in the petitioner's state habeas petition. Thus, due to the petitioner's supplement, his petition is a now "mixed" petition.[FN6] Therefore, the Court has three options. First, the petition could be dismissed. *See Rose v. Lundy,* 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (petitions containing exhausted and unexhausted claims are subject to dismissal as "mixed" petitions). Second, the Court may stay the instant petition and allow the petitioner to return to state court to exhaust his unexhausted ground. *See Rhines v. Weber,* 544 U.S. 269, 275, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (in light of the "AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with 'mixed' petitions, run the risk of forever losing their opportunity for any federal review of their unexhausted claims"). Third, assuming that ground eleven can be denied on the merits, the Court may proceed with the case as filed. *See* 28 U.S.C. § 2254(b)(2) ("[a]n application for a writ of habeas corpus may be *denied* on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.") (emphasis added).

[26][27][28] Turning to the merits of the petitioner's claim, it has long been recognized that the United States Constitution does not require a State to charge a person by indictment. *See Hurtado v. California,* 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Thus, ground eleven fails to raise a claim of constitutional dimension and should be denied. Nonetheless, the undersigned notes that any variance between the proof adduced at trial and the charge contained in the indictment is harmless. *See United States v. Castro,* 776 F.2d 1118 (3d Cir.1985) (variance which does not change charging terms does not violate the 5th Amendment's Grand Jury clause).[FN7]

Accordingly, ground eleven should be denied.

L. *Ground Twelve-Ineffective Assistance of Appellate Counsel*

[29] In this ground, the petitioner asserts that appellate counsel was ineffective for failing to argue that his state habeas counsel was ineffective. Moreover, the petitioner asserts that appellate counsel failed to appropriately develop his claims on appeal. Thus, the petitioner asserts that appellate counsel was so defective as to require the reversal of his conviction.

There is no constitutional right to an attorney in state post-conviction proceedings. *See Pennsylvania v. Finley,* 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Therefore, this ground is not cognizable on federal habeas review.

Accordingly, ground twelve should be denied.

IV. *Recommendation*

For the reasons set forth in this Opinion, it is recommended that the respondent's Motion for Summary Judgment (dckt. 25) be **GRANTED** and the petitioner's § 2254 petition be **DENIED** and **DISMISSED WITH PREJUDICE** from the active docket of this Court.

Within ten (10) days after being served with a copy of this recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objection is made and the basis for such objections. A copy of any objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wright v. Collins,* 766 F.2d 841 (4th Cir.1985); *United States v. Schronce,* 727 F.2d 91 (4th Cir.1984), cert. denied, 467 U.S. 1208, 104 S.Ct. 2395, 81 L.Ed.2d 352 (1984).

The Clerk is directed to send a copy of this Opinion/Report and Recommendation to the *pro se* petitioner by certified mail, return receipt requested, to his last known address as shown on the docket, and to counsel of record via electronic means.

FN1. The petitioner was accused of sexually assaulting a 7 year old girl who was in his care. At the time, the petitioner was 51 years old and had accepted the girl into his home as a respite care provider for the Potomac Center. The Potomac Center specializes in foster care and respite care placement for special needs children. The victim in this case was a foster child in the care of the Department of Health and Human Resources (DHHR) and suffered from seizure disorder, Attention Deficit Hyper Activity Disorder (ADHD), fetal alcohol syndrome and prior abuse and neglect. The victim was sent to the petitioner's home for temporary respite care placement when her foster father suffered a heart attack and was hospitalized. While in the care of the petitioner and his girlfriend, the victim alleged that the petitioner took her into a room at his house known as the “pink room,” put her on top of a piece of nautilus equipment, pulled her pants and underwear down, unzipped his pants and got on top of her.

The victim alleged that the petitioner then attempted to stick his “weenie” in her and that he put his finger in her butt. The victim alleged that it hurt, but that the petitioner was distracted by another foster child in the house and she was able to get up, put her clothes back on and get out of the situation. However, the victim also alleged that later that night, she was forced to sleep in the same bed as the petitioner where he again attempted to stick his “weenie” in her. When that was unsuccessful, the victim alleged that the petitioner took her into the bathroom, placed Vaseline on her vagina and stuck his finger inside her.

FN2. The petitioner's prior criminal history was not extensive. The form sent to the jury showed that the petitioner had an arrest for disorderly conduct and CDW. However, the jury did not know what CDW was and questioned the court about it. The Court told the jury that they were not to consider that evidence and that the information on the petitioner's prior criminal history was irrelevant to the case and should have been redacted from the form. The Court never told the jury that CDW stood for Carrying a Dangerous Weapon.

FN3. The court explained: “I wanted to let you know one loose end from the live closed-circuit television of the child this morning. If you saw somebody, blue shirt there beside her, at times, there beside her. That was M. Zelene Harman who is an attorney from Franklin, and very often when you have a child involved in any type of case, the Court appoints an attorney just to be with the child and assist them in their testimony, if they don't understand a question or things of that sort. So, that's who that was who was seated beside her. You probably may have just seen an arm, and you wondered whose arm that was, that's whose it was.” Resp't Ex. 8 (Trial Transcripts) at 87-88.

FN4. In *Craig,* the child witness was permitted to testify via closed-circuit television. The witness, the prosecutor, and defense counsel, withdrew to a separate room while the defendant remained in the courtroom with the judge and jury. A video monitor recorded and displayed the child's testimony to those in the courtroom. During this testimony, the child could not see the defendant and the defendant remained in contact with his counsel only through electronic communication.

FN5. “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig,* 497 U.S. at 845, 110 S.Ct. 3157. One way to ensure the reliability of the evidence against a criminal defendant is through face-to-face confrontation. *Id.* at 846, 110 S.Ct. 3157. Face-to-face confrontation reduces the risk that “a witness will wrongfully implicate an innocent person.” *Id.* However, although face-to-face confrontation “forms the core of the values furthered by the Confrontation Clause, we (the Supreme Court) have nevertheless recognized that it is not the *sine qua non* of the confrontation right.” *Id.* at 847, 110 S.Ct. 3157 (internal quotations and citations omitted). Therefore, “the Confrontation Clause is generally satisfied when the defense is given a full and fair oppor-

tunity to probe and expose testimonial infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Id.* (quoting *Delaware v. Fensterer,* 474 U.S. 15, 22, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)).

FN6. A "mixed" petition is one which contains both exhausted and unexhausted claims.

FN7. According to *Castro,* constructive amendment to an indictment occurs "when the charging terms of the indictment are altered." *Castro,* 776 F.2d at 1122. Constructive amendment to an indictment is a *per se* violation of the defendant's Fifth Amendment rights. *Id.* at 1121-22. However, a variance occurs when the charging terms remain unchanged, "but the evidence at trial proves facts materially different from those alleged in the indictment." *Id.* at 1122. If a variance occurs between the charge contained in the indictment, and the evidence adduced at trial, the elements of the offense remain unchanged and no violation of the defendant's rights occur unless there has been some prejudice. *Id.* In the petitioner's case, the elements of the offense charged in the indictment remained unchanged by the evidence adduced at trial. Thus, his indictment was not illegally amended.

220 W. Va. 582, 648 S.E.2d 346

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33134

IN RE: AUSTIN G. AND BREONA R.

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Judge
Civil Action No. 05-JN-47, 48

AFFIRMED

Submitted: January 9, 2007
Filed: February 21, 2007

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

3. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of

the child will be seriously threatened ....' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. "'Termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991)." Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

5. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus

Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Mingo County entered on February 3, 2006. In that order, the circuit court terminated the parental rights of Bradley R. to the infant children Breona R. and Austin G.[1] The circuit court also denied Bradley R.'s motion for post-termination visitation of both children. Bradley R. appealed the circuit court's adverse rulings against him. After reviewing the facts of the case, the issues presented, and the relevant statutory and case law, this Court affirms the decision of the circuit court.

I.

FACTS

On February 3, 2006, the Circuit Court of Mingo County terminated the parental rights of Bradley R. and Alisha G. to Breona R. and Austin G.[2] Physical and legal custody of the infant children was granted to the West Virginia Department of Health and

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 689 n. 1, 356 S.E.2d 181, 182 n. 1 (1987) (citations omitted).

[2]This appeal was brought by Bradley R. to address the circuit court's termination of his parental rights. The circuit court's disposition with regard to Alisha G. or toward any other party involved in the proceeding below is not the subject of this appeal.

Human Resources (DHHR) for permanent placement. Breona R. was born April 25, 2005, while Austin G. was born February 18, 2003. Alisha G. is the biological mother of both children, while Bradley R. is the biological father only to Breona R. Austin G.'s biological father, Larry W., voluntarily terminated his parental rights on September 27, 2005.

Several months prior to the termination of Bradley R.'s parental rights, on September 1, 2005, the DHHR filed an emergency petition alleging that Austin G. and Breona R. were in imminent danger, as outlined by West Virginia Code § 49-6-3(a) (2004).[3]

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[3]West Virginia Code § 49-6-3(a), provides:

> Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible person found by the court to be a fit and proper person for the temporary care of the child pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child; and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody: Provided, That where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in said home unless the alleged abusing person is or has been precluded from visiting or residing in said home by judicial order. In a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court

In its petition, the DHHR alleged that Alisha G. and Bradley R. failed to cooperate with Child Protective Services (CPS) despite numerous visits to the home.

The DHHR believed that Alisha G. and Bradley R. were making efforts to avoid CPS since DHHR employees rarely saw the children when they stopped at their home. Alisha G. and Bradley R. often made excuses for Breona R.'s absences such as claiming the newborn was visiting friends in Virginia even though they were unable to provide names, addresses, or phone numbers of any of these individuals. The DHHR determined that Alisha G. and Bradley R. were not meeting the infant children's basic needs. For instance, there was no electricity in the home, the parents were neglecting the children's medical care by not keeping their scheduled doctors' appointments, and they were not getting the children's medical prescriptions filled.

> shall order the removal of such child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such child or children to the department or a responsible relative which may include any parent, guardian, or other custodian. The court order shall state: (1) That continuation in the home is contrary to the best interests of the child and why; and (2) whether or not the department made reasonable efforts to preserve the family and prevent the placement or that the emergency situation made such efforts unreasonable or impossible. The order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.

Another factor causing concern for the DHHR was the fact that Alisha G. tested positive for opiates and barbiturates at the time of Breona R.'s birth. Alisha later reported to CPS workers that she had taken Valium, Lortab, and Xanax prior to the birth of Breona R. While Breona R. did not test positive for drugs, she did have symptoms of withdrawal.

On April 27, 2005, Alisha G. signed a protection plan with CPS. At the time, both children were being kept by their paternal grandmother, Margaret V., who is a registered sex offender in the State of West Virginia. Years earlier, Margaret V. pled guilty to violating W.Va. Code § 61-8D-5B,[4] for knowingly procuring another person to engage or attempt to engage in sexual exploitation of a child under the age of sixteen years.[5] The circuit court found that both Margaret V. and her husband, Billy Ray V., had a long and adverse history with the DHHR and repeatedly failed to protect children in their care throughout the years.

---

[4]W.Va. Code § 61-8D-5(b), in part, provides:

> If any parent, guardian, custodian or other person in a position of trust in relation to the child shall knowingly procure another person to engage in or attempt to engage in sexual exploitation of, or sexual intercourse, sexual intrusion or sexual contact with, a child under the care, custody or control of such parent, guardian, custodian or person in a position of trust when such child is less than sixteen years of age, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, such parent, guardian, custodian or person in a position of trust shall be guilty of a felony . . . .

[5]Those proceedings did not involve Breona R. or Austin G.

In June of 2005, it was also determined by the Mingo County DHHR that Bradley R. had another child in Wyoming County, separate from the underlying proceedings involving Breona R. and Austin G. With regard to that child, there were substantiated facts of abuse and neglect against Bradley R. for substance abuse. At the time of the proceedings before this Court, that child was in foster care.

During a September 6, 2005, preliminary hearing, the circuit court granted Bradley R. a pre-adjudicatory improvement period for ninety days. The circuit court outlined specific requirements such as random drug and alcohol screens, parenting classes, undergoing psychological tests, and attending substance abuse counseling. On January 25, 2006, the circuit court terminated the parental rights of Bradley R. and denied his motion for post-termination visitation. It concluded:

> The evidence clearly reflects the Respondent father, Bradley R., has not meaningfully participated in these proceedings. At the Status hearing on September 27, 2005 the children's Guardian ad Litem reported both Respondent parents were doing well. However, since then, [Bradley R.] has failed to participate in services or to make substantial efforts. CPS Supervisor Webb testified the Department offered numerous services to [Bradley R.], including Advance Skills; Parenting training; Transportation assistance; In-home services through KVC and Family Options; Psychological evaluations, and; drug screening. [Bradley R.] was non-compliant with all offered services, and did not, in fact comply with any offered service. [Bradley R.] did not attend the Adjudicatory hearing, citing alleged transportation difficulties. [Bradley R.] was incarcerated during the Dispositional hearing but could have been transported to the hearing if he desired, or in the alternative, could have appeared via videoconference. However, he chose to

voluntarily absent himself from the proceedings.

The circuit court found there was no reasonable likelihood that Bradley R. could substantially correct the conditions of abuse and neglect; that he had presented no evidence that he would meaningfully participate in an improvement period were he granted one by the circuit court; that he was unwilling to adequately care for the needs of the minor children, Austin G. and Breona R.; and that the continuation in his home was not in the best interests of the minor children. The circuit court permanently terminated Alisha G. and Bradley R.'s parental rights to Austin G. and Breona R. Bradley R. subsequently appealed the circuit court's order with regard to the termination of his parental rights and denial of post-termination visitation of both children.

II.

STANDARD OF REVIEW

In this case, Bradley R. contends that the circuit court erred in terminating his parental rights and denying his motion for visitation to his biological daughter Breona R. and to Austin G. This Court explained in *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000) that, "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." Also,

in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

In this case, Bradley R. maintains that it is in the best interests of Breona R. and Austin G. that both children be placed in his custody. He contends that in *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), this Court held that when placing a child outside the custody of a natural parent, there is a preference to effectuate placement with the

child's relatives. He further states that he has sought custody of both children from the beginning of the underlying proceedings and that he has a bond with both children.

Bradley R. further states that the DHHR initially did not oppose an Improvement Period for him, did not oppose visitation with the children, and that the circuit court granted custody to the DHHR in complete disregard to *Maynard*. He states that he was unable to attend the Dispositional Hearing because he was incarcerated at the time and maintains that due to his absence, the DHHR opposed placing the children with him and allowing him to have visitation. He believes that it would be in the children's best interest to be placed together in his home due to the familial relationship. Moreover, he states that the DHHR failed to prove he was an abusive parent and that the only allegation against him was that he had a substance abuse problem. He admits, however, that there were "slight instances" of domestic violence toward the children's mother Alicia G. Nonetheless, he concludes that since there were no allegations of abuse and/or neglect against him, he should have been granted custody of both children.

Conversely, Diana Carter Wiedel, the Guardian ad Litem for both children, states she is in complete agreement with the circuit court's ruling terminating Bradley R.'s parental rights. She states that Bradley R. was unwilling and unable to care for the children and maintains that he failed to participate in any of the DHHR's offered services or to comply with the circuit court's directives. She points out that the children are very young,

need a permanent placement, and that at no time during the course of the proceedings has Bradley R. demonstrated any ability or desire to provide the children with a safe, stable, environment.

Likewise, the DHHR responds that according to this Court in *In re R.J.M*, 164 W.Va. 496, 266 S.E.2d 114 (1980), termination of parental rights may be employed without the use of intervening less restrictive alternatives when there is no likelihood that the conditions of neglect or abuse can be substantially corrected as outlined by W.Va. Code § 49-6-5(b).[6]

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[6]W.Va. Code § 49-6-5(b), provides:

> (b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;
>
> (2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;
>
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other

Having thoroughly reviewed the entire record as well as the relevant statutory and case law in this matter we agree with the DHHR. This Court has held that:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989). In addition, this Court has declared that:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened ...." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Moreover,

> "Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect

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> rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

> the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

In this case, Bradley R. was given numerous opportunities to become a part of these children's lives, but chose not to do so. For instance, in its September 6, 2005, order, the circuit court ordered psychological testing for both Alicia G. and Bradley R., along with random drug and alcohol screening, parenting classes, substance abuse counseling, and supervised visitation with the children one time per week. In spite of the circuit court's order, Bradley R. did not visit the infant children a single time during the months of November and December 2005. Moreover, he did not keep his appointment for psychological treatment, attend parenting classes, or cooperate with in-home drug screens. He also failed to attend the December 5, 2005, adjudicatory hearing, and did not attend the January 26, 2006, final dispositional hearing. We recognize that at the time of the January 26, 2006, hearing, Bradley R. was incarcerated at the South West Regional Jail. Nonetheless, even though he was aware of the hearing and knew his parental rights were at stake, he made no request to be transported, nor did he request to appear via video conference.

It is clear to us that the DHHR made every effort to allow Bradley R. to be a good parent and he failed to partake in *any* of the services offered. Moreover, his failure to appear at court hearings to protect his interests, knowing that his rights to his children were in jeopardy, coupled with his lack of action with the directives of case law and the West Virginia State Code, lead us to conclude that the circuit court was correct in terminating the parental rights of Bradley R.

With regard to Bradley R.'s contention that he should have received post-termination visitation, the DHHR maintains that when no bond exists with the children, the consideration of post-termination visitation is not required. The DHHR contends that the circuit court properly denied such visitation. We agree.

We have long recognized that "[w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

In the case at hand, the DHHR made repeated efforts to visit with the infant children attempting to make sure that they were being properly cared for by Bradley R. and Alisha G. During those numerous visits, the DHHR found that Breona R. was not in the home for weeks at a time, but rather was "staying with friends in Virginia" even though she was only a newborn. The DHHR believed that Bradley R. was making an effort to avoid CPS since DHHR employees rarely saw the children when they stopped at their home. It further determined that neither Bradley R. nor Alisha G. were meeting the infant children's basic needs which included their medical care.

We find no evidence in the underlying facts to conclude that Bradley R. has developed a bond with either of these children. In fact, with regard to Breona R., the infant child has been in the custody of the DHHR since she was five months old and has been in her current foster home longer than she was in Bradley R.'s home. Furthermore, Austin G., who is not the biological child of Bradley R., never continuously lived in Bradley R.'s home. Instead, Austin G. spent a great deal of time with his grandparents, one of whom is a registered sex offender. Moreover, Bradley R. did not make a single visit with the children in November or December of 2005 despite having the opportunity to see them and with the full knowledge that his parental rights were in jeopardy. In addition, Bradley R. did not bother to take the drug tests the circuit court ordered, did not have a psychological examination completed, and did not attend parenting classes.

The DHHR points out that Austin G. and Breona R. are currently together in a pre-adoptive home where they have resided since March 2006 and are doing well in their placement. Conversely, as previously discussed, Bradley R. has made no effort to rectify his situation and there is no evidence that he has attempted to resolve the issues surrounding his drug use. This is further evidenced by the unresolved separate action filed against him by the DHHR in Wyoming County wherein Bradley R. was charged with substantiated abuse and neglect against him for substance abuse with regard to another child who is not a part of these proceedings. Moreover, Bradley R.'s actions with regard to his refusal to comply with any of the circuit court's directives demonstrate a willful rejection and unwillingness to cooperate in the development of a reasonable family case plan designed to lead to the children's return to his care, custody and control.

Finally, Bradley R.'s failure to follow through with any rehabilitative efforts of "social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child" weigh heavily in this Court's decision. *See* W.Va. Code § 49-6-5(b). Thus, due to Bradley R.'s drug use, his failure to have any meaningful participation in his improvement period, along with his refusal to attend scheduled court hearings, we believe it is not in the best interest of these children to have post-termination visitation with Bradley R.

Consequently, we find that the circuit court did not abuse its discretion in terminating Bradley R.'s parental rights and denying his motion for post-termination visitation. Therefore, we affirm the February 3, 2006, final order of the circuit court.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Mingo County entered on February 3, 2006, is affirmed.

Affirmed.

224 W. Va. 647, 687 S.E.2d 746

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

No. 34599

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE MATTER OF B.B., K.B., T.B., P.B., J.B., B.B., AND T.F.

Appeal from the Circuit Court of Mineral County
Honorable Phil Jordan, Judge
Juvenile Action Nos. 07-JA-20 through 26

AFFIRMED

Submitted: September 9, 2009
Filed: October 9, 2009

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE BENJAMIN and JUSTICE WORKMAN concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus point 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

3. "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5

[1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*,182 W. Va. 302, 387 S.E.2d 537 (1989).' Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993)." Syllabus point 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

4. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 7, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

5. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus point 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

The respondent below and appellant herein, Rosemary C. (hereinafter "Rosemary"), appeals from an order entered July 3, 2008, by the Circuit Court of Mineral County. By that order, the circuit court denied Rosemary's motion for a post-dispositional improvement period and terminated any parental rights to Tiffany B.[1] (hereinafter "Tiffany"), Patricia B. (hereinafter "Patricia"), Joshua B. (hereinafter "Joshua"), Brandon B. (hereinafter "Brandon"), and Tessa F. (hereinafter "Tessa"), all children to whom Rosemary had no biological relation.[2] The lower court's order further denied post-termination visitation. On appeal to this Court, Rosemary argues that the circuit court erred in denying her post-dispositional improvement period and in terminating her parental rights. Rosemary also alleges some procedural improprieties that will be discussed in this opinion.[3] Based on the

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[2]On appeal to this Court, only three children are at issue: Patricia, Joshua, and Brandon. Two siblings, Kenneth and Brittany, born 1989 and 1990, respectively, reached the age of majority during the earlier proceedings and are no longer part of these proceedings. This Court recognizes that Tiffany also reached the age of majority in September 2009, and thus, is no longer under this Court's jurisdiction in this matter. Further, Rosemary did not appeal the denial of her parental rights and/or visitation with regard to Tessa. Thus, this Court will decide the issues only as they relate to the remaining three children.

[3]Specifically, Rosemary argues that the lower court erred by improperly obtaining testimony from the children involved; considering the relative wealth or poverty of her situation in deciding whether to terminate parental rights; issuing its dispositional order in violation of the applicable time periods; and failing to appoint counsel for her son, Hiram C. (hereinafter "Hiram"), even after it was apparent that his actions or inactions could

(continued...)

parties' arguments, the record designated for our consideration, and the pertinent authorities, we affirm the rulings made by the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

The petitioner, Rosemary, is currently in her mid-seventies and her son, Hiram, is in his mid-forties. Previously, the two lived together in Baltimore, Maryland. While living in Maryland, Rosemary and Hiram came to care for seven children, none of whom were related by blood or marriage to either Rosemary or Hiram.[4] The biological parents[5] of the children were drug addicts and were acquaintances with one of Rosemary's

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[3](...continued)
directly affect Rosemary's improvement period.

[4]While Rosemary is the only petitioner whose rights are before this Court, the record reveals that the children referred to Rosemary as "mom" and to Hiram as "dad." It is undisputed that Hiram was a caretaker of the children during the time that they were in Rosemary's home. Moreover, some of the allegations in the abuse and neglect petition were directed to Hiram's conduct. Hiram's actions were an issue in the case plan, and he was subjected to court-mandated counseling and services. Further, the circuit court's dispositional order found that "[Hiram] has been treated as a party in this case . . . and signed the treatment plan." Significantly, the lower court ordered as follows: "That any parental rights, including visitation of Rosemary . . . and Hiram . . . to Tiffany . . . Patricia . . . Joshua . . . Brandon . . . and Tessa . . . are hereby TERMINATED." During an April 16, 2008, status hearing in the underlying case, Rosemary's counsel made a motion for Hiram to receive court-appointed counsel. Hiram indicated to the lower court that he was willing to proceed in the matter without representation of counsel; however, it does not appear that he was ever designated as a party in this action.

[5]All of the children in Rosemary's care had the same biological parents with the exception of Tessa.

biological children. When the biological parents could not care for their children, Rosemary would take informal temporary custody. This process continued as each of the six sibling children were born and with the one child who was unrelated to the other six children. Rosemary was granted legal custody and guardianship of the children in the Circuit Court of Baltimore City Division for Juvenile Cases in April 1999; however, the biological parents' rights were never terminated by the Maryland courts. The Maryland court terminated its jurisdiction over the matter in 2006.

In 2001, Rosemary and Hiram moved to West Virginia with these seven children. Soon thereafter, in March 2001, the children were brought to the attention of Child Protective Services (hereinafter "CPS"). Over the next several years, eleven different referrals were sought for various reasons. The referrals were investigated and some of the allegations contained therein were unsubstantiated. However, the referrals that were substantiated included instances of emotional abuse, physical abuse, improper threats of sending the children away for bad behavior, improper punishment by withholding food, illegal drug abuse in the home by adults, an unhealthy home with cockroaches falling from the ceiling, farm animals in the home, flea infestation resulting in bites to the children, and failure on Rosemary's part to complete the paperwork necessary for medical coverage for the children. Moreover, one of the children, Patricia, is ill with Hepatitis C.[6] It was found that

[6]It is believed that Patricia contracted this disease as an infant when her (continued...)

this child was forced to use a bucket outside of the home as separate toilet facilities. She was also forced to use different eating and drinking utensils from the rest of the family. The Department of Health and Human Resources (hereinafter "DHHR") also noted its concerns about the children living in the same home as adults with extensive criminal backgrounds.[7]

Based upon these referrals and concerns, a general abuse and neglect petition was filed by the DHHR against Rosemary on June 12, 2007.[8] In addition to Rosemary, other

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[6](...continued)
biological mother stabbed her with a dirty needle used for drug abuse. This incident occurred prior to t he time when Patricia came to be in Rosemary's care.

[7]Hiram has a felony record with convictions for drug possession and transportation of firearms. At one time, at least two other adults, Rosemary's daughter and grandson, lived in the home. The daughter was awaiting trial on charges related to driving under the influence. Her criminal background also included larceny, stalking, obstruction, and telephone misuse. The grandson's criminal background included charges of arson, theft, destruction of property, obstruction, harm and injury, assault, verbal threats, and conspiracy. Since the institution of the underlying proceedings, the daughter and grandson have left the home and have not returned. The children have reported various instances of Hiram and other adults acting strangely and in ways that the children believed illustrated drug use.

[8]The CPS referrals began in 2001. While we recognize that not every referral was substantiated and that there was also the issue of continuing jurisdiction in the Maryland courts, it seems that the delay in bringing the abuse and neglect petition was extensive and only served to prolong the children's exposure to an unstable home. *See* Syl. pt. 1, in part, and Syl. pt. 5, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.") ("The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible."). The delays do not appear to be a result of the circuit court or its docket, but rather, a delay in filing the petition
(continued...)

parties included in the underlying proceedings were the biological parents of the six sibling children, as well as the biological mother of the other child who was unrelated to the other six children.[9] During the court proceedings in West Virginia, the biological parents' rights to the six sibling children were terminated on December 12, 2007.[10] The biological mother's rights to Tessa are still pending in the circuit court. Of the seven children in Rosemary's care, only three of them are at issue before this Court, all of whom are related to each other by blood but are not related to either Rosemary or Hiram by blood. The three children at issue in this appeal are Brandon, born 1993; Patricia, born 1995; and Joshua, born 1999.[11]

As early as September 2004, the family was referred for various services including Family Preservation, Juvenile Probation, and Youth Services. Parenting plans

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[8](...continued)
at the outset. However, the record is unclear as to any discernible reason for the delay.

[9]All of the children in Rosemary's care had the same biological parents with the exception of Tessa. Rosemary's rights with regard to Tessa are not at issue before this Court as neither person desires interaction with the other person, and Rosemary did not appeal the termination of her parental rights and denial of visitation with Tessa.

[10]Termination of the biological parents' rights is not at issue in this appeal.

[11]As of the time of oral argument, Tiffany, Patricia, and Joshua were placed in foster care. Patricia and Joshua are together in the same placement. Tiffany reached the age of majority in September 2009. Brandon was removed from the home in January 2007 as a result of a juvenile and/or status offense petition. He was ultimately placed in a residential treatment facility and remains in that placement at this time. His eventual placement is undetermined.

were designed and counseling was ordered. It was found that Rosemary and Hiram initially were not compliant in taking advantage of these ordered programs. It was also found that Rosemary and Hiram were not compliant with the court-ordered sibling visitation with siblings who had been removed from the home on juvenile petitions. During the lower court proceedings, it was found that Rosemary had a habit of filing juvenile petitions on the children as they got older. The lower court specifically found that

> [a]s soon as a child gets old enough to report abuse, Rosemary would file a juvenile petition to get rid of and punish the child. That child is then shunned by Rosemary and Hiram.
>
> Once a child is on the "shunned list", there is an effort to exclude that child from her [or his] siblings.

As a result of the June 2007 abuse and neglect petition, the DHHR was granted legal custody of the children, but physical custody remained with Rosemary. A status hearing was held August 31, 2007, regarding a Motion for Contempt filed against Rosemary, wherein the lower court ruled that Rosemary was in contempt for intentionally interfering with sibling visitation that had been previously ordered to occur between the children remaining in her care and their sibling sister who had been removed from the home on a juvenile petition. Because Hiram's actions also contributed to the lack of compliance with visitation, he was also subjected to the same continuing terms and conditions as Rosemary.

In September 2007, an amended abuse and neglect petition was filed by the DHHR. This petition alleged that Rosemary had allowed the children's medical cards to

lapse. The DHHR was granted physical custody of the children due to this failure by Rosemary, which resulted in the children being denied continued services from Family Preservation Services and Mountain State Psychological. The children were removed from the home and placed in various foster homes, with only Joshua and Patricia remaining together in the same placement.

On October 3, 2007, an adjudicatory hearing was held and the parties informed the lower court that they had reached an agreed adjudication for the trial court to approve. The stipulations of the parties included Rosemary's concessions that the children had been exposed to inappropriate discipline in her home, resulting in both physical and emotional abuse. She further agreed that she had failed to participate with in-home services and social services recommended by the DHHR; and that the living conditions in her home had been less than adequate for the health, benefit, and welfare of the children. The lower court made a finding that the minor children were abused and/or neglected children and that continued physical custody by Rosemary was not in the children's best interests. The lower court granted a six-month post-adjudicatory improvement period to Rosemary. In that time, Rosemary was directed to participate in counseling recommended by her psychological evaluation and to attend all counseling, medical, psychological, psychiatric, and parenting appointments or sessions determined necessary by the MultiDisciplinary Team (hereinafter "MDT"). The goals were to address the necessary parenting issues needed to protect the children, to improve the living conditions in the home, and to maintain current medical cards

on the children.

The DHHR filed its Family Treatment Plan on February 14, 2008. The plan included the following eight items that must be remedied during the improvement period:

> 1. Rosemary and Hiram have a history of not following through with services which resulted in the removal of the children from the family home.
>
> 2. Rosemary and Hiram file incorrigibility petitions on the children when they reach a certain age, indicating that the child is out of control. The child is then shunned by the other children because Rosemary and Hiram tell them not to speak to the child.
>
> 3. The family home is in disarray and through reports of service providers there are cockroaches everywhere crawling on the floors, walls and falling from the ceiling this creates an unhealthy environment for the children to live in due to cockroaches carrying disease.
>
> 4. The children report physical and emotional abuse as evidenced by reports of being pushed down the stairs, pushed against the walls, beat up by the other children while being held down by Hiram. Patricia has indicated that she had to toilet in a bucket in the home and was not allowed to use the family bathroom. The bucket was moved to a trailer outside and she was forced to use that. Patricia was also told regularly that she would die by the time she is sixteen. The other children report that Hiram would get angry with them and hang a sign on his door that he is not their father and they have to call him by his given name. Hiram and Rosemary do not permit the children to associate with black children because they do not like them. If caught the children are shunned.
>
> 5. The children have reported that [various other adults] would stay at the home and use drugs with Hiram. When this would happen the children were exposed to people being passed

> out and possibly overdosing on the drugs.[12]
>
> 6. Hiram and Rosemary have not recognized the problems in the home. They have not realized the impact that their actions and words have had on the children. They do not feel the children have been abused emotionally or physically. They view themselves as the victims in the case. They feel the children are being allowed to run the court and MDT and that the MDT should not be listening to the children's wishes although all of the children at one time or another have expressed that they do not want to return to the family home.
>
> 7. The children have many concerns about returning home. They are concerned about the treatment they would receive if they return to the family home.
>
> 8. Hiram does not have any means of support.

(Footnote added).

On April 16, 2008, a status hearing was held to review the improvement period and the case plan. Rosemary's counsel's motion to meet with the children, in the presence of their guardian ad litem, was granted for the purpose of ascertaining the children's wishes on where they would like to reside. The same counsel also made a request for Hiram to receive independent court-appointed counsel, which was denied.[13] DHHR was requested to file the Children's Case Plan by June 1, 2008. In an order entered June 13, 2008, the circuit

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[12]The children reported various instances of adults being passed out and Rosemary pouring "milk" down their throats to wake them. Additionally, there were two instances when some of the children thought someone had "died" after he or she passed out and emergency services were called.

[13]*See* note 4, *supra*.

court acknowledged receipt of the DHHR's Children's Case Plan. In that plan, the DHHR stated that

> [w]hile participating in services the MDT has seen a significant amount of improvement from both Hiram and Rosemary. They have become more open to the children and dealing with them at their present ages. They have acknowledged a lack of information regarding Patricia's illness and apologized for their treatment of her during a family session. Both Hiram and Rosemary have listened to what the children have to say and how the children are feeling and then address the issues at hand. Both have learned to recognize the need to work together on the disciplining of the children so that the children can not triangulate the situation to achieve whatever goal they may have at the time. The children have become increasingly comfortable with Hiram and Rosemary. They have been able to express their fears without concerns of being shunned by Hiram. The children have had moments of wanting to return to the home and other moments of wanting to remain in foster care. Due to the family's successful completion of the treatment plan, the Department has no alternative but to recommend reunification of the children with Hiram and Rosemary[.]

Therein, the DHHR recommended a reunification plan with the goal to transition Tiffany, Patricia, Joshua, and Brandon, upon completion of his residential treatment program, back to Rosemary's home. In its June 13, 2008, order, the circuit court advised that it did not agree with the DHHR's assessment of the case and that it had reservations about the permanency plan for the children. Therefore, the lower court directed that the dispositional hearing scheduled for June 19, 2008, be held pursuant to W. Va. Code § 49-5D-3a (2004) (Repl. Vol. 2004)[14] and that the MDT should present evidence as to its rationale for the

[14]W. Va. Code § 49-5D-3a (2004) (Repl. Vol. 2004), in relevant part, provides: (continued...)

proposed service plan.

A dispositional hearing was held June 19, 2008. Testimony was heard from the child protective services worker, a clinical therapist who provided individual and family therapy, a case manager and counselor who provided parenting training, and two psychologists who provided therapy to the children. All of the witnesses indicated their recommendation that reunification be attempted between the children and Rosemary. At the conclusion of the testimony, all counsel, including the children's guardian ad litem, recommended that the children be returned to Rosemary's home with continued services and oversight by the DHHR. The matter was taken under advisement by the lower court, which set forth its findings of fact and conclusions of law in its Dispositional Hearing Order entered

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[14](...continued)

> (a) In any case in which a multidisciplinary treatment team develops an individualized service plan for a child pursuant to the provisions of section three [§ 49-5D-3] of this article, the court shall review the proposed service plan to determine if implementation of the plan is in the child's best interests. If the multidisciplinary team cannot agree on a plan or if the court determines not to adopt the team's recommendations, it shall, upon motion or sua sponte, schedule and hold within ten days of such determination, and prior to the entry of an order placing the child in the custody of the department or in an out-of-home setting, a hearing to consider evidence from the team as to its rationale for the proposed service plan. If, after a hearing held pursuant to the provisions of this section, the court does not adopt the team's recommended service plan, it shall make specific written findings as to why the team's recommended service plan was not adopted.

July 3, 2008. In its order, the lower court stated that

> **in this case there is ample evidence already in the record to show that the treatment goals have not been met, that the Department [DHHR] chose to ignore significant facts, that both respondents testified falsely, and that the best interest of these children will not be served by returning them to this strange home.**

(Emphasis in original). The lower court's order emphasized its conclusions that Rosemary and Hiram failed to follow through with services, that they filed incorrigibility petitions on children when they reach a certain age and then shun that child, that the house is in disarray with little or no food and a flea infestation problem, that Hiram and Rosemary have failed to appreciate the extent of the physical and emotional abuse suffered by the children as a result of their actions and inactions, that the children were exposed to illegal drug abuse by adults in the home, and that Hiram and Rosemary view themselves as victims and fail to understand the impact of their behavior on the children. Moreover, the children, during an interview with the court on June 12, 2008, indicated their fear and concern about treatment they would receive if they were returned to the home, as well as the treatment they would receive if they did not want to return home, including Rosemary and Hiram's anticipated refusal to let them visit any of their siblings who might have returned to the home. The lower court's order further identified as a major concern that Hiram has no means of support, and identifying that there is a question as to whether Hiram and Rosemary can afford to feed and

clothe the four children at issue.[15] Significantly, in regards to the current placements of the children outside of the home, the lower court order found that "[a]ll of these children continued to improve until contact with Hiram and Rosemary was increased. Their behavior then deteriorated." (Empahsis in original).

> The disposition in the lower court's order was stated as follows:
>
> > The Court has seriously considered whether to grant a dispositional period of improvement. However, the Court denies the request for the following reasons:
> >
> > 1. There is no reason to believe that [Rosemary and Hiram] will change as has been set forth previously.
> >
> > 2. Any trial placement back in the home that didn't work out would disrupt and possibly make return to current placements for the children impossible.
> >
> > 3. The children have regressed when they are around Rosemary and Hiram.
> >
> > 4. Given what has happened in this case, this Court simply cannot trust the members of this MDT to recognize and report to the Court if something were to go wrong.

The order directed "[t]hat any parental rights, including visitation of Rosemary . . . and Hiram . . . to Tiffany . . . Patricia . . . Joshua . . . Brandon . . . and Tessa . . . are hereby

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[15]Rosemary reports her income from social security as $793.00 per month. Hiram reports that he has applied for social security disability for depression, nervousness, and a heart valve problem. He occasionally performs odd jobs, which can total $400.00 to $500.00 per month in income, but there is no record evidence demonstrating the continuity of this income.

TERMINATED." The lower court further denied requests for post-termination visitation stating that "further visitation is not in the children's best interests. It is clear from the reports . . . that the children regress when they have contact with Hiram and Rosemary. . . . The children need a clean break." DHHR was ordered to provide for significant visitation among the children. It is from this order that Rosemary appeals to this Court.

Subsequent to the lower court's dispositional order, the DHHR has now filed a response with this Court wherein it alters the earlier recommendation made to the lower court. Because the children have improved so dramatically in their current placements, and because they seem to regress when they have any contact with Rosemary, DHHR is now advocating that the children remain in their current placements and that visitation with Rosemary occur only at the discretion of the individual children. Additionally, two new guardians ad litem subsequently were appointed because the original guardian ad litem took a public office and could no longer be involved in the case.[16] The two new guardians performed their own independent assessment, including home visits and interviews. Their opinions are that the children's best interests are to sever all contact with Rosemary and

[16]The original guardian ad litem in the case submitted a letter for this Court's use in this appeal. In that letter, the guardian opined that reunification was the most reasonable recommendation at the time of the dispositional hearing. However, due to the passage of time and the children's successful placements, he now recommends that the parental rights of Rosemary be terminated, but that visitation be allowed.

Hiram. The two guardians opine that there is ample concern for continuing emotional problems for the children and also conclude that the home is unsafe and uninhabitable for children. They do not recommend visitation. The guardians ask this Court to remand the case for the lower court to continue proceedings in accordance with its dispositional order so that permanency can be achieved for the children.

II.

STANDARD OF REVIEW

This case is before this Court on appeal from the circuit court's order denying Rosemary's request for a post-dispositional improvement period and denying her request for post-termination visitation. This Court has previously explained that, in the realm of an abuse and neglect case,

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

Mindful of the applicable standards, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Rosemary argues that the circuit court erred in denying her post-dispositional improvement period and in terminating her parental rights. Rosemary also alleges some procedural improprieties. Specifically, Rosemary asserts that the trial judge improperly obtained the testimony of the children and used these statements in violation of Rule 8 of the Rules of Procedure for Child Abuse and Neglect Proceedings.[17]

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[17]The relevant portion of Rule 8 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides as follows:

> (b) *Procedure for taking testimony from children*. – The presiding judicial officer may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the presiding judicial officer determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the presiding judicial officer shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the presiding judicial officer may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. . . .

This Court recognizes that the lower court met with the children individually on June 12, 2008, as stated in the trial court's Dispositional Hearing Order. There is no indication that

(continued...)

Further, she contends that the lower court improperly considered her modest income in deciding whether to terminate rights.[18] She also contends that the dispositional order was improperly entered more then ten days from the hearing date in violation of Rule 36 of the

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[17](...continued)
the guardian ad litem was present, that notice was presented to any parties, or that a record was made of the interviews. While we find the procedure utilized by the lower court was error, we are satisfied that such error was harmless. *See* Syl. pt. 3, in part, *Original Glorious Church of God In Christ, Inc. of Apostolic Faith v. Myers*, 179 W. Va. 255, 367 S.E.2d 30 (1988) (per curiam) ("'[T]his Court will disregard and regard as harmless any error, defect or irregularity in the proceedings in the trial court which does not affect the substantial rights of the parties.' Syl. pt. 2, *Boggs v. Settle*, 150 W. Va. 330, 145 S.E.2d 446 (1965)."). Notwithstanding any information learned by the circuit court during these interviews with the children, the record is replete with evidence properly relied on by the circuit court as a foundation for its underlying decisions.

[18]In this Court's previous case of *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W. Va. 688, 695-96, 356 S.E.2d 181, 188-89 (1987), we recognized "the existence of a bias in favor of having the child with someone who is more economically secure[.]" In addressing this matter, we stated that

> [p]etitions for termination of parental rights are particularly vulnerable to the risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on such comparisons rather than on the statutory criteria.

Id. (internal citations omitted). We find that a fair reading of the lower court's order reveals that Rosemary's modest economic status was not the basis for any termination decisions. Rather, one of the concerns enumerated by the circuit court was the apparent lack of evidence that would illustrate that these two people could adequately feed and clothe these children. This fear was further bolstered by the reports in the record that the children, upon being placed in foster care outside of Rosemary's home, were amazed to find food in the refrigerator. Moreover, the foster parents indicated that some of the children displayed hoarding tendencies with their food as if they were afraid that more food would not be available in the future. Thus, we find Rosemary's argument wholly without merit.

Rules of Procedure for Child Abuse and Neglect Proceedings.[19] Finally, because her son, Hiram, was also included in the improvement periods, Rosemary contends that he should have been appointed counsel.[20]

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[19]The relevant portion of Rule 36 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides that "[t]he court shall enter a disposition order, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the [dispositional] hearing." In the present case, the dispositional hearing took place on June 19, 2008; and the order was entered July 3, 2008. In the absence of any time computation specified in the Rules of Procedure for Child Abuse and Neglect Proceedings, this Court resorts to Rule 6 of the West Virginia Rules of Civil Procedure for time computation, which provides as follows:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . . When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Following the time computation rules, the order was properly entered on the tenth day following the dispositional hearing.

[20]We find this argument to be without merit. Rosemary is the only party who had received guardianship rights from the Maryland courts. *See* note 4, *supra*. *See also* Syl. pt. 1, *Maples v. West Virginia Dep't of Commerce*, 197 W. Va. 318, 475 S.E.2d 410 (1996) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal."). *See also Hardy v. Hardy*, 197 W. Va. 243, 250, 475 S.E.2d 335, 342 (1996) (per curiam) ("[t]he need for judicial economy within the family law master system precludes allowing everyone multiple opportunities for factual development, especially for the party who invited the error." (internal citations omitted)). Thus, we deem this issue waived by Hiram and not properly raised by Rosemary. *See Snyder v. Callaghan*, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981) ("Traditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary

(continued...)

Initially, the DHHR and the original guardian ad litem advocated for the return of the children to the care of Rosemary, and this was the position advanced during the underlying proceedings. However, because these children have been in the same placement since 2007 and are doing extremely well and only seem to regress with any contact with Rosemary, the DHHR is now advocating that the children remain in their current placements and that visitation with Rosemary occur only at the discretion of the individual children. The current guardians ad litem concur with the position of the DHHR expressed on appeal to this Court, with the exception that the guardians recommend that no visitation occur between the children and Rosemary.

As previously explained by this Court, "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Further guidance is provided as follows:

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions

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[20](...continued)
adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case." (internal citations omitted)).

> of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*,182 W. Va. 302, 387 S.E.2d 537 (1989)." Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589. Further, "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. pt. 7, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Thus, this Court elevates the health and welfare of the children above any parental rights of Rosemary to these children.

Significantly, in this case, the lower court found "by clear and convincing evidence that [Rosemary and Hiram] have failed to substantially comply with the treatment plan and the terms of the post-adjudicatory period of improvement." Therefore, the trial court rejected the Children's Case Plan. In this regard, this Court has held that,

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

Syl. pt. 6, *In the Interest of Carlita B., id.* While all of the MDT personnel opined that Rosemary had made great strides in her improvement period, the lower court found that she had failed to comply with the period of improvement. The lower court acknowledged that

Rosemary had performed better toward the end of the treatment period; however, the court found that a view of the overall treatment period showed that little progress had actually been made. The lower court emphasized Rosemary and Hiram's history of failing to follow through with services, the emotional abuse experienced by the children as a result of juvenile petitions filed by Rosemary against the children when they reach a certain age, and the family shunning that continued even in the midst of group therapy sessions. Further, while Rosemary appears to have attempted to eradicate the cockroach problem from her house, there was recent evidence of a problem with flea infestations, which resulted in multiple bites to one of the children during a visit. Significantly, as found by the lower court, Rosemary fails to appreciate the extent of the physical and emotional abuse suffered by the children as a result of the actions and inactions by both Rosemary and Hiram.

The children have been in their current placements since 2007. By all accounts from the DHHR and the two current guardians ad litem, these children are doing better in their current placements than they ever have done, and they regress after any contact with Rosemary and/or Hiram. Thus, the circuit court's determinations should be affirmed.

IV.

CONCLUSION

For the foregoing reasons, the July 3, 2008, Dispositional Hearing Order by the Circuit Court of Mineral County is hereby affirmed. The termination of Rosemary's parental

rights to the children is affirmed, and the denial of post-dispositional visitation also is affirmed.[21]

Affirmed.

[21]Further, the lower court's determination ordering "significant visitation among the children" is recognized and affirmed. *See* Syl. pt. 9, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) ("'In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.' Syl. Pt. 4, *In re James M.*, 185 W. Va. 648, 408 S.E.2d 400 (1991).").

No. 34599 – In the Matter of B.B., K.B., T.B., P.B., J.B., B.B. and T.F.

FILED
December 22, 2009
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Chief Justice, concurring:

I concur completely in the majority *per curiam* opinion of the Court. The July 3, 2008 Dispositional Hearing Order of the circuit court and the termination of rights and denial of post-dispositional visitation was proper. As I wrote earlier this year in my concurrence to the Court's decision in *State ex rel. WVDHHR v. Pancake*, 224 W.Va. 680 S.E.2d 54 (2009) (C.J.Benjamin, concurring): "Our guiding principle in cases such as this is the health and welfare of the child. These cases deservedly receive the highest priority of the court system's attention – a priority which applies to government in general. *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991)."

I write separately to express my continuing frustration with the failures of the Department of Health and Human Resources ("DHHR") to comply in a timely manner with its legal mandate to help families and children in West Virginia. My concerns are shared by Justice Workman and, I believe, by others on this Court.[1] The harsh emotional tone adopted

[1] See, for example, Justice Workman's concurrence herein. Because I believe that Justice Workman's concurrence focuses too much on the employees and administrators of DHHR, rather than on more institutionalized systemic problems such as inadequate resources, I choose not to join her separate opinion. From my observation, the employees and administrators of DHHR not only have the desire to serve the families and children of West Virginia, but also do so to the best of their abilities. Theirs is a thankless task which is easy to criticize and which too frequently goes unnoticed and unrecognized for the good actually done. I likewise choose not to join in the raw emotionalism apparent in

by Justice Workman in her concurrence, I believe, richly conveys the general frustration of many with DHHR's inability to meet its legal mandate – an inability which, I believe, will necessarily require this Court to resolve the issue if nothing is done.

In view of the continuing inability of the DHHR to meet its legal mandate to the children and families of West Virginia, I believe that this Court must soon consider the creation of a commission to ensure that all legal mandates are adequately met by the DHHR.

Justice Workman's concurrence. "[T]he effective judge . . . strives to persuade, and not to pontificate." Hon. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L.Rev. 1185, 1186 (1992). A judge should speak in "a moderate and restrained" voice. *Id.* A separate opinion should never "generate more heat than light." *Id.*, at 1194. While I choose not to join her separate opinion, it is apparent that Justice Workman not only shares my frustrations, but that her patience is close to being exhausted, if it isn't already exhausted.

No. 34599 – The Matter of B.B., K.B., T.B., P.B., J.B., B.B., and T.F.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring:

The majority's decision is well-written and certainly reaches the right result for these children. Unfortunately, the years that the DHHR permitted these children to live in neglectful and abusive circumstances will likely have a negative impact for the rest of their lives.

Despite at least eleven referrals to the DHHR that began in 2001, it was not until June 12, 2007, that the DHHR filed an abuse and neglect petition against Rosemary and Hiram. The DHHR's 2007 petition did not occur until there were more than six years of very serious allegations of abuse and neglect, wherein children were removed from the home on four separate occasions beginning in 2003. Even then, as more fully discussed below, in its June 6, 2008, subsequent filing in the circuit court, prior to a June 19, 2008, dispositional hearing, and in spite of a mountain of disturbing evidence showing abuse and neglect toward these children, the DHHR ***recommended that these children be returned to Rosemary and Hiram***. It is outrageous that seven children were left in despicable circumstances by the DHHR ***for more than six years*** and even then, that the DHHR still sought to place those children back in an unsafe environment.

It is important to review some of the underlying facts. As early as March 22,

2001, allegations arose that Rosemary did not have the proper medication for Brandon and, instead, was replacing it with sleeping medication. Again, on August 21, 2001, the DHHR was informed that Brandon's medication was not being filled and that it was interfering with his schoolwork. Next, on August 14, 2002, the DHHR received a referral alleging that another child, Kenny, was being emotionally abused. With regard to the allegations concerning Kenny, even though the DHHR substantiated those charges of abuse, a case was not opened and the DHHR did not pursue an abuse and neglect petition. Instead, the DHHR referred Rosemary and Hiram to Family Preservation for parenting skills.

Soon thereafter, on August 27, 2002, the DHHR received a referral alleging that there was an immediate risk to the safety of Brittany, due to a discovery that she was having suicidal thoughts and had run away from home. On that same day, the DHHR received another referral alleging physical abuse, questionable disciplinary techniques, inadequate housing, and unrealistic expectations. Just a few weeks later, on September 5, 2002, the DHHR substantiated allegations that Rosemary hit the children with cake turners, withheld food as punishment, and mentally abused the children by threatening to send them back to Baltimore, Maryland, if they were bad. In this instance, sending the children back to Baltimore meant giving six children back to their biological parents, who were described by the circuit court as current and "long-time Baltimore drug addicts."

As evidence of abuse and neglect against Rosemary and Hiram continued to

accumulate, on January 29, 2003, Brittany was removed from Rosemary's home on a juvenile petition, and returned to the home on February 26, 2003. She was again removed from Rosemary's home on September 9, 2004, and remains in the custody of the DHHR. On March 11, 2004, Kenny was removed from Rosemary's home by a juvenile petition, and was returned to the home on June 24, 2005. On September 9, 2004, the DHHR received yet another referral alleging inadequate care and emotional abuse in Rosemary's home, while on September 6, 2005, the DHHR received a referral alleging that Rosemary was refusing to send Joshua to school. On December 18, 2006, the DHHR received a referral alleging that Hiram physically and mentally abused Kenny. Kenny was temporarily removed from the home due to a juvenile petition, and the DHHR substantiated the allegations of emotional abuse. Even after all of these events, the DHHR still failed to institute a petition for abuse and neglect at this point.

On January 5, 2007, another child, Brandon, was removed from Rosemary's home and placed with the Division of Juvenile Services. On May 16, 2007, the DHHR received yet another referral, this time alleging that physical and emotional abuse was occurring in Rosemary's home. The children disclosed to DHHR employees that Hiram's sister, Serephine, her son Travis, and Travis' girlfriend, Diane, had been living at Rosemary's home, and that Hiram, Travis, and Diane had all overdosed at the home on numerous occasions. The children reported that Rosemary would give Hiram, Travis, and Diane milk when they passed out, and would only call an ambulance if she could not awaken them. The

children alleged that Serephine's children were all taken away due to her crack addiction, and that Serephine was incredibly mean to them calling them names like "slut" and "whore." During the investigation for this referral, another child, Tiffany, was discovered with self-inflicted cut marks on her arms. Despite the fact that the DHHR substantiated emotional abuse and drug abuse in the home, and even witnessed emotional and physical harm to a child, it did not file a petition for abuse and neglect until June 12, 2007.

In its June 12, 2007, petition, the DHHR stated that "the [DHHR] has recently learned that Hiram is a convicted felon" and had been found guilty of drug possession and illegal transportation of firearms. It further pointed out that Hiram's sister, Serephine, was awaiting trial on charges of driving while under the influence of drugs, and that she had a criminal background of larceny, stalking, domestic violence, obstruction, and telephone misuse. It was also reported that Serephine's son Travis, who was now living in Rosemary's home, had a criminal background consisting of arson, theft, destruction of property, obstruction, harm and injury, assault, verbal threats, and conspiracy.

The DHHR contended that remaining in the home would "further endanger the children" and that "[t]he parents have failed to benefit from previous intervention and services and the same dangerous behaviors continue to exist in the home." Thus, the DHHR stated that it "fears for their safety" and that there was "no alternative but the removal of the children from the home." Notwithstanding its earlier position, however, during a June 6,

2008, hearing before the circuit court, the DHHR had the audacity to recommend that four of the children be reunified with Rosemary and Hiram. It further recommended that a fifth child remain in the foster care system and become a ward of the state. It is important to explain that the only reason the DHHR did not recommend that the fifth child be returned to Rosemary, is that Rosemary and Hiram no longer wanted that child. Moreover, at the time of the DHHR's petition, the remaining two children had turned eighteen and were no longer under the circuit court's jurisdiction. Given the overwhelming evidence below, it is inconceivable that the DHHR could take a position that would have placed these children back in Rosemary's home.

In spite of the DHHR's misguided posture on placement of the children, following a June 19, 2008, dispositional hearing, the circuit court wisely disagreed with the DHHR and terminated Rosemary and Hiram's parental rights. The circuit court noted that this was one of the "most unusual procedural situations of any abuse and neglect case this judge has encountered in ten years on the bench." He pointed out that Rosemary, who was seventy-five-years-old at the time of her dispositional hearing, and her forty-seven-year-old son, Hiram, ***were never approved as a foster home in Maryland or West Virginia***; yet, they had seven children living in their home who were instructed to call them "Mom and Dad," none of whom were related by either blood or marriage to Rosemary or Hiram. The circuit court states that there was never even a child protective service case regarding these children in Maryland, and that "[t]he various cases seemed to be handled in family court, if at all."

Incredibly, the biological parents' rights to six of the children were not even terminated until December 12, 2007, while the biological mother's rights to the seventh child are still pending in the lower court. These children were ages two to twelve when they came to West Virginia, but were ages nine to nineteen at the time of the first dispositional hearing in the circuit court. Even then, as previously discussed, the DHHR was willing to leave these children in the care of Rosemary and Hiram. Why were these children failed by West Virginia and Maryland year after year?

There were countless red flags that should have triggered swift and meaningful action by the DHHR toward these children as numerous acts of abuse and unhealthy living conditions in Rosemary's home were substantiated throughout the years. As the circuit court stated, "A deplorable pattern was revealed." The circuit court further explained that "[a]s soon as a child gets old enough to report abuse, Rosemary would file a juvenile petition to get rid of and punish the child. That child is then shunned by Rosemary and Hiram." Clearly, these children lived in deplorable physical and emotional circumstances. Nonetheless, even though it was reported that ***a goat and a lamb were living inside the house***, and that the house had a significant cockroach and flea infestation problem, in addition to the myriad reports of emotional and physical abuse, the DHHR found no reason to take action during those time periods.

Rosemary and Hiram's treatment of Patricia is also troubling. As the circuit

court explained, "One of the best examples of how the DHHR, Guardian ad Litem and other MDT [Multidisciplinary team] members have overlooked the obvious is the cruel and completely unnecessary treatment of Patricia because she has Hepatitis C." It is believed that Patricia contracted Hepatitis C as an infant when her biological mother stabbed her with a dirty needle used for drug abuse. Throughout her time in Rosemary's home, Patricia was not allowed to use the family bathroom and was forced to use a bucket for a toilet that was located in a trailer outside of the home and without working plumbing. As the circuit court explained, "she was ostracized from the family at mealtime and in other ways [and she] was told she would die before she was sixteen." Rosemary and Hiram treated Patricia in this despicable manner in spite of well-documented evidence in the record that they had received specific and detailed medical advice to the contrary from numerous individuals. Earlier involvement by the DHHR could have prevented this situation altogether.

It is frustrating that it was not until this appeal, and ***after*** the circuit court terminated the parental rights of Rosemary and Hiram in 2008, that the DHHR finally took the position that the children remain in their current placements and that visitation with Rosemary occur only at the discretion of the individual children. The DHHR is about eight years late. Where was the DHHR as continued abuse and neglect occurred with child after child, year after year?

In consideration of all of the above, as well as the countless other cases

throughout the years regarding the DHHR's responsibilities toward the children of this State, we face an epidemic in child protective services in West Virginia that will necessarily affect future generations as they almost always re-appear within the court system battered, bruised, and often broken; or as abusers in their adult families; and often as criminals. It is clear that most child protective service workers in West Virginia are dedicated and conscientious, but also overworked, and underpaid. This concurring opinion is in no way intended to denigrate their work. Instead, the intent is to issue a clarion call to the DHHR to provide child protective services with more resources and more direction in protecting children as provided in an extensive body of both statutory and case law.

It is also important to note that from the earliest time these children came to the DHHR's attention, some inquiry should have been made as to their legal status. The record reflects that Rosemary and Hiram had only a legal guardianship of the children executed by the children's biological parents and endorsed by a Maryland court. Once these children fell in West Virginia's jurisdiction by virtue of the earliest abuse and neglect allegations, the DHHR should have begun an ongoing inquiry into the legal status of the children. Case law has made clear that every child is entitled to permanency to the greatest extent the legal system can ensure it. *See State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996); *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995); *In re Lindsey C.*, 196 W.Va. 395, 473 S.E.2d 110 (1995) (Workman, J., dissenting); *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). The

DHHR should have acted very early to begin concurrent planning,[1] more effective intervention, and permanency in the children's lives–permanency in "the level of custody, care, commitment, nurturing and discipline that is consistent with . . . [a] child's best interests." *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185 (1998). This Court observed in *Amy M.*, *supra*, that a child deserves "resolution and permanency" in his or her life and deserves the right to rely on his or her caretakers "to be there to provide the basic nurturance of life." 196 W.Va. at 260, 470 S.E.2d at 214. Moreover, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted).

This Court has consistently held that abuse and neglect cases must be given the highest priority to ensure their prompt resolution in order to provide permanency for the children involved therein. *See* Syllabus Point 1, *In re Carlita B.*, *supra*. It is a child's natural right to have proper care, adequate nutrition, shelter, and nurturance; and to not be neglected, abused, or forced to live in a substandard, scarring environment. But in too many cases in this Court, we see children who are denied permanency by being left in legal limbo for long periods of time during their formative years. This phenomenon not only causes concern that

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[1]*See In re Micah Alyn R.*, 202 W.Va. 400, 409, 504 S.E.2d 635, 644 (1998) (Workman, J., concurring) ("concurrent planning for permanency should occur even where parental rights are not terminated. This should be the practice in all abuse and neglect cases, so that there is a permanency plan for children where family reconciliation efforts are not successful for whatever reason").

this may be the tip of the iceberg, but engenders the question as to whether we must begin to reexamine child protective services in a more systemic manner.

Therefore, for the reasons set forth above, I respectfully concur with the majority opinion.

233 W. Va. 130, 755 S.E.2d 664

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

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No. 13-0383

_____

FILED
February 21, 2014
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: B.C.

Appeal from the Circuit Court of Ohio County
The Honorable David J. Sims, Judge
Civil Action No. 12-CJA-20

REVERSED AND REMANDED

Submitted: January 22, 2014
Filed: February 21, 2014

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JUSTICE KETCHUM delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

2. "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syllabus Point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

3. "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care." Syllabus Point 5, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

4. Under *W.Va. Code* § 48-27-305 [2001], a petition for a domestic violence protective order may be pursued by three classes of people: (1) a person individually seeking relief from domestic violence; (2) an adult person seeking relief from domestic violence on behalf of a family or household member, such as a minor child; or (3) a person who is being abused, threatened or harassed because they witnessed or reported domestic violence.

5. While a civil abuse and neglect action pursuant to *W.Va. Code* § 49-6-1 [2005] may be initiated by either the West Virginia Department of Health and Human Resources or "a reputable person," the action is pursued solely on behalf of the State of West Virginia in its role as *parens patriae*.

6. A petition for a domestic violence protective order under *W.Va. Code* § 48-27-101, *et seq.*, and a petition alleging abuse and/or neglect under *W.Va. Code* § 49-6-1, *et seq.*, may be filed upon the same facts without consequences under the doctrine of *res judicata* or the doctrine of collateral estoppel.

Justice Ketchum:

In this appeal from the Circuit Court of Ohio County, the parties dispute a circuit court order dismissing a petition which alleged that a parent abused and/or neglected a child. We are asked to determine whether one parent may seek a domestic violence protective order against the other parent of the child, and then later file a petition to initiate an abuse and neglect proceeding for the child in circuit court regarding the same conduct. In its order dismissing the petition, the circuit court concluded that an abuse and neglect proceeding filed after the conclusion of a domestic violence proceeding would be barred by principles of *res judicata* and collateral estoppel.

As set forth below, we reverse the circuit court's order. We find that even if a civil domestic violence proceeding and a civil abuse and neglect proceeding involve the same underlying facts, the separate proceedings do not implicate the doctrines of *res judicata* or collateral estoppel.

I.
FACTUAL AND PROCEDURAL BACKGROUND

This case presents issues involving the overlapping jurisdictions of the magistrate, family, and circuit courts of Ohio County, West Virginia. The underlying facts are simple. K.S. and K.C. are the biological parents of B.C., a minor child. K.S. ("the mother") and K.C. ("the father") divorced in 2004. The mother now alleges that the father has been neglectful and physically violent toward B.C.

In December 2011, the mother filed a domestic violence petition in magistrate court on behalf of B.C. She alleged several incidents of abuse and neglect by the father against B.C.[1] Based upon the abuse allegations, a magistrate granted an emergency protective order for B.C., and then scheduled a final hearing on the petition before a family court judge. Following the hearing, the family court judge dismissed the mother's domestic violence petition, in part because he did not find the testimony of B.C. to be credible. On March 9, 2012, the circuit court affirmed the family court's dismissal.

On March 12, 2012, the mother filed an abuse and neglect petition in the circuit court. The mother asked the circuit court to terminate the father's parental rights

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[1] In addition to citing several specific examples of violence by the father against the child, the December 2011 domestic violence petition vaguely alleged that the father had substance abuse problems that led him to neglect the child. We note that a court may not issue a domestic violence protective order based solely upon allegations of neglect, unless those allegations meet one of the five categories of "domestic violence" or "abuse" that are defined in *W.Va. Code* § 48-27-202 [2010]:

> (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
>
> (2) Placing another in reasonable apprehension of physical harm;
>
> (3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts;
>
> (4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code; and
>
> (5) Holding, confining, detaining or abducting another person against that person's will.

based upon allegations of abuse and neglect. The circuit court later noted that the allegations were "essentially the same allegations that were made" in the December 2011 domestic violence petition.

After filing the abuse and neglect petition, the mother alleges that an additional incident of domestic violence was committed by the father against B.C. That incident occurred on May 5, 2012, when the mother took B.C. to the Wheeling Police Department to exchange him with the father as required by the parties' shared parenting agreement. Apparently, the father grabbed the child and forcefully tried to take him, and in so doing twisted and fractured the child's wrist. This incident was recorded by video cameras.

On May 7th, the mother filed a new domestic violence petition on B.C.'s behalf against the father. The family court granted the petition and entered an emergency protective order in favor of B.C. The family court found clear and convincing evidence that B.C. "sustained a fractured wrist at the hands of [the father] . . . The same would constitute an act of domestic violence[.]"

On May 9th, the prosecutor filed a criminal complaint against the father charging him with misdemeanor domestic battery for the fracturing of B.C.'s wrist.[2] However, the prosecutor later agreed to a "pretrial diversion" with the father.[3] The prosecutor indicated that he would stay prosecution of the complaint for six months, and

[2] *See W.Va. Code* § 61-2-28(a) [2011].

[3] The prosecutor and K.C. reached this agreement on February 25, 2013.

that if the father complied with certain court orders during that time, the prosecutor would dismiss the domestic battery charge.

Several days later, on May 14th, the Department of Health and Human Resources ("DHHR") made a motion to intervene in the abuse and neglect action still pending in circuit court. DHHR said it wanted to intervene "to provide supportive services to the infant" and "to remedy any circumstances which may be detrimental to the child[.]"

Finally, on June 7th, the mother filed an amended abuse and neglect petition in the circuit court. In this newest petition, the mother added the allegations of domestic violence that the father allegedly committed against B.C. at the police department on May 5, 2012.

Counsel for the father filed a motion to dismiss the original and amended abuse and neglect petitions. The father asserted that the abuse and neglect allegations were the same as the allegations in the domestic violence petition filed in December 2011. Because the family court and circuit court had issued final orders adjudicating the mother's domestic violence allegations and denying the mother any relief, the father argued that the doctrines of *res judicata* and collateral estoppel supported dismissal of the abuse and neglect action.

In an order dated March 18, 2013, the circuit court agreed and dismissed the mother's abuse and neglect petitions. Finding that the allegations in both the original and amended abuse and neglect petitions were "essentially the same" as those made in the December 2011 domestic violence petition, the circuit court determined that the abuse

and neglect petitions were barred by the doctrine of *res judicata*. Further, the circuit court found the doctrine of collateral estoppel barred the abuse and neglect petitions because the issues of abuse dispensed with in the domestic violence petition and in the misdemeanor criminal complaint "are factually identical to the issues raised in this action." The circuit court accepted the father's assertion that his ex-wife (the mother) was simply attempting "to relitigate the domestic violence allegations that a Family Court has addressed and dismissed and the criminal charges that the State intends to dismiss."

Counsel for the mother now appeals the circuit court's dismissal order.

II.
STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

III.
ANALYSIS

The circuit court dismissed the mother's original and amended abuse and neglect petitions under the doctrine of *res judicata* and the doctrine of collateral estoppel. Both doctrines can be invoked to halt the prosecution of a lawsuit, or of a claim within a lawsuit, when the claim has been resolved on the merits in a prior proceeding. We find that the circuit court erred in applying these doctrines.

In *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997), we set forth a three-part test for determining if a lawsuit was barred by *res judicata*. Syllabus Point 4 of *Blake* states:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. (Emphasis added).

In *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), we outlined a four-part test to determine if a party was collaterally estopped from raising a previously resolved question in a new civil action. We stated in Syllabus Point 1 of *Miller*:

> Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

As we discuss below, the circuit court misapplied both of these doctrines. Generally speaking, two of the key elements to invoking these doctrines are that (1) the party in the current lawsuit, against whom either doctrine is being invoked, must be same as the party in the prior proceeding, and (2) the claims in both suits must essentially be identical. Neither of these elements was satisfied in the instant appeal. As a matter of

law, petitions for domestic violence protective orders involve different parties from civil abuse and/or neglect actions. Further, in the instant case, the mother's abuse and neglect petitions raised claims substantially different from those adjudicated in the December 2011 domestic violence petition.

A. *Identical Parties*

The doctrines of *res judicata* and collateral estoppel prevent parties from relitigating in a new action a claim or issue that was definitively settled by a prior judicial decision. The doctrine of *res judicata* essentially requires that the prior and current actions must involve the same parties;[4] the doctrine of collateral estoppel only requires the party against whom the doctrine is invoked to have been a party[5] to the prior action.

In this case, the circuit court presumed that B.C.'s mother was the same party who pursued both the December 2011 domestic violence petition and the March and June 2012 abuse and neglect petitions.[6] The circuit court concluded that because the mother was the same party asserting "essentially the same" allegations in both these

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[4] In the rare alternative, individuals in "privity" with the parties may be barred from pursuing an action based upon *res judicata*.

[5] In the rare alternative, an individual in "privity" with a party may be barred from pursuing a claim in a later action because of collateral estoppel.

[6] As we discuss later, the circuit court also seems – incorrectly – to have presumed that the same parties and allegations raised in the abuse and neglect petition were also involved in the criminal action against K.C., and that the resolution of the criminal action also resolved the allegations of abuse and neglect.

actions, she could not pursue her abuse and neglect petition. We reject this conclusion by the circuit court because the parties to a civil domestic violence proceeding are inherently different from those in a civil abuse and neglect proceeding.

A domestic violence proceeding is brought "[t]o assure victims of domestic violence the maximum protection from abuse that the law can provide," and to "create a speedy remedy to discourage violence against family or household members[.]" *W.Va. Code* § 48-27-101 (b)(1) and (2) [2001]. Our domestic violence prevention statutes identify three "persons" who may seek protection, for themselves or others, by filing a petition for a protective order. *W.Va. Code* § 48-27-305 [2001] states:

> A petition for a protective order may be filed by:
>
> (1) A person seeking relief under this article for herself or himself;
>
> (2) An adult family or household member for the protection of the victim or for any family or household member who is a minor child or physically or mentally incapacitated to the extent that he or she cannot file on his or her own behalf, or
>
> (3) A person who reported or was a witness to domestic violence and who, as a result, has been abused, threatened, harassed or who has been the subject of other actions intended to intimidate the person.

Specifically, the Legislature has established that the party in interest who pursues a petition for a domestic violence protective order is a "person."

A civil abuse and neglect proceeding is substantially different from a proceeding for a domestic violence protective order. West Virginia's abuse and neglect

statutes "establish a mechanism whereby the courts may adjudicate questions arising when the State or a citizen thereof believes there is necessity to change the custodial relationship of natural parent and child because of some dereliction on the part of the parent[.]" *In re Willis*, 157 W.Va. 225, 238, 207 S.E.2d 129, 137 (1973). West Virginia's abuse and neglect statues indicate that a petition may be filed by two entities: either the West Virginia Department of Health and Human Resources ("DHHR") or "a reputable person." *W.Va. Code* § 49-6-1[2005] states, in part:

> (a) If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court. . . . The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought. . . .
>
> (b) The petition and notice of the hearing shall be served upon both parents and any other custodian . . . Notice shall also be given to the department, any foster or preadoptive parent, and any relative providing care for the child. . . .
>
> (c) At the time of the institution of any proceeding under this article, the department shall provide supportive services in an effort to remedy circumstances detrimental to a child.

Our abuse and neglect statutes certainly permit "a reputable person" to initiate a petition for relief. "By permitting an individual who believes that abuse and/or neglect is occurring, or has occurred, to file a petition alleging such circumstances, and by requiring this person to also have sufficient knowledge of the facts underlying this

belief to verify the petition, the statutory framework attempts to protect parents, custodians, guardians, and care givers from unsubstantiated charges while permitting the filing of petitions seeking to protect the health, safety, and well-being of children." *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 256, 496 S.E.2d 198, 206 (1997).

However, while "a reputable person" may *initiate* an abuse and neglect action under *W.Va. Code* § 49-6-1, it does not mean that the reputable person has any stake in the action or that the action is being pursued on behalf of the reputable person as the party in interest. Instead, our cases make clear that an abuse and neglect action is prosecuted on behalf of one party, and only one party: the State of West Virginia, in its role as *parens patriae*.

The doctrine of *parens patriae* allows the State "in its capacity as provider of protection to those unable to care for themselves" to prosecute a suit "on behalf of someone who is under a legal disability." *Black's Law Dictionary* 1221 (9th Ed. 2009). The State, in its role of *parens patriae*, "[s]tand[s] at the side of the natural parents with benign, but continuing, interest" in the care and custody of children. *In re Willis*, 157 W.Va. at 238, 207 S.E.2d at 137. The Legislature first adopted our abuse, neglect and child welfare statutes in 1915 as a way to "afford special protection to persons of tender years," and crafted those statutes as "an obvious expression of our lawmakers to join the then modern sociological trend by the codification of the doctrine of *parens patriae*." *State ex rel. Slatton v. Boles*, 147 W.Va. 674, 679, 130 S.E.2d 192, 196 (1963). As Justice Miller observed:

> While parents enjoy an inherent right to the care and custody of their own children, the State in its recognized role of *parens patriae* is the ultimate protector of the rights of minors. The State has a substantial interest in providing for their health, safety, and welfare, and may properly step in to do so when necessary. . . . . In cases of suspected abuse or neglect, the State has a clear interest in protecting the child and may, if necessary, separate abusive or neglectful parents from their children.

In the Interest of Betty J.W., 179 W.Va. 605, 608, 371 S.E.2d 326, 329 (1988). Hence, as we said in Syllabus Point 5 of *In re Willis*, *supra*:

> Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care.

While a civil abuse and neglect action is pursued solely under the State's *parens patriae* authority, "the legislature has made DHHR the State's representative." Syllabus Point 4, in part, *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997). "DHHR is the client of county prosecutors," and "prosecutors must *cooperate* with DHHR's efforts to pursue civil abuse and neglect actions." *Id*. And it is the circuit court that has exclusive "jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith[.]" Syllabus Point 3, *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997).

To summarize, under *W.Va. Code* § 48-27-305, a petition for a domestic violence protective order may be prosecuted by three classes of people: (1) a person individually seeking relief from domestic violence; (2) an adult person seeking relief from domestic violence on behalf of a family or household member, such as a minor

child; or (3) a person who is being abused, threatened or harassed because they witnessed or reported domestic violence. However, while a civil abuse and neglect action pursuant to *W.Va. Code* § 49-6-1 may be initiated by either the West Virginia Department of Health and Human Resources or "a reputable person," the action is prosecuted solely on behalf of the State of West Virginia in its role as *parens patriae*.

Comparing these statutory schemes, it is clear that the party in interest in a domestic violence action is, as a matter of law, different from the party in interest in an abuse and neglect action. Accordingly, we hold that a petition for a domestic violence protective order under *W.Va. Code* § 48-27-101, *et seq.*, and a petition alleging abuse and/or neglect under *W.Va. Code* § 49-6-1, *et seq.*, may be filed upon the same facts without consequences under the doctrine of *res judicata* or the doctrine of collateral estoppel.

Applied to the instant case, it is obvious that the circuit court erred in dismissing the mother's petitions alleging abuse and neglect under the doctrines of *res judicata* and collateral estoppel. The mother unsuccessfully pursued her December 2011 petition for a domestic violence protective order on behalf of her son, B.C. However, when she alleged these same acts of domestic violence in her March 2012 abuse and neglect petition, she did so only as "a reputable person."[7] Upon the filing of the abuse

[7] Before the circuit court, counsel for the father argued that the mother was not a "reputable person" under *W.Va. Code* § 49-6-1 "because she is, in part, forum shopping" and "is clearly showing a level of bias and animosity that the Legislature could not have meant" when enacting the abuse and neglect statutes. In its order, the circuit court declined to address this argument by the father.

(continued . . .)

and neglect petition, it was the State of West Virginia who became the prosecuting party in interest. The DHHR, as the agent for the State, was then charged with investigating the allegations and pursuing the best course to assure the "care, safety and guidance," and the "mental and physical welfare," of the minor child. *W.Va. Code* § 49-1-1(a)(1) and (2). Put simply, the mother was neither the same party nor was she in privity with the parties in both the December 2011 domestic violence action and the March 2012 abuse and neglect action. The circuit court erred in holding otherwise.

B. *Identical question*

The doctrines of *res judicata* and collateral estoppel bar the relitigation of a claim or issue previously resolved in another suit. *Res judicata* (also called "claim preclusion") generally applies if "the cause of action identified for resolution in the subsequent proceeding" is "identical to the cause of action determined in the prior action," or could have been raised and determined in the prior action. Syllabus Point 4, *Blake*, *supra*. Collateral estoppel (also called "issue preclusion") applies if the "issue previously decided is identical to the one presented in the action in question." Syllabus

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A "reputable person" under *W.Va. Code* § 49-6-1 is simply a person who "believes that abuse and/or neglect is occurring, or has occurred," and who has "sufficient knowledge of the facts underlying this belief to verify the petition." *State ex rel. Paul B. v. Hill*, 201 W.Va. at 256, 496 S.E.2d at 206. In *Paul B.*, we approved of an abuse and neglect petition filed by respite caregivers whose belief about the existence of abuse and/or neglect was based upon "personal familiarity with and observations of the children during their provision of respite care[.]" 201 W.Va. at 257, 496 S.E.2d at 207. On the appendix record presented to this Court, it appears that the mother meets these standards to qualify as a "reputable person."

Point 1, *Miller*, *supra*. An "issue" is "any right, fact or legal matter which is put in issue[.]" *Miller*, 194 W.Va. at 9, 459 S.E.2d at 120. In the instant case, the circuit court ruled that the causes of action and issues in both the December 2011 domestic violence petition and the March and June 2012 abuse and neglect petitions were identical "because the same evidence supports each of these separate and various causes of action [and issues]."

The circuit court's ruling was clearly in error, because the court failed to consider that the claims and issues that can be raised before, and the relief that could be granted by, the circuit court in an abuse and neglect action are substantially different and broader than the claims, issues and relief that can be considered by the magistrate and family courts in a proceeding for a domestic violence protective order. A domestic violence action is intended solely as a short-term, temporary response to prevent domestic violence; an abuse and neglect action is designed to craft long-term solutions to both violence and neglect in the household. While the circuit courts have concurrent jurisdiction with the family and magistrate courts over domestic violence proceedings, only circuit courts have jurisdiction to preside over abuse and neglect actions. *Compare W.Va. Code* § 48-27-301(a) [2012] ("Circuit courts, family courts and magistrate courts, have concurrent jurisdiction over domestic violence proceedings"); *W.Va. Code* 49-6-1(a) (if a child is neglected or abused, "the department or the person may present a petition setting forth the facts to the circuit court").

To state it succinctly, many of the long-term, comprehensive remedies that a circuit court can order in an abuse and neglect case are simply not available in a

domestic violence action. We perceive that, in many instances, the same factual scenario of domestic abuse and/or neglect could support not only a civil abuse and/or neglect action and an action for a domestic violence protective order, but could also simultaneously support a criminal prosecution, a civil tort action for damages, and an action in family court for divorce or allocation of parental responsibility. Each of these actions involves different parties, different causes of action, different burdens of proof, and/or different forms of relief not available in one court or another.

Additionally, the circuit court failed to make any reference to the mother's amended abuse and neglect petition, which raised allegations of violence against the child that happened in May 2012. Counsel for the mother plainly expressed to the circuit court that new, unresolved, unadjudicated facts supported the petition. The new issues raised in the amended petition occurred five months after the events detailed in the December 2011 domestic violence action, and therefore could not have been identical to the previously adjudicated questions. Yet the circuit court still went on find the issues raised by the amended petition were "essentially the same" as those in the domestic violence action, and dismissed the amended petition as barred by the doctrines of *res judicata* and collateral estoppel.

Finally, we are troubled by one additional conclusion by the circuit court. The mother was not a party to the criminal action filed in magistrate court. The criminal case was initiated by the prosecutor, and it was the prosecutor who entered into a bargain with the father. Still, counsel for the father argued that the abuse and neglect petition was "simply another attempt" by the mother "to re-litigate the domestic violence . . . criminal

charges that the State intends to dismiss." The circuit court accepted this argument, and found that the mother "had a full and fair opportunity to litigate all of the issues" in the criminal proceeding in magistrate court. The circuit court concluded that the mother's abuse and neglect assertions were collaterally estopped, in part, because they were "issues of (domestic) abuse . . . dispensed with by the State in the criminal action[.]"

This conclusion by the circuit court was in error. This Court has determined that civil abuse and neglect proceedings are to be treated as separate and apart from criminal proceedings arising from child abuse or neglect. As we stated in Syllabus Point 2 of *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997),

> A civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to Code, 49–6–1 et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

This is because "civil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." 201 W.Va. at 66, 491 S.E.2d at 613. The circuit court erred when it found that the allegations in the abuse and neglect petition were collaterally estopped by the prosecutor's choice to dismiss the criminal charges against the father.

In sum, because the claims and issues resolved in the December 2011 domestic violence proceeding were different from those in the original and amended abuse and neglect petitions, the circuit court erred in finding the mother's abuse and neglect action was precluded by the doctrines of *res judicata* and collateral estoppel.

IV.
CONCLUSION

The circuit court erred in finding that the original and amended abuse and neglect petitions were barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the circuit court's March 18, 2013, order must be reversed.

Reversed and remanded.

233 W. Va. 57, 754 S.E.2d 745

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

FILED
February 5, 2014
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0342

IN RE: B.H. and S.S.

Appeal from the Circuit Court of Wood County
Honorable John D. Beane, Judge
Civil Action Nos. 11-JA-145 and 11-JA-146

AFFIRMED

Submitted: January 15, 2014
Filed: February 5, 2014

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JUSTICE LOUGHRY delivered the opinion of the Court.

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

2. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

3. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

5. "'To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child.' Syl. Pt. 2, *Cloud v. Cloud*, 161 W.Va. 45, 239 S.E.2d 669 (1977)." Syl. Pt. 5, *In re Frances J.A.S.*, 213 W.Va. 636, 584 S.E.2d 492 (2003).

LOUGHRY, Justice:

The petitioner, Krista H. ("the mother"), appeals from the January 9, 2014, Corrected Disposition Order through which the Circuit Court of Wood County granted primary custodial responsibility of her daughters, B.H. and S.S.,[1] to their biological father, the respondent Randy H., Jr. ("the father");[2] granted her unsupervised visitation with the children; and dismissed the proceeding from the circuit court's docket.[3] Seeking a reversal of the circuit court's order and the entry of a new order making her the primary custodial parent, the mother asserts that the circuit court erred by granting the father primary custody of the children because she had substantially complied with the terms and conditions of her

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[1]Consistent with our practice in cases involving sensitive matters, we use the first name and last initial of the parents and the child victim's initials. *See State v. Edward Charles L.*, 183 W .Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990); *see also* W.Va. R. App. P. 40(e)(1).

[2]The record reflects that the Randy H. is the biological father of both S.S. and B.H. There is some indication in the appendix record that the mother and father were married and later divorced, although the Court could not find a specific date in the record for either event.

[3]On April 5, 2013, the mother filed her notice of appeal from the circuit court's first Disposition Order entered March 6, 2013, that terminated her custodial rights to B.H. and S.S. and gave primary custody of the children to their father. This order also gave the mother liberal visitation with her daughters pursuant to the Multi-Disciplinary Team's proposed Parenting Plan, which the circuit court adopted. Under Rule 50 of the Rules of Procedure for Child Abuse and Neglect Proceedings, "[t]he filing of a petition for appeal does not operate to automatically stay the proceedings or orders of the circuit court in abuse, neglect, and/or termination of parental rights cases . . . ." The circuit court's docket sheet reflects that no stay was entered in this matter and, during the pendency of this appeal, the circuit court entered its Corrected Disposition Order.

improvement period and by denying her an adequate opportunity to regain primary physical custody of the children through unsupervised visitation. Based upon the record, the parties' briefs, and the arguments presented, we find no error. Accordingly, we affirm the circuit court's award of primary custody of the children to the father and unsupervised visitation to the mother.

I. Factual and Procedural Background

On December 5, 2011, the respondent, the West Virginia Department of Health and Human Resources ("the Department"), filed a verified Petition to Institute Child Abuse and Neglect Proceedings ("Petition") against the mother in relation to her minor children, B.H. and S.S.[4] The father was also a named respondent in the proceeding, although there were no allegations of either abuse or neglect against him in the Petition.[5] The Department alleged that the mother was in a personal relationship with a registered sex offender, John

[4]B.H. was born in 2004, and S.S. was born in 2001. The children were initially placed in foster care, then with their paternal grandparents, and ultimately with their father, as more fully discussed *infra*. Although the mother's oldest child was also named in the Department's Petition, he reached the age of majority during the pendency of the proceeding and was no longer a party at the time of disposition.

[5]After the father was served with the Petition, he sought custody of his children as the non-offending parent. The father admittedly had no contact with his children for an extended period of time. During a hearing before the circuit court, the father acknowledged that he had previously attempted to voluntarily relinquish his parental rights to B.H. and S.S., an action that he attributed to the mother's interference with his attempts to have contact with his children, as well as her transient lifestyle, both of which prevented him from maintaining contact with his children.

Bailey; that the mother exposed her children to Mr. Bailey, as well as his friend, Andrew Oldaker, a registered sex offender with whom the mother, her daughters, B.H. and S.S., and Mr. Bailey lived for a period of time; and that S.S. and B.H. were sexually abused on multiple occasions by Mr. Bailey and other sex offenders with whom the mother associated.[6] The Department took emergency custody of the children and, on December 6, 2011, the circuit court ordered that the legal and physical custody of B.H. and S.S. remain with the Department. The mother waived her preliminary hearing and the matter proceeded to adjudication.

During the January 10, 2012, adjudicatory hearing, the circuit court accepted the mother's stipulation wherein she stated, in part, as follows:

> 3. The father of [B.H. and S.S.] is Randy [H., Jr.] whose whereabouts are unknown.
> • • • •
> 7. The respondent-mother admits to the neglect of the above-named children as follows:
>
> 1. No permanent residence at the time of filing the petition.

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[6]The following is an example of the abuse alleged in the Department's Petition:

> On or around December 1, 2011, [S.S.] stated that John took her the night before and threw her on the bed then ripped . . . her pants off and stuck his fingers in her spot and pointed at her vaginal area. She stated that he also made her rub his chest. [S.S.] stated that it never stops. She stated that sometimes she does not mind it because if she does things with him he buys her really cool stuff.

> 2. She and her children were residing with John Bailey, a registered sex offender.
> 3. She was aware that John Bailey and Andrew Oldaker were registered sex offenders, and failed to protect her children by allowing them to be around John Bailey and Andrew Oldaker.
> 4. That as a result of being around John Bailey and other individuals who are registered sex offenders, her children were subjected to sexual abuse.
>
> 8. Based upon these stipulations, the children are neglected children within the meaning of the West Virginia Code 49-6-1 et al.

On January 17, 2012, the circuit court entered an order adjudicating the children abused and neglected and awarding the mother a six-month post-adjudicatory improvement period. The primary goals of the improvement period were to aid the mother in improving her self-esteem; to help her gain insight into how her children had been harmed through their exposure to registered sex offenders; and to teach her how to identify and recognize sex offenders, how to prevent the sexual abuse of her children, and how to provide them with a safe and secure home, free from exposure to sex offenders. The improvement period also allowed the mother to have supervised visitation with her daughters.

Thereafter, periodic review hearings were held before the circuit court to ascertain how the mother was doing in her improvement period. While the mother complied

with certain aspects of her improvement period, in other areas she experienced difficulties.[7] In Child Protective Services ("CPS") worker Amanda Damron's April 3, 2012, hearing update, she reported that the mother had knowingly started dating and living with another sex offender, Patrick Trembly. CPS worker Damron further reported that the mother indicated that Mr. Trembly was fighting his "wrongful conviction" and that she believed he is innocent.[8]

In CPS worker Damron's update for the July 9, 2012, review hearing, she reported that the mother "seemed to understand what the appropriate boundaries should be with [B.H. and S.S.], but in the next visit, she did nothing that she and the worker [the

[7]The concerns reported by the service provider and the child protective services worker included the mother's difficulty in understanding the safety concerns that arise when she allows S.S. to use her cell phone to access Facebook in her effort to find "dates" for her mother; the mother being "very untruthful at times[;]" the mother's inability to see the mistakes that she continues to make with the children despite her ability to verbalize her past mistakes; and the mother not retaining the information discussed at her parenting classes.

[8]Although Ms. Damron indicated in her May, 23, 2012, hearing update that there had been no further reports of the mother being in a relationship with a sex offender at that time, the appendix record contains the mother's testimony that she lived with Mr. Trembly until June 2012 and that she "broke it off" with him after learning that he was a registered sex offender, although she still agreed "to help him go over his papers[,]" "as a friend." When questioned regarding her claim that she had learned from her mistake with John Bailey given her relationship with Mr. Trembly, the mother responded that "[she] learned not to have [registered sex offenders] around my kids[]" and Mr. Trembly "wasn't around my children because they were with CPS." Admittedly, the mother did not have custody of her children due to her relationships with registered sex offenders, which led to the sexual abuse of her daughters.

parenting provider] talked about." Ms. Damron further reported that the parenting provider was "very uneasy at the thought of unsupervised visitation."

In late August 2012, the mother filed a motion for a ninety-day extension of her improvement period, which the circuit court granted. Approximately one month into the ninety-day extension, CPS worker Damron reported that the mother had started weekend visitations with her children under the supervision of her maternal aunt. Ms. Damron concluded her October 2012 report by expressing continuing concern that the mother will not be protective of the children based on the parenting provider's impression that the mother still does not believe that John Bailey is a sex offender[9] but says that she does so as to appear protective.[10] In late November 2012, CPS worker Damron filed another hearing update in

[9]During the disposition hearing, the mother testified that she knew John Bailey was a pedophile when she was dating him but did not believe that he was because she was told that his victim "was 16 and he was only a couple years older, and that, to me, does not make you a pedophile." The mother further testified that she ended her relationship with John Bailey, not because he was a registered sex offender and a pedophile, but because she "didn't approve of the way he was yelling at [her children]."

[10]This October 2012 report also reflects that the parenting provider questioned the mother about "Jerry," a friend of John Bailey and a registered sex offender whom S.S. said had sexually abused her. The appendix record reflects that "Jerry" shared one bed in a hotel room with B.H. and S.S. while the mother and John Bailey shared the other bed. The mother told the provider that she did not know that "Jerry" was a registered sex offender at the time. When the provider asked the mother why it would be appropriate for her to allow her daughters to be in a bed with a grown male, regardless of whether she knew that person was a registered sex offender, the mother responded that she has no "common sense" and does not "think of those types of things[.]"

which she reported that while the mother had complied with the terms and conditions of all services,[11] she "continue[d] to be concerned that [the mother] will not be protective of the children in the future" and that "the provider's account of [the mother's] diminished decision making skills . . . will cause safety concerns for the children if they were to be in [the mother's] complete care."[12] In recognition of these continuing concerns, when the circuit court awarded the mother unsupervised visitation by order entered December 10, 2012, the court directed that only the mother and the children's maternal grandmother[13] could be present and that "the [Department], provider or the Guardian ad Litem shall follow-up immediately after the visitations to make sure they are appropriate."

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[11]The appendix record reflects that the terms and conditions of the mother's improvement period included her participating in parenting classes, adult life skills classes, and a domestic violence group to teach her independence and the ability to build healthy relationships that do not put her children at risk; participating in group and individual therapy geared toward improving her self-esteem; complying with her psychiatric treatment; attending the children's therapy appointments; maintaining a safe and stable household for her children; and participating in the supervised visitation with her children.

[12]In her November 2012 update, Ms. Damron also reported on a recent Multi-Disciplinary Team meeting during which the parenting provider advised that the mother would have "difficulty recognizing safety concerns early enough to prevent the children being harmed in the future[;]" and that unsupervised visits, if any, should be solely between the mother and the children given the mother's difficulty in choosing appropriate people with whom to associate.

[13]During the course of this proceeding, the mother moved into the basement apartment of her mother's home. Counsel advised the Court during oral argument that the mother continues to reside in this apartment.

In CPS worker Damron's final report to the circuit court, she advised that the mother's unsupervised visitations began the prior month in the basement apartment of her mother's home where she was residing, and that the visitations went well. Ms. Damron further advised that while the mother had complied with services, the Multi-Disciplinary Team ("MDT") members continued to be concerned that she had "not changed her behavior enough to ensure that she will not expose her children to inappropriate people." Ms. Damron concluded her report by stating that all MDT members, except the mother, agreed that the best interests of the children would be served by allowing them to remain in the primary custody of their father with a visitation plan for the mother.

On February 5, 2013, the disposition hearing was held during which Ms. Damron testified consistently with her final report, as discussed above. The mother testified that she now understands that it is important to keep her children away from certain kinds of people; that she was attracted to these people because they "paid attention" to her; that she learned how to determine "whether these guys are on the sex offender list[;]" that her self-esteem had improved; and that she "blame[d]" Parkersburg, West Virginia,[14] for her relationships with three different sex offenders. The father testified that the children had been living with him, his wife, and his other daughter for approximately four months; that

[14]The mother previously resided in the state of Ohio.

their school attendance had been excellent; that both girls were on the honor roll at school; and that both girls feel safe and know that they have a stable home.

At the conclusion of the disposition hearing, the Department's counsel advised that the children's best interest would be served by terminating the mother's custodial rights and allowing the children to remain with their father while giving the mother visitation. The GAL concluded that it was in the children's best interest to remain with their father with frequent and liberal visitation with their mother.[15]

On March 13, 2013, the circuit court entered its first Disposition Order in which it terminated the mother's custodial rights[16] and adopted the Parenting Plan proposed by the MDT, which made the father the primary residential parent and gave the mother

[15]The GAL also expressed concern to the circuit court regarding the mother's relationship with Patrick Trembly and her "lack of insight into these issues[,]" including that she blamed Parkersburg, West Virginia, for her association with sex offenders. As the GAL observed, "I think it's the mother's choices and where she puts herself and where she ends up." While acknowledging that the mother had completed her improvement period, the GAL also stated that "when it comes down to where do the kids go, I think the bottom line is right now they're in a safe place. They're in a stable environment with their father, and I don't think we need to risk that again by putting them back with the mother."

[16]Although the Department appeared to withdraw its recommendation to terminate the mother's custodial rights near the conclusion of the disposition hearing, the Department's counsel drafted this initial Disposition Order, which terminated the mother's custodial rights.

unsupervised visitation with the children.[17] In its Corrected Disposition Order entered during the pendency of this appeal, the circuit court did not terminate the mother's custodial rights. Instead, the circuit court found that the mother had "substantially complied" with the terms and conditions of her improvement period,[18] but that it was in the children's best interest that their father be appointed as their "primary residential parent." The circuit court stated in this order that it had considered the children's wish to remain in the primary custody of their father, as well as the "totality of circumstances in the case, including but not limited to the academic performance of the children while living with their father and the safe and stable environment they have enjoyed while living there[.]" The circuit court again adopted the MDT's proposed Parenting Plan[19] and dismissed the proceeding from the court's docket.[20]

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[17]The MDT's Parenting Plan provides the mother with overnight visitation with the children every Wednesday; visitation every other weekend from 7:00 p.m. on Friday to 7:00 p.m. on Sunday; the parents alternate weeks during the summer school break; the mother has the children on her birthday and Mother's Day and the father has them on his birthday and Father's Day; the father has the children until 1:00 p.m. on Thanksgiving day and the mother has them the remainder of that day; the father has the children until 6:00 p.m. on Christmas Eve and the mother has them Christmas night and Christmas day; and the parents alternate years having the children during their Christmas break from school. The mother, also a member of the MDT, did not agree with this Parenting Plan because she believes that she should be the primary custodial parent.

[18]*See supra* note 11 for a discussion of these terms and conditions.

[19]During oral argument before this Court, counsel advised that the parents had been following this Parenting Plan since its initial adoption in the Disposition Order entered on March 13, 2013. *See supra* note 3.

[20]The circuit court's Corrected Disposition Order also advised the father that both the Corrected Disposition Order and the Parenting Plan should "be ratified by the Original Court (continued...)

During oral argument before this Court, all parties agreed that the mother's first assignment of error challenging the termination of her custodial rights in the circuit court's first Disposition Order was mooted by the entry of the Corrected Disposition Order. Thus, the sole remaining issue on appeal is whether the circuit court erred in awarding primary custody of B.H. and S.S. to their father.

II. Standard of Review

We are asked to review a circuit court's disposition order entered upon a petition for termination of parental rights. Our standard of review in this regard is well established:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed

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[20](...continued)
of Jurisdiction which previously addressed the legal custody and support issues." Without further information from either the parties or the appendix record in this regard, we presume the circuit court was referring to the court in which the parties were divorced.

> in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). As we have previously explained, "a circuit court's substantive determinations in abuse and neglect cases on adjudicative and dispositional matters—such as whether neglect or abuse is proven, or whether termination is necessary—is entitled to substantial deference in the appellate context." *In re Rebecca K.C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723 (2003) (internal citations omitted). With these principles in mind, the parties' arguments will be considered.

III. Discussion

In the present appeal, the mother asserts that the circuit court erred in granting primary custody of B.H. and S.S. to their father as she had substantially complied with the terms of her post-adjudicatory improvement period; the children had lived with her solely since they were infants; and she had been denied an adequate period of unsupervised visitation to demonstrate what she had learned from her improvement period. We begin our analysis of this issue by acknowledging that

> "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). Indeed, '"'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).' Syllabus Point 4, *State ex rel. David Allen B. v.*

> *Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)." Syl. Pt. 2, *In the Interest of Kaitlyn P.*, at 123-124, 690 S.E.2d at 131-132.

In re Timber M., 231 W.Va. 44, __, 743 S.E.2d 352, 361 (2013). Further, although parents have substantial rights, "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

In the case-at-bar, the mother's post-adjudicatory improvement period provided her with "'an opportunity . . . to modify . . . her behavior so as to correct the conditions of abuse and . . . neglect with which . . . she ha[d] been charged.' *In re Emily*, 208 W.Va. at 334, 540 S.E.2d at 551." *In re Isaiah A.*, 228 W.Va. 176, 184, 718 S.E.2d 775, 783 (2010). As this Court has previously directed,

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and *whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.*

Syl. Pt. 6, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991) (emphasis added). While the circuit court acknowledged the mother's substantial compliance with the terms and conditions of her improvement period, we have recognized that "'it is possible for an

individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting.' *W.Va. Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990)." *In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). Moreover, "'[t]he assessment of the overall success of the improvement period lies within the discretion of the circuit court . . . . "regardless of whether . . . the individual has completed all suggestions or goals set forth in family case plans."' *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991)." *In re Jonathan Michael D.*, 194 W.Va. at 27, 459 S.E.2d at 138.[21]

In reviewing the circuit court's rulings in the case *sub judice*, we remain mindful that

> whenever a child appears in court, he is a ward of that court. W.Va. Code § 49–5–4 (1996); *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them. As Justices Cleckley and Albright stated in *West Virginia Department of Health and Human Resources ex. rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996), "[a]bove all else, child abuse and neglect proceedings relate to the rights of an infant." *Id.* at 477, 475 S.E.2d at 569.

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[21]West Virginia Code § 49-6D-3 (2009 & Supp. 2013) requires the Department to develop and file a family case plan if the circuit court awards an improvement period to a parent. While the appendix record reflects that the terms and conditions of the mother's post-adjudicatory improvement period were presented to and approved by the circuit court, the parties' briefs never refer to a family case plan. While we presume that such a plan was developed in the instant proceeding, we nonetheless remind both the Department and the circuit courts of the statutory requirement for such plans.

State v. Julie G., 201 W.Va. 764, 776, 500 S.E.2d 877, 889 (1997) (J. Workman, dissenting). Further, as we stated in *In re Timber M.*, 231 W.Va. 44, 743 S.E.2d 352 (2013),

> [I]t is clear from our [child abuse and neglect] procedural rules, as well as our prior case law, that "[t]here cannot be too much advocacy for children." *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 570, 490 S.E.2d 642, 657 (1997) (Workman, C.J., concurring). Indeed, if one thing is firmly fixed in our jurisprudence involving abused and neglected children, it is that the "polar star test [is] looking to the best interests of our children and their right to healthy, happy productive lives[.]" *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). This Court has repeatedly stated that a child's welfare acts as "the polar star by which the discretion of the court will be guided." *In Re: Clifford K.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted).

231 W.Va. at __, 743 S.E.2d at 367-68.

Grounded in these same fundamental principles, this Court observed that "[t]he question at the dispositional phase of a child abuse and neglect proceeding is not simply whether the parent has successfully completed his or her assigned tasks during the improvement period. Rather, the pivotal question is what disposition is consistent with the best interests of the child." *In re Frances J.A.S.*, 213 W.Va. 636, 646, 584 S.E.2d 492, 502 (2003). Indeed, the overriding consideration must be whether the issues that brought about the allegations of abuse and/or neglect have been addressed by the parent in a substantive and effective manner, and whether those conditions of abuse and/or neglect have been

sufficiently remedied such that it is in the child's best interests to be returned to the parent's custody.

Based on our prior precedent and long history of unwavering concern for the health and well-being of children, we now hold that in making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

In the present appeal, although the mother substantially complied with the terms and conditions of her improvement period, there were continuing concerns that she would again become involved with inappropriate individuals and thereby continue to expose her daughters to the serious risks attendant with such ill-advised associations. We observe that there is evidence for these concerns in the appendix record.

As previously indicated, the mother stipulated that she was aware that John Bailey and Andrew Oldaker were registered sex offenders; that she failed to protect her children by allowing them to be around Messrs. Bailey and Oldaker; and, that as a result of being around Mr. Bailey and other individuals who are registered sex offenders, her children were subjected to sexual abuse. The appendix record also reflects that the mother continued

her relationship with John Bailey after learning that he was a registered sex offender because she believed he was innocent. In fact, as late as October 2012, a parenting provider reported that the mother still did not believe that John Bailey is a registered sex offender, but says that she does so as to appear protective of her children. Moreover, during the mother's improvement period, she entered into a relationship with yet another registered sex offender, Patrick Trembly. She endeavored to excuse this relationship on the basis that her daughters were never around Mr. Trembly because they were in the Department's custody.[22] Further, as with John Bailey, after learning that Mr. Trembly was a registered sex offender, the mother believed he was innocent and agreed "to help him go over his papers[,]" "as a friend."

We recognize the difficulty that the circuit court confronted in terms of assessing whether the mother had made "sufficient improvement . . . in the context of all the circumstances of the case to justify the return of the child[ren]." Syl. Pt. 6, in part, *Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365. Unlike an abuse and neglect proceeding that involves a dirty home or a parent abusing drugs, where a parent's success in an improvement period can be measured in concrete terms of whether the home is clean or the parent's drug screens are negative, here, the circuit court had to assess whether the mother had internalized what the service providers endeavored to teach her during her improvement period and whether

[22]Again, the children were in the Department's custody due to the mother's relationships with registered sex offenders and her failure to protect her children.

she would, in fact, protect her children by avoiding relationships with individuals in whose presence her children were placed at risk of abuse.

In addressing this difficult question, the circuit court had the benefit of numerous improvement period review hearings during which it was advised of continuing concerns about unsupervised visitation and whether the mother would protect her daughters if they were under her full-time care. At disposition, CPS worker Damron summarized for the circuit court the children's circumstances prior to the instant proceedings when they were residing with the mother: "[T]hey moved several times, missed several days of school, their grades were suffering, and ultimately the children were sexually abused as a result of the mother exposing the children to inappropriate individuals because she put her need to have a relationship above the children's need for safety." Ms. Damron also advised the circuit court that after the children were removed from the mother, they have

> excelled in their school work and also their attendance. The children have enjoyed playing basketball and other after school activities that they have never been able to participate in before. The children have a routine every day that creates a safe and stable environment for them and allows them to actually act their age. The children reside full time with their father, who is providing a safe and stable home for them. There have been no safety concerns raised while they have resided with their father.[23]

[23]After the children were removed from foster case and placed in the home of their paternal grandparents in May 2012, the MDT regularly monitored and discussed the contact (continued...)

(Footnote added.). The circuit court received multiple recommendations at disposition that the best interests of the children would be served by remaining in the primary custody of their father with visitation to the mother, which is what the children desired, as well. *See Matter of Brian D.*, 194 W.Va. 623, 636, 461 S.E.2d 129, 142 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). . . . and [the children's] own feelings and emotional attachments should be taken into consideration by the lower court.").

As we have previously held, "'[t]o justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child.' Syl. Pt. 2, *Cloud v. Cloud*, 161 W.Va. 45, 239 S.E.2d 669 (1977)." Syl. Pt. 5, *In re Frances J.A.S.*, 213 W.Va. 636, 584 S.E.2d 492 (2003). During oral argument, counsel advised this Court that the parents have been following the MDT's Parenting Plan since it was first adopted by the circuit court in March 2013, and that there have been no concerns raised concerning the welfare of the children during that time. Accordingly, based upon our review of the appendix record, the relevant law, and the parties' arguments, and giving substantial deference to the circuit court's dispositional

[23](...continued)
between the children and their father, who lived nearby. Progressively, the children developed a relationship with their father and went to live in his home in October 2012.

decision,[24] this Court concludes that the circuit court's adoption of the MDT's Parenting Plan serves the best interests of B.H. and S.S. by fostering their bond with their mother[25] through liberal unsupervised visitation while simultaneously insuring their safety and materially promoting their welfare by allowing primary custody to remain with their father.

Lastly, we address the mother's argument that she was not given sufficient unsupervised visitations to permit her to demonstrate the full extent of what she had learned from her improvement period.[26] As indicated above, any delay in ordering unsupervised visits was due to the mother's actions and conduct, which led to continuing concerns that she would not protect her daughters from additional acts of abuse. Although the circuit court awarded the mother unsupervised visitation in December 2012, in the face of these continuing concerns, it also directed that the only persons who were to be present during the unsupervised visitation were the mother and the children's maternal grandmother and that the Department, its services provider, or the GAL were to follow-up immediately after such visitations to ensure their appropriateness. The unsupervised visitation began the following month.

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[24]*See In re Rebecca K.C.*, 213 W.Va. at 235, 579 S.E.2d at 723.

[25]The GAL stated in his dispositional hearing report that the children were bonded with both parents.

[26]The mother began requesting unsupervised visitation in July 2012.

Based on all of the above, we find that the mother had ample opportunity during her improvement period to demonstrate that she had learned and internalized how to make better parenting decisions and better choices in terms of the persons with whom she chooses to associate so as to protect her daughters. Consequently, any delay in awarding unsupervised visitation was due to the mother's behaviors and actions which caused continuing concern for the children's safety. Accordingly, we find no error in this regard.

IV. Conclusion

Based upon this Court's thorough review of this matter and for the foregoing reasons, the Circuit Court of Wood County's Corrected Disposition Order awarding primary custody of B.H. and S.S. to the father with liberal visitation to the mother is hereby affirmed.

Affirmed.

2015 WL 3631681

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: B.L., G.W., and I.W.

No. 14-0660 (Wood County 14-JA-30, 12-JA-172, 12-JA-173)

and

In Re: N.K. and K.K.

No. 14-0714 (Wood County 12-JA-142, 12-JA-143)

FILED
June 10, 2015
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

In these two abuse and neglect cases, we issued a Rule to Show Cause against guardian ad litem Courtney Ahlborn to explain why she should not be held in contempt and denied eligibility for future appointments after failing to comply with the scheduling orders mandated by this Court. After considering the imposition of sanctions due to the untimely and poor quality of filings by Ms. Ahlborn and reviewing her responses to the Show Cause Order, we decide not to find Ms. Ahlborn in contempt. Therefore, Ms. Ahlborn will not be denied eligibility for future guardian ad litem appointments. Upon consideration of the standard of review, we find no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Case No. 14-0660

This appeal involved an order entered by the Circuit Court of Wood County terminating the petitioner Mother's parental, custodial, and guardianship rights of her one-year-old, eight-year-old, and ten-year-old children. This Court entered a scheduling order on July 15, 2014. After the appeal was perfected on September 19, 2014, an amended scheduling order was issued directing that the respondents' briefs be filed on or before October 20, 2014. On October 22, 2014, a second amended scheduling order was entered because the guardian ad litem's brief had not been filed. The amended scheduling order directed that the guardian ad litem's brief be filed on or before October 27, 2014, and reminded counsel that failure to file the brief could result in sanctions being imposed. Ms. Ahlborn again failed to file the guardian ad litem's brief. Consequently, a Notice of Intent to Sanction was entered on October 31, 2014, directing that the brief be filed on or before November 6, 2014. On November 6, 2014, Ahlborn filed a four-page summary response by facsimile.

Case No. 14-0714

This appeal involved an order entered by the Circuit Court of Wood County terminating the petitioner Mother's parental, custodial, and guardianship rights of her four-year-old, and seven-year-old children. This Court entered a scheduling order on August 4, 2014, and the appeal was perfected on September 5, 2014. On October 22, 2014, an amended scheduling order was entered because the guardian ad litem's brief had not been filed. The amended scheduling order directed that the guardian ad litem's brief be filed on or before October 27, 2014, and reminded counsel that failure to file the brief could result in sanctions being imposed. Ms. Ahlborn failed to file the guardian ad litem's brief, and a Notice of Intent to Sanction was entered on October 31, 2014, directing that the brief be filed on or before November 6, 2014. On November 6, 2014, Ms. Ahlborn filed by facsimile a four-page summary response.

On November 18, 2014, this Court, on its own motion, proceeded to review and consider the imposition of sanctions due to the untimely and poor quality of filings by Ms. Ahlborn in the instant abuse and neglect cases. In response to this Court's order issuing a rule to show cause in contempt, Ms. Ahlborn filed an initial response brief on December 12, 2014, and two supplemental response briefs on January 12, 2015. Ms. Ahlborn avows that she has been experiencing medical issues over the past few months that interfered with her duties.[1] She also contends that when the second amended scheduling orders were entered in these cases, she was vigorously defending a client in a felony malicious assault case in which her client was ultimately acquitted. She believed she over-focused on this felony work, thereby causing her to neglect her duties with these appeals. She readily expresses remorse for this lack of focus.

Ms. Ahlborn asserts that she takes seriously each of her appointments as a guardian ad litem. She emphasizes that being a guardian to children is one of the most fulfilling parts of her being an attorney, and she apologizes for having filed poor quality briefs in an untimely fashion herein. Ms. Ahlborn contends that if the brevity or form of her summary responses is unacceptable, she will submit additional information to any future submissions to the Court. She also claims that her problems herein are not a true reflection of her ability as a guardian ad litem. Instead, she asserts that her active participation in the underlying cases is what best reflects her abilities. She argues that she routinely attends interviews, meets with her clients at school and in their foster homes, meets with their therapists, and assists with removal when necessary. In addition to these arguments, Ms. Ahlborn attached letters from Margaret Burdette, CASA Director; Stacy

[1] Ms. Ahlborn provided a doctor's excuse indicating that she was to undergo surgery on December 12, 2014, the same day as her deadline to respond to the Court's rule to show cause.

Smith, M.A., L.S.W., with the Department of Health and Human Resources; and Shelly Villers, M.A., L.P.C., a therapist who provides therapeutic services to children suffering from the trauma of abuse and neglect. These letters collectively reflect that Ms. Ahlborn is very effective and attentive in representing children involved in abuse and neglect cases and that her briefing issues before us do not reflect her overall competency as a guardian ad litem.

Having reviewed Ms. Ahlborn's responses to the Rule to Show Cause order issued by this Court and having heard her oral argument in this matter, we find that she has provided sufficient medical reasons to excuse her conduct in the instant cases. As such, we have determined that Ms. Ahlborn shall not be denied her eligibility for future guardian ad litem appointments. In so holding, however, we urge Ms. Ahlborn to seriously reflect upon her failings herein and we expect that Ms. Ahlborn will, hereafter, fully comply with this Court's orders and procedures in the future.

The Court continues to observe an increasing pattern of inadequate and untimely filings made by guardians ad litem in abuse and neglect appeals. Although we decline to hold Ms. Ahlborn in contempt in the instant cases, we wish to re-emphasize how vitally important it is for guardians ad litem to comply with Rule 11(h) of the Rules of Appellate Procedure and this Court's orders in a timely fashion so that abuse and neglect appeals can be promptly and efficiently resolved. Guardians ad litem must submit a response brief or summary response that specifically responds to each of the assignments of error raised on appeal. Also, if the appendix lacks documents from the record that are essential for the Court's review of the case, it is the guardian ad litem's obligation to file a motion to supplement the appendix to ensure that the necessary parts of the record below are included on appeal.

Based on the foregoing, we decline to enter extraordinary sanctions.

No Sanctions Imposed.
Rule to Show Cause Dismissed.

ISSUED: June 10, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Allen H. Loughry II

193 W. Va. 196, 455 S.E.2d 565

Supreme Court Of Appeals Of West Virginia

BELINDA KAY C., Plaintiff Below, Appellant,

v.

JOHN DAVID C., Defendant Below, Appellee

No. 22334
Submitted: January 17, 1995
Filed: February 17, 1995

SYLLABUS BY THE COURT

"The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances." W.Va. Code § 48-2-15(b)(1), in part.

H. L. Kirkpatrick, III
Ashworth & Kirkpatrick
Beckley, West Virginia
Attorney for the Appellant

John David Cobb, Pro Se

Per Curiam:

In this domestic case, the appellant, Brenda Kay C., claims that the Circuit Court of Raleigh County erred in granting the appellee, her former husband, John David C., unsupervised visitation with the parties' two children. The appellant claims that the appellee has exhibited violent behavior toward the children and that, under the circumstances, the trial court should have required that any visitation with the children be supervised. We agree and, therefore, remand this matter to the circuit court with directions that visitation be at least minimally supervised.

The marriage of the parties in this matter was turbulent, and during it each obtained violence-related warrants against the other. At length, they were divorced. At one time during the pendency of the divorce proceeding, over twenty warrants and cross- warrants were on file in the Magistrate Court of Raleigh County involving the parties or members of their respective families.

In the divorce decree entered on March 9, 1992, the appellant was awarded custody of the parties' two infant sons, who were then seven and four years of age. The appellee was granted visitation, but, in accordance with an agreement between the parties, the court required the visitation to be limited and supervised, in that it

was to be conducted at the home of the children's maternal grandmother between 12:00 o'clock noon and 6:00 o'clock p.m. on Saturdays.

Only one supervised visitation was conducted at the children's grandmother's house. That session ended after the appellee became involved in a physical altercation with the appellant's mother, the children's maternal grandmother. As a result of the altercation, police were summoned to the scene.

After the incident, the appellee complained that he had been denied appropriate visitation with the children. A hearing was conducted on the question before a family law master, and the family law master directed that other arrangements be made to afford the appellee reasonable, controlled visitation.

Subsequently, visitations were scheduled at Pinecrest Hospital in Beckley, West Virginia, and the appellant hired an off- duty social worker, who was employed by the West Virginia Department of Human Resources as a member of its Child Protection Agency, to supervise. Two visitation sessions were conducted, but the Pinecrest Hospital administration refused to allow further sessions because during the second visitation, the police were called by the social worker, who apparently felt that the appellee was attempting to remove one, or both, of the children from the hospital premises.

The appellee complained about the denial of further visitation, and the question was addressed at a hearing conducted on December 22, 1992. At that hearing, the appellant testified that the appellee had behaved violently toward the parties' two children and had spanked the older child so hard that he had "whelps" and bruises all over his back. She also said that the appellee would regularly "holler" and curse at the children. She indicated that the children were terrified of the appellee and that upon coming into contact with him, the older child would become physically ill.

In spite of the appellant's testimony, the family law master, at the conclusion of the hearing, recommended that the appellee be afforded unsupervised visitation during specified periods. The circuit court subsequently adopted this recommendation.

West Virginia Code § 48-2-15 governs the circumstances under which a circuit court may in a divorce proceeding grant an noncustodial parent child visitation rights. West Virginia Code § 48-2-15(b)(1), the section specifically dealing with visitation, provides, in relevant part:

> The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the

> residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances.

In Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992), this Court concluded that W.Va. Code § 48-2-15(b)(1) is sufficiently broad to allow, and in fact contemplates, that a trial court may order supervised visitation under appropriate circumstances. See also, Sherry L.H. v. Hey, 187 W.Va. 353, 419 S.E.2d 17 (1992).

In the Mary D. case, the Court stated:

> [W]here supervised visitation is permitted, it is of paramount importance that the child's best interests be served by not only what the court deems is in his or [sic] best interests, but also, that the child feels safe when such visitation is exercised by the noncustodial parent. Accordingly, the person who supervises such visitation must be one with whom the child is comfortable and feels safe. It is not enough that the person who is appointed to supervise visitation is in the best interests of the child from the court's standpoint, which would merely assure that no further abuse will occur during such visitation. Rather, the fears of the child must be allayed as well so that the child may be protected not only from further physical harm, but also further psychological harm.

190 W.Va. at 349, 438 S.E.2d at 529.

Although the Mary D. case dealt with sexual abuse, implicit in a reading of it is this Court's view that where the physical welfare of a child is involved, whether because of the sexual propensities of a parent or because of the parent's propensity to violence, supervision is appropriate and may be necessary to safeguard and promote the welfare of the child. Further, there can be no doubt that W.Va. Code § 48-2-15(b)(1) is sufficiently broad to authorize a trial court to place supervisory restrictions on child visitation where there is substantial evidence that a party entitled to visitation might demonstrate violent behavior toward a child.

Of course, the Mary D. case indicates that the best interests of the child must be the determining factor in assessing how supervision should be conducted. This proposition is in accordance with this Court's general rule that:

> "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syllabus Point 1, Holstein v. Holstein, 152 W.Va. 119, 160 S.E.2d 177 (1968).

Syllabus, Taylor v. Taylor, 168 W.Va. 519, 285 S.E.2d 150 (1981).

In the case presently before the Court, there was substantial evidence indicating that the appellee had on occasion demonstrated violent propensities and some evidence that his violence had, at least, disturbed his children. Although a portion of this evidence came from parties who might be considered to be biased in favor of the appellant, included in the record is the apparently disinterested testimony of Charles Lilly, a lieutenant with the Raleigh County Sheriff's Department. He testified that on one occasion he had been hurriedly summoned to the home of a neighbor, Mrs. Bower, where the appellee had apparently just caused a disturbance. When he got to the house, he could see the appellant on the porch "crying, screaming, she had blood on her," the clear implication of his testimony being that the appellee had assaulted or otherwise seriously disturbed her. When he went inside, he found the man who is currently married to the appellant. He had been assaulted. Further: "The children were crying. Mrs. Bower was crying and upset." When asked whether the children might have been injured, Lieutenant Lilly responded:

> One of the children, I'm not sure which one because, like I say, that's the first -- and I could have possibly saw them again since then, I don't really know. I don't remember. One of them seemed to have had a -- was crying a lot and was complaining of his face hurting.

When asked whether he had observed any kind of mark or injury on the child, Lieutenant Lilly responded, "Just a red place."

While this Court feels that continuing contact by an infant child with a noncustodial parent is important to the welfare of the child, it is also important that a court, in authorizing visitation, prescribe such supervisory requirements as are necessary to ensure that the visitation will not be detrimental to the child's welfare.

Given the evidence in the present case of the previous violent propensities of the appellee, as well as the evidence that those propensities had had some impact upon the parties' children, this Court believes that the trial court erred in authorizing visitation with the appellee without imposing some restrictions on the visitation.

Obviously, the previous visitation arrangements were unsatisfactory. This may have been due, in part, to the choice of supervisors, that is, the appellant's mother in the first instance and a social worker hired by the appellant in the second. Apparently these arrangements provoked, at least to some degree, the appellee.

Rather clearly, implicit in the idea of visitation is the concept that a child be allowed to develop some sort of personal bond with the parent he is visiting. The

presence of the appellant's representatives in the previous visitation arrangements may have interfered with the development of that bonding process.

In view of this, the Court believes that an arrangement should be devised by the trial court in which a wholly impartial supervisor is present to monitor future visitation between the appellant's former husband and the infant children. The Court also believes that the impartial supervisor should be directed to refrain, insofar as it is consistent with the welfare of the children, from interfering with the bonding process between the appellant's former husband and the children.

Under W.Va. Code § 48-2-15(b)(1), a trial court has rather broad discretion in setting the conditions of visitation, and, as indicated in Mary D. v. Watt, included within this discretion is the discretion to determine whether the parties involved in the visitation situation require counseling or treatment.

It is rather clear to this Court that the trial court is in a better position to assess the conditions surrounding the parties in the present case. While, as previously indicated, the Court believes that the trial court erred in failing to require supervision, and while the Court finds that the trial court should provide for a neutral supervisor, the Court also believes that the trial court should determine the other conditions to be placed upon the required supervision. At the very least, the trial court should consider whether counseling and treatment are appropriate for the parties.

Implicit in what the Court has said in this opinion is its belief that child visitation with a noncustodial parent is a circumstance which normally will promote the welfare of a child. At the heart of any such visitation is the emotional bonding which can develop between the noncustodial parent and the child. Insofar as it is consistent with the welfare of the children, a trial court, in ordering any sort of supervision of visitation, should take such steps as would promote the bonding between the noncustodial parent and child. If after a period of time there is evidence of bonding, and if the noncustodial parent demonstrates a clear ability to control the propensities which necessitated supervision, then it would be appropriate for the trial court to diminish gradually the degree of supervision required with the ultimate goal of providing unsupervised visitation.

For the reasons stated, this Court believes that the trial court erred in directing that the appellant's former husband be awarded nonsupervised visitation with his children. The Court believes that the circuit court's ruling should be reversed and this case should be remanded with directions that the trial court grant visitation only in accordance with the principles enunciated herein.

Reversed and remanded with directions.

179 W.Va. 742, 372 S.E.2d 920
Supreme Court of Appeals of West Virginia.

Henry BENNETT, Jr., et al.,
v.
Ralph WARNER, et al., William N. Haney, Sr., et al.,
v.
COMMONWEALTH LAND TITLE INSURANCE CO.

No. 18023.
July 1, 1988.
Rehearing Denied Sept. 22, 1988.

Syllabus by the Court

1. Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.

2. "Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.Pt. 1, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977).

3. The 1986 jury selection statute, W.Va. Code § 52-1-1 *et seq.*, mandated the use of juror qualification forms, although amendments to that statute, 1988 W.Va. Acts Ch. 79, nullified that requirement as of July 1, 1988.

4. It is the prerogative of the Legislature to change its mind and alter statutes, but this Court is obligated to uphold the lawful legislative policy that was in effect at the time a cause of action arose.

5. The statutory procedure for challenging the jury selection process requires only a finding of a substantial failure to comply with article 1, chapter 52, of the Code to support such a challenge, with no showing of prejudice required.

6. Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting *sua sponte*, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.

7. Issuance of a broad protective order, based upon the assertion of a blanket privilege against discovery, without scrutiny of each proposed area of inquiry and without giving full consideration to a more narrowly drawn order constitutes abuse of discretion under West Virginia Rule of Civil Procedure 26(c).

8. It is beyond argument that the courts of this state are open to all and that parties in litigation should have access to their legal proceedings, W.Va.Const., art. III, § 17, and such access to court proceedings is also required as a part of due process, W.Va. Const., art. III, § 10.

Richard W. Cardot, Elkins, for William and Rose Haney.

Braun Hamstead, Charles Town, for Henry Bennett et al.

McGRAW, Justice:

This is an appeal by William N. and Rose Ann Haney, third-party plaintiffs below, from an order of the Circuit Court of Pendleton County which denied their motion for a new trial in their suit against the Appellee, Commonwealth Land Title Insurance Company (Commonwealth), a third-party defendant below. The third-party complaint alleged that Commonwealth's delay in obtaining a right-of-way for the Appellants was intentional infliction of emotional and physical suffering and distress, and the action was brought within the concept known as the "tort of outrage." The trial was bifurcated so as to first consider only the issue of liability. The jury verdict was for Commonwealth, and costs were assessed against the Appellants by the court.

I FACTS

William N. and Rose Ann Haney were Pennsylvania residents who purchased a thirty-six acre tract of property in Pendleton County from Ralph and Nellie Warner on August 9, 1984, with the intention of relocating their residence to West Virginia. Rose Ann Haney said she suffered from severe allergic reactions to a multitude of environmental pollutants, and that the purpose of the relocation was to live in an area free from industrial pollutants.

The title search for the Appellants' property was done by an approved attorney for the Appellee, who also applied for and obtained title insurance for the property from that company. There was no note of defect in the right-of-way mentioned in the deed title report, and the title insurance policy included protection of the right-of-way to the insured property.

After the Appellants had purchased the property and had begun construction of their home, they learned of a possible problem with access to their property when a neighboring property owner (the Bennetts) refused to give them a written right-of-way along an existing access road to their property. The Bennetts denied the Appellants use of that access road in December 1984, and refused a utility right-of-way in April 1985. As a result of this right-of-way problem, the Appellants were delayed in obtaining construction financing. They suspended construction on their home, except for completion of a habitable basement, in which they were living by June 1985.

The Appellants were unsuccessful in obtaining a right-of-way or legal assistance from the attorney involved in the title search, application for title insurance, and purchase of their property. They sought legal assistance from another attorney, who noted the possible coverage by the title insurance of the right-of-way problem, and wrote a letter to the Appellee and their approved attorney in May 1985. The Appellee, through its attorney Braun A. Hamstead, began negotiations for a right-of-way across the Bennett property and notified the Appellants' attorney by letter dated May 31, 1985, that they would take care of the problem. Proposals for a right-of-way agreement were exchanged by the parties in the fall of 1985, but no agreement was reached.

On March 24, 1986, the Bennetts initiated this action by filing a suit seeking injunctive relief against the continuing trespass of the Appellants, the Warners, and one other landowner within the original Warner tract. The Appellants answered that suit, and filed a counterclaim against the Bennetts, a cross-claim against the Warners, and third-party complaint against the Appellee, Commonwealth. The Appellants sought recovery from the Appellee of any amount awarded the Bennetts against the Appellants. They demanded, in addition, judgment against the Appellee in the sum of $100,000 in compensatory damages and $100,000 in punitive and exemplary damages.[FN1]

In a hearing held on January 20, 1987, the court dismissed all matters in the suit except the third-party complaint by the Appellants against the Appellee. On that same day, the Appellants moved for a continuance, citing the inability of Appellant Rose Ann Haney to attend trial because of allergic reactions she had suffered from a recent trip to the courthouse. The Appellants also cited the lack of development of their plea for damages, the inadequacy of the two days allotted to conduct the trial, and the failure of the circuit clerk to obtain juror qualification forms from the potential jurors in the case. The court denied that motion and ordered the parties to appear for trial on January 21, 1987.

The Appellants immediately filed a petition for a writ of prohibition with this Court, seeking a stay of the scheduled trial on the same grounds cited in their motion for continuance below. That petition was refused by this Court on the day presented.

The jury was impaneled on January 20, 1987, with objection from counsel for the Appellant on the basis of the lack of juror qualification forms. The trial was commenced on January 22, 1987, and at that time the court *sua sponte* bifurcated the trial so as to try the issue of liability separately from the issue of damages, with the Appellants objecting to that bifurcation.

The jury returned a verdict on January 23, 1987, finding that the Appellee was not liable to the Appellants, and the court thereafter entered judgment for the Appellee and ordered the Appellants to pay the costs of the proceedings. The Appellants subsequently filed a motion for a new trial, which was denied. The Appellants appeal that denial.

II JUROR QUALIFICATION FORMS

The Appellants assign error to the failure of the trial court to require the use of juror qualification forms in the jury selection process as required by West Virginia Code § 52-1-1 *et seq.* (Supp.1987).

Under article eight, section three of our Constitution, the Supreme Court of Appeals “shall have the power to promulgate rules ... for all of the courts of the State related to ... process, practice, and procedure, which shall have the force and effect of law.” As we have previously noted, “[u]nder Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Vir-

ginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.Pt. 1, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977); *see State v. Davis*, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987) (and cases cited therein); *see also State ex rel. Kenamond v. Warmuth*,179 W.Va. 230, 232, 366 S.E.2d 738, 740 (1988).

This Court's rule regarding jury selection, W.Va.T.C.R. XII, does not, however, address the matter of juror qualification forms. Therefore, until this Court promulgates such a rule, the Legislature is not disabled from filling in the interstices, and we see no reason to invalidate the statutory requirements in question. The specific Code sections in question, W.Va.Code § 52-1-7(c), (d), and (e), were new provisions at the time of trial of this case, having taken effect on July 1, 1986. Upon inquiry by counsel for the Appellants on January 15, 1987, which was five days before the date set for striking of the jury, the Circuit Clerk of Pendleton County indicated that juror qualification forms had not been prepared for use in the county, and would, therefore, not be available for inspection in the Appellants' suit.

The Appellants argue that Code § 52-1-7 is mandatory in nature, and that failure to use the juror qualification forms deprives counsel of appropriate information needed to select an impartial jury. The Appellee argues that the purpose of that statute was satisfied by *voir dire*, in that the questions addressed to the panel produced the information that would have been available on the juror qualification forms. The Appellee also contends that the Appellants waived any error in the jury selection process by failing to object to the jury venire.

The trial court held, in denying the Appellants' motion for a new trial, that the Appellants had preserved their objection to the jury selection procedure, [FN2] but found that the statutory language requiring use of the forms was directory, rather than mandatory, in nature. The court noted that similar forms prepared in the past had not been utilized by attorneys in *voir dire*. The court further remarked that the county's circuit clerk was new in her position and unfamiliar with the new statute. The trial court held that the failure to use such forms was not grounds for granting a new trial.

The Appellants argue that the legislative choice of the term "shall," rather the term "may," in the 1986 jury selection statute dictates interpretation of the statute as mandatory in nature. Although the Appellants correctly state the general rule of statutory construction, this Court has held that jury selection statutes, notwithstanding the use of the term "shall," are generally directory in nature. *State v. Nuckols*, 152 W.Va. 736, 745-46, 166 S.E.2d 3, 10 (1968); *State v. Hankish*, 147 W.Va. 123, 126, 126 S.E.2d 42, 45 (1962). We have, however, found certain provisions of the jury selection statute to be mandatory in nature, such as the preparation of grand jury lists, Syl.Pt. 1, *Nuckols*, 152 W.Va. 736, 166 S.E.2d 3, and use of the proper procedure for selecting jury commissioners, Syl.Pt. 5, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

We comprehensively reviewed statutory interpretation of the word "shall" in *Canyon PSD v. Tasa Coal Company*, 156 W.Va. 606, 611-13, 195 S.E.2d 647, 651-52 (1973), and noted therein that the use of "shall" was not conclusive in determining whether a statute is mandatory or directory. We concluded in *Canyon* that "[i]n determining whether a statute is mandatory or directory the intention of the Legislature is controlling, and if that intention is to make compliance with the statute essential to the validity of the act directed to be done, the statute is mandatory." *Id.* 156 W.Va. at 611, 195 S.E.2d at 651.

The language of the 1986 jury selection statute is not sufficiently free from ambiguity so that its meaning may be accepted and applied without resort to interpretation. Syl.Pt. 2, *Canyon*, 156 W.Va. 606, 195 S.E.2d 647. A review of the statutory language and the legislative history of the 1986 amendments, however, convinces us that the Legislature intended the mandatory use of juror qualification forms primarily as a tool for carrying out public policies identified by the Legislature. Those policies included the random selection of jurors from a cross section of the population and consideration for service of all eligible citizens, W.Va.Code § 52-1-1, as well as the prohibition of certain forms of discrimination in selecting juries, W.Va.Code § 52-1-2.

The 1986 jury selection statute substantially changed traditional procedures in this area, and legislative refinements were made in subsequent years.[FN3] An amendment of the article in 1987 expanded the use of the juror qualification forms in the jury selection process. That expanded use was one of the reasons cited for the Governor's veto of the legislation. H.B. 2380, 68th Legislature, 1st Session (1987) (vetoed March 31, 1987). Finally, the 1988 Legislature amended the article to make the use of juror qualification forms discretionary with each circuit judge, 1988 W.Va.Acts Ch. 79 (to be codified at

W.Va.Code § 52-1-5a), which is a strong indication that the Legislature considered their use mandatory prior to that time. The cumulative impression left by the various actions after 1986 reflects recognition of the mandatory nature of the use of the juror qualification forms in the original statutory provisions.

We are, therefore, convinced that the completion of juror qualification forms was a mandatory, rather than directory, provision of the statute in effect at the time of the trial below.[FN4] The 1986 jury selection statute, W.Va.Code § 52-1-1 *et seq.*, mandated the use of juror qualification forms, although subsequent amendments to that statute, 1988 W.Va.Acts Ch. 79, nullified that requirement as of July 1, 1988. It is the prerogative of the Legislature to change its mind and alter statutes, but this Court is obligated to uphold the legislative policy that was in effect at the time a cause of action arose.

Even if we had found that the statutory language was directory, substantial compliance with the article is required. W.Va.Code § 52-1-15. Since the trial court made no attempt to procure the completed forms from the prospective jurors, we must conclude that the trial court failed to comply substantially with article 1, chapter 52.[FN5]

We note that the 1986 statute established a new statutory procedure for challenge of a jury selection process. W.Va.Code § 52-2-15. The Legislature intended that, in the absence of fraud, that section be the exclusive means for a party to challenge the conformity of the jury selection process to the provisions of article 1, chapter 52. W.Va.Code § 52-1-15(c). Prior to passage of that statutory challenge process, we had generally held that parties challenging the jury selection process on the grounds of lack of substantial compliance with directory provisions of the statute had to show that the challenging party was prejudiced by that lack of compliance. *State v. Pancake*, 170 W.Va. 690, 697, 296 S.E.2d 37, 44 (1982); Syl.Pt. 3, *Hankish*, 147 W.Va. 123, 126 S.E.2d 42. We hold that the current statutory procedure for challenging the jury selection process requires only a finding of a substantial failure to comply with article 1, chapter 52, of the Code to support such a challenge with no showing of prejudice required.[FN6]

III BIFURCATION OF LIABILITY ISSUE FROM DAMAGES ISSUE

Apparently without any prior discussion with or notice to the parties, the trial court, *sua sponte*, bifurcated the issue of liability from the issue of damages on the morning that the trial commenced. The bifurcation was announced by the trial court just before the Appellants' counsel made his opening statement. The Appellants' best argument is that the bifurcation created significant procedural problems which weakened the presentation of their case. Counsel's opening statement reflected confusion on his part as a result to the bifurcation. Witnesses had to be called in a different order than that anticipated before the bifurcation, which was part of the cause of one important witness' inability to appear. The Appellants also contend that the bifurcation created tactical problems in presentation of their case because it eliminated any opportunity for the jury to hear evidence on how their harm was compounded by what the Appellants contend was an intentional and outrageous failure by the Appellee to settle the right of way problems as promised.

This Court has not previously addressed directly the propriety of bifurcating the liability and damages issues at trial. West Virginia Rule of Civil Procedure 42(c) provides, in part, that a trial court may grant a separate trial on any issue when such separate trial furthers convenience, avoids prejudice, or is conducive to expedition and judicial economy. Olson, *Modern Civil Practice in West Virginia*, § 7-11 (1984). In interpreting this rule, we have held that granting separate trials lies within the sound discretion of the court, *Anderson v. McDonald*, --- W.Va. 170, 56, 62, 289 S.E.2d 729, 735 (1982), and we will not interfere with a bifurcation decision in the absence of an abuse of that discretion, *See Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 377, 175 S.E.2d 452, 456-57 (1970). Nevertheless, the trial court's authority is not unlimited and Rule 42(c) "... must be considered ... in light of the general policy of our joinder rules, which are designed to promote consolidation of issues and parties in a single trial to save expense and encourage judicial economy." Syl.Pt. 2, *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981).

Our sister jurisdictions generally maintain a similar policy of allowing trial court discretion, but requiring that such discretion be exercised in a manner that best promotes judicial economy while avoiding prejudice. *Scott v. Stacey's Moving Ltd.*, 95 Mich.App. 191, 290 N.W.2d 121 (1980); *Schwartz v. Binder*, 91 A.D.2d 660, 457 N.Y.S.2d 109; (N.Y.App.Div.1982); *Finkel v. Finkel*, 120 Misc.2d 936, 466 N.Y.S.2d 906 (N.Y.Sup.Ct.1983); *See also Carlson v. Cain*, 204 Mont. 311, 700 P.2d 607 (1985).[FN7]

The federal appellate courts, in interpreting the similar federal rule on bifurcation,[FN8] "have emphasized that separate trials should not be ordered unless such a disposition is clearly necessary [since] a single trial generally tends to lessen delay, expense and inconvenience to all concerned." 5 Moore's Federal Practice § 42.03 (2d ed. 1987). In *Frasier v. 20th Century Fox Film Corp.*, 119 F.Supp. 495, 497 (D.Neb.1954), the court held that separation of issues:

> should be resorted to only in the exercise of informed discretion and in a case and a juncture which moved the court to conclude that such action will really further convenience or avoid prejudice....
>
> [a] paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto.
>
> *Id.* quoting *Moss v. Associated Transport, Inc.*, 344 F.2d 23, 26 (6th Cir.1965) and *Baker v. Waterman S.S. Corp.*, 11 F.R.D. 440, 441 (S.D.N.Y.1951).

We agree that a court must exercise informed discretion before bifurcating issues at trial. We hold that parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting *sua sponte*, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.

It is not apparent that the trial judge in this case adequately considered the goal of judicial economy, or the danger of possible prejudice to the Appellants. There was no discovery or preparation time saved by the bifurcation, since apparently neither party had any advance notice of the trial court's intention to bifurcate. Further, the additional trial that would have been required if the Appellants had prevailed on the issue of liability would have necessarily involved extensive overlap of witnesses and testimony. From the record before us, it is apparent that the surprise bifurcation of the issues of liability and damages was not based on the exercise of informed discretion and may well have denied the Appellants a fair and impartial trial.

We, therefore, hold that the trial court abused its discretion in its *sua sponte* bifurcation of the liability and damages issues, and further note that orders for the bifurcation of issues should hereafter be supported with sufficient reasons to indicate the exercise of informed discretion by the trial court.

IV APPELLEE'S COUNSEL AS A WITNESS

Braun A. Hamstead, a counsel for the Appellee, had been involved in unsuccessful negotiations for a right-of-way agreement for the Appellants during the period prior to institution of this action. After the Bennetts instituted this suit and the Appellants filed a third-party claim against the Appellee, Oscar M. Bean replaced Hampstead as counsel for the Appellants on the right-of-way negotiations. Bean was successful in negotiating an agreement, which was signed on July 23, 1986.

There are three distinct issues in this assignment of error, only one of which we need address. We find the court below erred in issuing a broad protective order prohibiting the Appellants from deposing Hamstead.[FN9]

Hamstead filed a motion for a protective order, citing no grounds more explicit than his general need for protection from "the annoyance, oppression, and harassment of the above said deposition." He also noted that a proffer made by the Appellants' counsel to the trial court represented that the information sought from Hamstead could also be supplied by in-house counsel for the Appellee, Nathanial Yingling, who was also to be deposed. Counsel for the Appellants, in reply to that motion, argued that Hamstead had not established any need for protection, and contended that Hamstead's deposition was needed in addition to Yingling's in order to establish whether the Appellee acted in bad faith in attempting to secure the Appellants' right-of-way.

The trial court issued a protective order on October 3, 1986, which found the deposition of Hamstead to be "inappropriate as a means of discovery." While stating that the trial court "cannot completely rule out the possibility of relevant evidence from Attorney Hamstead," the order prohibited deposition on the grounds that it would be "oppressive" for the Appellee to have its trial counsel deposed. The court also indicated that "there would be no way to protect a

breach of attorney-client privilege at a deposition outside the presence of the court."

Motions for protective orders are made pursuant to West Virginia Rule of Civil Procedure 26(c). Olson notes that "[the] provisions of West Virginia Rule 26(c) provide a general authorization to the trial court to assure that the conduct of discovery does not result in annoyance, harassment, embarrassment, or in undue burden or expense." Olson, *supra,* Part III, at § 6.3C. The provisions of that rule include eight possible forms of a protective order, of varying degrees of restrictiveness.

In *State ex rel. McGraw v. West Virginia Judicial Review Board,* 164 W.Va. 363, 264 S.E.2d 168 (1980), we examined the use of a broad protective order similar to the one issued in the instant case and found that, "[a] protective order may be given, but it must set forth the areas that are open to legitimate inquiry and the areas that are to be protected from inquiry." *Id.* 164 W.Va. at 367, 264 S.E.2d at 171. In that decision, we held improper a broad protective order, ruling that each area of inquiry in a proposed deposition should be scrutinized as contemplated in Rule 26(c), and "a narrowly drawn protective order, if appropriate, entered." *Id.*

In this case, the protective order stated that "the Court cannot completely rule out the possibility of relevant evidence from Attorney Hamstead based on what is now before it ..." Issuance of a broad protective order, based upon the assertion of a blanket privilege against discovery, without scrutiny of each proposed area of inquiry and without giving full consideration to a more narrowly drawn order constitutes abuse of discretion under West Virginia Rule of Civil Procedure 26(c). The protective order was plain error in this case because the order ignored the fact finding function of the proposed deposition as well as its importance in the discovery process in this matter.[FN10]

V
INABILITY OF APPELLANT ROSE ANN HANEY TO ATTEND AND PARTICIPATE IN THE TRIAL

The Appellants assign error to the refusal of the trial court to grant a continuance they requested on January 20, 1987, citing the inability of Appellant Rose Ann Haney to attend the scheduled trial because of illness. In support of their motion for a continuance, the Appellants submitted a letter from Dr. Henry Taylor, dated January 18, 1987. In that letter, Dr. Taylor expressed the opinion that Appellant Rose Ann Haney was "not medically stable to participate in court proceedings at the present time."

Appellant Rose Ann Haney experienced a serious allergic reaction during a January 15, 1987, attempted deposition at the Pendleton County courthouse. A room in the courthouse had recently been painted, and the Appellant had an allergic reaction to the fumes still in the air.[FN11] Her deposition was later taken at her home.

Dr. Taylor indicated that it was "likely she will experience similar allergic reactions during the jury trial," and that he had discussed with the Appellants the possibility of creating some sort of enclosure within the courtroom with sufficient flow of purified air that would isolate that Appellant from the courtroom environment. The letter further stated that access to an air purifier stored in the Appellants' basement, or purchase of a new air purifier, would be necessary. The letter concluded by indicating that if it were not possible to create a purified enclosure, the Appellant would have to provide testimony by closed circuit television or on videotape to prevent allergic reactions.

The trial court reviewed the letter from Dr. Taylor, but noted that no testimony was offered to the court in regard to the paint odor problem in the courthouse. The court also noted that the Appellee had willingly participated in a video evidentiary deposition of the Appellant prior to trial. The trial court found that the Appellant's medical condition was long-standing and existed long before she moved to West Virginia and well before the suit was filed. The court further found that the condition did not appear to be one that would be resolved in the near future.[FN12] The trial court denied the motion for a continuance, and ordered the trial to proceed on January 22, 1987.

Because of the existence of previously discussed errors sufficient to reverse the judgment of the trial court in this matter, we will not rule on whether the trial court was in error by refusing the motion for a continuance by the appellants. It is, however, beyond argument that the courts of this state are open to all and that parties in litigation should have access to their legal proceedings, W.Va. Const., art. III, § 17, and such access to court proceedings is also required as a part of due process, W.Va. Const., art. III, § 10.[FN13]

VI CONCLUSION

The Appellants have also assigned error to a number of other procedural decisions made by the trial court, and have generally taken exception to the manner in which the trial was conducted. Because we have found sufficient error to reverse the judgment of the trial court and order a new trial, we will not rule on those procedural and conduct objections.

For the reasons stated, the verdict below is reversed and the case is remanded to the Circuit Court of Pendleton County for a new trial.

REVERSED AND REMANDED.

FN1. The Appellants were represented for the answer, counterclaim and cross-claim by Oscar M. Bean, retained by the Appellee to represent the Appellants in their right-of-way dispute after institution of the Bennett action. Attorney Richard Cardot was co-counsel on those actions, and also represented the Appellants in their third-party complaint against the Appellee.

After institution of the suit, Bean continued to negotiate with the Bennetts for the Appellants' right-of-way, and an agreement granting the Appellants the required access was signed on July 23, 1986. Consideration for that right-of-way agreement included payment of $4,000 (paid by the Appellee) and certain limitations on the future sale of the Appellants' property. Bean then withdrew as co-counsel for the Appellants by notice filed November 3, 1986.

FN2. We agree with the trial court that the Appellants' objection was preserved. The Appellants objected to the absence of the completed juror qualification forms prior to impaneling the jury. The appellants also unsuccessfully moved to stay the proceedings in the trial court and petitioned this Court for a Writ of Prohibition. Their challenge to the jury selection process is, therefore, in compliance with the challenge procedure found in West Virginia Code § 52-1-15.

FN3. We recognize that the actions of a subsequent legislature ordinarily are not helpful in determining the intent of a prior legislature. Syl. Pt. 4, *Detch v. Board of Education*, 145 W.Va. 722, 117 S.E.2d 138 (1960). In this case, however, the make-up of the legislative bodies was substantially the same, the amendments were temporally close to the 1986 statute, and the refinements of the 1987 and 1988 amendments occurred under circumstances which reveal the original legislative intent. *See Sutherland Stat. Const.* § 49.11 (4th ed. 1984).

FN4. In their briefs before this Court, both parties focus their discussion on the use of the juror qualification form to aid parties in *voir dire*, and the trial court discussed the use of such forms only in the context of providing information for *voir dire*. Such a discussion does not address the public policies that the use of juror qualification forms was primarily intended to promote.

The use of juror qualification forms, as mandated by the 1986 amendments to article 1, chapter 52, was not primarily intended to provide information to parties for *voir dire*. Therefore, the existence of alternative sources for such information is not sufficient grounds for failure to use such forms in the jury selection process. The 1986 statute required the use of such forms to provide a record of the identity and characteristics of persons summoned for jury duty so that this Court and others interested in a fair jury system could ensure that trial courts carried out the public policies of broad-based random selection and nondiscrimination underlying that statute.

FN5. Because the trial court made no effort to require the use of such forms, it is not necessary to determine what minor variance might be allowed in the completion of prospective juror forms and still adequately satisfy the statute.

FN6. We also note that the 1988 amendments did not insert in Code § 52-1-15 any requirement for prejudice to the protesting party to support a challenge to the jury selection process.

FN7. In examining Virginia case law on the bifurcation of liability and damages issues when several parties are involved, the

Fourth Circuit federal court concluded that, "[a]lthough separate trials have their uses, it would appear that separating the issues of liability and damages in this kind of fact situation can only produce confusion and prevents the jury from any serious consideration of the respective roles of the parties." *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade and Douglas*, 411 F.2d 1379, 1388 (4th Cir.1969). While the fact situation in this case is not identical to that in *Regan*, we agree with the sentiment expressed therein.

FN8. Fed.R.Civ.P. 42(b).

FN9. The other issues are the trial court's refusal to require Hamstead's withdrawal as counsel for the Appellee and the refusal of the court to allow the Appellants to call Hamstead as a witness.

FN10. As a result of the overly-broad protective order, it was impossible for the trial court to determine what, if any, relevant evidence Hamstead could offer, and in what form such relevant evidence might be introduced. It is similarly impossible to determine whether Hamstead's role as a potential witness would have been sufficient to disqualify him from continuing as counsel for the Appellee. We cannot, therefore, reach the issues of whether Hamstead should have been called as a witness, or whether he should have been disqualified as counsel for the Appellee.

FN11. The Appellant had also experienced a previous allergic reaction in the courthouse on November 19, 1986, following exposure to fumes from perfume or a leather jacket worn by an observer.

FN12. In a hearing on post trial motions, the trial court noted that "there was no way that counsel could assure this court that any time, in any reasonably near period in the future, that she [Appellant Rose Ann Haney] would be able to appear in this Court."

FN13. We believe that the Appellants should have supported their motion for a continuance with more than an unsworn letter from the Appellant's local physician. The trial court, however, could have, *sua sponte*, required the development of evidence regarding the Appellant's medical condition and the actual provisions that would be necessary to allow her to attend the trial. Deprivation of a party's right to attend trial should only be done after full examination of the party's reasons for not being able to attend, and after exhaustion of any reasonable accommodations.

204 W. Va. 424, 513 S.E.2d 472

Supreme Court Of Appeals Of West Virginia

IN RE: BETH ANN B. and COURTNEY DANIELLE B.

No. 25210
Submitted: November 10, 1998
Filed: December 16, 1998

SYLLABUS BY THE COURT

1. "' When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.' Syl. Pt. 1, McCormick v. Allstate Insurance Company, 197 W.Va. 415, 475 S.E.2d 507 (1996)." Syl. Pt. 1, State v. Michael M., W. Va. , 504 S.E.2d 177 (1998).

2. In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights.

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Workman, Justice:

This child neglect matter is before this Court on appeal from a final order of the Circuit Court of Wood County, entered May 19, 1998. The Appellant, Debbie B., protests the circuit court's order, which effected, among other things, a termination of her parental rights in relation to Beth Ann B. and Courtney Danielle B. See footnote 1 The sole issue is whether a circuit court may terminate a parent's rights in his or her children without first

conducting a disposition hearing , when the parent has signed an agreed order stipulating to the predicate facts for such termination. We find, under the applicable law, that a disposition hearing is required in those circumstances. Based on our review of the record, See footnote 2 the parties' briefs, See footnote 3 and all other matters submitted to this Court, we conclude that the circuit court erred in failing to conduct a disposition hearing prior to terminating Debbie B.'s parental rights. Accordingly, we reverse and remand the decision of the circuit court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Debbie B. is the natural mother of Beth Ann B., born February 20, 1995, and Courtney Danielle B., born October 31, 1996. On June 9, 1997, the Appellee, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), filed a petition, pursuant to West Virginia Code § 49-6-1 (1992),See footnote 4 alleging that Beth Ann B. and Courtney Danielle B. were "neglected children," as defined by West Virginia Code § 49-1-3 (1994).See footnote 5 As grounds for this allegation, the DHHR asserted that the health, safety, and welfare of the children were harmed and threatened by Debbie B.'s inability to provide them with supervision, food, shelter, medical care, and clothing. The petition asked that the children be placed into the temporary custody of the DHHR, pending a hearing on the matter.

By order entered June 9, 1997, the circuit court awarded the DHHR temporary custody of the children. A preliminary hearing was waived by agreement of the parties, as reflected in an agreed order entered by the circuit court on July 18, 1997. On November 7, 1997, an adjudicatory hearing was held. After considering the evidence adduced at the hearing, the circuit court found that Beth Ann B. and Courtney Danielle B. were neglected children and that the neglect had been inflicted by Debbie B. These findings were set forth in an order entered by the circuit court on November 24, 1997. By that same order, the circuit court directed that the children remain in the temporary custody of the DHHR.

Following adjudication, Debbie B. was granted a post-adjudicatory improvement period. The terms and conditions of the improvement period were set forth in a Family Case Plan, dated December 10, 1997, prepared by a DHHR child protective service worker.

Although another hearing in the case was scheduled for April 10, 1998, the hearing did not occur. Instead, on that date, the parties advised the circuit court that they had come to "an agreement regarding the best interests of

the children." This ostensible agreement was detailed in an agreed order, which was signed by Debbie B. and her counsel. The material provisions of the agreement, as set forth in the agreed order, were as follows:

> 3. That the respondent-mother failed to comply with the terms of the improvement period;
>
> . . . .
>
> 6. That there is no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future by the respondent- mother; that it is in the best interests of the above- named children that there be no reunification at this time with the respondent-mother; that the Department of Health and Human Resources has taken steps and made reasonable efforts to provide the respondent-mother with [the] opportunity to correct the problems and to prevent removal of the children; that the above-named children need permanency in their lives; that the respondent-mother is incapable of properly parenting the above-named children.

After outlining the parties' agreement, the agreed order provided that "the Court does hereby adopt the above as its findings." The order concluded that the parental rights of Debbie B. in relation to Beth Ann B. and Courtney Danielle B. be terminated. On May 19, 1998, the circuit court entered the agreed order.

II. STANDARD OF REVIEW

In considering the circuit court's order, this Court employs the two-prong deferential standard recently enunciated in syllabus point one of State v. Michael M., W. Va. , 504 S.E.2d 177 (1998) , where we stated:

> " When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, McCormick v. Allstate Insurance Company, 197 W.Va. 415, 475 S.E.2d 507 (1996).

III. DISCUSSION

The only error assigned in this appeal is that the circuit court erred in failing to conduct a disposition hearing prior to terminating the Appellant's parental rights, as required by the Rules of Procedure for Child Abuse and Neglect Proceedings. The DHHR does not refute that the circuit court disposed of this case based entirely on the parties ' agreement, as embodied in the agreed order, without any disposition hearing. Rather, the DHHR argues that Debbie B. understood "the effect of signing the agreed order, " and also points to the fact that her attorney was present during that signing. See footnote 6 Thus, the issue before this Court is whether the circuit court can terminate parental rights, in a child abuse and/or neglect proceeding, without first conducting a disposition hearing, where the parent has signed an agreed order containing stipulations of the facts necessary for such termination.

The statutory scheme applicable in child abuse and neglect proceedings provides for an essentially two phase process. The first phase culminates in an adjudication of abuse and/or neglect. See W. Va. Code § 49-6-2(c) (1996). The second phase is a dispositional one, undertaken to achieve the appropriate permanent placement of a child adjudged to be abused and/or neglected. See W. Va. Code § 49-6-5 (1996).See footnote 7 It is this latter phase that is relevant to this appeal.

In the dispositional phase of a child abuse and neglect proceeding, the "party or parties having custodial or other parental rights or responsibilities to the child" are entitled, pursuant to West Virginia Code § 49-6-2(c), to "a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." Id. In addition, West Virginia Code § 49-6-5, which sets forth a panalopy of dispositional alternatives available to the circuit court, including termination of parental rights, provides that "[t]he court shall forthwith proceed to disposition giving both the petitioner [DHHR] and respondents [parent(s)] an opportunity to be heard." Id. If the State seeks termination of parental rights, then West Virginia Code § 49-6-5 requires that certain facts be proven as a prerequisite to such termination. Those ultimate facts, which the State must prove, are delineated in West Virginia Code § 49-6-5 (a)(6) and § 49-6-5 (b).

Clearly, the statutory scheme contemplates a disposition hearing prior to termination of an individual's parental rights. This Court recognized as much in syllabus point one of West Virginia

Department of Welfare ex rel. Eyster v. Keesee, 171 W. Va. 1, 297 S.E.2d 200 (1982), where we held:

> "West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing." Syl. pt. 2, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Our decision in Keesee preceded the advent of the Rules of Procedure for Child Abuse and Neglect Proceedings, adopted by order of this Court on December 5, 1996, and effective on January 1, 1997. But the mandatory prerequisite of a disposition hearing where parental rights are being terminated is plainly incorporated in the Rules.

Rule 33 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides, in pertinent part:

> (b) Voluntariness of consent. Before accepting a stipulation of disposition, the court shall determine that the parties understand the contents of the stipulation and its consequences, the parties voluntarily consent to its terms, and the stipulation or uncontested adjudication meets the purposes of these rules and controlling statute and is in the best interests of the child. The stipulations shall be specifically incorporated in their entirety into the court's order reflecting disposition of the case.
>
> Id.

Moreover, the relevant portions of Rule 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings provide:

> (a) Uncontested termination of parental rights. If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing:
>
> (3) If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court

> shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.
>
> (4) If the parent(s) is/are not present in court but has/have signed a relinquishment of parental rights, the court shall determine whether there was compliance with all state law requirements regarding a written voluntary relinquishment of parental rights and whether the parent(s) was/were thoroughly advised of and understood the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.
>
> Id.

While Rules 33 and 35 obviously contemplate the use of stipulations in connection with child abuse and neglect proceedings, these rules nonetheless require a disposition hearing even where a parent has signed a stipulation of facts which, if proven, would support a termination of parental rights under West Virginia Code § 49-6-5.See footnote 8 Parties cannot by stipulation negate the necessity for a hearing which comports with the provisions of Rules 33 and 35.

State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983), was procedurally analogous to this case in that the adjudicatory hearing under West Virginia Code § 49-6-2 was aborted when the parties entered into a voluntary arrangement regarding the custody of the allegedly abused child. In syllabus points one and two of T.C., this Court held:

> In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

W. Va. Code, 49-6-1, et seq., does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without

restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

Accordingly, under the facts of this case, we hold that in a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights. See footnote 9

IV. CONCLUSION

Therefore, upon all of the foregoing, we reverse the order appealed from and remand this case to the circuit court with directions to conduct a disposition hearing for the limited purposes of ascertaining whether Debbie B. fully understood the contents of the agreed order and the consequences of the termination of her parental rights, was aware of possible, less drastic alternatives than termination, voluntarily consented to such termination, and was informed of the right to a disposition hearing. See footnote 10 If after exploring these matters the circuit court finds affirmatively on these points, and further finds that the stipulated disposition (i.e., termination of parental rights) is in the best interests of the children and meets the purposes of the Rules of Procedure for Child Abuse and Neglect Proceedings and West Virginia Code § 49-6-5, then Debbie B.'s parental rights should be terminated. Furthermore, as in all cases involving children, the circuit court must act with great dispatch to bring safety, stability, security, and permanency to the lives of Beth Ann B. and Courtney Danielle B.

Reversed and remanded with directions.

Footnote: 1 In keeping with our usual practice in matters of child abuse and neglect, we refer to the individuals involved in this proceeding using the initials of their surnames. See In Matter of Jonathan P., 182 W. Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

Footnote: 2 The record before this Court is minimal. Although it is apparent that the testimony of several witnesses was presented during the adjudicatory hearing, we have received no transcripts of that testimony, or any other testimony in this case. The record is also devoid of a child's case plan, which the DHHR is required by West Virginia Code § 49-6-5(a) to prepare, and which must comport with that statute and with Rule 28 of the Rules of Procedure for Child Abuse and Neglect Proceedings.

Footnote: 3 We feel compelled to comment on the bare bones nature of the Appellant's brief. While this Court certainly encourages lawyers to submit appellate briefs which are concise, we also put a premium on clarity. From the Appellant's cryptic brief, it is unclear to us on what grounds she claims that the lack of a disposition hearing adversely impacted her rights or what relief she is seeking.

Footnote: 4 West Virginia Code § 49-6-1 was amended by the Legislature in 1998. The amendment does not impact the outcome of this case.

Footnote: 5 West Virginia Code § 49-1-3 defines a "neglected child" to mean a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian . . . .

Id. West Virginia Code § 49-1-3 was amended by the Legislature in 1998, but the amendment did not alter the foregoing definition of a "neglected child."

179 W.Va. 605, 371 S.E.2d 326

Supreme Court of Appeals of West Virginia.

In the Interest of BETTY J.W., Dorothy N.W., James E.W., Sandra K.W., and Cassie A.W.

No. 17482.

July 1, 1988.

SYLLABUS BY THE COURT

1. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

2. W.Va.Code, 49-6-2(b) (1984), allows a parental improvement period, while the child is temporarily physically removed from the alleged abusive situation, as the court may require temporary custody in the state department or other agency during the improvement period.

3. W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Teresa McCune, Williamson, for the mother, Mary Wright.

Timothy Koontz, Susan B. Perry, Williamson, for the children.

MILLER, Justice:

Mary W. See footnote 1 appeals from a final order of the Circuit Court of Mingo County which terminated her parental rights to her five minor children. She first assigns as error the legal insufficiency of the child abuse petition. She also contends the trial court erred in denying a statutory improvement period, in failing to adopt the least restrictive alternative appropriate to the circumstances, and in relying on her status as a victim of domestic violence as a basis for the termination of parental rights.

I.

Mary W. and her husband, J.B.W., See footnote 2 are the natural parents of five minor children, See footnote 3 the youngest of whom is now ten years old. On June 3, 1985, the West Virginia Department of Human Services (DHS) took emergency custody of the children. See footnote 4 In a petition to terminate parental rights filed on June 4, 1985,

the DHS alleged that on April 30, 1985, the husband, J.B.W. sexually abused and assaulted his then seventeen-year-old daughter, B.J. The petition alleged that since the sexual assault, J.B.W. had been out of the marital home until June 1, 1985, when he again stayed overnight. The DHS also alleged that J.B.W. habitually physically abused his children and that Mary W. failed to protect the children from her husband's abuse. See footnote 5

A hearing on the petition was held on June 10, 1985, at which all parties appeared except J.B.W., who was then a patient in St. Mary's Hospital. The court appointed a guardian ad litem for J.B.W. and a guardian ad litem for the five children. Testimony was taken, but no record was made of the proceedings. In an order entered August 1, 1985, the court denied motions for an improvement period, found no less drastic alternative than the removal of the children, ordered physical and legal custody to be placed with DHS, and scheduled a final hearing.

On September 17, 1985, at the final hearing, all parties appeared and were represented by counsel. J.B.W. and Mary W. individually requested improvement periods which the court denied. At the conclusion of the hearing, the court recited facts to be part of the final written order, which was entered on November 22, 1985. The trial court found that J.B.W. had abused his children, that Mary W. had failed to protect them, that no reasonable likelihood existed that the conditions of neglect and abuse could be substantially corrected, and that Mary W. and J.B.W. had refused and were unwilling to cooperate in the development of a plan to effectuate necessary changes. On that basis, the court concluded that there was no less drastic alternative than to terminate the parental rights of J.B.W. and Mary W. See footnote 6

II.

Mary W. first argues that the abuse petition filed by DHS did not contain specific factual allegations as required by W.Va.Code, 49-6-1(a) (1977). See footnote 7 In State v. Scritchfield, 167 W.Va. 683, 280 S.E.2d 315 (1981), we held in Syllabus Point 1:

> "If the allegations of fact in a child neglect petition are sufficiently specific to inform the custodian of the infant of the basis upon which the petition is brought, and thus afford a reasonable opportunity to prepare a rebuttal, the child neglect petition is legally sufficient."

See also State ex rel. Moore v. Munchmeyer, 156 W.Va. 820, 197 S.E.2d 648 (1973).

The DHS filed a form petition in this case which recited the pertinent statutory language and contained only blank spaces for the specifics of the case. The DHS attached to the petition a summary which contained identifying information, the specific abusive conduct, and supportive services provided to the family. Mary W. does not argue that the summary fails to comply with statutory notice requirements. Consequently, we find

that the petition and the attached written summary with its recitation of facts satisfies the statute.

III.

Mary W. next contends that she was unlawfully denied a statutory improvement period under W.Va.Code, 49-6-2(b) (1984), before her parental rights were terminated. See footnote 8 It is useful to review the constitutional underpinnings upon which this statutory improvement period rests. In Syllabus Point 1 of In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973), this Court, relying on Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), recognized that a natural parent has a constitutional right to the custody of his or her infant children:

> "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions."

See also State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983); State ex rel. Miller v. Locke, 162 W.Va. 946, 253 S.E.2d 540 (1979).

The United States Supreme Court's continued adherence to this basic constitutional principle is reflected in Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599, 606 (1982):

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."

In Santosky, the Supreme Court held that the due process clause of the Fourteenth Amendment prohibited the termination of parental rights upon less than clear and convincing evidence. Accord In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981); W.Va.Code, 49-6-2(c) (1984).

While parents enjoy an inherent right to the care and custody of their own children, the State in its recognized role of parens patriae is the ultimate protector of the rights of minors. The State has a substantial interest in providing for their health, safety, and welfare, and may properly step in to do so when necessary. Stanley v. Illinois, supra. This parens patriae interest in promoting the welfare of the child favors preservation, not severance, of natural family bonds, a proposition that is echoed in our child welfare

statute. W.Va.Code, 49-2B-1 (1981). See footnote 9 The countervailing State interest in curtailing child abuse is also great. In cases of suspected abuse or neglect, the State has a clear interest in protecting the child and may, if necessary, separate abusive or neglectful parents from their children.

The dual nature of the State's interest is evidenced by the statute which permits a parent to move the court for an improvement period when abuse or neglect is alleged. See footnote 10 The court must allow the improvement period unless "compelling circumstances" justify a denial, as we explained in State v. Scritchfield, 167 W.Va. at 692-93, 280 S.E.2d at 321:

> "Clearly, the statute presumes the entitlement of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child neglect or abuse proceeding is based pending final adjudication, no doubt in recognition of the fundamental right of a parent to the custody of minor children until the unfitness of the parent is proven. See, e.g., In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). The statute permits the court to deny such a request only upon a finding of 'compelling circumstances.' "

See also In Re Thaxton, 172 W.Va. 429, 307 S.E.2d 465 (1983).

It is important to observe that W.Va.Code, 49-6-2(b) (1984), allows a parental improvement period, while the child is temporarily physically removed from the alleged abusive situation, as the court "may require temporary custody in the state department or other agency during the improvement period."

This is the thrust of Mary W.'s claim. She moved for an improvement period at the June 10, 1985 preliminary hearing. The trial court found the alleged history of abuse by her husband, J.B.W., to be a compelling circumstance justifying the denial of an improvement period. At the final hearing, Mary W. renewed her motion. The trial court again denied the improvement period, stating that to return the children to the mother, who had continued contact with the father, "would put these children at great risk again."

It appears that the trial court believed that its only option in granting an initial improvement period was to return the children to Mary W. Nothing in the record indicates the trial court gave any consideration to the possibility of granting Mary W. an improvement period without custody of the children. As previously observed, W.Va.Code, 49-6-2(b) (1984), expressly permits a circuit court to grant an improvement period with temporary custody with the DHS or other appropriate agency. In Scritchfield, 167 W.Va. at 693, 280 S.E.2d at 321-22, we noted this provision:

> "[T]he statute does not limit 'improvement period' to a period of time during which the mother and child live together. The statute specifically provides that the court may order the child into the temporary custody of the Department of [Human Services] or another agency during the improvement period."

We found in Scritchfield no compelling circumstances justifying the denial of such an improvement period. There the natural mother's rights had been permanently terminated, as in this case. The underlying problem with the mother was that she had suffered a mental illness which had occasioned the neglect and abuse of the children. During the course of the proceeding, she had been hospitalized at a mental health facility. At the time of the final hearing, testimony indicated she had recovered from her mental illness to the extent she would be able to care for her children. She had asked for an improvement period, but the court had denied it and we concluded this was reversible error.

The same type of custodial transfer can be made under W.Va.Code, 49-6- 5(c) (1984). See footnote 11 This section empowers circuit courts at the dispositional hearing to grant an improvement period for up to one year as an alternative disposition, during which parental rights cannot be permanently terminated. During this period, the court can place the child with the parents, relatives, or appropriate agencies. See footnote 12

The failure to consider an improvement period for Mary W. was due in large part because the trial court found that she "knowingly allowed" the sexual abuse. This standard is derived from W.Va.Code, 49-1- 3(a) (1984), which defines an abused child to include one whose parent "knowingly allows another person" to commit the abuse. See footnote 13

We do not believe the record supports the trial court's legal conclusion that Mary W. "knowingly allow[ed]" the sexual abuse. Courts in other states with similar child abuse statutes, which contain a "knowingly allows" type provision, have focused on whether the parent in some manner condoned the abuse. Termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent. Typical is In Interest of A.M.K., 723 S.W.2d 50 (Mo.App.1986), where a mother admitted knowing that her husband had sexually abused their children. The court terminated the mother's parental rights saying "there is no evidence that the appellant attempted to make a hot-line report or to have her husband charged with child abuse." 723 S.W.2d at 54.

Similarly, where the mother admitted to various people that she had observed sexual abuse and had condoned it with a statement that her daughter needed to be taught about "such things" before she started dating, the court terminated the mother's parental rights

for her omission to act. In Interest of H.W.E., 613 S.W.2d 71 (Tex.Civ.App.1981); see also In Interest of Armentrout, 207 Kan. 366, 485 P.2d 183 (1971); Re: Biggs, 17 Cal.App.3d 337, 94 Cal.Rptr. 519 (1971); In Re: Van Vlack, 81 Cal.App.2d 838, 185 P.2d 346 (1947).

We followed this view in In the Interest of Darla B., 175 W.Va. 137, 331 S.E.2d 868 (1985), and terminated a father's parental rights for his nonaction in protecting his child. See footnote 14 There the father had asserted that he should be held blameless for his nonaction in protecting his child. In that case, a 38-day-old infant suffered life-threatening injuries including a skull fracture, other broken bones, and bruises. The father supported his wife's explanation for the infant's injuries, even though that testimony was inconsistent with the medical evidence and he had witnessed the first injury to his child.

This case is analogous to Shapley v. Tex. Dept. of Human Resources, 581 S.W.2d 250 (Tex.Civ.App.1979), in which the appellate court reversed the termination of a mother's parental rights where the father had physically abused their eighteen-month-old child. The mother took the child to a hospital emergency room, reported that her husband was a heavy drinker, and that he had beaten the child the night before and on one other prior occasion. The mother had delayed reporting the second occurrence until after her husband had gone to work. The Department of Human Resources temporarily removed the child from the home.

Three months later, the father again became intoxicated and abused the mother and the family's pet puppy. She filed suit for divorce. Witnesses who interviewed the mother after the first hearing on the abuse matter believed it unlikely that she would remain separate and apart from her husband and there was danger of future injury to the child by the father. The court held the evidence insufficient to terminate the mother's parental rights saying: "It was only because of the mother's love for her child that the beating was ever called to the attention of the authorities in the first place. Her delay could well have been caused by her own fear of her husband." 581 S.W.2d at 254. See also In Interest of Loitra, 81 Ill.App.3d 962, 36 Ill.Dec. 833, 401 N.E.2d 971 (1979); In Re Adoption of P., 475 Pa. 197, 380 A.2d 311 (1977).

Here, the evidence shows that Mary W. did not knowingly allow any sexual abuse. Her daughter told her about the sexual assault the day after it happened. She was unable to get away from her husband that day, but the following day, while her husband was absent, she paid a neighbor to take her and the children to her parent's residence. See footnote 15 That same day she reported the abuse to DHS and requested services including a place to stay. See footnote 16 The reasons for delay in this case, as in Shapley, centered on an opportunity to get away from an abusive spouse.

There was also testimony that when J.B.W. had attempted to sexually abuse the daughter during the evening hours on the day of the assault, Mary W. had interceded and was beaten and threatened with a knife. Certainly, a parent charged with acts of omission, who takes reasonable steps to protect her child and who does not defend the abuser or condone the abusive conduct, does not "knowingly allow" the abuse.

The trial court also found that Mary W. failed to protect her children by failing to keep J.B.W. away and by not separating from him. Her perceived inability to break from the pattern of abuse was described by the court as classic spouse abuse: "Men who abuse their wives classically follow that pattern and the family follows that pattern. A man beats his wife, makes promises and they kiss and make up, and there is a period psychologists call 'the honeymoon'. At some point following the honeymoon there is a cycle of abuse and the cycle starts all over again." We recognized this syndrome, which we termed "battered woman's syndrome," in State v. Steele, 178 W.Va. 330, 359 S.E.2d 558 (1987). See footnote 17 See also State v. Duell, 175 W.Va. 233, 332 S.E.2d 246 (1985).

The court apparently believed that Mary W. would continue to reconcile with her husband, thereby exposing the children to further abuse by him. However, as we have previously pointed out, an improvement period without custody of the children would have enabled Mary W. to overcome this perceived problem. See footnote 18

The court's decision also rested on the finding that Mary W. would not cooperate in the development of a plan to provide for the safety of her children, which would involve her separating from her husband. The difficulty with this conclusion is that it is not borne out in the record. Prior to the child abuse incident, the DHS had not provided any regular services to the family for some two years. There was no showing that an improvement plan had been developed and had not been followed by Mary W. on the current charges.

In fact, the record indicates that Mary W. after reporting the sexual abuse incident the day after it happened to the authorities was left to fend for herself and her family. She sought refuge with relatives. There is no indication in the record that DHS acted under W.Va.Code, 49-6A-9 (1977), See footnote 19 to bring into play its family protective services to assist Mary W. and her family. We think it inappropriate and erroneous under these circumstances to deny Mary W. an improvement period.

For the foregoing reasons, the judgment of the Circuit Court of Mingo County is reversed, and this case is remanded for further proceedings not inconsistent with this opinion. These proceedings shall include granting an improvement period with an appropriate family case plan under W.Va.Code, 49-6D- 3(a) (1984). The court should decide, based on the conditions then existing, whether the children may physically reside

with Mary W. during the improvement period, and should ultimately determine whether or not to reunite Mary W. and her children.

Reversed and Remanded With Directions.

Footnote: 1 We follow our past practice in domestic relations and juvenile cases which involve sensitive facts and do not utilize the last names of the parties. The husband is known only by his initials, J.B.W. See, e.g., Nancy Viola R. v. Randolph W. and Grady W., 177 W.Va. 710, 356 S.E.2d 464 (1987); West Virginia Dept. of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985).

Footnote: 2 On November 26, 1986, we rejected J.B.W.'s appeal from an order terminating his parental rights.

Footnote: 3 There were two older children, a daughter age twenty-one and a son age nineteen living at home at the time of these proceedings. Because of their ages, they were not involved in these proceedings. The daughter has now graduated from Alice Lloyd College in Pippa Passes, Kentucky.

Footnote: 4 W.Va.Code, 49-6-3(c) (1984), in pertinent part, states: "If a child or children shall, in the presence of a child protective service worker of the department of human services, be in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in section three [§ 49-1-3], article one of this chapter, and if such worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered, the worker may, prior to the filing of a petition, take the child or children into his or her custody without a court order: Provided, That after taking custody of such child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or a juvenile referee of the county wherein custody was taken, or if no such judge or referee be available, before a circuit judge or a juvenile referee of an adjoining county, and shall immediately apply for an order ratifying the emergency custody of the child pending the filing of a petition."

Footnote: 5 W.Va.Code, 49-1-3(a) (1984), provides: " 'Abused child' means a child whose health or welfare is harmed or threatened by: (1) a parent, guardian or custodian who knowingly inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or substantial mental or emotional injury, upon the child or another child in the home." (Emphasis added.)

Footnote: 6 See W.Va.Code, 49-6-5 (1984), for disposition of neglected or abused children.

Footnote: 7 W.Va.Code, 49-6-1(a) (1977), states in pertinent part: "The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought."

Footnote: 8 The text of W.Va.Code, 49-6-2(b) (1984), is:
"In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter."

Footnote: 9 W.Va.Code, 49-2B-1 (1981), provides in pertinent part:
"It is the policy of the State to assist a child and his or her family as the basic unit of society through efforts to strengthen and preserve the family unit. In the event of absence, temporary or permanent, of parents or the separation of a child from the family unit, for care or treatment purposes, it is the policy of the State to assure that a child receives care and nurturing as close as possible to society's expectations of a family's care and nurturing of its child. The State has a duty to assure that proper and appropriate care is given and maintained."

Footnote: 10 For the full text of W.Va.Code, 49-6-2(b) (1984), see note 8 supra.

Footnote: 11 W.Va.Code, 49-6-5(c) (1984), provides:
"The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently terminated and the court shall require the parent to rectify the conditions upon which the determination was based. No more than one such postdispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section." (Emphasis added).

Footnote: 12 Given the ages of Mary W.'s children, we note that W.Va.Code, 49-6-5(a)(6) (1984), contains the following provision giving a child a voice in the termination decision: "Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

Footnote: 13 For applicable text of W.Va.Code, 49-1-3(a) (1984), See note 5, supra.

Footnote: 14 The current definition of "abused child," found in W.Va.Code, 49-1-3, see note 4, supra, was adopted in 1984. The former definition limited acts of omission to inadequate supervision.

Footnote: 15 There was testimony in the record that Mary W. does not know how to drive an automobile.

Footnote: 16 The court found that Mary W. obtained a warrant against her husband for the April 30, 1985 abuse.

Footnote: 17 In Steele, we commented on one phase of the syndrome which was that often "the abused woman is unable to free herself from her situation or report the abuse to the authorities." 178 W.Va. at 336, 359 S.E.2d at 564. We quoted this language from Smith v. State, 247 Ga. 612, 618-19, 277 S.E.2d 678, 683 (1981): "Because there are periods of harmony, battered women tend to believe their husbands are basically loving, caring men, that they themselves are somehow responsible for their husbands' violent behavior, and that they are low in self-esteem and feel powerless." For an earlier view of this problem, when it is said that the law permitted a husband to beat his wife with a stick no larger than his thumb, see Stedman, Rights of Husband to Chastise Wife, 3 Va.L.Rev. 241 (1917). For more current analyses, see N. Taub, Adult Domestic Violence, The Law's Response, 8 Victimology: An Int'l J. 152, 152-57 (1983); K. Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash.L.Rev. 267 (1985).

Footnote: 18 The trial court appeared to center on the week in which the husband claimed he cohabitated at the family home. This was after criminal charges had been initiated for his sexual abuse of his daughter. Mary W. claimed that she was staying with friends and family members, but did return to the home to clean it. The children had been previously removed by court order and placed in temporary custody of the DHS. Two neighbors who testified were somewhat equivocal. One said she saw the husband at the house in the early evening hours drinking coffee. She also stated that she was

aware that Mary W. was not living there full time. Another neighbor saw both of them walk by her house. She also stated she was informed earlier by Mary W. not to disclose to J.B.W. where she was staying.

Footnote: 19 W.Va.Code, 49-6A-9 (1977), in material part, states:
"The state department shall establish or designate in every county a local child protective service to perform the functions set forth in this article.
"Except in cases involving institutional abuse or cases in which police investigation also appears appropriate, the child protective service shall be the sole public agency responsible for receiving, investigating or arranging for investigation and coordinating the investigation of all reports of child abuse or neglect. In accordance with the local plan for child protective services, it shall provide protective services to prevent further abuse or neglect of children and provide for or arrange for and coordinate and monitor the provision of those services necessary to ensure the safety of children. The local child protective service shall be organized to maximize the continuity of responsibility, care and service of individual workers for individual children and families."

206 W. Va. 1, 521 S.E.2d 173

Supreme Court Of Appeals Of West Virginia

IN RE: BILLY JOE M. AND JASON M.,

No. 25888

Submitted: June 1, 1999

Filed: July 15, 1999

SYLLABUS BY THE COURT

1. “Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. “When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.” Syl. Pt. 5, In re Christina L., 194 W .Va. 446, 460 S.E.2d 692 (1995).

3. “Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.” Syl. Pt. 3, In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996).

4. Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however,

the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement.

5. Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.

6. A permanency plan for abused and neglected children designating their permanent placement should generally be established prior to a determination of whether post- termination visitation is appropriate.

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Workman, Justice:

This is an appeal by Brenda and Hubbard M. See footnote 1 (hereinafter "Appellants") from an order of the Circuit Court of Nicholas County terminating their parental rights to their two sons, Billy Joe M. and Jason M., See footnote 2 currently ages eleven and twelve, respectively, and denying post-termination visitation rights. The Appellants contend that denial of visitation is not in the best interests of the children. They do not, however, appeal the termination of parental rights. We reverse and remand for implementation of permanency plans See footnote 3 and additional evaluation regarding the potential for successful post-termination visitation, both after the permanency plans are implemented and in the interim.

I. Facts

The Appellants are the natural parents of three sons. See footnote 4 On August 14, 1998, emergency petitions for the custody of Billy Joe and Jason were filed in the Circuit Court of Nicholas County by Mr. Mark Abbot, a child protective services worker for the West Virginia Department of Health and Human Resources (hereinafter "DHHR").See footnote 5 Subsequent to an October 13, 1998, adjudicatory hearing, the lower court ruled, by order dated October 29, 1998, that Billy Joe and Jason were abused and/or neglected children.See footnote 6 The lower court found the following conditions in existence at the time of the filing of the August 1998 petition in Nicholas County: garbage including rotten food scattered through the house; animal urination and defecation in the house; matted hair and dirty clothing on the children; children eating from garbage cans; inability of the children to perform basic hygiene; and Billy Joe's ear compacted with foreign items including toe nails, plastic, and sand. Billy Joe also vomited in the car of a transportation provider for DHHR, and his vomit contained sticks, pine needles, and cotton balls. In its October 29, 1998, order, the lower court provided that the possibility of visitation between the parents and the children was to be evaluated by the DHHR, and a dispositional hearing was scheduled for December 4, 1998. The lower court further found that the health and well-being of the children would be endangered by permitting them to return to their parents' home.

During the December 4, 1998, hearing, the lower court received the testimony of Mr. Mark Abbott, the child protective services worker assigned to this case in Nicholas County. Mr. Abbott testified regarding the children's behavior problems and acting out in the foster home. According to Mr. Abbott's testimony, the children urinated in trash cans, behind closed doors, and in hampers. Mr. Abbott indicated that the children spat on the walls during their first few weeks in foster care and that one of the children saved his feces in a can. The children also destroyed property at their foster home, including video tapes and a garden. Jason reported suicidal thoughts, and Billy Joe reported homicidal thoughts. Each child was eventually placed, separately, in in-patient psychiatric care. See footnote 7

Ms. Nancy Conner, a child protective services worker in Nicholas County, also testified that visitations between the parents and children had caused the children to behave in a negative manner. Ms. Conner testified that in her opinion, visitation with the parents was not in the best interests of the children and would impede the progress of the children.

Ms. Patty Salisbury, a child protective services worker assigned to the case in Braxton County and continuing to work with the family in Nicholas County, testified concerning the effects of monthly parental visitation, occurring during the period the children were removed from the home in Braxton County. She explained that the children's behavior in foster care was "uncontrollable" for two or three days after parental visitation. Ms. Salisbury indicated that the children

would become emotionally upset, cry, withdraw, and engage in acting out behaviors such as damaging objects after visiting with their parents. Ms. Salisbury explained that the children were confused about seeing their parents and then being separated from them again. The confusion, according to Ms. Salisbury, manifested itself by disruption of school patterns, poor interaction with foster parents and other children in the home, and destruction of property by hitting or kicking walls or breaking things.

Dr. Stephen O'Keefe, Ph.D., a licensed psychologist, also testified during the December 4, 1998, hearing. Dr. O'Keefe had evaluated the children in 1994 and had listened to the testimony in the courtroom on December 4, 1998. Based upon the testimony in that December 4, 1998, hearing, Dr. O'Keefe opined that any contact with the parents at that time would be detrimental to the children's transition into foster care and potential adoptive placement. He testified that the problems the children appeared to be experiencing in 1998 were identical to those he had encountered with the children during his 1994 examination, in which he had found that each child was "mildly retarded" and was suffering from "attention deficit disorder." Dr. O'Keefe further opined that whether or not post-termination visitation was appropriate depended upon whether the children were to be adopted. If adoption was a real possibility, he indicated that he would not be opposed to post-adoption visitation but would oppose visitation pending adoption. If the permanency plan for the children was permanent foster care, Dr. O'Keefe indicated that he would not be opposed to visitation and that specialized care would be capable of managing the children's reactive behaviors arising from visitation with their parents.

The lower court subsequently entered an order, dated December 29, 1998, terminating the parental rights of the parents See footnote 8 to Billy Joe and Jason and indicating that visitation was not in the best interests of the children and should not take place "at this time." The court further indicated that "the possibility of visitation for the infants and their parents" would be addressed during a custody review hearing scheduled for March 1, 1999.See footnote 9 The Petition for Appeal to this Court was thereafter filed.

The Appellants do not appeal the adjudication of neglect or the termination of parental rights. Their sole issue on appeal is the lower court's denial of post-termination visitation. The Appellants maintain that the close parent-child emotional bond compels the conclusion that post-termination visitation is warranted. The DHHR contends, however, that post-termination visitation is not in the best interests of the children and would in fact be detrimental to them. The DHHR maintains that the lower court properly recognized the emotional bond between the parents and the children, as well as the fact that the children desired to reside with their parents, but concluded, based upon the testimony of Dr. O'Keefe

and Mr. Abbott, that post-termination visitation would be detrimental to the children and would not be in their best interests at the time of the hearing on December 4, 1998. The lower court did not, however, exclude the possibility of future visitation.

II. Standard of Review

We have expressed our applicable standard of review in abuse and neglect cases as follows:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.
>
> Syl. Pt. 1, In re Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

III. Post-termination Visitation

This Court has previously acknowledged that post-termination visitation See footnote 10 may be appropriate under certain circumstances and has explained as follows:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Syl. Pt. 5, In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995).

We also expressed the superiority of the rights of the children in syllabus point three of In re Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996), explaining that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." In State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996), we explained that post-termination visitation should be permitted if it is in the children's best interest and "would not unreasonably interfere with their permanent placement." Id. at 260, 470 S.E.2d at 214. Such determination of whether the post-termination visitation would interfere with the children's permanent placement indicates the necessity for the formulation of a permanency plan prior to the decision regarding post-termination visitation.

Unfortunately for these children, their case was fraught with difficulties long before the commencement of the visitation issue which is now before this Court. The children have been left with the parents for a lengthy period of time, indeed all the formative years of their lives, and have formed a close emotional bond with their parents. Now they are being "rescued" into an uncertain future - no permanent placement and no one definitely committed to them. See footnote 11 Where allegations of neglect See footnote 12 are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services systemSee footnote 13 [13] makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement. See footnote 14 According to the evidence of record, the children in the present case have developed an intense emotional bond with their parents, making separation excruciatingly painful for the children and the parents. Additionally, as the children have become older, their likelihood of being placed in adoptive homes has decreased, further prejudicing their chances for permanency.

We have previously discussed the need for concurrent planning. Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings. See footnote 15 Implementation of concurrent planning See footnote 16 would have been beneficial to these children, permitting continued services to the family in an effort to maintain family unity while also planning an alternative resolution should such services be unsuccessful. If such concurrent planning had been effectuated, two very essential results may have occurred: (1) the children

may have been more immediately placed in permanent foster or adoptive homes subsequent to termination; and (2) specifically relevant to the issue squarely before us, the lower court could legitimately have made a finding regarding whether post-termination visitation was in the best interest of the children, with specific reference to a definitive permanent custody arrangement. Thus, a permanency plan for abused and neglected children designating their permanent placement should generally be established prior to a determination of whether post-termination visitation is appropriate. Where children have a substantial emotional bond with their parents, the termination of parental rights based upon intellectual incapacity of parents and denial of post-termination visitation, without any definitive permanent plan in place, is tantamount to throwing the children out of the frying pan into the fire.

In the present case, based primarily upon the parents' intellectual incapacity, the needs of the children have not been met, and the resulting living conditions constitute neglect. However, the social services and legal systems have left these children with their parents for eleven and twelve years, with resultant strong emotional bonds. In such circumstances, the emotional bonds between the parents and child(ren) should be closely evaluated to determine the appropriate course of action. We therefore remand this matter for implementation of permanency plans and additional evaluation regarding the potential for successful post-termination visitation, both after the permanency plans are implemented and in the interim.

Reversed and remanded with directions.

Footnote: 1 *We follow our traditional practice in cases involving sensitive facts and use only initials to identify the parties rather than their full names. See In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989). Mr. M. is presently sixty-one years of age, functioning at approximately the fourth percentile for IQ scores in the United States, with a fourth grade education. His employment has reportedly been very sporadic. Mrs. M is forty-two years of age, with a second-grade education and no history of employment. She functions at approximately the first percentile for IQ scores in the United States.*

Footnote: 2 *Billy Joe was born on October 14, 1987, and Jason was born on July 24, 1986. Both children have been diagnosed as mildly mentally retarded.*

Footnote: 3 *The case plans for both Billy Joe and Jason indicate the need for specialized foster care pending attempted adoptive placement.*

Footnote: 4 *Allegations of abuse and neglect, in the form of inadequate supervision of the children and maintenance of their physical surroundings, had previously been filed in Braxton County in February 1994, and the children were removed from the parental home from March 1994 through June 1995.See footnote 17 Subsequent to improvement periods, Billy Joe and Jason were returned to their parents' care in June 1995. The parents repeatedly cleaned their home in an attempt to regain custody of the children but would then permit the same unsanitary conditions to reoccur. The children were again removed in August 1995 and returned in January 1996. Parental rights to the youngest son, James, were terminated by the Circuit Court of Braxton County on August 14, 1998. James is not a subject of this appeal from the Nicholas County order. As noted by the lower court, the Braxton County Circuit Court provided little reasoning for permitting Billy Joe and Jason to return to their parents, while terminating the parental rights to the youngest son, James, explaining only that the older children were more capable of caring for themselves.*

Footnote: 5 *The petition asserted that the West Virginia DHHR has an extensive history with the family, beginning in Jefferson County on December 15, 1986, at the time Jason was five months of age and services were opened for child protective services to monitor neglect issues. The petition indicated that Action Youth Care had provided basic needs assistance, parenting skills, family preservation services, hygiene and housekeeping skills and access to community resources in Jefferson County from February 1992 through August 1993. Braxton County DHHR initiated family services in August 1993 when the family moved to Braxton County, providing parenting, budgeting, nutritional counseling, grocery shopping supervision, and basic child care training. Well Spring Family Services provided assistance in Nicholas County from August 1994 through November 1996.*

Footnote: 6 *The lower court found that the Braxton County DHHR had provided services to this family prior to the 1995 petition filed in Braxton County. The lower court recounted the myriad of services provided to this family in Braxton County, including parent training, budgeting skills training, grocery shopping, homemaking, hygiene, basic child care, in-home services from Florence Crittenton Center, and in-home services from the Daily Living organization.*

Footnote: 7 *Jason was placed in HCA Riverpark Hospital, and Billy Joe was placed in Highland Hospital in Charleston. Jason had been hospitalized based upon suicide threats, threatening to jump off a moving school bus, and threatening to jump off a high porch at his foster parents' home. Upon learning of Jason's hospitalization, Billy Joe became distraught, informed his foster parents that he was running away, and rode a bicycle down the middle of a highway. After discharge, both boys were placed in specialized foster homes through Action Youth Care in Wayne County.*

Footnote: 8 *The lower court found that there was no reasonable likelihood that the parents could substantially correct the existing conditions of neglect, based upon (1) the fact that the parents suffered from "mental deficiency of such duration as to render. . . [them] incapable of exercising proper parenting skills or sufficiency improving the adequacy of such skills;" (2) the long history of services offered to the family, resulting in little or no improvement. The lower court recounted the services offered since 1994 through the DHHR, Florence Crittenton Center, Action Youth Care, and counseling with Seneca Mental Health and Health Transitions; and (3) the mental deficiencies of the parents as reflected in multiple psychological evaluations finding both parents functioning with IQs in the low 60s, with little ability to handle the financial affairs or the child rearing issues of the family.*

Footnote: 9 *By the March 1999 hearing, the Petition for Appeal to this Court had been filed. The lower court heard the testimony of Nancy Conner of child protective services, indicating that the boys were progressing well in foster care, and delayed any further decisions regarding visitation until this Court issued its decision on the petition for appeal.*

Footnote: 10 *The right to post-termination visitation is a right of the child, not the parent. In re Christina L., 194 W. Va. 446, ___, 460 S.E.2d 692, ___ n.9. It is the right of the child to continued association with those with whom he shares an emotional bond which governs the decision.*

Footnote: 11 *Although counsel on oral argument represented that he believed the current foster placement might result in a permanent placement, there was nothing in the record to definitively support this potential.*

Footnote: 12 *Where the charge is abuse as opposed to neglect, the obligation to provide remedial services is far less substantial.*

Footnote: 13 *By reference to the social services system, we include not only the DHHR, but also the myriad of other service agencies charged with providing services to families, including those agencies providing services to this family, as listed in footnotes five and eight. These include private, non-profit agencies such as Action Youth Care which receive referrals from DHHR, hospitals, schools, and private psychologists.*

Footnote: 14 *It is axiomatic that the older children become and the more troubled they become, the more difficult it is to find adoptive homes.*

Footnote: 15 *In In re Lilley, 719 A.2d 327 (Pa.Super. 1998), the following explanation of new federal legislation was provided:*

On November 19, 1997 President Clinton signed the Adoption and Safe Families Act of 1997 (ASFA), Public Law 105-89, [42 U.S.C. 675(5)(C)] which amends the Titles IV- B and IV-E of the Social Security Act. ASFA establishes unequivocally that the goals for children in the child welfare system are safety, permanency and well-being. The law intends to make the child welfare system more responsive to the multiple, frequently complex, needs of children and their families. While affirming the need to forge linkage between the child welfare system and other support systems for families, the child welfare system and the courts, the law reaffirms the need to assure the safety and well-being of children and their families. The law provides renewed impetus to dismantling the barriers to permanence existing for children in placement and the need for permanency for these children. ASFA embodies several key principles that must be considered in implementing the law:

. The child's safety is the paramount concern. All decisions made must be based on the child's safety and well-being.

. Substitute care is a temporary setting. It is not a place for children to grow up. For children who cannot safely return home, the law provides for an expedited process to find these children permanent homes.

. Permanency planning for children begins as soon as the child enters substitute care. From the time a child enters placement, the agency must be diligent in finding a permanent family for the child.

. The practice of concurrent planning is encouraged by ASFA to facilitate finding a permanent home for a child in a timely manner.

. Achieving permanency for children requires timely decisions from all elements of the child serving system.

. Innovative approaches are needed to produce change. The law envisions real change in the child welfare program.

Id. at 334 n.5.

Footnote: 16

Rule 28 of the Rules of Abuse and Neglect Proceedings requires the DHHR to prepare the child's case plan. The following information should comprise a part of that case plan:

(c) When the Department's recommendation includes placement of the child away from home, whether temporarily or permanently, the report also shall include:

(1) An explanation why the child cannot be protected from the identified

problems in the home even with the provision of service or why placement in the home is not in the best interest of the child;

(2) Identification of relatives or friends who were contacted about providing a suitable and safe permanent placement for the child;

(3) A description of the recommended placement or type of home or institutional placement in which the child is to be placed, including its distance from the child's home and whether or not it is the least restrictive (most family-like) one available and including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent's(s')/respondent's('s) home, facilitate return of the child to his or her own home, or the permanent placement of the child;

(4) A suggested visitation plan including an explanation of any conditions be placed on the visits;

(5) A statement of the child's special needs and the ways they should be met while in placement;

(6) The location of any siblings and, if siblings are separated, a statement of the reasons for the separation and the steps required to unite them as quickly as possible and to maintain regular contact during the separation if it is in the child's best interest . . . .

W. Va. R. P. Abuse & Neglect Pro. 28(c). See In re Micah Alyn R., 202 W. Va. 400, 409, 504 S.E.2d 635, 644 (1998)(Workman, J., concurring)("concurrent planning for permanency should occur even where parental rights are not terminated. This should be the practice in

all abuse and neglect cases, so that there is a permanency plan for children where family reconciliation efforts are not successful for whatever reason").

Footnote: 17 *Parental rights to the youngest son, James, were terminated by the Circuit Court of Braxton County on August 14, 1998. James is not subject to this appeal.*

199 W. Va. 541, 485 S.E.2d 710

Supreme Court Of Appeals Of West Virginia

WEST VIRGINIA DEPARTMENT OF HEALTHAND HUMAN RESOURCES EX REL.
YOLANDA MILLS, SOCIAL SERVICES WORKER, Petitioner Below, Appellee

v.

BILLY LEE C., MARGARET ANN C., ANGELINA C., APRIL C., RYAN C. AND RANDY C., Respondents Below
BILLY LEE C., Respondent Below, Appellant

No. 23895
Submitted: March 25, 1997
Filed: April 14, 1997

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, In the Interest of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. VA. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, In Re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

3. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

4. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, In re Katie S., ___ W. Va. ___, 479 S.E.2d 589 (1996).

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Per Curiam:
This case is before this Court upon an appeal from the final order of the Circuit Court of Cabell County, West Virginia, entered on March 15, 1996. The case concerns the alleged abuse and neglect of four children by the names of Angelina C., April C., Ryan C. and Randy C. See footnote 1The appellant, Billy Lee C., contends that the circuit court committed error in terminating his parental rights to the children. The appellee, the West Virginia Department of Health and Human Resources, however, contends that, in terminating the appellant's parental rights, the circuit court ruled correctly and in a manner protective of the health and welfare of the children.

This Court has before it the petition for appeal, all matters of record and the briefs of counsel. For the reasons stated below, the final order of the circuit court is affirmed.

I

As in many such cases, the facts herein are grievous. The appellant and Margaret Ann C., his wife, are the natural parents of four children: Angelina (born on April 24, 1988), April (born on April 15, 1989), Ryan (born on January 8, 1991) and Randy (born on October 29, 1992). Unfortunately, as the marriage continued, the home environment, particularly with regard to the children, became less and less stable. For example, the record indicates that both parents drank alcohol and smoked marijuana in the presence of the children. According to psychologist, Paul Mulder, the appellant, in particular, acknowledged the "regular use of alcohol or

marijuana." Moreover, the record indicates that the appellant engaged in domestic violence against Margaret Ann C. In one instance, he allegedly kicked Margaret Ann C. in the stomach while she was pregnant, necessitating medical treatment.

In addition, poor hygiene and inadequate clothing of the children and frequent absences of the children from school were problems. Moreover, the appellant and Margaret Ann C. ultimately separated, and the children lived with both parents at various times. The appellant's employment included working as an assistant manager of a fast food restaurant, and Margaret Ann C.'s employment included working as an exotic dancer. The record indicates that as a result of the separation of the appellant and Margaret Ann C., and as a result of their respective working hours, the children were often exposed to other individuals who, in themselves, brought the well-being of the children into question. In one instance, Robert B., a male companion of Margaret Ann C., allegedly battered Angelina. In fact, Robert B. had such a negative impact upon the children, generally, that Margaret Ann C. was ordered by the circuit court to avoid having the children in his presence. Moreover, Angelina C. stated that the appellant's friends beat her, and she indicated that, on one occasion, one of the appellant's friends intentionally burned her with a cigarette. Furthermore, the record indicates that, while under the care of the appellant in April 1994, Angelina was allegedly sexually assaulted by the son of a baby sitter. With regard to the latter instance, although the medical evidence revealed that Angelina "had a laceration in her vagina and redness and bleeding" and a police report was filed, no charges were ever brought as a result of the allegation.

The circumstances resulting in this proceeding arose in December, 1994. On December 19, 1994, the Department of Health and Human Resources, with the assistance of the Cabell County Prosecuting Attorney, filed an emergency petition in the circuit court seeking immediate custody of the children and termination of the parental rights of the appellant and Margaret Ann C. The petition indicated that Angelina (then age 6), April (then age 5), Ryan (then age 3) and Randy (then age 2) were abused and neglected children. See W. Va. Code, 49-1-3 [1994], and W. Va. Code, 49-6-1 [1992]. Specifically, the petition alleged that the appellant had performed oral sex upon April C.

Upon review of the petition, the circuit court awarded temporary custody of the children to the Department and appointed a guardian ad litem upon the children's behalf. Soon after, the circuit court named a Court Appointed Special Advocate (CASA) for the children, appointed counsel for the appellant and Margaret Ann C. and scheduled a preliminary hearing. See W. Va. Code, 49-6-3(a) [1992]. The children were placed in a foster home in Wayne County, West Virginia. At the conclusion of the preliminary hearing, conducted in January, 1995, the circuit court stated: "[T]here is enough evidence to demonstrate there is probable cause

that some form of sexual abuse and/or assault has occurred against [April C.] at the hands of [the appellant]."

In March, 1996, a final adjudicatory hearing was conducted by the circuit court, and the witnesses included Lisa Bailey and Brenda Wright. Lisa Bailey was April C.'s preschool teacher for Cabell County schools, and Brenda Wright was a child protective service worker employed by the Department. Ms. Bailey, who had testified at the preliminary hearing, again stated that, on December 15, 1994, while at school, April C. went in and out of the bathroom several times. On the last occasion, Ms. Bailey accompanied April C. to the bathroom. Then, as Ms. Bailey testified:

[April] pulled up her pants and she went ahead and washed her hands. And she kept putting her hands between her legs. She had done that frequently all day. And she said 'Hurt' again. And I asked her, I said, 'April, what hurts?' You know, I asked her, 'What hurts?' And she kept putting her hand between her legs. And she said, 'Hurt. Daddy hurt. Daddy eat me.' And I wasn't sure at that time what exactly she was saying. And I said, 'What?' And I was questioning her. And she repeated it. And I said, 'What does Daddy do?' And she patted herself on the crotch, and she said, 'Daddy put his head down here.'

Brenda Wright, who had also testified at the preliminary hearing, stated that she was present with April C. in the emergency room of Cabell Huntington Hospital immediately after the incident related by Ms. Bailey. As she testified at the preliminary hearing, Ms. Wright again indicated that she understood April to say at the hospital: "Daddy eat me." Furthermore, as Ms. Wright testified:

> Q. Were you present, I think you testified, during the physical examination of April by Dr. Lehman?
>
> A. Yes. . . . She was highly upset about the exam. We had a terrible time getting the exam over with. There was some redness and irritation in the vaginal area. And, yes, there was a strong odor.

A number of other witnesses testified at the final adjudicatory hearing including Huntington, West Virginia, police officer Kendra Clark, who described the police report concerning the alleged sexual assault of Angelina C. in April 1994, and Elizabeth Brachna, a family services counselor, who stated that both Angelina and April exhibited the "behavioral and psychological profile of a sexually abused child." Moreover, during the hearing, the circuit court conducted an in camera proceeding during which the court interviewed Angelina C. and April C. It was during that hearing that Angelina C. indicated that the appellant's

friends beat her. The appellant, who has denied the allegations of December, 1994, throughout this litigation, and who maintains that he was protective of his children, did not testify at the final adjudicatory hearing.

Following the final adjudicatory hearing, the circuit court entered the order of March 15, 1996. In terminating the appellant's parental rights, the final order stated:

> The respondent children were abused and neglected as those terms are defined in the West Virginia Code by both respondent parents, and both respondent parents failed to protect the respondent children while said children were in the custody of either respondent parent. The testimony herein provides clear and convincing evidence to the Court that not once, but on a number of occasions, these children were abused and neglected. . . . With regard to the respondent father, [the appellant], there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future.

As reflected in the final order, Margaret Ann C., was granted an improvement period concerning the children. The improvement period, however, was unsuccessful, and by order entered on September 12, 1996, the parental rights of Margaret Ann C. to the children were also terminated. The latter order is not contested in this appeal and is, therefore, not before this Court. See footnote 2

II

The appellant contends that the circuit court committed error in terminating his parental rights to the children. In that regard, he argues that the Department failed to establish by clear and convincing evidence (1) that he abused April C., (2) that his conduct toward the children, generally, could not be substantially corrected and (3) that he failed to protect the children from others. As stated above, the appellant denied the allegations of December, 1994 and maintains that he was protective of his children. The West Virginia Department of Health and Human Resources, however, contends that the circuit court ruled correctly and in a manner protective of the health and welfare of the children.

In syllabus point 1 of In the Interest of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), this Court observed:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or

> neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

See also syl. pt. 1, State ex rel. Virginia M. v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996).

An "abused child" is defined in W. Va. Code, 49-1-3 [1994], as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" In addition, W. Va. Code, 49-1-3 [1994], defines a "neglected child" as a child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian [.]"

In particular, with regard to the termination of parental rights, W. Va. Code, 49-6-5(a)(6) [1992], provides that a circuit court may:

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency.

Moreover, W. Va. Code, 49-6-5(b) [1992], provides:

> As used in this section, 'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be

> deemed to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such abusing parent or parents have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning [.]
> . . . .
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child [.]

The above provisions of W. Va. Code, 49-6-5 [1992], are similar to the 1977 version of that statute, which this Court cited in In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980). In syllabus point 2 of In re R.J.M., this Court held:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. VA. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. VA. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

See also syl. pt. 1, In re Brianna Elizabeth M., 192 W. Va. 363, 452 S.E.2d 454 (1994).

The In re R.J.M. case was subsequently cited by this Court in In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993). In In re Jeffrey R.L., we held in syllabus point 3:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

See also syl. pt. 2, In re Danielle T., 195 W. Va. 530, 466 S.E.2d 189 (1995), holding that parental rights should be terminated where a child had been burned and subjected to malnutrition.

In the case now before us, the final order made clear that the West Virginia Department of Health and Human Resources established by "clear and convincing evidence" that Angelina C., April C., Ryan C. and Randy C. were abused and neglected children. Moreover, the final order specifically stated that, with regard to the appellant, "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." Based upon a careful review of the record, this Court is of the opinion that, under the standard of In the Interest of Tiffany Marie S. set forth above, the findings of the circuit court were not "clearly erroneous." With regard to the likelihood of correcting the conditions of abuse and neglect in the future, for instance, Dr. Mulder indicated as follows, concerning the appellant's use of alcohol and marijuana: "[G]iven the fact that [the appellant] does not perceive his level of alcohol and drug use to be a problem, it's questionable how much impact educational counseling will have. There is no evidence that [the appellant] would benefit substantially from psychiatric treatment or long-term psychological counseling."

Here, the allegations that the appellant sexually abused or assaulted April C. in December, 1994 were substantiated by Lisa Bailey, April C.'s preschool teacher, and Brenda Wright, a child protective service worker employed by the Department. Although the record before us does not include the medical records relating to that incident, Ms. Wright, who was present at the hospital when April C. was examined, described April C. as having "redness and irritation in the vaginal area."

Even in view of the appellant's denial of the incident of December, 1994, however, the record contains significant evidence of other circumstances of abuse and neglect of the children. As stated above, the appellant acknowledged the regular use of alcohol and marijuana, and the appellant engaged in domestic violence against Margaret Ann C. As this Court recognized in Nancy Viola R. v. Randolph W., 177 W. VA. 710, 713-14, 356 S.E.2d 464, 467-68 (1987), such problems are relevant considerations with regard to the welfare of children in the home. See W. Va. Code, 49-6-5(b)(1) [1992]. Moreover, it is particularly disturbing that the record suggests that both the appellant and Margaret Ann C. routinely left the children with others who, in themselves, brought the well-being of the children into question. In fact, Angelina C. may have been beaten, burned with a cigarette and even sexually assaulted, while in the appellant's care. As family services counselor Elizabeth Brachna testified, generally, at the final adjudicatory hearing: "I find it very disturbing that the children have been exposed to this many situations and people."

In the recent case of In re Katie S., ___ W. Va. ___, 479 S.E.2d 589 (1996), this Court, in syllabus point 3, held: "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Here, this Court is of the opinion that the circuit court's ruling, terminating the appellant's parental rights to Angelina C., April C., Ryan C. and Randy C., was protective of the health and welfare of the children. Accordingly, the final order of the Circuit Court of Cabell County, entered on March 15, 1996, is affirmed.

Affirmed.

Footnote: 1 We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P., 182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote:2 In granting this appeal, this Court noted that the appellant, in his petition, asserted that his right to equal protection of the laws was violated because the final order of March 15, 1996, terminated his parental rights to the children but did not terminate the parental rights of Margaret Ann C. As stated above, however, the parental rights of Margaret Ann C. were later terminated. Consequently, the appellant's contention concerning equal protection is moot.

The record demonstrates that, at best, the relationship of Margaret Ann C. to her children was progressively troubled. As stated above, both parents drank alcohol and smoked marijuana in the presence of the children. Robert B., a subsequent male companion of Margaret Ann C., allegedly battered Angelina, and, in fact, Margaret Ann C. was ordered by the circuit court to avoid having the children in his presence. According to the record, Margaret Ann C. violated that order. Moreover, in addition to the allegations concerning the babysitter's son, relating to the appellant, the record also contains assertions that Angelina may have been sexually molested by male babysitters utilized by Margaret Ann C. One witness described Angelina as indicating that those baby sitters were friends of Robert B, "who was mother's boy friend, who was not supposed to be in the home at that time."

Although the children were largely in foster care throughout the proceedings below, they were returned to Margaret Ann C. more than once, only to be returned again to foster care. On one occasion in 1996, the children were returned to the Department, and to foster care, at Margaret Ann C.'s request. Furthermore,

Margaret Ann C.'s exercise of her visitation rights with the children, during the proceedings below, was sporadic.

Footnote: 6 We are greatly troubled by the complete absence of the guardian ad litem during the course of this appeal. In Michael M., this Court underscored that "guardians ad litem have a duty to fully represent the interests of their child wards at all stages of the abuse and/or neglect proceedings, both in the circuit court and on appeal." ___W.Va. at ___, 504 S.E.2d at 183 n.11. The guardian ad litem totally disregarded this Court's mandate as set forth in Michael M.

Footnote: 7 West Virginia Code § 49-6-5 was amended in 1998, but the amendment does not affect this decision.

Footnote: 8 As this Court has previously held, "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. Pt. 6, In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973).

Footnote: 9 Any disposition must, of course, also comport with West Virginia Code § 49-6-5.

Footnote: 10 Since the Appellant was represented by an attorney when she signed the agreed order, it seems likely that she was informed of her right to a disposition hearing but elected to execute the agreed order and thereby obviate the need for a full blown hearing.

190 W. Va. 533, 438 S.E.2d 876

Supreme Court of Appeals of West Virginia
Georgia BOARMAN, Plaintiff Below, Appellee,
v.
Raymond T. BOARMAN, Defendant Below, Appellant,
Department of Health and Human Resources, Intervenor.
No. 21814
Submitted Oct. 5, 1993
Decided Dec. 15, 1993

SYLLABUS BY THE COURT

1. Rule 34(b) of the West Virginia Rules of Practice and Procedure for Family Law provides that where there have been allegations of abuse or neglect, the family law master or circuit judge may, sua sponte or on motion of either party, order an investigation or home study of one or both of the parties. Further, Rule 34(b) provides that when a family law master of circuit judge finds that a child has been neglected or abused, the family law master or circuit judge shall report the abuse in accordance with the provisions of West Virginia Code § 49-6A-2 (1992 & Supp.1993).

2. When serious allegations of child abuse or neglect are made in a custody case, the family law master and circuit judge should direct the Department of Health and Human Resources to intervene and conduct home studies and the court should make full inquiry into these allegations. Furthermore, where serious allegations of abuse and neglect arise, the protections afforded children under abuse and neglect law should apply.

3. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts." Syl. Pt. 1, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. "In formulating the improvement period and family case plans, courts and social services workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel

involved in assisting the family." Syl. Pt. 4, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

5. "The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

Gilbert Wilkes, III, Martinsburg, for appellee.

Cinda L. Scales, Steven M. Askin, Askin, Burke and Schultz, Martinsburg, for appellant.

Thomas M. Woodward, Deputy Atty. Gen., Charleston, for Department of Health and Human Resources.

WORKMAN, Chief Justice:

This is an appeal by Raymond Lee Boarman from an October 16, 1992, final order of the Circuit Court of Berkeley County granting custody of six of the parties' seven children to the Appellee and former wife of the Appellant, Georgia Boarman. The Appellant contends that the lower court erred in awarding custody to the children's mother and requests this Court to reverse the decision of the lower court. Finding that insufficient evidence has been gathered in this egregious custody matter, we remand this for additional proceedings consistent with this opinion.

I.

While no custody dispute can properly be classified as normal or ordinary, the present case is one of the most troublesome custody matters we have recently encountered. The Appellee filed a divorce complaint on January 29, 1990, in the Circuit Court of Berkeley County, and the Appellant's answer was filed on February 20, 1990. Both parties sought custody of the seven children born of the marriage, namely Raymond Boarman (December 27, 1978), Brix Boarman (October 27, 1980), Betty Boarman (November 4, 1981), Reinhold Boarman (November 15, 1982), Reich Boarman (November 22, 1983), Misty Boarman (November 18, 1986), and Charles Boarman (November 15, 1989).

The parties were granted a divorce on December 7, 1990, and the temporary custody issue was addressed on December 11, 1990. At that hearing, the family law master interviewed the two oldest children, Raymond (age 11) and Brix (age 10), in order to ascertain their custody preferences. The Appellant now complains that the family law master failed to administer any oath to the boys and failed to instruct them as to the importance of telling the truth. The boys informed the family law master that they

desired to live with their mother. They further related incidents involving the father's alleged threats to the children and the father's shooting of cats at a family barbecue. Although Brix admitted that his mother had suggested that he use the term "supervised visitation" during the interview when referring to the type of visitation he desired with his father, the family law master apparently failed to inquire further into possible rehearsal or preparation of the boys for this interview. Based upon this interview with the two children, the family law master granted temporary custody to the mother with visitation to the father.

A final custody hearing was held on August 29, 1991, and the mother was determined to be the primary caretaker. The evidence adduced at this hearing was extensive and included testimony of the parents, babysitters, family members, neighbors, school personnel, and teachers. Witnesses for the father testified that the mother frequently verbally abuses the children, calling them various names. She later admitted to using the term asshole, but denied use of any other degrading language in reference to the children. Mr. and Mrs. Robert Palczynski, neighbors of the mother in New York, testified that the mother verbally abused the children, did not provide adequate clothing for the children in the winter months, and allowed them to catch mice and place them in the microwave until they exploded. The twelve-year-old son of the Palczynskis testified that he had played with the Boarman children and had been threatened by their mother. He had witnessed the placement of the mice in the microwave, and he further testified that the children were permitted to play with knives and sticks and were permitted to watch pornographic films. He had personally witnessed an incident in which the children had observed their mother in bed with a man. See footnote 1

Evidence by the father's witnesses also included allegations that the mother failed to cook properly for the children, failed to clean the living quarters, allowed the children to use profanity, failed to remove feces from the children when changing diapers, drank straight whiskey in the morning hours while caring for the children, and had sexual relations in the presence of the children.

The witnesses for the mother testified that the father conveyed social and political ideas to his children which included the belief that Jews and Negroes should be killed and that Adolph Hitler's political principles were laudable. See footnote 2 Testimony for the mother also included allegations that the father shot at cows in an attempt to change their direction and that he loses his temper easily and threatens to physically harm the children. The father denied shooting at cows but admitted that he had shot at cats because he thought they might have rabies. However, he denied having shot cats which were his children's pets.

Several witnesses for the mother also testified that her habits in her new location in New York were excellent and that she was an outstanding example of a single parent. A

school psychologist from the children's school in New York testified that the mother was very cooperative and responsive to the needs of the children. The mother admitted that she had a drinking problem in the past, but assured the court that it had been corrected. She further admitted that the oldest boy preferred to live with his father.

The family law master then examined the oldest child of the parties. He testified that the mother's house in New York was not nice and that he had previously testified to things that were untrue. He further stated that his mother had paid the children for being good in court, and that his mother would frequently keep him home from school to babysit the other children.

Based upon the testimony at the final custody hearing, the family law master recommended that the mother be awarded custody of the six youngest children and the father be awarded custody of the oldest child. Each party contended that the other party was unfit for custody. On October 16, 1992, the Circuit Court of Berkeley County entered the final custody order, approving the findings of the family law master without further hearing.

II.

Upon appeal to this Court, it appeared that these serious allegations of abuse and neglect had never been examined, and we consequently ordered home studies of both the mother's home in New York and the father's home in West Virginia. A report on the father's home was filed with this Court on September 30, 1993, and a report on the mother's home was filed on October 1, 1993. See footnote 3 The home study conducted on the father's home indicated that the Appellant, age 61, is employed by General Motors. Raymond Boarman, currently in the ninth grade at Hedgesville High School, has been residing with his father since April 1992. The report indicated that the Appellant seemed open and honest and resided in a two-story farm house in a rural area of the county. The home appeared to be in good repair and the housekeeping standards were deemed acceptable. The social service worker concluded that the Appellant seemed to have adequate financial resources, housing, and space to provide for the needs of all seven children. The worker recognized that due to the seriousness of the accusations against the Appellant with regard to his care of the children, the primary concern should be for the emotional well-being of the children. Psychological evaluations were recommended.

The home study performed on the mother's home in New York indicated that the Appellee was very cooperative and appeared open and honest. The Appellee was not working at the time of the study, but she apparently indicated that she hoped to find work within a few weeks. The family is presently living on food stamps and Medicaid assistance. Although the Appellant apparently owes child support, the Appellee indicated that she was not receiving any payments. The social service worker concluded that the Appellee was an extremely well- motivated single parent. Other individuals

interviewed by the worker described the Appellee as very involved with the children, able to effectively deal with problems the children might encounter, nurturing, and caring. The final recommendation was that the children presently in their mother's care remain with her.

On September 30, 1993, prior to its receipt of the home study of the mother's home, the West Virginia Department of Health and Human Resources ("the Department"), as an intervenor party to this action, See footnote 4 recommended that this case be remanded to the family law master for further proceedings, that the Department continue to remain a party to the action, that the children be appointed a guardian ad litem, that a psychological evaluation be performed on both parents and the children, and that the lower court make a finding as to each significant allegation that would impact the welfare of the children. Upon review of this matter, we agree with the Department's conclusions and remand this matter for initiation of orders and proceedings outlined above.

With regard to our request for intervention of the department, we remind the circuit courts and family law masters that Rule 34(b) of the West Virginia Rules of Practice and Procedure for Family Law (effective October 1993) provides that where there have been allegations of abuse or neglect, "the family law master or circuit judge may, sua sponte or on motion of either party, order an investigation or home study of one or both of the parties." Further, Rule 34(b) provides that "[w]hen a family law master or circuit judge finds that a child has been neglected or abused, the family law master or circuit judge shall report the abuse in accordance with the provisions of chapter 49, article 6A, section 2 of the Code of West Virginia."

Where serious allegations of abuse or neglect are made in a child custody case, the family law master and circuit judge should direct the department to intervene and conduct home studies and the court should make full inquiry into these allegations. Furthermore, when serious allegations of abuse or neglect arise, the protections afforded children under abuse and neglect law should apply.

The Appellant's primary assignments of error related to his contention that the Appellee was unfit to gain custody of the children. Obviously, due to our decision to remand, that issue need not be addressed at this juncture. With regard to his contention that the lower court erred by examining the two older children in camera during the temporary custody hearing without administering an oath, we find no merit to the position of the Appellant. First, the Appellant would have great difficulty convincing this Court that any irregularity in the administration of oaths or the lack of oaths at the temporary hearing prejudiced his rights in any manner. Moreover, the family law master's decision to grant temporary custody to the mother, while based in large part on the testimony of which the Appellant now complains, was not even the final decision regarding custody. Under

these circumstances, we find no error in the failure of the family law master to administer an oath to the children.

We remain deeply concerned that something here is awry. We cannot abandon the question of these children's well-being without further inquiry into this situation. We have previously recognized the following:

> Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts.

Syl. Pt. 1, In re Carlita B., 185 W.Va. 613, 615, 408 S.E.2d 365, 367 (1991). In syllabus point 4 of Carlita, we explained the following:

> In formulating the improvement period and family case plans, courts and social services workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Id. at 616, 408 S.E.2d at 368.

Finally, in syllabus point 5 of Carlita, we stated:

> The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

Id.

This matter will be remanded for further proceedings consistent with the recommendations of the Department, with the assistance of the Department continuing

until resolution of this matter is accomplished. Furthermore, we direct the Department to expedite this case which has already languished too long in the judicial and social service systems to the detriment of the children involved. See footnote 5 Similarly, we instruct the circuit court that these allegations of neglect and abuse must be examined and resolved. On remand, the circuit court should appoint a guardian ad litem for the children and develop an expeditious schedule for ensuing proceedings. At the conclusion of the proceedings, which should be no more than six months, the circuit court shall file its findings of fact and conclusions of law with this Court, and we will undertake further consideration of this appeal at that time.

Remanded for further proceedings.

Footnote: 1 It should be noted that Georgia Boarman alleged that her former husband had paid the Palczynskis for their negative testimony against her. When questioned regarding that allegation, Mr. Boarman explained that he had provided them with travel money to drive from New York to Martinsburg, West Virginia, but had not otherwise compensated them for their testimony.

Footnote: 2 The father later explained that he thought Adolph Hitler had some good ideas and some bad ones and explained that Hitler's ideas were good from a military standpoint.

Footnote: 3 Amazingly, both the home study conducted by the West Virginia Department of Health and Human Resources on the father in Martinsburg and the study conducted by the Broome County Department of Social Services on the mother in New York characterize these parents in almost glowing terms.

Footnote: 4 We note that the West Virginia Department of Health and Human Resources was directed by this Court to intervene in this matter.

Footnote: 5 We note that on oral argument of this matter, counsel for the Department appeared less than adequately briefed on the status of this case. While it may be unfair to blame the particular lawyer involved, who maintained that the file had been handed to her only a few days before the hearing, we cannot tolerate such a dilatory effort on the part of the Department as a whole. We reemphasize to the Department that they must meet their responsibilities in such matters in a thorough and expeditious manner.

190 W. Va. 533, 438 S.E.2d 876

Supreme Court of Appeals of West Virginia
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The parties were granted a divorce on December 7, 1990, and the temporary custody issue was addressed on December 11, 1990. At that hearing, the family law master interviewed the two oldest children, Raymond (age 11) and Brix (age 10), in order to ascertain their custody preferences. The Appellant now complains that the family law master failed to administer any oath to the boys and failed to instruct them as to the importance of telling the truth. The boys informed the family law master that they

desired to live with their mother. They further related incidents involving the father's alleged threats to the children and the father's shooting of cats at a family barbecue. Although Brix admitted that his mother had suggested that he use the term "supervised visitation" during the interview when referring to the type of visitation he desired with his father, the family law master apparently failed to inquire further into possible rehearsal or preparation of the boys for this interview. Based upon this interview with the two children, the family law master granted temporary custody to the mother with visitation to the father.

A final custody hearing was held on August 29, 1991, and the mother was determined to be the primary caretaker. The evidence adduced at this hearing was extensive and included testimony of the parents, babysitters, family members, neighbors, school personnel, and teachers. Witnesses for the father testified that the mother frequently verbally abuses the children, calling them various names. She later admitted to using the term asshole, but denied use of any other degrading language in reference to the children. Mr. and Mrs. Robert Palczynski, neighbors of the mother in New York, testified that the mother verbally abused the children, did not provide adequate clothing for the children in the winter months, and allowed them to catch mice and place them in the microwave until they exploded. The twelve-year-old son of the Palczynskis testified that he had played with the Boarman children and had been threatened by their mother. He had witnessed the placement of the mice in the microwave, and he further testified that the children were permitted to play with knives and sticks and were permitted to watch pornographic films. He had personally witnessed an incident in which the children had observed their mother in bed with a man. See footnote 1

Evidence by the father's witnesses also included allegations that the mother failed to cook properly for the children, failed to clean the living quarters, allowed the children to use profanity, failed to remove feces from the children when changing diapers, drank straight whiskey in the morning hours while caring for the children, and had sexual relations in the presence of the children.

The witnesses for the mother testified that the father conveyed social and political ideas to his children which included the belief that Jews and Negroes should be killed and that Adolph Hitler's political principles were laudable. See footnote 2 Testimony for the mother also included allegations that the father shot at cows in an attempt to change their direction and that he loses his temper easily and threatens to physically harm the children. The father denied shooting at cows but admitted that he had shot at cats because he thought they might have rabies. However, he denied having shot cats which were his children's pets.

Several witnesses for the mother also testified that her habits in her new location in New York were excellent and that she was an outstanding example of a single parent. A

school psychologist from the children's school in New York testified that the mother was very cooperative and responsive to the needs of the children. The mother admitted that she had a drinking problem in the past, but assured the court that it had been corrected. She further admitted that the oldest boy preferred to live with his father.

The family law master then examined the oldest child of the parties. He testified that the mother's house in New York was not nice and that he had previously testified to things that were untrue. He further stated that his mother had paid the children for being good in court, and that his mother would frequently keep him home from school to babysit the other children.

Based upon the testimony at the final custody hearing, the family law master recommended that the mother be awarded custody of the six youngest children and the father be awarded custody of the oldest child. Each party contended that the other party was unfit for custody. On October 16, 1992, the Circuit Court of Berkeley County entered the final custody order, approving the findings of the family law master without further hearing.

II.

Upon appeal to this Court, it appeared that these serious allegations of abuse and neglect had never been examined, and we consequently ordered home studies of both the mother's home in New York and the father's home in West Virginia. A report on the father's home was filed with this Court on September 30, 1993, and a report on the mother's home was filed on October 1, 1993. See footnote 3 The home study conducted on the father's home indicated that the Appellant, age 61, is employed by General Motors. Raymond Boarman, currently in the ninth grade at Hedgesville High School, has been residing with his father since April 1992. The report indicated that the Appellant seemed open and honest and resided in a two-story farm house in a rural area of the county. The home appeared to be in good repair and the housekeeping standards were deemed acceptable. The social service worker concluded that the Appellant seemed to have adequate financial resources, housing, and space to provide for the needs of all seven children. The worker recognized that due to the seriousness of the accusations against the Appellant with regard to his care of the children, the primary concern should be for the emotional well-being of the children. Psychological evaluations were recommended.

The home study performed on the mother's home in New York indicated that the Appellee was very cooperative and appeared open and honest. The Appellee was not working at the time of the study, but she apparently indicated that she hoped to find work within a few weeks. The family is presently living on food stamps and Medicaid assistance. Although the Appellant apparently owes child support, the Appellee indicated that she was not receiving any payments. The social service worker concluded that the Appellee was an extremely well- motivated single parent. Other individuals

interviewed by the worker described the Appellee as very involved with the children, able to effectively deal with problems the children might encounter, nurturing, and caring. The final recommendation was that the children presently in their mother's care remain with her.

On September 30, 1993, prior to its receipt of the home study of the mother's home, the West Virginia Department of Health and Human Resources ("the Department"), as an intervenor party to this action, See footnote 4 recommended that this case be remanded to the family law master for further proceedings, that the Department continue to remain a party to the action, that the children be appointed a guardian ad litem, that a psychological evaluation be performed on both parents and the children, and that the lower court make a finding as to each significant allegation that would impact the welfare of the children. Upon review of this matter, we agree with the Department's conclusions and remand this matter for initiation of orders and proceedings outlined above.

With regard to our request for intervention of the department, we remind the circuit courts and family law masters that Rule 34(b) of the West Virginia Rules of Practice and Procedure for Family Law (effective October 1993) provides that where there have been allegations of abuse or neglect, "the family law master or circuit judge may, sua sponte or on motion of either party, order an investigation or home study of one or both of the parties." Further, Rule 34(b) provides that "[w]hen a family law master or circuit judge finds that a child has been neglected or abused, the family law master or circuit judge shall report the abuse in accordance with the provisions of chapter 49, article 6A, section 2 of the Code of West Virginia."

Where serious allegations of abuse or neglect are made in a child custody case, the family law master and circuit judge should direct the department to intervene and conduct home studies and the court should make full inquiry into these allegations. Furthermore, when serious allegations of abuse or neglect arise, the protections afforded children under abuse and neglect law should apply.

The Appellant's primary assignments of error related to his contention that the Appellee was unfit to gain custody of the children. Obviously, due to our decision to remand, that issue need not be addressed at this juncture. With regard to his contention that the lower court erred by examining the two older children in camera during the temporary custody hearing without administering an oath, we find no merit to the position of the Appellant. First, the Appellant would have great difficulty convincing this Court that any irregularity in the administration of oaths or the lack of oaths at the temporary hearing prejudiced his rights in any manner. Moreover, the family law master's decision to grant temporary custody to the mother, while based in large part on the testimony of which the Appellant now complains, was not even the final decision regarding custody. Under

these circumstances, we find no error in the failure of the family law master to administer an oath to the children.

We remain deeply concerned that something here is awry. We cannot abandon the question of these children's well-being without further inquiry into this situation. We have previously recognized the following:

> Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts.

Syl. Pt. 1, In re Carlita B., 185 W.Va. 613, 615, 408 S.E.2d 365, 367 (1991). In syllabus point 4 of Carlita, we explained the following:

> In formulating the improvement period and family case plans, courts and social services workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Id. at 616, 408 S.E.2d at 368.

Finally, in syllabus point 5 of Carlita, we stated:

> The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

Id.

This matter will be remanded for further proceedings consistent with the recommendations of the Department, with the assistance of the Department continuing

until resolution of this matter is accomplished. Furthermore, we direct the Department to expedite this case which has already languished too long in the judicial and social service systems to the detriment of the children involved. See footnote 5 Similarly, we instruct the circuit court that these allegations of neglect and abuse must be examined and resolved. On remand, the circuit court should appoint a guardian ad litem for the children and develop an expeditious schedule for ensuing proceedings. At the conclusion of the proceedings, which should be no more than six months, the circuit court shall file its findings of fact and conclusions of law with this Court, and we will undertake further consideration of this appeal at that time.

Remanded for further proceedings.

Footnote: 1 It should be noted that Georgia Boarman alleged that her former husband had paid the Palczynskis for their negative testimony against her. When questioned regarding that allegation, Mr. Boarman explained that he had provided them with travel money to drive from New York to Martinsburg, West Virginia, but had not otherwise compensated them for their testimony.

Footnote: 2 The father later explained that he thought Adolph Hitler had some good ideas and some bad ones and explained that Hitler's ideas were good from a military standpoint.

Footnote: 3 Amazingly, both the home study conducted by the West Virginia Department of Health and Human Resources on the father in Martinsburg and the study conducted by the Broome County Department of Social Services on the mother in New York characterize these parents in almost glowing terms.

Footnote: 4 We note that the West Virginia Department of Health and Human Resources was directed by this Court to intervene in this matter.

Footnote: 5 We note that on oral argument of this matter, counsel for the Department appeared less than adequately briefed on the status of this case. While it may be unfair to blame the particular lawyer involved, who maintained that the file had been handed to her only a few days before the hearing, we cannot tolerate such a dilatory effort on the part of the Department as a whole. We reemphasize to the Department that they must meet their responsibilities in such matters in a thorough and expeditious manner.

218 W. Va. 689, 629 S.E.2d 748

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32771

IN RE: BOBBY LEE B.

Appeal from the Circuit Court of Randolph County
Hon. John L. Henning, Judge
Case No. 04-JD-26

REVERSED

Submitted: January 11, 2006
Filed: February 21, 2006

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The Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Per Curiam:

Appellant, State of West Virginia Department of Health and Human Services ("the DHHR"), appeals from an order entered by the Circuit Court of Randolph County requiring the DHHR to pay Thomas R. Adamski, M.D. the sum of $1,000.00 for a four-hour sexual offender evaluation of Bobby Lee B., a juvenile delinquent. For the reasons set forth below, we reverse the circuit court's order.

I.

On April 19, 2004, a juvenile petition was filed charging Bobby Lee B., a fourteen-year-old child, with being a juvenile delinquent for having committed the offense of sexual abuse in the first degree under *W.Va. Code*, 61-8B-7. The alleged victim was five years old and was in the care of Bobby Lee B.'s mother's at the time of the abuse.

On May 5, 2004, the case was scheduled for a preliminary hearing. Bobby Lee B. waived his preliminary hearing and entered an "*Alford*"-style plea. The court accepted the plea and adjudicated Bobby Lee B. a delinquent for "sexual abuse in the first degree."[1] Upon agreement of the parties, the court ordered that Bobby Lee B. undergo a sixty-day diagnostic evaluation at the Industrial Home for Youth. The court further ordered "that Dr. Thomas Adamski perform an appropriate sexual offender evaluation of the juvenile and that

[1]By Order dated the 19th day of July, 2004, the circuit court found that the record should be corrected to reflect that the plea was to sexual abuse in the third degree.

the Department of Health and Human [Resources] shall pay for services not covered by insurance, at Medicaid rates."

On August 2, 2004, a status/disposition hearing was conducted and the court ordered that Bobby Lee B. be placed at Boys Village, Inc., in Wooster, Ohio.

On September 2, 2004, the court entered an order requiring the DHHR to pay Dr. Thomas R. Adamski, M.D. the sum of $1,000.00 for services performed in the case.[2]

On October 7, 2004, the DHHR filed a motion to vacate the payment order. The DHHR in its motion prayed that the court find that payment at the Medicaid rate would be proper. The DHHR claimed in its motion that it had paid Dr. Adamski the sum of $214.89, which represented payment at the Medicaid rate.

On November 8, 2004, the court conducted a hearing on the DHHR motion. After considering argument of counsel, the court denied the DHHR motion.[3] It is from this

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[2]Dr. Adamski's statement for services was for: "4.0 Hours of Professional Time @ $250.00 per hour = $1000.00."

[3]In the order denying DHHR's motion, the court made the following findings:

> 1. That the juvenile, Bobby Lee [B.], is now fifteen (15) years of age, and that he was fourteen (14) years of age at the time that he committed the offense for which he was adjudicated delinquent herein, that being sexual assault of a five (5) year old child;
>
> 2. That sexual assault of any individual at any age is a very serious matter; however, the Court believes that sexual assault of a child is even more serious;
>
> 3. That because of his conduct and the offense that he committed, which would have been a crime if he were an adult, the juvenile had been in detention since approximately April of this year, or at least for a number of months;

(continued...)

November 8 order that DHHR appeals.

II.

[3](...continued)

> 4. That the juvenile is presently in a treatment facility in Ohio which costs roughly $3000.00 per month and he is expected to be there for at least a year which will result in a cost per annum roughly of $40,000;
>
> 5. That Dr. Adamski regularly does work for this Court, which is not only accepted by the Court and respected, but also accepted by most if not all members of the bar that practice before this Court;
>
> 6. That not only does Dr. Adamski do a thorough and excellent evaluation, he also does it promptly which is important to the Court and the parties;
>
> 7. That a psychological or psychiatric evaluation is of huge significance to the Court in deciding what to do with this youth, when in essence the Court is making a $40,000 decision to try and treat this youth so that he does not sexually assault another child;
>
> 8. That the State [Department] has suggested that the statute [§ 49-7-33] only permits the payment of $214.00 for the evaluation completed by Dr. Adamski, that being the applicable medicaid rate;
>
> 9. That the Court believes, however, that you generally get what you pay for, and that the Court would be very reluctant to make a $40,000 per annum decision which perhaps involves the sexual assault of young children on a $214.00 evaluation;
>
> 10. That the Court rather believes that it can make the best decision based upon a thorough evaluation report which the Court has received in this matter, and the Court does not believe that it can obtain a thorough and prompt evaluation at the amount represented by the Department; and,
>
> 11. That the Court believes it has inherent power to take such action as it deems appropriate to have this juvenile evaluated and perhaps prevent the sexual assault of young children.

In Syllabus Point 1 of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) we held "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." In Syllabus Point 1 of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996) we also recognized that questions of law are subject to a *de novo* standard of review. We find that the matter at bar is a question of interpretation and application of *W.Va. Code*, 49-7-33, and thus we apply a *de novo* standard of review.

W.Va. Code, 49-7-33 states as follows:

> **§49-7-33. Payment of services.**
> At any time during any proceedings brought pursuant to articles five and six of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia department of health and human resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every such psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the West Virginia department of health and human resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia department of health and human resources.

When interpreting statutes we have held:

> When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. Syllabus Point 5 of *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

From our examination of *W.Va. Code*, 49-7-33, we find that the language therein relating to payment for professional services in both abuse and neglect cases and delinquency cases is governed by these *Code* provisions. We further find that the following provision is clear and unambiguous and that the legislative intent is clear:

> The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate.

W.Va. Code, 49-7-33 (2002), in part.

The payment of expert witnesses in abuse and neglect and delinquency cases has been discussed by this Court in two prior cases, namely *Hewitt v. State Dept. of Health and Human Resources*, 212 W.Va. 698, 575 S.E.2d 308 (2002) ("*Hewitt I*") and *State ex rel. Artimez v. Recht*, 216 W.Va. 709, 613 S.E.2d 76 (2005) (Per Curiam) ("*Hewitt II*").

In *Hewitt I*, 212 W.Va. at 703, 575 S.E.2d at 313, the Court did not apply the provision of *W.Va. Code*, 49-7-33, because the payment issues in that case predated the effective date of the statute.[4] In *Hewitt I*, the Court observed in footnote 10, however, as follows:

[4]The provisions of *W.Va. Code*, 49-7-33 went into effect on June 7, 2002.

> The provisions of West Virginia Code § 49-7-33 do not limit the fees charged by expert witnesses where such witnesses are retained privately. Those statutory provisions only operate as a restriction on the amount that can be charged when DHHR is ordered by the trial court to pay for health care services in connection with matters arising under articles five and six of chapter 49.[5]

In *Hewitt II*, 216 W.Va. at 711-712, 613 S.E.2d at 78-79, we further discussed *Hewitt I* and the application of *W.Va. Code*, 49-7-33 and stated as follows:

> This Court held that the DHHR was liable for the payment orders in abuse and neglect cases and that it was required to pay for the services at the rate established by the trial court, unless the order under consideration was entered after June 7, 2002, the effective date of West Virginia Code § 49-7-33 (2002) (Repl. Vol. 2004). [FN1] That statute provides that the DHHR "shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate." West Virginia Code § 49-7-33. Consequently, the *Hewitt I* Court concluded the abuse and neglect fee issue by upholding the fees in underlying payment orders entered before June 7, 2002, and explaining that the payment orders entered after June 7, 2002, were subject to the statute's provisions regarding the Medicaid rate. [FN2] 212 W.Va. at 703, 575 S.E.2d at 313

In the instant case the payment order is for professional services performed in a juvenile delinquency proceeding as opposed to an abuse and neglect proceeding. As observed in *Hewitt I* and *Hewitt II*, the payment restrictions apply equally to abuse and neglect cases as they do in delinquency cases. Therefore, the payment order in this case requires the application of *W.Va. Code*, 49-7-33.

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[5]Article five relates to "Juvenile Proceedings" and article six relates to "Procedure in Cases of Child Neglect and Abuse."

Consistent with the discussion in *Hewitt I* and *Hewitt II* and the clear and unambiguous language of *W.Va. Code*, 49-7-33, we conclude that the services provided by Dr. Thomas R. Adamski are payable at the Medicaid rate. We make no determination, however, as to whether or not the amount asserted by the DHHR as the proper amount to be paid to Dr. Adamski, to-wit: $214.89, is a correct application of the Medicaid rate in this case.[6]

III.

Based upon the forgoing, we reverse the Circuit Court of Randolph County.

Reversed.

[6]If there is a difficulty in obtaining specialized court services because of the application of Medicaid rates, *W.Va. Code*, 49-7-33 clearly provides the opportunity for the DHHR to address the problem by adopting rates other than the Medicaid rates.

178 W.Va. 179, 358 S.E.2d 438

Supreme Court of Appeals of West Virginia.

WEST VA. DEPARTMENT OF HUMAN SERVICES, et al.

v.

Janet Sue BOLEY and the Fayette County Board of Education.

No. 17032.

June 5, 1987.

SYLLABUS BY THE COURT

The provisions of W.Va.Code, 49-6-1, et seq., relating to child abuse and neglect, are not applicable to remove or discipline a teacher who is alleged to have abused students. Such removal or disciplinary procedures should be accomplished under the provisions of W.Va.Code, 18A-2-8 (1985), our teacher disciplinary statute.

Charles G. Brown, Atty. Gen., Mary Beth Kershner, Asst. Atty. Gen., Janet L. Todd, Daniel F. Hedges, Charleston, for appellant.

Gordon E. Billheimer, Jr., Billheimer & Billheimer, Montgomery, WVEA, Charleston, for Janet Boley.

Elton Byron, Beckley, for Fayette Co. Bd. of Ed.

MILLER, Justice.

In this case, we are asked to determine if the circuit court was correct in holding that a public school teacher was not subject to the provisions of W.Va.Code, 49-6-1, et seq., our child neglect and abuse statute, for alleged abuse of children in her classroom. We affirm the circuit court's holding.

Initially, we observe that there is no express language in this statute that places teachers within the purview of the statute. The petitioners argue that because the statute utilizes the term "custodian" in several places See footnote 1 and the term "custodian" is generally defined in W.Va.Code, 49-1-5(5), as a "person who has or shares actual physical custody of a child," See footnote 2 then a teacher should be deemed a custodian under the statute.

The only case that we have found dealing with the question is Pennsylvania State Education Ass'n v. Commonwealth of Pennsylvania, Department of Public Welfare, 68 Pa.Cmwlth. 279, 449 A.2d 89 (1982), in which an educational association and a public school teacher sought a declaratory judgment to determine if teachers were subject to the

provisions of the Child Protective Services Law (CPSL). The court concluded they were not.

The Pennsylvania CPSL utilized the phrase "by a person responsible for the child's welfare" and the claim was made, as here, that this implicated a teacher. However, the court, 449 A.2d at 92, rejected this as giving any indication that the legislature intended to draw teachers within the ambit of the statute:

> "We believe we may safely assume that the legislature was well aware of the legislation already 'on the books' which would protect children from abuse by school employees and, by enacting the CPSL did not intend to duplicate those provisions, but rather, intended to fill a gap in an area where no prior legislative protection had been provided."

Moreover, we have substantial doubt that a teacher is a "custodian" under our child neglect and abuse statute, W.Va.Code, 49-6-1(b). This term is defined in W.Va.Code, 49-1-5(5). See footnote 3 In Bowens v. Maynard, 174 W.Va. 184, 186, 324 S.E.2d 145, 147 (1984), we spoke to the custodian question under the statute and stated: "A custodian, freely chosen by the children's parents, may not be deprived of her custody rights by the Department of Human Services arbitrarily."

A teacher's custody of children does not derive from any voluntary act on the part of the parents, but arises from our compulsory school attendance law, W.Va.Code, 18-8-1, which, in relevant part, provides: "Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday."

The petitioners also rely on W.Va.Code, 18A-5-1, which provides that a "teacher shall stand in the place of the parent or guardian in exercising authority over the school, and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes." They contend that this language demonstrates that the legislature intended to bring teachers within the child abuse and neglect statute.

We do not agree for several reasons. This statute was enacted in 1919, See footnote 4 long before the first enactment of the child neglect and abuse statute in 1941. See footnote 5 As we pointed out in Smith v. West Virginia State Board of Education, 170 W.Va. 593, 597, 295 S.E.2d 680, 685 (1982), this Code provision embodies the in loco parentis doctrine which "originated in the English common law and recognizes that a parent delegates part of his parental authority while the child is in their custody." We also noted in Smith that one of the reasons for the doctrine was to enable the school authorities to discipline school children. Thus, the statute which incorporated the in loco parentis doctrine is unrelated to and perhaps inconsistent with the concepts underlying

our child neglect and abuse statute. See footnote 6 Furthermore, as the court in Pennsylvania State Education Ass'n, 449 A.2d at 92, points out in regard to its similar statute:

> "It is our opinion that the statutory provision invests authority in public school teachers; it does not impose a duty upon them. It has been held that Section 1317 of the Code was 'never intended' to invest in teachers all the authority of parents over their children but rather only such authority as is necessary to maintain discipline in the schools. Axtell v. LaPenna, 323 F.Supp. 1077 (W.D.Pa.1971)." (Emphasis in original).

The Pennsylvania court also reviewed the provisions of the CPSL and concluded that its emphasis was on the parents and the family environment of the child and, therefore, could not be deemed to include the temporary daily custody of teachers. Our child neglect and abuse statute has much the same focus, particularly as it is supplemented by W.Va.Code, 49-6D-1, et seq. Furthermore, as our cases indicate, our child neglect and abuse procedures involve the removal of the child from its family environment when remedial measures are unavailing. E.g., State ex rel. W.Va.Dept. of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987); In Re Darla B., 175 W.Va.137, 331 S.E.2d 868 (1985); State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983); State v. Scritchfield, 175 W.Va. 58, 280 S.E.2d 315 (1981).

There is nothing within our child neglect and abuse statute that authorizes the removal of the parent from the child. Furthermore, it is impossible to correlate the procedural mechanism in the statute to a teacher-child relationship. Our child neglect and abuse statute has as a primary policy to keep the child with the family under counseling and to remove the child only when it is necessary. See footnote 7 To impose the statutory removal procedures for children in a school setting as the petitioners urge by removing the teacher would require this Court to rewrite the statute. Procedural due process would have to be afforded the involved teacher when any removal is sought. See North v. Board of Regents, 160 W.Va. 248, 233 S.E.2d 411 (1977). The present statutory proceedings for child neglect and abuse would have to be redesigned to afford such protection. This task is obviously more suited to the legislature.

We were confronted with a somewhat related fact pattern in Mullins v. Kiser, 175 W.Va. 56, 331 S.E.2d 494 (1985), where a school teacher was alleged to have participated in the abuse of a student. In that suit, the teacher's removal was sought under W.Va.Code, 6-6-7 (1979), which relates to the removal of public officials. We held that this procedure was unavailing because the teacher was not a public official and that W.Va.Code, 18A-2-8, dealing with the removal of teachers, was applicable.

Among the arguments advanced in Mullins was one that underlies the petitioners' concerns in this case, i.e., that if a board of education does not act to discipline or remove a teacher, a citizen is without remedy. In Mullins, 175 W.Va. at ---, 331 S.E.2d at 496, we explained that this was not the case:

> "[A] public school employee may be dismissed on a complaint initiated by a citizen outside the school system. Mason Cty. Bd. of Educ. v. State Supt. of Schools, [165] W.Va. [732], 274 S.E.2d 435, 439 (1981). A school board has a duty to consider and act on such citizens' complaints, and may be compelled to do so by appropriate legal action if its inaction is arbitrary. See, e.g., State ex rel. Withers v. Board of Educ., 153 W.Va. 867, 879-81, 172 S.E.2d 796, 802-04 (1970)."

Moreover, as Pennsylvania State Education Ass'n points out, in addition to removal under teacher disciplinary statutes, it is possible for a teacher to be sued civilly or charged criminally for child abuse. We acknowledged the availability of these remedies in Smith v. West Virginia State Bd. of Education, supra.

Finally, we decline to create a removal right against teachers under the child neglect and abuse statute when there is a specific removal provision available under W.Va.Code, 18A-2-8, which covers this situation. See footnote 8 To do so would run counter to our traditional rule of statutory construction that a specific statute will take precedence over a general statute dealing with the same subject matter. E.g., Manchin v. Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984); State ex rel. Simpkins v. Harvey, 172 W.Va. 312, 305 S.E.2d 268 (1983); State ex rel. Sahley v. Thompson, 151 W.Va. 336, 151 S.E.2d 870 (1966).

For the foregoing reasons, we conclude that the provisions of W.Va.Code, 49-6-1, et seq., relating to child abuse and neglect, are not applicable to remove or discipline a teacher who is alleged to have abused students. Such removal or disciplinary procedures should be accomplished under the provisions of W.Va.Code, 18A-2-8 (1985), our teacher disciplinary statute. Therefore, the ruling of the circuit court is affirmed.

Affirmed.

Footnote: 1 W.Va.Code, 49-6-1(b), requires the child neglect petition to be "served upon both parents and any other custodian." The word "custodian" is also used in W.Va.Code, 49-6-2, which sets out the right to counsel and the hearing procedures.

Footnote: 2 The full text of W.Va.Code, 49-1-5(5), is: " 'Custodian' means a person who has or shares actual physical possession or care and custody of a child, regardless of

whether such person has been granted custody of the child by any contract, agreement or legal proceedings."

Footnote: 3 See note 2, supra, for the text of W.Va.Code, 49-1-5(5).

Footnote: 41919 W.Va.Acts ch. 2, § 87.

Footnote: 5 1941 W.Va.Acts ch. 73.

Footnote: 6 In Smith, we curtailed the right of teachers to administer corporal punishment by prohibiting the use of a "paddle, whip, stick or other mechanical devices." 170 W.Va. at 599, 295 S.E.2d at 687. In 1983, the legislature amended W.Va.Code, 18A-5-1, to permit the use of a paddle. This reinforces our conclusion that the legislature did not envision that this section would be construed to include school personnel under our child neglect and abuse statute.

Footnote: 7 The petitioners do not argue and we do not address whether the child may be removed from the classroom upon allegations of child abuse by a teacher.

Footnote: 8 W.Va.Code, 18A-2-8 (1985), provides:
"Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine [§ 18-29-1 et seq.], chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended." While this statute was amended in 1985, its basic grounds for removal have been longstanding.

174 W. Va. 184, 324 S.E.2d 145

Supreme Court of Appeals of West Virginia

Sylvia Mae BOWENS

v.

Honorable Elliot E. MAYNARD.

Sylvia Mae BOWENS

v.

John E. BURDETTE, II.

Nos. 16519, 16520.

Dec. 18, 1984.

SYLLABUS BY THE COURT

1. If a party has lawful physical custody of a child, she has the right to service of process and to be heard in any proceeding that concerns the child.

2. If a party having lawful physical custody of a child is not served with process of a proceeding concerning that child she has the right to intervene in that proceeding.

Paul R. Sheridan, Logan, for appellant.

Susan Shelton Perry, Perry & Perry, Logan, for children.

Mary Beth Kershner, Asst. Atty. Gen., Charleston, for appellee.

NEELY, Justice:

The petitioner in these two consolidated cases requests a writ of habeas corpus to show why she should not regain the custody of five children who were entrusted into her care. She also asks that a writ of prohibition be issued to restrain the circuit court from further proceedings regarding the children until a final order in habeas corpus is issued or, in the alternative, to prohibit the circuit court from continuing without first granting intervention to the petitioner. Because the petitioner had lawful physical custody of the children we hold that she had the right, as custodian, to be served with process and to be heard in any proceeding that involved the children. This Court denies the writ of habeas corpus but awards the writ of prohibition as moulded to prohibit the circuit court from entering any order concerning the children until the petitioner is allowed to intervene.

I

The petitioner, Miss Sylvia Mae Bowens, is a twenty-nine-year-old nurse's aid and private caretaker who currently lives with her parents in Logan County. For eight months before June 1984, Miss Bowens lived in the Adkins' home in Mingo County and cared

for Mr. and Mrs. Adkins' five children. During this time it appears that Miss Bowens and the children developed strong emotional bonds. The Adkins children, whose ages range from four to nine years, were placed in the custody of the petitioner by written agreement of Mrs. Adkins on 25 April 1984 and with the apparent acquiescence of Mr. Adkins. On 9 June 1984, Miss Bowens took the Adkins children to her parents' home and stated her intention to adopt the children after the statutory six month period under W.Va.Code 48-4-9(a) [1984] had elapsed.

On 3 August 1984 Mr. and Mrs. Adkins were divorced. Although the Adkins children were not residing with either parent the court awarded the father permanent custody. Thereafter, Mr. Adkins went to Miss Bowen's residence but was repulsed in his attempts to regain the custody of his children. Because Miss Bowens feared that the father would return and that the children would be abused by Mr. Adkins, she contacted the Department of Human Services.

Miss Bowens' apprehension regarding Mr. Adkins was well-founded. The record discloses that the Department of Human Services had first investigated allegations that the Adkins children were abused in 1980. A child psychiatrist stated that "these are the most emotionally disturbed children she has ever encountered" and added that "all five children have been severely abused physically and sexually by their parents." See footnote 1

After Mr. Adkins attempted, unsuccessfully, to regain the children's custody, the Department of Human Services filed a petition alleging abuse. Pursuant to this petition, a hearing was held for the Adkins children on 10 August 1984. Mr. and Mrs. Adkins, their appointed counsel, members of the Department of Human Services, an assistant prosecuting attorney for the Department of Human Services, and an appointed counsel for the children were all present. Miss Bowens attended the hearing too, but was not served with notice and was not permitted in chambers during the hearing--all contrary to the procedural statutory rights of a lawful custodian.

After the hearing, the circuit court placed the children in the custody of the Department of Human Services. The order acknowledges that Mr. and Mrs. Adkins did not, at that time, have custody of their children yet, inexplicably, did not consider allowing the children to remain with Miss Bowens although, by all indications, the children were adequately cared for there. As a result of this order the children were scattered among five foster homes. According to medical reports in the record, the children have not adjusted well to their dispersal and are extremely depressed. Two of the Adkins children were placed in hospital because they exhibited suicidal tendencies. Initially Miss Bowens visited the children, but was later told she could not continue to do so.

On 27 September 1984, Miss Bowen attempted to intervene in the ongoing abuse proceedings against Mr. and Mrs. Adkins. Although the parent's counsel had no objection to Miss Bowen's intervention, her inclusion in the proceedings was denied.

II

W.Va.Code 49-1-5(5) [1981] defines a custodian as "a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceedings." Miss Bowens was entrusted, at least implicitly by both parents, with the custody of their children. As the custodian Miss Bowens had a right to participation in the subsequent abuse proceedings. W.Va.Code 49-6-1(b) [1977] states that in a child neglect or abuse case, "[t]he petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodians at least ten days notice, ..." [Emphasis added.]

In addition a custodian, like a parent, has a statutory right to be represented in any abuse or neglect proceeding and a "meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W.Va.Code 49-6-2(a) & (c) [1984]. None of these clearly delineated procedural rights was accorded to our petitioner.

Child neglect and abuse procedures that include the custodian of the children in all the proceedings are calculated to achieve a valuable social goal. Their motivating factor is the often stated standard of the "best interests of the child." As this Court stated in Syllabus Point 2 of Lipscomb v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 (1948): "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided."

A custodian, freely chosen by the children's parents, may not be deprived of her custody rights by the Department of Human Services arbitrarily. The Department must have good cause before proceeding against the custodian and then afford her a reasonable opportunity to rebut charges that her custody is wanting. See Syllabus Point 1, State v. Scritchfield, W.Va., 280 S.E.2d 315 (1981). In this case, the court had before it allegations of child abuse by the natural parents who, however, no longer had custody of their children. For some unexplained reason, the court refused to allow the children's custodian to intervene in the proceedings and, instead, passed her by entirely. It may, indeed, ultimately appear that there is such a unity of interest between the appointed custodian and the abusing parents that custody is better placed in the Department. Nonetheless, custody determinations, to the maximum extent possible, should be custom crafted in each case with due attention to the welfare of the children.

The best interests of the child standard insists that the custodian be included in proceedings involving her wards. Indeed, if a party has legitimate physical custody of children, that party has the right to be served with process and to be heard in any proceedings dealing with those children. If the custodian is not served with process, she has the right to intervene in the proceedings.

The writ of prohibition prayed for is granted. The writ of habeas corpus, however, is denied because renewed dislocation of the children may be inimical to their best interests at this time and because the circuit court, with the intervention of Miss Bowen, can best decide the proper custody for the Adkins' children.

Case No. 16519 Writ Awarded as Moulded

Case No. 16520 Writ Denied.

Footnote: 1 A complaint that Miss Bowens whipped the Adkins children "constantly" was similarly examined by a social worker who, however, reported that Miss Bowens resorted to corporal punishment to control the children's disruptive behavior. The social worker also noted that "the children were extremely attached to Ms. Bowen and she to them"

209 W. Va. 752, 551 S.E.2d 674

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2001 Term

FILED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29288

RELEASED
July 6, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
BRANDON L. AND CAROL JO L.,
Petitioners,

v.

HONORABLE ALAN D. MOATS,
JUDGE OF THE CIRCUIT COURT OF BARBOUR COUNTY,
AND LINDA K. S. AND RICHARD S.,
Respondents

PETITION FOR WRIT OF PROHIBITION

WRIT DENIED

Submitted: June 5, 2001
Filed: July 6, 2001

Scott A. Curnutte
Elkins, West Virginia
Attorney for the Petitioners

David W. Hart
Elkins, West Virginia
Attorney for the Respondents,
Linda K. S. and Richard S.

Chaelyn W. Casteel

Clagett & Gorey
Phillipi, West Virginia
Guardian Ad Litem for
Alexander L.

JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984).

3. The West Virginia Grandparent Visitation Act, West Virginia Code §§ 48-2B-1 to -12 (1998) (Repl.Vol. 1999), by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control over his/her child[ren] without undue interference from the state.

Albright, Justice:

Petitioners Brandon L. and Carol Jo. L.,[1] the adoptive stepfather and the natural mother of Alexander David L., a minor child, seek a writ of prohibition to prevent enforcement of the September 22, 2000, order of the Circuit Court of Braxton County directing that an evidentiary proceeding be held before the family law master in connection with the petition filed by Respondents Linda K. S. and Richard S. (hereinafter referred to as "Respondents"), the paternal grandparents, through which they sought visitation with Alexander David. Petitioners contend that Respondents have no standing to seek visitation rights under the provisions of this state's grandparent visitation statutes (herein referred to as the "grandparent act" or the "act"), West Virginia Code §§ 48-2B-1 to -12 (1998) (Repl.Vol.1999),[2] and that the provisions of the act amount to an unconstitutional deprivation of their liberty interest with regard to issues of care, custody, and control of their child. Upon a thorough review of the issues raised herein, we find no constitutional infirmities with the grandparent act and conclude that Petitioners have not demonstrated the necessary requisites for the issuance of a writ of prohibition. Accordingly, we deny their request for extraordinary relief.

I. Factual and Procedural Background

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[1]*See In re Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n.1 (1989) (discussing practice of this Court to identify parties in sensitive cases by initial only).

[2]The Legislature recodified the statutes involving domestic relations matters by enactment of Enrolled Committee Substitute for House Bill 2199, which was effective from its passage on March 22, 2001. The pertinent recodification of the grandparent visitation act, which is now found in West Virginia Code §§ 48-10-101 to -1201, did not alter the language of the statutory provisions under consideration.

The birth parents of Alexander David, Petitioner Carol Jo L. and David Allen C., were divorced by order entered on December 22, 1998. Carol Jo L. was awarded sole care, custody, and control of Alexander David while David Allen C. was awarded visitation rights.[3] The divorce order expressly provided that the visitation rights awarded to David Allen C. were to be exercised under the supervision of David Allen C.'s mother--Respondent Linda K. S.[4] Pursuant to the divorce order, Respondent Linda K. S.[5] supervised the visitation of David Allen C. with his son and continued the relationship she and her husband had developed and maintained with Alexander David since birth. Respondents represent, and Petitioners do not dispute, that the visitation permitted under the divorce order "turned out to be visitation by Linda and Richard S. . . . with very little, if any, participation by the child's natural father, David Allen C." This visitation arrangement between Alexander David and his paternal grandparents continued even after the marriage of Petitioners Carol Jo L. and Brandon L. on February 25, 2000. When, however, the adoption of Alexander David by his step-parent, Petitioner Brandon L., became effective on May 11, 2000,[6] Carol L. advised Respondent Linda K. S. by handwritten letter that

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[3]Visitation was granted to David Allen C. under "Schedule A," which involves alternate weekends, rotating holidays, and extended summer visitation for the non-custodial parent.

[4]The order of divorce does not establish any rights of visitation between Respondents and Alexander David.

[5]While the divorce order states that Respondent Linda K. S. is the supervising adult, we assume that Respondent Richard S. was present during the visitations based on the fact that the visitations took place in Respondents' home.

[6]Petitioners undertook the necessary procedures to have Alexander David adopted by his stepfather, Brandon L. Carol Jo L. executed a parental consent for adoption on March 1, 2000, and David Allen C. executed his parental consent for adoption on March 2, 2000. By order entered on May 11, 2000, the Circuit Court of Barbour County granted the adoption of Alexander David by his stepfather.

(continued...)

"all of your grandparents rights and visitation are cancelled, null and void."[7] (emphasis in original)

Respondents, who were completely unaware of the adoption proceedings until after the adoption was granted, filed an action in the circuit court on May 23, 2000, through which they sought visitation rights with Alexander David. Pursuant to a telephone conference held on June 12, 2000, the family law master considered Respondents' request for temporary visitation along with Petitioners' motion to dismiss, which was predicated on their argument that Respondents lacked standing under the grandparent act. Concluding that Respondents had no standing to pursue visitation rights, the family law master recommended dismissal of Respondents' petition. Respondents sought review of this recommended disposition before the circuit court and by order entered on September 22, 2000, the circuit court rejected the family law master's recommendation and recommitted the matter to the family law master for "a full hearing to determine whether the requested grandparent visitation would be in the best interests of the infant child and would not substantially interfere with the parent-child relationship, in accordance with the factors delineated in West Virginia Code § 48-2B-5 (1999)." Petitioners seek a writ of prohibition to prevent this matter from proceeding to the evidentiary hearing directed by the lower court.

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[6](...continued)

[7]The letter continues to state that Davey (now Alexander David) "has a new name, a new dad, and new grandparents" and that "[a]t Daves [sic] request, you will never see Davey again." (emphasis in original) The biological father, David Allen C., is purportedly opposed to contact between his son and Respondents because he "doesn't want [Alexander David] to turn out like . . . [he did]."

II. Standard of Review

Based on their contention that Respondents have no standing to seek visitation rights under the provisions of this state's grandparent act, Petitioners argue that the lower court had no jurisdiction to hear this matter. As we held in syllabus point three of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), "'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." As an alternate basis for the writ, Petitioners assert that the grandparent act is unconstitutional, both on its face and as applied to this case, citing their right to substantive due process. *See State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, n. 1, 373 S.E.2d 484, n. 1 (1988) (stating that "[p]rohibition may be used as a means to test the constitutionality of a statute"). We proceed to determine whether the lower court was acting within its jurisdictional grant when it entered the order from which this proceeding arises and whether the grandparent act is unconstitutional, either on its face or in application to this matter.

III. Discussion

A. Standing

After acknowledging that the grandparent act, by its own express declaration, is the exclusive statutory scheme for resolving issues of grandparent visitation, Petitioners conclude that only grandparents who have secured visitation rights *prior* to an adoption have standing under our statutory scheme. *See* W.Va. Code § 48-2B-1 (stating that "[i]t is the express intent of the Legislature that the

provisions for grandparent visitation that are set forth in this article are exclusive"). As support for their contention that Respondents lack standing, Petitioners argue that West Virginia Code § 48-2B-9 governs the issue of whether Respondents can pursue visitation rights with their grandchild. That provision, which bears the heading "Effect of remarriage or adoption on visitation for grandparents," reads as follows:

> (a) The remarriage of the custodial parent of a child does not affect the authority of a circuit court to grant reasonable visitation to any grandparent.
>
> (b) If a child who is subject to a visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child.

W.Va. Code § 48-2B-9.

In viewing the provisions of section 9 of the grandparent act as determinative with regard to the issue of standing, Petitioners are clearly misguided. Standing to proceed under the act is addressed in section 3. That section states: "A grandparent of a child residing in this state may, by motion or petition, make application to the circuit court of the county in which that child resides for an order granting visitation with his or her grandchild." W.Va. Code § 48-2B-3. Under the statutory scheme of the act, there are no limitations on when a petition may be filed by a grandparent for the purpose of requesting visitation rights with a grandchild. By its terms then, section three of the act does not proscribe consideration of petitions seeking visitation to only pre-adoption situations.[8]

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[8]In section III. B. of this opinion, however, we discuss how, under the statutory scheme of the act, visitation is not likely to be granted where it is first sought post-adoption except in those rare cases where a relationship has been both established and maintained between the grandparent(s) and child[ren] before (continued...)

In concluding that Respondents had standing, the circuit court relied upon the provisions of section 4(b):

> The Court specifically finds that West Virginia Code § 48-2B-4(b) (1999) is the applicable statute which does provide the Petitioners with standing to petition for grandparent visitation. West Virginia Code § 48-2B-4(b) places no limitations on when or whether a grandparent(s) may petition the Court for visitation. In addition, although West Virginia Code § 48-2B-9(b) (1999) does not specifically address the situation, as in this matter, where no grandparent visitation order has been entered prior to an adoption of the infant child by a stepparent, the code section does not preclude a grandparent(s) from petitioning the Court for visitation.

While section 4(b) is not the provision that provides standing to Respondents, that section is nonetheless applicable because it governs the procedures to be employed in instances, like the case before us, where the visitation petition is not included as a part of another proceeding.

Section 4(b) of the act provides that:

> The provisions of this subsection apply when no proceeding for divorce, custody, legal separation, annulment or establishment of paternity is pending. A grandparent may petition the circuit court for an order granting visitation with his or her grandchild, regardless of whether the parents of the child are married. If the grandparent filed a motion for visitation in a previous proceeding for divorce, custody, legal separation, annulment or establishment of paternity, and a decree or final order has issued in that earlier action, the grandparent may petition for visitation if the circumstances have materially changed since the entry of the earlier order or decree.

In matters covered by section 4(b)--cases where no divorce, custody, legal separation, annulment or establishment of paternity proceeding is pending--the following procedures apply:

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[8](...continued)
the adoption was finalized.

> (c) When a petition under subsection (b) of this section is filed, the matter shall be styled "In re grandparent visitation of [petitioner's(s') name(s)]."
>
> (d) The court, on its own motion or upon the motion of a party or grandparent, may appoint a guardian ad litem for the child to assist the court in determining the best interests of the child regarding grandparent visitation.

W.Va. Code § 48-2B-4(c), (d).

Section 4(b) of the grandparents act along with subsections (c) and (d), address the procedural particulars involved in those instances when the petition seeking visitation is instituted separate from any ongoing domestic relations proceeding. A simple comparison of section 4(a),[9] which applies when there are pending domestic relations proceedings, with section 4(b) demonstrates that the Legislature clearly contemplated that grandparents could seek visitation in instances where no other domestic relations type proceeding is pending. *Cf.* W.Va. Code § 48-2B-4(a), (b). Through the provisions of section 4(c) and (d), the Legislature went a step further and set forth how the pleadings are to be styled and authorized

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[9]Subsection (a) provides that:

> The provisions of this subsection apply to all proceedings for divorce, custody, legal separation, annulment or establishment of paternity. After the commencement of the proceeding, a grandparent seeking visitation with his or her grandchild may, by motion, apply to the circuit court for an order granting visitation. A grandparent moving for an order of visitation will not be afforded party status, but may be called as a witness by the court, and will be subject to cross-examination by the parties.

W.Va. Code § 48-2B-4(a).

the appointment of a guardian ad litem[10] in cases such as the present one where the proceeding initiated under the grandparent act is separate from any other pending matter. *See* W.Va. Code § 48-2B-4 (c), (d).

Choosing to ignore the clear language of section 3, Petitioners rely exclusively on section 9(b) of the act in arguing that Respondents have no standing under the act. Petitioners suggest that, because this section does not reference instances where visitation rights have not been granted pre-adoption, no standing exists for any grandparent to seek visitation rights following an adoption if such rights were not previously established. This argument fails because section 9 expressly deals with the effect of remarriage or adoption on *established* visitation rights. In suggesting that the absence of language in section 9(b) addressing situations similar to Respondents defeats their right to seek visitation, Petitioners ignore the clear imperatives of sections 3 and 4(b), (c), and (d). *See* W.Va. Code §§ 48-2B-3, 4(b), (c), (d). There is no mention of *non-established* visitation rights in section 9 as that section is concerned only with *established* visitation rights. *See* W.Va. Code § 48-2B-9. The standing of a party to seek visitation rights, where no such rights have previously been established, is addressed in section 3. *See* W.Va. Code § 48-2B-3.

While the language of section 9(b) does not address the issue of Respondents' standing, it demonstrates that the Legislature draws a distinction concerning issues of visitation depending on the type

[10]The lower court appointed a guardian ad litem in this case.

of adoption involved. Section 9(b) makes clear that the Legislature both contemplated and approved the continuation of visitation rights following an adoption in those instances where the adoption occurs within the immediate family, as opposed to outside the family.[11] In providing that visitation rights which are established pre-adoption are not to be affected by an adoption that occurs when the adopting parent is a stepparent, grandparent, or other relative of the child, the Legislature was both recognizing the difference between adoptions that occur within and without the immediate family and expressing a preference of continuing established relationships between children and their grandparents in the former instance. Understandably, adoptions that take place outside the immediate family do not permit, nor perhaps should they, the continuation of visitation rights that were granted pre-adoption. *See* W.Va. Code § 48-2B-9(b). In contrast, however, adoptions that take place within the family do not automatically result in the complete extinguishment of established visitational relationships between adoptive children and their grandparents under the act. *See id.*

Respondents argue that the absence of language in the act which addresses their specific circumstances, rather than being an indication of legislative intent to deny them standing, is just the opposite.

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[11]Respondents suggest in their brief that the language of section 9(b) "does, at the very least, imply that grandparents should not be denied visitation with their grandchild where the adopting parent is a step-parent." In our opinion, the implication that can be drawn from section 9(b) is not that visitation should never be denied in such instances, but that visitation rights that have not previously been established, rather than being summarily extinguished, should be considered upon proper petitioning. Any determination regarding the granting of such rights must be made within the statutory requirements set forth in section five. *See* W.Va. Code § 48-2B-5 (stating that visitation can only be granted where it is jointly determined to be in the best interest of the child and not to substantially interfere with the parent-child relationship and delineating thirteen factors to aid such determinations).

As analogous support for this contention, Respondents discuss this Court's decision in *Elmer Jimmy S. v. Kenneth B.*, 199 W.Va. 263, 483 S.E.2d 846 (1997), in which we held that visitation could be granted following the termination of the parental rights of the child of the petitioning grandparents where the prior grandparent act, West Virginia Code 48-2B-1 to -9 (1992), was silent with regard to what effect termination of parental rights had on grandparent visitation. The reasoning employed in *Kenneth B.* was essentially that, while the Legislature could have provided for the cessation of grandparent visitation rights upon a termination of parental rights for abuse or neglect, the absence of law expressly disallowing visitation upon such a termination of rights suggested that the Legislature did not intend to prohibit visitation in all such instances. 199 W.Va. at 267, 483 S.E.2d at 850. While *Kenneth B.* does stand for the proposition that the absence of legislation denying visitation may, in some instances, be construed as an indirect indication of legislative approval for visitation, we find it unnecessary to rely upon *Kenneth B.* as support for our conclusion that standing exists in this case. Based on our determination that section 3 is the singular provision that governs whether a grandparent has standing under the act, we do not have to rely upon the nonexistence of language in the act which expressly governs visitation rights sought in the first instance following an adoption. *See also Troxel v. Granville*, 530 U.S. 57, 60, 62 (2000) (noting that Washington statutory language which read "[a]ny person may petition the court for visitation rights at any time" gave grandparents standing to seek visitation "irrespective of whether a custody action was pending").

In a final attempt to defeat Respondents' standing to pursue visitation rights with their grandchild, Petitioners go outside the act to a statutory provision contained in the adoption statutes. The

specific statute upon which Petitioners rely is West Virginia Code § 48-4-11 (1984) (Repl.Vol.1999), which provides, in pertinent part, that:

> (a) *Upon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights*, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

W.Va. Code § 48-4-11 (emphasis supplied).

Despite the express language of section one of the act, which declares in unmistakably clear terms, that the subject grandparent act, which was enacted in 1998,[12] is the "*exclusive*" legislation with regard to the issue of visitation, Petitioners nonetheless maintain that the adoption statutes are controlling on the issue of grandparent visitation. W.Va. Code § 48-2B-1 (emphasis supplied); *see also Kenneth B.*, 199 W.Va. at 266, 483 S.E.2d at 849 (emphasizing identical language contained in the 1992

[12]There were two earlier versions, one enacted by Acts 1980, ch. 24 (W.Va. Code § 48-2B-1), and a second one enacted by Acts 1992, ch. 53 (W.Va. Code § 48-2B-1 to -9) and amended by Acts 1994, ch. 46. In annotations, the editors of the West Virginia Code state that the new provisions [1998 enactments] are "sufficiently different [such] that a detailed explanation of the changes and the retention of historical citations from the former law were impracticable." The same editorial explanation was provided in reference to the 1992 enactments.

grandparents act stating that the act was "exclusive" with regard to visitation before resolving whether termination of parental rights had affect on correspondent grandparent's right to visitation). The adoption statute at issue was first enacted in 1882 and was last amended in 1984. Because the subject matter of grandparent visitation is one of relatively recent vintage, 1980 in this state,[13] there can be little question that the enactment in 1882 of West Virginia Code § 48-4-11, which is directed at the divestment of rights to a child upon the entry of an adoption order, was not written with concern for the correlative divestment of a grandparent's rights to visitation. Of further significance is the fact that the last amendments to West Virginia Code § 48-4-11 occurred in 1984. Since that time, the Legislature has twice enacted legislation dealing with the issue of grandparent visitation and has included, in both of those enactments, identical language indicating that those statutory enactments are the "exclusive" law on the subject matter. *See* W.Va. Code § 48-2B-1 (1992); W.Va. Code 48-2B-1 (1998).

Even if we were to conclude that the act and West Virginia Code § 48-4-11 were in conflict, which we do not, the rules of statutory construction would nonetheless require that we resolve the issue based on the specific language set forth in the grandparent act, rather than under the general statutory language that appears within the adoption statutes. As we recognized in syllabus point one of *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984), "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." *See also, Cropp v. State Workmen's*

[13]*See* W.Va. Code § 48-2B-1 (1980) (allowing grandparent visitation only in those instances when child of grandparent is deceased).

Compensation Comm'r, 160 W.Va. 621, 626, 236 S.E.2d 480, 484 (1977) (stating that "[i]t is an accepted rule of statutory construction that where a particular section of a statute relates specifically to a particular matter, that section prevails over another section referring to such matter only incidentally"); Syl. Pt. 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970) ("A specific section of a statute controls over a general section of the statute."). Because the grandparent act is specific legislation drafted and adopted for the express purpose of addressing the issue of visitation, its provisions must necessarily be viewed as controlling when a question arises regarding the application of another code provision with regard to the issue of grandparent visitation.

In a case decided before the adoption of the current grandparent act, *In re Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987), we addressed the precise issue that Petitioners raise in this case: whether West Virginia Code § 48-4-11 and the grandparent act then in existence[14] were in conflict based on the identical language relied upon by Petitioners to argue that Respondents' legal rights were extinguished coterminous with the adoption. At issue in *Nearhoof* was whether the adoption of a grandchild by his stepmother resulted in the termination of visitation rights that were petitioned for and obtained by the maternal parents of the child's deceased mother pre-adoption. 178 W.Va. at 360-61, 359 S.E.2d at 588-89. While the grandparent visitation statute then in effect provided for visitation where the child of the petitioning grandparents was deceased, it was not clear what effect the adoption of a child had

[14]Because *Nearhoof* involved the issue of which set of statutes was controlling--grandparent act or adoption statute--the fact that the grandparent act in effect at the time is a different version than the present statutory scheme is of no import with regard to the applicability of the *Nearhoof* ruling to the case before us.

on a grandparent's right to continue an established grant of visitation rights. *See* W.Va. Code § 48-2B-1 (1980). After examining the decisions of three other states on this very issue, we concluded that rather than being in conflict, the adoption and grandparent statutes had the same underlying objective: "[T]o provide substitute parental relationships for children who have been deprived of the benefits of a healthy relationship with one or both natural parents." 178 W.Va. at 363, 359 S.E.2d at 591. Rather than viewing the language of West Virginia Code § 48-4-11 as prohibitive of grandparent visitation, we determined that "the legislature intended to vest in the trial court exclusive discretionary authority to grant grandparents' visitation rights pursuant to *W.Va. Code*, 48-2B-1 . . . ." 178 W.Va. at 363, 359 S.E.2d at 591. As further support for our decision in *Nearhoof*, we observed that "had the legislature intended the adoption statute to limit the statute providing for grandparents' visitation, the statutes could have reflected that intention." *Id.* at 364, 359 S.E.2d at 592. In concluding, we stated that: "[T]he availability of the grandparent visitation mechanism is not limited to the nonadoptive custodial setting. We do not believe that the legislature intended to permit the statutorily granted right of grandparent visitation to be frustrated by the otherwise beneficient [sic] provisions of the adoption statute." *Id.*

We find significant the fact that, despite the passage of fourteen years since the *Nearhoof* decision, the Legislature has yet to enact legislation expressly denying grandparent visitation following adoptions. Rather than enacting such prohibitory legislation, the Legislature has expressed a clear preference, through the proviso language included in section 9(b), for continuing established visitation rights where an adoption involves a "stepparent, grandparents, or other relative." W.Va. Code § 48-2B-9(b). This enactment illustrates the Legislature's recognition "that under certain limited circumstances,

grandparents should have continuing contacts with their grandchild's development." *Nearhoof*, 178 W.Va. at 364, 359 S.E.2d at 592. The reasons for such continuing contact are many, as we recognized in *Nearhoof*:

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

178 W.Va. at 364, 359 S.E.2d at 592 (quoting *Mimkon v. Ford*, 332 A.2d 199, 204-05 (N.J. 1975)). Having found no statutory impediment to the issue of standing, we proceed to determine whether a constitutional defect prevents implementation of the grandparent act.

B. Constitutionality of Grandparents Act

Petitioners assert that the grandparent act is unconstitutional, on its face and in application, based on the recent ruling of the United States Supreme Court in *Troxel*. 530 U.S. 57. Under consideration in *Troxel* was the following broadly worded two-sentence statute: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code § 26.10.160(3) (1994). While agreeing

with the Washington Supreme Court's conclusion that the grandparent visitation provision unconstitutionally infringed on a parent's right to rear his/her children, the United States Supreme Court repeatedly articulated that its finding of unconstitutionality resulted from the manner in which the Washington statute was applied and was *not* a ruling that the Washington statute, or all such statutes providing for non-parental visitation, are unconstitutional *per se*. 530 U.S. at 73.

After discussing the underlying basis of the liberty interest[15] that is implicated with a parent's rights concerning the care, custody, and control of her children, the Court proceeded to consider what had ensued in the *Troxel* case. In response to the paternal grandparents' request that they be granted visitation rights with their two granddaughters,[16] the trial court, based mostly on his own positive experiences as a

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[15]The source of this liberty interest is the Fourteenth Amendment's proscription on depriving "any person of life, liberty, or property." *Troxel*, 530 U.S. at 65; *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"). This Court has recognized the existence of a liberty interest with regard to various issues concerning the parent/child relationship. *See State ex rel. Jeanette H. v. Pancake*, 207 W.Va. 154, 161, 529 S.E.2d 865, 872 (2000) (stating that "it is . . . well established that a parent has a constitutionally protected liberty interest in retaining custody of his or her child and is, therefore, entitled to certain due process protections when the State seeks to terminate the parent/child relationship"); *Overfield v.* Collins, 199 W.Va. 27, 34, 483 S.E.2d 27, 34 (1996) (recognizing that natural parent "acquires a liberty interest in maintaining a substantial parental relationship with her children vis-à-vis third parties"); State *ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 631-33, 474 S.E.2d 554, 561-63 (1996) (recognizing that liberty, within meaning of Due Process Clause, embraces rights of parenthood and holding that father had liberty interest in maintaining established parent-child relationship, regardless of whether relationship was within traditional and official parameters); Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973) (holding that "[i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions").

[16]The mother of the children wanted to limit the grandparents to one short visit per month and

(continued...)

child,[17] determined that it would be in the best interests of the children to have expanded contact with their grandparents and ordered that the grandparents could have one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. 530 U.S. at 71.

In attacking the trial court's ruling in *Troxel*, the Supreme Court heavily criticized the lower court's alteration of the burden of proof:

> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's [mother's] determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. . . . In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters.

530 U.S. at 69. Rather than requiring the grandparents to prove that visitation would be in the best interests of the children, the trial court reversed this burden and imposed it on the children's mother, the non-petitioning party.

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[16](...continued)
special holidays. In their petition, the grandparents sought to obtain visitation rights comprised of two weekends per month and two full weeks in the summer.

[17]The trial court opined that:

> "I look back on some personal experiences . . . .We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out."

530 U.S. at 72.

Also critical to the ruling in *Troxel* was the failure of the Washington Supreme Court to give the statute at issue a more narrow interpretation. The high Court found disfavor with the fact that the Washington statute "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." 530 U.S. at 67. The Supreme Court also disliked the fact that the Washington statute, unlike the West Virginia act, was so broadly written that it applied to any third party and was not limited to grandparents or other parties who had a specific relationship with the child[ren] in issue. *Id.* Given the absence of any limiting factors within the statute or any interpretational limitations imposed by the Washington Supreme Court, the Court in *Troxel* was concerned with the inevitability of a judge imposing his own "best interest" standard and totally disregarding the stated preferences of the parent where there had been no showing of unfitness with regard to that parent. *Id.*

Despite all these shortcomings--a broadly written statute that provided for no consideration of the parent's preferences and which permitted the trial court to apply whatever factors the trial court deemed appropriate in determining the pivotal issue of best interests--the United States Supreme Court did not conclude that the Washington statute was unconstitutional *per se*, but only as applied to the facts of that particular case. Explaining its decision, the Court stated:

> Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court--whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding

> visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.' *Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a per se matter.*

530 U.S. at 73 (emphasis supplied).

After discussing the deficiencies of the Washington statute with regard to its "fail[ure] to provide any protection for Granville's [mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters," the United States Supreme Court identified, with seeming approval, the statutes of seven other states and noted specific language contained in those statutes that stood in contrast to the Washington statute. *See Troxel*, 530 U.S. at 70, *citing, inter alia*, Me. Rev. Stat. Ann. 19A § 1803(3) (1998) (providing that court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (providing that court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43-1802(2) (1998) (requiring that court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship").

The West Virginia statutory scheme stands in stark contrast to the simplistic and broadly-worded two-sentence Washington statute scrutinized in *Troxel*. As an initial matter, our statute does not

permit just "any person" to file a petition under the act. *See* W.Va. Code § 48-2B-3 (providing that only grandparents can seek visitation under W.Va. act). In addition to setting forth the axiomatic standard of best interests by which any visitation decisions are to be made under the act, section five of our act requires a correspondent affirmative determination that such visitation "would not substantially interfere with the parent-child relationship." W.Va. Code § 48-2B-5(a). As an aid to making this joint determination of best interests and lack of substantial interference with the parent-child relationship, the Legislature has delineated twelve specific and one general factor for the trial court's consideration of this weighty issue. Those factors are:

> (1) The age of the child;
> (2) The relationship between the child and the grandparent;
> (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
> (4) The time which has elapsed since the child last had contact with the grandparent;
> (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
> (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
> (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
> (8) The good faith of the grandparent in filing the motion or petition;
> (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;
> (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents; or
> (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence.
> (12) **The preference of the parents with regard to the requested visitation**; and

(13) Any other factor relevant to the best interests of the child.

W.Va. Code § 48-2B-5(b) (1) - (13) (emphasis supplied). A final significant difference between our statute and the Washington statute is the inclusion of a burden of proof standard requiring grandparent(s) seeking visitation to prove by a preponderance of the evidence that the requested visitation "is in the best interest of the child." W.Va. Code § 48-2B-7(a), (c).

In light of these extensive and significant improvements over the Washington statute, we find Petitioners' statement that "[e]ach of the deficiencies the Supreme Court identified in the Washington statute is present in W.Va. Code § 48-2B-1, *et seq.*" to be without merit. Placing unwarranted importance on the numerical placement of parental preference as the twelfth factor for the trial court's consideration, Petitioners first suggest that this placement denotes a lessening of the factor's constitutional significance. In addition, Petitioners argue that the location of parental preference towards the bottom of the list somehow indicates that this particular factor is a co-equal factor to be weighted equally with the other twelve factors. Unlike Petitioners, we find nothing in the legislative delineation of these factors in section 5 of the act that suggests either that the factors are to be given equal weight or that a parent's preference on the issue of visitation is not to be accorded any enhanced consideration. In reviewing the Washington statute in *Troxel*, the United States Supreme Court suggested that if the Washington Supreme Court had interpreted the statute at issue in a narrower fashion the high Court's ruling of unconstitutionality might have been avoided. 530 U.S. at 67. While the instant petition for a writ of prohibition does not present the opportunity for us to determine the amount of weight that should attach to the factor of parental

preference,[18] we note that in light of the *Troxel* decision it is clear that "the court must accord at least some special weight to the parent's own determination" provided that the parent has not been shown to be unfit. 530 U.S. at 70.

After comparing the provisions of our grandparent act with the flaws identified by the Court in *Troxel*, we conclude that the act, by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control of his/her child[ren] without undue interference from the state. *See Troxel*, 530 U.S. at 65-66. Our statutory scheme addresses almost every concern addressed by the Court in *Troxel* and many of those concerns are alleviated outright by the overarching standard that requires all visitation decisions to be reached by applying a two-prong standard of best interests and lack of substantial interference with the parent-child relationship. *See* W.Va. Code § 48-2B-5(a). Moreover, we are convinced that the Legislature both anticipated and provided for the proper consideration of the parent's liberty interest within the parameters of the *Troxel* ruling. This is demonstrated both by the listing of parental preference as a factor that directly bears on the issue of visitation and, perhaps even more importantly, by the legislatively-imposed requirement that any grant of visitation must be preceded by an express affirmative finding that the visitation "w[ill] not substantially interfere with the parent-child relationship." *Id.* Thus, because our act expressly

[18]Petitioners criticize the circuit court for not affording the requisite level of deference to their preference on the issue of visitation. It is premature, however, for Petitioners to argue that the lower court has ignored their preference on the issue as no evidentiary proceeding has taken place which would require the lower court's consideration of the factors set out in section five of the act. *See* W.Va. Code 48-2B-5.

requires consideration of parental preference and because no grant of visitation can be accomplished without an initial determination that such visitation will not detrimentally affect the parent-child relationship, the constitutional deficiencies presented by the Washington statute at issue in *Troxel* are not present here. Accordingly, we reject Petitioners' suggestion that the act is constitutionally deficient on its face given the inclusion of parental preference within a list of other factors for the trial court's consideration on the issue of visitation. And, given the procedural phase of this matter, we have no basis from which to make any finding that the act is unconstitutional in application since the statutory provisions under discussion have yet to be applied to reach any determination as to the ultimate issue of visitation.

Although we find no impediment to Respondents' standing and thus to enforcement of the lower court's order directing that the matter proceed to an evidentiary hearing, we wish to make clear that our decision on standing has no bearing on the more difficult issues yet to be resolved: whether an award of visitation is in the best interests of the child and will not substantially interfere with the parent-child relationship. *See* W.Va. Code § 48-2B-5. While the Legislature has clearly opened the courthouse doors in granting circuit courts jurisdiction to consider petitions for grandparent visitation, the Legislature has also enumerated a considerable set of factors that bear on this weighty issue of visitation. *See id.* One of those factors, which is deserving of discussion today, and which has been used by this Court in resolving issues of contact between children and relatives in various domestic settings, is whether there has been an established relationship between the child and his/her relative prior to the subject litigation.[19] *See* W.Va.

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[19]*See, e.g., State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 462, 475 (continued...)

Code § 48-2B-5(b)(2). Obviously, a grandparent who has an established relationship with his/her grandchild will be in a better position when the trial court is asked to rule upon the issue of visitation, than one who has just appeared out of the blue, or with little history of contact, and is now seeking to gain visitation rights.[20] As the Supreme Court recognized in *Troxel*, the motivating factor for the creation of grandparent visitation statutes was a legislative recognition of the societal need "to ensure the welfare of the children therein by protecting the relationships those children form with . . . third parties" such as grandparents. 530 U.S. at 64. And underpinning all of these statutes is "a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons--for example, their grandparents." 530 U.S. at 64; *see also Kessel v. Leavitt*, 204 W.Va. 95, 197, 511 S.E.2d 720, 822 (1998) (stating that "[i]n recent years, the recognized rights of grandparents have continued to expand through both statutory definition and judicial interpretation"), *cert. denied*, 525 U.S. 1142 (1999). Despite this legislative recognition of the important role that grandparents

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[19](...continued)
S.E.2d 548, 554 (1996) (directing circuit court on remand that no matter who becomes child's primary custodian, "he has the right to a continued relationship with both his grandmother and his mother"); Syl. Pt. 2, in part, *Roy Allen S.*, 196 W.Va. 624, 474 S.E.2d 554 (1996) (holding that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so"); *Kenneth L. W. v. Tamyra S. W.*, 185 W.Va. 675, 680, 408 S.E.2d 625, 630 (1991) (recognizing importance of stability and continuity in child's life in child custody setting and stating that "[t]his continuity is especially important if a grandparent or other relative has been the caregiver"); *Honaker v. Burnside*, 182 W.Va. 448, 452-53, 388 S.E.2d 322, 325-26 (1989) (discussing need to provide for transition period in change of custody cases as well as the rights of visitation with a stepparent or half-sibling and stating that "[t]aking away continued contact with . . . important figures in . . . [a child's life] would be detrimental to her stability and well-being").

[20]Especially in infant adoptions, where grandparents have had no opportunity to develop a relationship with the child, an application under the statute reviewed here would be futile.

can play in the lives of children, a grandparent who seeks to avail him or herself of this statutorily-granted mechanism for seeking visitation must be able to demonstrate that the visitation being sought will be in the best interest of the child[ren] and will not substantially interfere with the parent-child relationship. *See* W.Va. Code § 48-2B-5(a). This will be very difficult to do in cases where adoptions have preceded the petitions seeking visitation unless the petitioning grandparent[s] can demonstrate to the trial court's satisfaction, within the guidelines and standards established by the Legislature, that such visitation is likely to be a positive factor in the child's life and will not unduly disrupt the child's relationship with his/her parent(s). And, as we emphasized previously, in the absence of an established relationship between the grandparent[s] and the child[ren], it will be most difficult to meet the statutory standards imposed under the act.[21]

We perceive that the statutory scheme for grandparent visitation--which provides for two ultimate determinations by the trial court, related both to the best interests of the child[ren] involved and to the protection of the parent-child relationship from any *significant* interference--constitutes a workable means by which the legitimate interests of the child[ren] in maintaining a viable relationship with their

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[21]This is why we have considered and rejected the argument advanced by the dissent that our ruling in this case will have a chilling effect on adoptions. Adoptions that take place outside the immediate family are clearly beyond the scope of this opinion as the Legislature has made clear that visitation should not be continued in such instances. *See* W.Va. Code § 48-2B-9(b). And in those cases where adoptions occur within the immediate family and no visitation order was obtained pre-adoption, the issue of granting grandparent visitation is controlled by a host of factors that will still only result in awards of visitation in those rare instances where grandparents can demonstrate that such visitation is in the child's best interest and will not interfere with the parent-child relationship. We simply do not foresee either the end of adoptions or a consequential rash of ensuing litigation from grandparents seeking visitation rights as a result of this opinion.

grandparent[s] and the liberty interests of parents relative to the care, custody, and control of their children can be effectively examined, protected, and promoted. Under the statutory scheme adopted by the Legislature, which provides for a hearing on the issue of whether reasonable visitation rights should be granted, there is no question that Respondents are entitled to present their evidence and be heard. We wish to emphasize that our ruling today has done nothing to change the availability of the court system to grandparents seeking visitation rights. Consistent with our obligation to uphold a legislative enactment as constitutional when at all possible, we have merely recognized the broad grant of standing[22] extended to grandparents by the Legislature under the act. *See* Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) (stating that "[e]very reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question"). Thus, rather than making new law, we have merely interpreted the act's existing provisions in light of the pronouncements made by the United States Supreme Court in *Troxel*. And, as discussed in full above, we have found West Virginia's act to be well within the constitutional concerns addressed in *Troxel*, given the act's specific identification of parental preference as a factor which directly impacts on the issue of visititation. We note particularly that the grandparent visitation permitted by the Legislature here cannot be ordered by the circuit court without an affirmative finding that such visitation will not cause a substantial interference in the parent-child relationship, as well as an affirmative finding that such visitation meets the traditional test of serving the best

[22]The only limitation imposed under the act regarding the filing of a petition seeking visitation rights concerns where such petition can be filed.

interests of the child. In short, if the circumstances fail either prong of that legislatively-defined test, then the plea for grandparent visitation fails. *See* W.Va. Code § 48-2B-5(a).

While it would certainly be preferable for the adults involved in these visitation issues to reach an agreed and written accommodation, with or without the formal approval of a court order, we recognize that this will not always be the case. In those, hopefully few, cases where the matter cannot be resolved without a court deciding one or more of the issues, it appears to this Court that the statute under consideration provides a comprehensive and fair means by which the best interests of the child[ren] and the relationships with their respective parent[s] or grandparent[s] can be protected from harm resulting either from the inconsiderate or excessive demands of grandparents or the obstinate or unreasonable and *insignificant* objections of parents, any of which may, on occasion, be driven more by emotion than pursuit of the proper interests of the children and their parents. Because we recognize the likely sensitivity and difficulty of such circumstances, we urge the lower courts to be particularly attentive to the need for careful and complete findings of fact and conclusions of law when ruling on actions brought under this act. *See* W.Va. Code § 48-2B-8(a) (requiring written findings of fact and conclusions of law).

Finding no basis for issuing the requested writ of prohibition, we hereby deny Petitioners' request for extraordinary relief.

Writ denied.

No. 29288 - State of West Virginia ex rel. Brandon L. and Carol Jo L. v. Honorable Alan D. Moats, Judge of the Circuit Court of Barbour County, and Linda K. S. and Richard S.

FILED
July 6, 2001
RORY L. PERRY II, CLERK
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OF WEST VIRGINIA

RELEASED
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SUPREME COURT OF APPEALS
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Davis, J., dissenting:

Before the deliverance of the majority's decision herein, an order of adoption was considered to be a complete divestiture of an adoptee's former familial and legal ties and the creation of a unique adoptive family unit with correspondingly new legal relationships among those family members. The Opinion in the case *sub judice*, though, not only unsettles the once certain world of adoption, causing adoptees and adopters alike to constantly question the security of their court-established rights, it also contravenes the preeminent law of this State which dictates the applicability of new pronouncements of law. For these reasons, I respectfully dissent.

A. Finality

The first source of contention I have with the majority's opinion is its resolute disregard of the heretofore understood force and effect of adoption orders: finality. "Finality is of the utmost importance in an adoption." *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 266, 418 S.E.2d 575, 580 (1992). In this respect, it has been stated that

> *[t]he most drastic and far-reaching action that can be taken by a court of equity is to enter a final order of adoption. Such an order severing the ties between a parent and a child is as final, and often as devastating, as though the child had been delivered at birth to a stranger instead of into the arms*

> *of his natural mother or father*. Custody of children and child support are matters that remain within the breast of the court and are subject to change and modification so long as a child is a minor. *This is not true of adoptions*. Once an order of adoption becomes final, the natural parent is divested of all legal rights and obligations with respect to the child, and the child is free from all legal obligations of obedience and maintenance in respect to them. The child, to all intents and purposes, becomes the child of the person adopting him or her to the same extent as if the child had been born to the adopting parent in lawful wedlock.

14A Michie's Jurisprudence *Parent and Child* § 27, at 285 (2001) (emphasis added) (footnote omitted). These sentiments are echoed by the adoption law of this State which proclaims that

> [u]pon the entry of [an] order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

W. Va. Code § 48-4-11(a) (1984) (Repl. Vol. 1999). *Accord* W. Va. Code § 48-4-9(d) (1997) (Repl. Vol. 1999). Likewise, the culmination of an adoption proceeding, which is evidenced by the order of adoption, is held to be inviolate, except in certain enumerated, and quite limited, circumstances:

> (a) An order or decree of adoption is a final order for purposes of appeal to the supreme court of appeals on the date when the order is entered. An order or decree of adoption for any other purpose is final upon the expiration of the time for filing an appeal when no appeal is filed or when an appeal is not timely filed, or upon the date of the denial or

dismissal of any appeal which has been timely filed.

(b) An order or decree of adoption may not be vacated, on any ground, if a petition to vacate the judgment is filed more than six months after the date the order is final.

(c) If a challenge is brought within the six-month period by an individual who did not receive proper notice of the proceedings pursuant to the provisions of this chapter, the court shall deny the challenge, unless the individual proves by clear and convincing evidence that the decree or order is not in the best interest of the child.

(d) A decree or order entered under this chapter may not be vacated or set aside upon application of a person who waived notice, or who was properly served with notice pursuant to this chapter and failed to respond or appear, file an answer or file a claim of paternity within the time allowed.

(e) A decree or order entered under this chapter may not be vacated or set aside upon application of a person alleging there is a failure to comply with an agreement for visitation or communication with the adopted child: Provided, That the court may hear a petition to enforce the agreement, in which case the court shall determine whether enforcement of the agreement would serve the best interests of the child. The court may, in its sole discretion, consider the position of a child of the age and maturity to express such position to the court.

(f) The supreme court of appeals shall consider and issue rulings on any petition for appeal from an order or decree of adoption and petitions for appeal from any other order entered pursuant to the provisions of this article as expeditiously as possible. The circuit court shall consider and issue rulings on any petition filed to vacate an order or decree of adoption and any other pleadings or petitions filed in connection with any adoption proceeding as expeditiously as possible.

(g) When any minor has been adopted, he or she may, within one year after becoming of age, sign, seal and acknowledge before proper authority, in the county in which the order of adoption was made, a dissent from such adoption, and file such instrument of dissent in the office of the clerk of the circuit court which granted said adoption. The clerk of the county commission of such county and the circuit clerk shall record and

> index the same. The adoption shall be vacated upon the filing of such instrument of dissent.

W. Va. Code § 48-4-12 (1997) (Repl. Vol. 1999).

As is evidenced by the above-quoted authorities, once the proceedings surrounding an adoption have been concluded, the ultimate import of the court's final order of adoption is just that---to serve as a final and complete resolution of the adoptee's former and forthcoming familial and legal relationships, thereby providing him/her with the comfort and knowledge of future certainty. Despite this legislatively intended result, however, the majority of this Court has, in just one Opinion, completely obviated the security attending the conclusion of adoption proceedings by allowing grandparents, who had no prior order of visitation,[1] to petition the court for such an order at any time, even after the entry of a final

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[1]This fact is significant as both the grandparent visitation statutes and the adoption laws suggest that a grandparent who has previously been granted visitation with his/her grandchild has at least nominal rights to continue such a relationship following the grandchild's adoption. *See* W. Va. Code § 48-2B-9 (1998) (Repl. Vol. 1999) (noting, in subsection (a), that "[t]he remarriage of the custodial parent of a child does not affect the authority of a circuit court to grant reasonable visitation to any grandparent," but further admonishing, in subsection (b), that "[i]f a child who is subject to a visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child"); W. Va. Code § 48-4-8(a)(3) (1997) (Repl. Vol. 1999) (requiring notice of adoption be given to "[a]ny person other than the petitioner . . . who has visitation rights with the child under an existing court order issued by a court in this or another state"); W. Va. Code § 48-4-12(e) (1997) (Repl. Vol. 1999) (observing that "[a] decree or order [of adoption] may not be vacated or set aside upon application of a person alleging there is a failure to comply with an agreement for visitation or communication with the adopted child," but allowing "[t]hat the court may hear a petition to enforce the agreement, in which case the court shall determine whether enforcement of the agreement would serve the best interests of the child"). *But compare* W. Va. Code § 48-2B-3 (1998) (Repl. Vol. 1999) ("A grandparent of a child residing in this state may, by motion or petition, make application to the circuit court of the county in which that child resides for an order granting visitation with his or her grandchild.") *with* W. Va. Code § 48-2B-7(c)

(continued...)

adoption order.

By reaching the decision announced herein, the majority has permitted grandparents, in general, to petition courts for visitation with their *former* grandchildren after their familial relationship has been terminated as a result of the grandchild's adoption. *See* W. Va. Code § 48-4-11(a) (explaining change in familial relationships upon entry of final adoption order). As the adoption will have likewise divested these *former* grandparents of their kinship with their *former* grandchild, however, they simply would have no standing under the governing statutes to pursue such a claim---a simple observation which the Court's Opinion deftly ignores. *See id. See also* W. Va. Code § 48-2B-2(2) (1998) (Repl. Vol. 1999) (defining "[g]randparent" as "a biological grandparent, a person married or previously married to a biological grandparent, or a person who has previously been granted custody of the parent of a minor child with whom visitation is sought", but omitting a *former* grandparent from such definition). I find this result to be particularly absurd considering the majority's lengthy discussion of the respondent grandparents' standing in the case *sub judice*, *see supra* Section III.A, and their ultimate finding of such standing in spite of the respondents' son's relinquishment of his parental rights and their grandchild's subsequent adoption.

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[1](...continued)
(1998) (Repl. Vol. 1999) (suggesting that petition for grandparent visitation will not be granted in certain circumstances where "there is a presumption that visitation privileges need not be extended to the grandparent if the parent through whom the grandparent is related to the grandchild . . . exercises visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose").

Moreover, my colleagues suggest, at the end of Section III.A of the majority Opinion, *supra*, that the Legislature could have amended the adoption statutes to address the present scenario and that their failure to do so necessitates reliance solely on the grandparent visitation statutes. *See* W. Va. Code § 48-2B-1 (1998) (Repl. Vol. 1999) (providing that "[i]t is the express intent of the Legislature that the provisions for grandparent visitation that are set forth in this article are exclusive"). Neither do I agree with this conclusion. Rather, I am of the opinion that the long-standing rule of statutory construction resolves this quandary: *inclusio unius est exclusio alterius*. This doctrine, which means that "'"one is the exclusion of the others[,]" . . . informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.'" *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 491 n.6, 490 S.E.2d 306, 310 n.6 (1997) (quoting *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n.11, 474 S.E.2d 554, 560 n.11 (1996)). *Accord State v. Lewis*, 195 W. Va. 282, 288 n.12, 465 S.E.2d 384, 390 n.12 (1995).

Because the adoption statutes at issue herein do, in fact, address the issue of grandparent visitation in adoption proceedings,[2] it seems to me that the Legislature's refusal to speak further on this topic indicates its decision to foreclose any further intervention in adoption proceedings by grandparents or other individuals who seek to assert a purported right to visitation with the adoptee. Given that the respondents' claim does not come within the rubric of intervenors contemplated by the adoption statutes, I would submit that they lack standing to pursue visitation with Alexander David and that the final order of adoption should

[2]*See* W. Va. Code § 48-4-8(a)(3); W. Va. Code § 48-4-12(e). For a discussion of the pertinent language of these statutes see *supra* note 1.

be allowed to remain undisturbed by further proceedings that are not sanctioned by the governing statutory law.

B. Prospective Application

The second issue on which I part company with my brethren herein is the proposed application of the instant Opinion. While my colleagues adhere to the belief that this decision should be given retroactive effect, the applicable law supports only the prospective application of the Court's holding. Typically, the prospective/retroactive dilemma is resolved through the contemplation of several factors

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. *Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity.* Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (emphasis added). Among these enumerated criteria, I am most concerned with the fourth and fifth factors which address the difficulties attending the majority's decision in this case insofar as it represents a dramatic

departure from the existing statutory law regulating adoptions and grandparental visitation rights.

In the proceedings underlying the instant appeal, it appears that Alexander David's biological parents, Carol Jo L. and David Allen C., complied with the statutory requirements for obtaining consent to and giving notice of Brandon L.'s prospective adoption of his stepson. *See* W. Va. Code § 48-4-3 (1997) (Repl. Vol. 1999) (delineating persons from whom consent to adopt is required); W. Va. Code § 48-4-8 (1997) (Repl. Vol. 1999) (listing individuals entitled to notice of adoption proceedings). Nowhere in these statutes, however, is there a requirement that persons in the position of the respondent grandparents, who did not have any court-established rights to visitation with their grandson, must give their consent to such an adoption or be notified of the proceedings therein. Thus, it appears that the parties to Alexander David's adoption proceedings complied with the law then in existence and, as a result thereof, should have been able to enjoy the protections provided thereby upon their conclusion. *See, e.g.*, W. Va. Code § 48-4-11(a) (describing finality of adoption proceedings). The majority's decision in the case *sub judice*, though, usurps any reliance Carol Jo L., David Allen C., or Brandon L., not to mention Alexander David, could reasonably have placed upon the final resolution of Alexander David's adoption by creating, in the child's grandparents, rights not heretofore contained in the applicable statutory law.

By allowing retroactive application of the instant decision, the majority has effectively amended the statutory law governing both adoption and grandparents' visitation rights to include a class of grandparents never contemplated by either of these promulgations. Primarily, the consent and notice provisions of the adoption laws of this State are designed to shield parents and children alike from

difficulties that may arise when persons who have protected interests have not been made parties to such proceedings. Perhaps no case in this Court's recent history illustrates this point more poignantly than *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), *cert. denied*, 525 U.S. 1142, 119 S. Ct. 1035, 143 L. Ed. 2d 43 (1999), wherein a biological mother's failure to notify her child's biological father of their son's adoption resulted in protracted litigation in this Court on claims of tortious interference and fraud nearly seven years after the child's birth and when the child's adoptive fate had long been sealed. As further insurance against late-asserted claims, the Legislature has additionally included within the list of those persons entitled to notice of adoption proceedings "[a]ny person . . . who has visitation rights with the child under an existing court order issued by a court in this or another state." W. Va. Code § 48-4-8(a)(3). Similarly, in the off chance that such persons either have not been properly notified or that the visitation order has not been effective in securing visitation with the adoptee post-adoption, these individuals are allowed a rare opportunity to seek relief from the court in an otherwise finalized matter. *See* W. Va. Code § 48-4-12(e). When, however, the virtual floodgates are opened to allow grandparents, such as the respondents herein, to request visitation rights following the conclusion of adoption proceedings where they had no pre-existing right thereto, the scope of persons with protected interests contemplated by this State's adoption laws has been compromised and a novel application of the law has been created. Both of these results dictate giving the majority's Opinion prospective effect.

Moreover, the Court's decision herein drastically changes the scope of persons entitled to pursue visitation in accordance with the grandparents' visitation statutes. As I discussed in Section A., *supra*, the entry of a final order of adoption effectively changes the legal and familial relationships of the

parties thereto by divesting the pre-adoption lineages and obligations and replacing them with ties indicative of the post-adoption state of affairs. Among the divestitures that take place in the course of an adoption are those of "the lineal or collateral kindred of any" person who was previously entitled to parental rights. W. Va. Code § 48-4-11(a). Thus, as a result of Brandon L.'s adoption of Alexander David, David Allen C.'s parental rights to his son were relinquished and those rights of his parents, the respondent grandparents, if any such rights existed, were likewise extinguished. The effect of the majority's holding, however, has been to miraculously restore the respondents's former kinship status as the child's grandparents upon the Court's decision to grant them standing to pursue their claims for visitation with their *former* grandson. Accordingly, then, the majority's Opinion will have the effect of expanding the Legislature's definition of a "grandparent" to include those persons who formerly enjoyed that status despite the subsequent adoption of their grandchild and their divestiture of such familial status by the statutes governing that adoption. *Cf.* W. Va. Code § 48-2B-2(2). Since this alteration in the grandparent visitation statutes also represents a dramatic departure from the previously established law in this field, the majority's pronouncement thereof should be applied prospectively only.

Accordingly, for the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

211 W. Va. 587, 567 S.E.2d 597

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

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OF WEST VIRGINIA

No. 29701

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: BRANDON LEE B.

JERRY L. S., II AND LISA A. S., CURRENT FOSTER PARENTS,
Intervenors Below

Appeal from the Circuit Court of McDowell County
Honorable Kendrick King, Judge
Civil Action No. 99-JA-30
REVERSED AND REMANDED

Submitted: October 2, 2001
Filed: December 7, 2001

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE ALBRIGHT concurs, in part, and dissents, in part,
and reserves the right to file a separate opinion.

SYLLABUS

"When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syllabus Point 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

Per Curiam:

This is an appeal by the West Virginia Department of Health and Human Resources from an order of the Circuit Court of McDowell County dismissing a child abuse and neglect action and directing that Brandon Lee B., the infant named in the petition, be returned to his mother. On appeal, the Department of Health and Human Resources argues that the evidence in the case is clear and convincing that Brandon Lee B.'s mother has neglected him, and is unfit to have custody of him, and that under the circumstances, the circuit court erred in dismissing the Department's petition.

I.
FACTS

On October 22, 1999, the relator, Brandon Lee B., was born three months premature. At the time of birth, he weighed one pound, two ounces, and subsequent to his birth, he spent several months in intensive care at Women and Children's Hospital in Charleston, West Virginia.

Brandon Lee B.'s mother, Carrie Q. B., is from Fort Wayne, Indiana. Apparently, while living in a juvenile group home, she established a relationship with Brandon Lee B.'s putative father, Ahmed A., an Iraqi immigrant, and as soon as she turned 18, she moved into Ahmed A.'s home.

While in the home of Ahmed A., Carrie Lee B. became involved in a series of acts of physical violence, which included a domestic assault on Ahmed A. One of the instances resulted in Carrie Lee B. being charged with felony battery upon a police officer.

At length, Ahmed A. drove Carrie Q. B., who was then pregnant with Brandon Lee B., to McDowell County, West Virginia, where she hoped to live with her biological parents. Shortly after meeting her biological parents, Carrie Q. B. met Cecil Lee B., a McDowell County man who was a total stranger. The next day, she married him. The marriage was not successful, and Carrie Q. B. sought refuge at an abuse shelter near Welch, West Virginia.

It became apparent that Carrie Q. B. was going to give birth to Brandon Lee B. prematurely, and she was transferred to Women and Children's Hospital at Charleston, West Virginia, where Brandon Lee B. was born on October 22, 1999. After Brandon Lee B.'s birth, Carrie Q. B. returned to McDowell County, and Brandon Lee B. remained in intensive care at Women and Children's Hospital.

The evidence in the present case shows that for six weeks after Carrie Q. B. returned to McDowell County, a social worker unsuccessfully begged her to return to Charleston to bond with Brandon Lee B. and to authorize various medical procedures for him.

At length, Carry Q. B. agreed to return to Charleston, and arrangements were made for her to live at the Ronald McDonald House in Charleston and be with the child. However, the day before she was to report to Charleston, she called an emergency communications center to report that warrants were pending against her in Indiana and arranged for her own arrest. She subsequently appeared in the Circuit Court of McDowell County and waived her right to contest extradition and returned to Indiana in custody.

After Carrie Q. B. failed to report to Charleston, the West Virginia Department of Health and Human Resources filed a child neglect and abandonment petition. After receiving the petition, the circuit court made a preliminary finding of neglect and abandonment and awarded temporary legal and physical custody of Brandon Lee B. to the Department of Health and Human Resources on December 29, 1999. The court continued the proceedings for three months because Carrie Q. B. remained in jail. Subsequently, in March 2000, Carrie Q. B. entered guilty pleas to a felony charge of battery upon a police officer and the misdemeanor offense of domestic assault in Indiana, and she was placed on probation.

After Carrie Q. B. was placed on probation, her adoptive parents returned her to West Virginia, and on March 29, 2000, she visited Brandon Lee B. and his foster parents for an hour and a half. It appears that that visit was initiated by Carrie Q. B.'s parents. Carrie Q. B. did not again visit with Brandon Lee B. until she attended the adjudicatory hearing in the present proceeding on October 12, 2000.

On April 13, 2000, the Department of Health and Human Resources amended the child abuse and neglect petition and alleged that Carrie Q. B. was unfit to parent Brandon Lee B. safely, given his special needs. An adjudicatory hearing was set on the petition for June 28, 2000. Carrie Q. B. failed to appear at that hearing, and her attorney advised the court that he had received no communication from her for a lengthy period of time and that she had provided him with no new address or telephone number. As a consequence, the adjudicatory hearing was continued to October 12, 2000.

On October 12, 2000, the West Virginia Department of Health and Human Resources presented evidence relating to the fitness of Carrie Q. B. to have custody of Brandon Lee B. Among other things, the evidence showed that Carrie Q. B. had a history of mental illness, of fetal alcohol syndrome, of oppositional defiant disorder, of post-traumatic stress disorder, of dissociative disorder, of bulimia, of dysthymia and of a borderline personality disorder. Carrie Q. B.'s adoptive mother testified that Carrie Q. B. was unpredictable and that she engaged in risky and reckless behavior including running away from home, numerous suicide attempts and violent relationships with men. Carrie Q. B.'s adoptive mother also testified that she believed that Carrie Q. B. could not be trusted to take care of herself, and that she was certainly not fit to care for a child with Brandon Lee B.'s special needs.

Child Protective Services workers testified that Brandon Lee B. had engaged in a life or death struggle while in intensive care at Women and Children's Hospital and that while he was engaged in that struggle, they had attempted without success to generate some interest in him from Carrie Q. B. Additionally, one of the workers testified that during her hour and a half visit with Brandon Lee B. on

March 29, 2000, Carrie Q. B. had to be told how to hold Brandon Lee B., and further had to be told not to try to force him to accept pacifier when he did not want it. The social worker explained that Carrie Q. B. did not request another visit after the March 29, 2000, visit and in the next few months the worker could not maintain contact with her despite substantial efforts on his part.

Additional evidence adduced during the hearing included a negative home study of Brandon Lee B.'s birth father's home and evidence that the father could not attend the hearing because the father needed surgery to close a knife wound.

At the conclusion of the hearing, the circuit court ordered the record held open for an additional 15 days to allow any party to supplement the record with additional evidence.

During the 15-day period, the Department of Health and Human Resources filed medical reports which indicated that Brandon Lee B. had a crucial need for committed caretakers who could follow prescribed physical therapy and a special feeding regime. Records were also filed describing Carrie Q. B.'s mental limitations and emotional problems.

At the end of the 15-day period, the circuit court ordered that the child abuse and neglect petition be dismissed. In the order dismissing the case, the court recognized that the evidence relating to Carrie Q. B.'s ability to parent Brandon Lee B. was generally negative. The court stated: "To be blunt, the Mother, even when she is making her best efforts, is only minimally able to adequately take care of her

own self, much less a small 'special needs' baby." The court, however, went on to say that W. Va. Code 49-6-2(c) required that a finding of neglect or abuse be based "upon conditions existing at the time of the filing of the Petition." In analyzing the evidence, the court, in effect, found that much of the evidence relating to Carrie Q. B.'s inability to care for Brandon Lee B. involved incidents and conditions which arose after the filing of the Department of Health and Human Resources' petition. In view of this, the court reached the conclusion that the Department of Health and Human Resources had not met the burden established by W. Va. Code 49-6-2(c).

In the present proceeding, the Department of Health and Human Resources contends that the circuit court erred in holding that it had not met its burden and erred in not granting its petition in this case.

II.
STANDARD OF REVIEW

In *In Re: Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998), this Court indicated that in a child abuse and neglect case the Court employs the two-pronged standard of review set forth in Syllabus Point 1 of *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

III.
DISCUSSION

Although W. Va. Code 49-6-2(c) requires the West Virginia Department of Health and Human Resources in a child abuse or neglect case to prove conditions existing at the time of the filing of the petition, this Court has indicated that a petition may be amended at any time before the final adjudicatory hearing. *State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1997). Specifically, in Syllabus Point 4 of *State v. Julie G., id.*, the Court stated:

> Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

In *State v. Julie G., id.*, the Court noted that the circuit court believed that it was required to disregard facts that supported the initial concerns of the Protective Services worker because such facts were not discovered until after the filing of the petition. The Court indicated that this belief was erroneous and that the allegations in the petition should have been evaluated in light of the evidence of the mother's performance after the filing of the petition, but during the pre-adjudication period.

Unlike the situation in *State v. Julie G., id.*, the court in the present case actually amended the petition to include in the scope of concern the conduct of Brandon Lee B.'s mother, Carrie Q. B., after the filing of the original petition.

Although *State v. Julie G.* indicates that a child abuse or neglect case must be decided upon conditions existing at the time of the filing of the petition, or, by implication, in a case such as the present case, the amended petition, the clear import of *State v. Julie G.* is that facts developed after the filing of the petition, or amended petition, may be considered in evaluating the conditions which existed at the time of the filing of the petition or amended petition.

The clear thrust of the petition and amended petition in the present case is that Carrie Q. B. is unfit to be the mother of Brandon Lee B., especially in light of his need for medical and special nutritional care. The evidence adduced during the case shows that the health and possibly the very life of Brandon Lee B. depend upon his receiving appropriate and consistent medical and nutritional care. Although he apparently was receiving such care at the time of the filing of the petition, the care was being provided by the Department of Health and Human Resources rather than Carrie Q. B. The evidence subsequently developed, in this Court's view, clearly and convincingly shows that Carrie Q. B. at the time of the filing of the petition lacked, and still lacks, the stability, maturity, judgment and discipline necessary to provide the consistent care which Brandon Lee B. requires. Rather clearly, Carrie Q. B. has been unable to establish a stable home situation even for herself. At very best, she has demonstrated only a sporadic interest in Brandon Lee B., and she has demonstrated little initiative in establishing a relationship

with Brandon Lee B. A fair reading of the record shows that she has been sporadic, at best, in maintaining any kind of contact with the parties involved in the life of Brandon Lee B.

Additionally, the record shows that Carrie Q. B. has a history of mental and emotional problems, that she has had minor problems with the criminal system, and that she needs assistance with her own life.

In *State v. Krystal T.*, 185 W. Va. 391, 407 S.E.2d 395 (1991), this Court indicated that parents who do not adequately provide for a child's needs and are not sufficiently motivated or organized to provide for such needs on an ongoing basis should have their parental rights terminated.

This Court believes that the evidence does rather clearly show that Brandon Lee B.'s mother, Carrie Q. B., is not sufficiently motivated or organized to provide for Brandon Lee B.'s needs and that the evidence is sufficient to support a termination of her parental rights.

After examining the decision of the circuit court in this matter, this Court believes that the circuit court also essentially reached this conclusion. However, the Court believes that the circuit court erred in concluding that it could only consider the conduct of Carrie Q. B. at the time of the filing of the petition or prior thereto in determining the fitness of Carrie Q. B. to have custody of Brandon Lee B.

For the reasons stated, the judgment of the circuit court is reversed, and this case is remanded to the Circuit Court of McDowell County with directions that the circuit court terminate the parental rights of Carrie Q. B. to Brandon Lee B.

Reversed and remanded.

No. 29701 - *In Re: Brandon Lee B.*

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OF WEST VIRGINIA

Albright, Justice, concurring in part and dissenting in part:

I concur with the majority's determination that the decision of the lower court in this matter should be reversed. The Department of Health and Human Resources presented evidence in the adjudicatory phase sufficient to warrant a finding of neglect. The determination of the appropriate next step, however, is the focus of my disagreement with the majority opinion.

While the extreme circumstances of this case may indeed warrant termination of parental rights, that determination must be made in conformity with the procedures outlined in the West Virginia Code, the West Virginia Rule of Procedure for Child Abuse and Neglect Proceedings, and the numerous opinions authored by this Court. As an appellate tribunal, this Court does not have authority to issue such a determination where the lower court has not proceeded to the dispositional hearing phase.[1] The timely,

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[1]As this Court stated in *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998),

> The statutory scheme applicable in child abuse and neglect proceedings provides for an essentially two phase process. The first phase culminates in an adjudication of abuse and/or neglect. The second phase is a dispositional one, undertaken to achieve the appropriate permanent placement of a child adjudged to be abused and/or neglected.

Id. at 427, 513 S.E.2d at 475 (citations omitted).

(continued...)

effective, and detailed procedures enumerated by statute, rule, and judicial opinion must be observed. As this Court so distinctly stated in syllabus point two of *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998), "In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual's parental rights."

This Court explicitly stated in syllabus point two of *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973), that this is an issue of constitutional dimension: "West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing."

This Court has characterized a dispositional hearing as a "mandatory prerequisite" to the termination of parental rights. *Beth Ann B.*, 204 W.Va. at 428, 513 S.E.2d at 476. In our recent decision in *State ex rel. Chastity D. v. Hill*, 207 W.Va. 358, 532 S.E.2d 358 (2000), we held that "even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 (1999) and Rules 33 and 35 of the West

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[1](...continued)

Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. . . ." *Id.* at 364, 532 S.E.2d at 364.

These rules and statutory guidelines are essential, and this Court has consistently treated them as mandatory. In syllabus point five of *In re Edward B.*, ___ W.Va. ___, ___ S.E.2d ___, 2001 WL 1402147 (No. 28732, Nov. 8, 2001), this Court recently explained as follows:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Neither the lower court system nor the Department of Health and Human Resources should interpret the majority decision as an excuse to disregard the guidance provided by this Court or the requirements enumerated by statute and rule with regard to dispositional hearings. Egregious facts adduced on the issue of disposition may indeed justify termination of parental rights. However, it is not a determination to be made here at this time. This Court should require adherence to the procedural and substantive protections provided by the Constitution, our statutes, court rules and cases. Accordingly, I respectfully dissent from the portion of the majority opinion which directs the lower court to terminate parental rights. To comply with the mandates of statute, rule, and this Court, the lower court must hold a dispositional hearing prior to termination.

I am authorized to state that Justice Starcher joins in this concurring and dissenting opinion.

218 W. Va. 724, 629 S.E.2d 783

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

No. 32872

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: BRANDON LEE H.S.

Appeal from the Circuit Court of Berkeley County
The Honorable David H. Sanders, Judge
Case No. 04-JA-122

REMANDED

Submitted: March 1, 2006
Filed: April 6, 2006

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review." Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

2. "[W]hether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. Pt. 1, in part, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

3. "Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

Per Curiam:

The West Virginia Department of Health and Human Resources (hereinafter referred to as "DHHR" or the "Department") appeals from the January 26, 2005, order[1] entered by the Circuit Court of Berkeley County holding it in contempt due to its failure to provide sufficient staff resources to enable the Child Protective Services unit of the Martinsburg, West Virginia, DHHR office to fulfill its mandatory responsibilities. The entry of the circuit court's order was stayed for sixty days to permit DHHR to purge itself of the contempt ruling. Upon our review of the record in this matter, DHHR has implemented the necessary measures to purge itself of the contempt ruling.

I. Factual and Procedural Background

The contempt order that is the subject of this action arose out of an abuse and neglect proceeding that evidenced specific staffing problems that the Child Protective Services unit was experiencing in the Eastern Panhandle counties of this state. The abuse and

[1]While there is a second contempt order that was entered on February 7, 2005, DHHR notes that "[b]oth orders basically make the same findings of fact and conclusions of law, and order the Department to undertake various actions concerning the operations of its Child Protective . . . unit in the Eastern Panhandle District comprised of Berkeley, Jefferson and Morgan Counties." Consequently, we will refer collectively to both orders as the "contempt order."

neglect proceeding was initiated following the positive testing of infant Brandon Lee H.S.[2] for traces of cocaine, marijuana, and amphetamines upon his premature birth on October 22, 2004. As a result of this testing, an immediate referral was made to Child Protective Services. The circuit court awarded DHHR emergency temporary custody of Brandon on October 26, 2004, and Brandon was placed in foster care upon his discharge from the hospital.[3]

A preliminary hearing was scheduled for November 5, 2004, to address whether there was probable cause for continuing the award of emergency custody to DHHR. When both of Brandon's parents waived their rights to this preliminary hearing, the circuit court confirmed the actions of DHHR in acquiring legal custody of Brandon. Through its order entered on November 5, 2004, the trial court ordered that Brandon's parents be subjected to random drug screens and directed that visitation with Brandon be arranged at the discretion of DHHR. In this same order, the circuit court included the following language:

> In reviewing this case, the Court finds that D.H.H.R. located in the Eastern Panhandle of West Virginia is dangerously understaffed, with as many as 12 unfilled staff

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[2]As is this Court's longstanding practice, we identify this individual by initials only based upon the sensitive nature of the matter. *See In re Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[3]He remained in the legal custody of DHHR at the time of his foster care placement.

> positions. The Court finds that this may be putting infants in the Eastern Panhandle at risk. Further, the Court finds that this interferes with the proper oversight that D.H.H.R. should be giving to this case, including proper visitation and considerations of placement.

The trial court set this matter for adjudication on December 6, 2004.[4]

On November 30, 2004, the Child Protective Services supervisor learned that Brandon's case had not yet been assigned within the Department.[5] Brandon's father and the guardian ad litem appointed to represent Brandon's interests filed a petition for contempt in which they alleged that the Department failed to properly staff this case and complained of the resulting delay in scheduling visitation, as well as in initiating drug-related services. Brandon's father raised an additional complaint concerning the Department's failure to conduct a home visit to determine if placement with him would be appropriate.[6]

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[4]While the order indicated that the hearing was to occur on December 6, 2003, the designation of the year was clearly a typographical error.

[5]This error resulted based on alleged miscommunication within the unit when the investigative worker originally assigned to the case left the Department's employ on the same date as the preliminary hearing. While Department policy apparently required that the vacated position should have resulted in the staffing of the case by either a long-term or an ongoing Child Protective Services worker, this assignment did not occur and was not discovered until November 30, 2004.

[6]The Department notes that there is no directive contained in the November 5, 2004, order, providing for such a home visit. In addition, the Department maintains that a home visit could not have been performed due to the fact that the father was adamant that his parents, with whom he resided, were not to be informed about the fact that Brandon tested positive for having drugs in his system at birth.

On December 15, 2004, the hearing on the contempt petition began.[7] With respect to the underlying allegations of contempt pertaining to the failure of the Martinsburg Child Protective Services unit to staff Brandon's case, the trial court found that these failures were "not the result of any 'willful, intentional, or contumacious act' on the part" of the local DHHR employees. However, based upon testimony offered by several DHHR workers regarding the status of conditions at the Martinsburg Child Protective Services office, the circuit court ruled that

> the Secretary of the Bureau for Children and Families and the Commissioner and Deputy Interim Commissioner of the West Virginia Department of Health and Human Resources are in contempt of their obligation under West Virginia law to provide sufficient resources so that the Martinsburg CPS Unit of D.H.H.R. can fulfill its obligations in the present case, as well as to assure the "safety and guidance" of other children in its custody and in the Eastern Panhandle of West Virginia.

The trial court expressly concluded that the ongoing failure to provide sufficient staffing was "willful, intentional, and contumacious" in light of the fact that "the Secretary has known of the problem at the CPS unit at D.H.H.R. in Martinsburg since 2000, and more particularly since the beginning of 2004, but has taken no action to remedy the situation."

In fashioning the conduct required by the Department to purge the contempt finding, the trial court identified specific directives all aimed at solving the staffing crisis at the Martinsburg Child Protective Services office. The dictates required by the circuit court

[7]The hearing was continued and completed on December 17, 2004.

included the immediate hiring of workers to fill the numerous office vacancies and various measures designed to expedite the training of new hires, as well as certain salary incentives, including the use of geographic pay differentials designed to forestall the heavy attrition rate purportedly due to workers leaving to work in contiguous states. The trial court provided for a sixty-day stay of its order to provide the Department with sufficient time to implement the necessary measures to purge itself of the contempt finding. Arguing that it timely effectuated the actions required of it to be purged from the contempt order, DHHR seeks relief from this Court.

II. Standard of Review

The standard pursuant to which we review civil contempt orders was identified in syllabus point one of *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996):

> In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

Accordingly, we proceed to determine whether error was committed by the trial court in entering the contempt order that is the subject of this proceeding or in refusing to purge the Department of the contempt order.

III. Discussion

In challenging the entry of the contempt order that is the subject of this appeal, DHHR maintains that it had corrected the inaction relative to Brandon's case concerning both visitation and services and had complied, to the extent possible, with the trial court's directives concerning staff-related issues by the time of the hearing on the contempt petition. As a result, DHHR maintains the trial court erred in refusing to enter an order finding that the Department purged itself of the contempt rulings set forth in the January 26, 2005, order.[8] In addition, the Department contends that certain procedural infirmities exist with regard to the contempt ruling due to the lack of service of process that was effectuated on the agency directors who were held in contempt individually.

We begin our analysis of this matter with a review of civil contempt. In *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981), we explored the distinction between civil and criminal contempt, and found that "whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." *Id.* at 660, 276 S.E.2d at 813, syl. pt. 1, in part. We further instructed that

> [w]here the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt

[8]*See supra* note 1.

> action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil.

Id. at 660, 276 S.E.2d at 813, syl. pt. 2.

The Department argues that the court order necessary to serve as the predicate for a civil contempt ruling is the November 5, 2004, order. Maintaining that the terms of that order solely control the issue of whether it has purged itself of non-compliant conduct, the Department argues that the November 5, 2004, order contained only two specific directives with regard to Brandon's case. Those directives were:

> (1) "It is further Ordered that the Respondents shall cooperate with ASI[9] evaluations and with random drug screens, all to be paid for by D.H.H.R."; and
> (2) "It is further Ordered that the Respondents' visitation with the Infant, and placement of the Infant, is [sic] in the discretion of the D.H.H.R."

Emphasizing that the petition for contempt and the rule to show cause rely entirely on the November 5, 2004, order as the basis for the alleged contempt, the Department maintains that at the time of the hearing on the petition for contempt, it had resolved, to the extent of its capabilities, each of the actions related to Brandon's case that were complained of in the petition.[10]

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[9]The Abuse Severity Index involves an evaluation performed to determine the level, if any, of an individual's addiction.

[10]Those four items were that: (1) DHHR had failed to staff this CPS case to the ongoing CPS unit; (2) DHHR had failed to exercise discretion regarding visitation and/or failed to arrange visitation with the parents; (3) DHHR had failed to exercise discretion with (continued...)

DHHR contends that the trial court's contempt order exceeded the permissible scope of the November 5, 2004, order by mandating extensive staffing directives that are unrelated to Brandon's case. The Department objects to the trial court's use of the contempt order to compel conduct on its behalf with regard to staffing issues that have no application to the Brandon case and are beyond the authority of the judicial branch of government to address.

While the Department is correct in stating that the November 5, 2004, order only contained two specific directives with regard to the action required in connection with Brandon's case, the order does contain language finding that the current staff shortage of twelve unfilled positions directly impacts on "the proper oversight that D.H.H.R. should be giving to this case, including proper visitation and considerations of placement."[11] Given the trial court's recognition in the November 5, 2004, ruling of how the staff shortage was contributing to the attention that the Department could necessarily give all cases, not just Brandon's case, we do not find the inclusion of staffing directives in the contempt order to

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[10](...continued)
regard to possible placement of the child with the father; and (4) DHHR had failed to contact the parents regarding implementation of services, visitation, and placement.

[11]The guardian ad litem notes that language similar to that which the trial court inserted in the November 5, 2004, order regarding the DHHR staffing crisis in the Eastern Panhandle was included in orders entered by Judge Sanders in other abuse and neglect cases in the Fall of 2004. She opined that these "statement[s] reflected the Circuit Court's deepening concern about the deteriorating staff situation at DHHR in Martinsburg."

be beyond the scope of the predicate order. Clearly, the staffing concerns were not being raised for the first time in the contempt order and, as a constitutional officer charged with upholding the numerous statutory enactments that govern the protection of this state's children from abuse and neglect,[12] the trial court had the authority, subject to the limitations required in this opinion, to compel the Department to act to remedy the serious effects of the significant staff shortage at issue, specifically, in this case and, generally, in other abuse and neglect proceedings before that court.

Numerous statutes evidence the paramount importance that we attach to protecting and safeguarding this state's children from abusive and neglectful environs. In chapter forty-nine of the West Virginia Code, a body of statutory law devoted exclusively to child welfare, it is recognized that "[t]he purpose of this chapter is to provide a coordinated system of child welfare and juvenile justice for the children of this state that has goals to: (1) Assure each child care, safety and guidance[.]" W.Va. Code § 49-1-1(a)(1) (1999) (Repl. Vol. 2004). Included in this chapter of the Code is an article expressly devoted to handling reports of children suspected of abuse or neglect. *See* W.Va. Code § 49-6A-1 to -10 (1977) (Repl. Vol. 2004). That the state is serious about its creation of "a comprehensive system of child welfare" such that "no child subjected to abuse or neglect shall be left without assistance" is abundantly clear from our laws in this area. W.Va. Code

[12]*See generally* W.Va. Code § 49-1-1 to 49-9-17 (Repl. Vol. 2004).

§§ 49-6D-2(a), (b)(2) (1984) (Repl. Vol. 2004). Inherent in the enactment of the multiple provisions addressing the protection of this state's children is recognition "of the State's responsibility to assist the family in a manner consonant with the purposes of this article [6D – Child Protective Services Act]" which includes as one of its stated purposes the goal of "secur[ing] to a child removed from the family a degree of custody, care and control consistent with the child's best interests." W.Va. Code §§ 49-6D-2(a), -2(b)(6) . Included in the statement of intent for article 6D of chapter 49 is the express recognition that the "legislature enact[ed] this article to provide for the protection of the children of this State from abuse and neglect *and to provide direction to responsible state officers*." W.Va. Code § 49-6D-2(a)(emphasis supplied).

Given the critical nature of the issues presented by abuse and neglect proceedings, as well as the clear legislative recognition of the duties incumbent on the state and its officers to act in the best interests of the child "while recognizing . . . the fundamental rights of parenthood," we cannot fault the trial court for addressing the issue of unfilled Child Protective Services positions in the contempt order. W.Va. Code § 49-6D-2(a). That the unfilled positions played a part in the delayed assignment of Brandon's case to a Child Protective Services worker cannot be doubted. Thus, in directing that the vacant positions be immediately filled, the trial court was acting in furtherance of the legislatively recognized need to "provide direction to responsible state officers" in the interest of securing the full and

proper implementation of specific abuse and neglect statutes. W.Va. Code § 49-6D-2(a). Accordingly, we do not find the inclusion of directives that pertain generally to the issue of hiring additional personnel to fill the vacant positions within DHHR to render the contempt order unenforceable. That is not to say, however, that all of the hiring-related directives are enforceable.

While we agree in principle with the circuit court's directives aimed at hiring and expediting the training process so that the new Child Protective Services workers could be actively handling cases as quickly as possible,[13] we cannot uphold the specific mandate that requires the implementation of geographic pay differentials for DHHR employees located in the Eastern Panhandle of this State. As support for such pay differentials, the trial court and the guardian ad litem both look to legislation that allows the "transfer [of] funds between all general revenue accounts under the [DHHR] secretary's authority." W.Va. Code § 49-6-1a (1994) (Repl. Vol. 2004). In addition, they rely upon a Division of Personnel regulation that authorizes the State Personnel Board to "approve the establishment of pay differentials to address circumstances such as class-wide recruitment and retention problems, [and] regionally specific geographic pay disparities. . . ." W.Va. R. *Personnel* 143 § 1-

[13]In its order, the trial court alludes to the Department's use of an antiquated and protracted training program for newly hired employees.

5.4(f)4 (2003).[14] Appellees maintain that these provisions, combined with the legislative mandate to "provide to the local child protective service such assistance [upon request]. . . as will enable it to fulfill its responsibilities," require the use of geographic pay differentials. W.Va. Code § 49-6A-9(e).

The Department correctly recognizes that the directives in the contempt order which compel DHHR to establish and implement geographic pay differentials for the Child Protective Services unit in the Eastern Panhandle District run afoul of the Separation of Powers doctrine. *See W.Va. Const.* art. V, § 1. We recognized in syllabus point one of *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981), that article V, section one of the West Virginia Constitution is part of the fundamental law of the state and must be strictly construed and closely followed. The separation of powers doctrine requires that the specific functions of the legislative, executive, and judicial branches of government are to be kept distinct. *See State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 87, 150 S.E.2d 449, 454 (1966).

[14]These regulatory provisions were adopted pursuant to West Virginia Code § 29-6-10(2) (1999) (Repl. Vol. 2004). Any such pay plan that incorporates geographic pay differentials "shall become effective only after it has been approved by the governor after submission to him by the [State Personnel] board." *Id.*

Although this Court has recognized that the realities of modern governance sometimes require an overlapping of functions between the three branches,[15] the implementation of geographic pay differentials does not fall into that permissible ambit of branch overlap that would allow the judicial branch to invade the executive branch's jurisdiction over the salaries of its employees.[16] As the Department observes, while it certainly may submit a request to the Division of Personnel, whether a geographic pay differential should be implemented is a decision that lies within the discretion of the Personnel Board. By statute, an agency first recommends a pay differential to the Personnel Board, and if the Personnel Board agrees with the recommendation, the issue must then be

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[15]*See, e.g., Appalachian Power Co. v. Public Serv. Comm'n*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982) (recognizing that "in order to make government workable and economical, it must lend itself to practical considerations" that may include "some overlapping of judicial and administrative duties" (quoting *Chapman v. Huntington W.Va. Housing Auth.*, 121 W.Va. 319, 336, 3 S.E.2d 502, 510 (1939)); *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988) (holding by judicial branch directing executive branch to construct new correctional facility because of unconstitutional penitentiary conditions).

[16]The guardian ad litem suggests that this Court recognized in *Hewitt v. State DHHR*, 212 W.Va. 698, 575 S.E.2d 308 (2002) (*Hewitt I*), that a state court has the power to order state officials to fulfill mandatory duties including the expenditure of executive agency funds. *Hewitt I* acknowledged that due to the "necessary interworkings of the judicial branch and the executive branch in instances of cases involving children who require the services of this state," that the judicial branch may properly be involved in setting expert fees that may be charged in such cases. 212 W.Va. at 703 n.9, 575 S.E.2d at 313 n.9. That limited observation, which pertains solely to expert fee setting, cannot be extrapolated to support the guardian ad litem's contention that the judicial branch has the power to encroach upon the salary setting jurisdiction of the executive branch based on its statutory duty to protect children. *Hewitt I* simply does not support such a wholesale incursion on the executive branch's domain.

referred to the Governor for final approval before a pay differential may be implemented. *See* W.Va. R. 143 *Personnel* § 1-5.4(f)4; W.Va. Code § 29-6-10(2) (1999) (Repl. Vol. 2004). In concluding that a geographic pay differential is mandatory, both the guardian ad litem and the trial court overlook the critical element of discretion that is involved. Circumventing both the separation of powers issue and the discretionary nature of such a decision, the circuit court and guardian ad litem suggest that the issue of pay differentials is compelled based on the inclusion of mandatory statutory language directing that all state "departments, boards, bureaus and other agencies" are to provide assistance to the local child protective service, upon request, to "enable it [DHHR] to fulfill its responsibilities." W.Va. Code § 49-6A-9(e).

In syllogistic fashion, the trial court and the guardian ad litem attempt to convince us that pay differentials are *mandatory* based on statutory language that (a) compels DHHR to assure the "care, safety and guidance" of children in its custody; and (b) charges all agencies, bureaus, and boards to assist DHHR with the fulfillment of its responsibilities. *See* W.Va. Code §§ 49-1-1(a)(1), 49-6A-9(e). This argument – that the geographic pay deferential is mandatory – is simply indefensible. While the Division of Personnel has the discretionary authority, by regulation, to act upon an agency's request for a geographic pay deferential, there is no statutory language that requires the implementation of such salary enhancements. Moreover, as the Department explains, the issue of geographic

pay differentials is one that necessarily must be made solely by the executive branch. This is because such a decision must take into consideration a host of other factors that necessarily include issues such as how a differential affects pay grades, classifications, and budgetary constraints, as well as the potential for grievance filing by employees outside the geographic area selected to receive a pay differential.

While we do not wish to downplay the unacceptable situation that the trial court found itself presented with in regularly presiding over abuse and neglect cases during a period when DHHR staff vacancies reached crisis proportions, the extreme nature of those facts do not justify an invasion of the executive branch's province to set the salaries of its employees. Notwithstanding the legislative recognition of a need to increase the number of child protective services workers and investigators and the granting of authority to the DHHR Secretary to "transfer funds between all general revenue accounts under the secretary's authority," these acts do not constitute a legislative invitation to encroach upon the separation of powers between the three governmental branches that is constitutionally mandated. W.Va. Code § 49-6-1a. Quite simply, the trial court was without power to require the use of geographic pay differentials in its desire, albeit laudatory, to immediately fill those vacant Child Protective Services positions. *See State ex rel. Canterbury v. County Court*, 151 W.Va. 1013, 1019, 158 S.E.2d 151, 156 (1967) (recognizing that separation of powers provision precludes courts from exercising administrative duties relating to executive

branch in refusing to use judicial power of mandamus to control fiscal affairs of county court); *cf. State ex rel. Lambert v. Cortellessi*, 182 W.Va. 142, 148, 386 S.E.2d 640, 646 (1989) (issuing writ of mandamus directing county commission to give due consideration to duties and responsibilities of employees of county clerk's offices to provide "reasonable and proper" funds for performance of statutory duties of office).

In contrast to those cases where this Court has exercised judicial power when the budgets of county officers were arbitrarily reduced and the performance of statutory duties thereby affected, this case does not present a situation where the wrongful denial of funds to constitutional officers required judicial intervention to mandate adequate funding for the fulfillment of specific job duties. *See Cortellessi*, 182 W.Va. at 148 n.6, 386 S.E.2d at 646 n.6 (directing that respective county commissions could not "act arbitrarily by providing clearly inadequate funds for the performance of the statutory duties of the county officers"); *State ex rel. Ginsberg v. Naum*, 173 W.Va. 510, 318 S.E.2d 454 (1984) (holding that county commission has fiscal responsibility to provide prosecuting attorney with sufficient staff for duties of office). While we are convinced that the trial judge, in inserting staff-related directives in the contempt order, was acting solely out of concern for the best interests of the children placed in the state's custody pursuant to our abuse and neglect laws, and that his actions were certainly driven by the lack of action taken by the previous

administration's DHHR officers,[17] we simply lack the authority to address the employment terms of the Department's staff – issues that are unquestionably administrative in nature.[18] Those functions are solely in the realm of the executive branch of government.

With regard to the issue raised by the Department concerning the lack of service of process effected on the individual agency officials[19] who were named in the contempt order, we find this argument less than compelling. The crux of the contempt order was to resolve the immediate issues of visitation and drug testing in the Brandon case and to remedy the unfilled Child Protective Services positions. In not providing the individually

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[17]We wish to acknowledge the huge improvements that the Department has made under the leadership of the current DHHR Secretary, Martha H. Walker, who upon taking office, immediately proposed sweeping changes to improve the employment conditions of Child Protective Service workers throughout the state. We suspect that the actions taken by Secretary Walker were impelled, at least in part, by the continuing interest and careful monitoring of the DHHR staff vacancies by Judge Sanders.

[18]While the trial court framed the contempt order in terms of "whether the CPS unit at the D.H.H.R. office serving the Eastern Panhandle of West Virginia has sufficient resources to fulfill its obligations," the issue of adequate funds was never raised by DHHR. In fact, the guardian ad litem notes that plenty of funds were available for staff hiring purposes due to the unfilled positions. We are certainly cognizant of the fact that the starting salary figure for the Child Protective Services worker may have contributed to the staff vacancies; however, the funds available for such salaries had not been arbitrarily reduced by the Department. Absent arbitrary conduct by the executive branch that placed job performance in jeopardy, this Court has no power to compel action with regard to fiscal issues under the Department's control. *See Canterbury*, 151 W.Va. at 1019, 158 S.E.2d at 156.

[19]The Secretary of the Bureau for Children and Families, which is part of DHHR; and the Commissioner and Deputy Commissioner for DHHR, were named individually by the trial court in the contempt order.

named agency heads with separate service of process of the contempt proceedings, DHHR suggests that due process standards of notice and an opportunity to be heard were violated. *See generally, In Re Yoho,* 171 W.Va. 625, 629-30, 301 S.E.2d 581, 586 (1983).

Critically, as the guardian ad litem notes, these officials were never subject to any sanctions in connection with the contempt finding. Moreover, there is no question that they were aware of the staff shortage situation at the Martinsburg office. The circuit court merely named these individuals in recognition of the fact that an organization such as DHHR can only act through its officials. We presume that the circuit court's naming of these individuals in the contempt order was intended solely for the purpose of resolving the staff shortage in an expedited fashion. Rather than seeking to impose any form of individualized sanctions against these agency officials, the trial court was attempting to get the necessary players – those with hiring powers – on board immediately.

While the better practice is always to adhere to procedural requirements which necessarily include due process protections, in this case the lack of any sanctions against the agency heads combined with the fact that the agency itself was clearly a party to this proceeding who received full notice and an opportunity to be heard, suggest that the lack of individual service does not render the contempt order fatally defective.[20] Because these

[20]Although we conclude in this particular case that the lack of compliance with (continued...)

individuals were named in their professional capacities, they did not incur any expenses for legal representation. In short, we can find no prejudice to have been sustained as a result of the inclusion of the individual DHHR officers in the contempt order.

We are similarly unpersuaded by the Department's argument that the trial court violated the notice provisions included in West Virginia Code § 55-17-1 (2002). That chapter was enacted to codify the procedures to be used "in certain civil actions filed against state government agencies and their officials." W.Va. Code § 55-17-1(b). Consequently, chapter 55 is inapplicable to the case *sub judice* as the contempt proceeding arose out of an abuse and neglect matter – a proceeding initiated by a government agency. Given the

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[20](...continued)
service of process requirements on the individual agency heads is not a fatal defect given the specific factual and legal parameters of this case, we do not suggest that due process requirements can be disregarded when individuals outside the jurisdiction of the trial court are determined to be necessary parties to the proceedings. The protections guaranteed to all citizens by the due process provisions of the state constitution are fundamental to our system of jurisprudence and are vital to securing the implementation of proceedings in a manner that fully comports with principles of fundamental fairness. While those due process protections were not observed with regard to the individual agency heads found by the lower court to be in contempt, we cannot find a consequent violation of the precepts of fundamental fairness to have resulted in this case. The practically immediate purging of any contempt – resulting from the prompt action of those agency heads to address the concerns of the lower court (other than geographical salary differentials) – has led inexorably to our decision today finding a purging of any contempt and, in practical effect, mooting the due process issues. In another case, however, the failure to effect personal service on necessary parties may cause a similar action to be rendered fatally defective for noncompliance with constitutionally significant procedural requirements.

inapposite nature of that chapter of the Code to the matter before us, we do not further address this issue.

Based on the foregoing, we determine that DHHR has fully complied with the portions of the contempt ruling issued by the Circuit Court of Berkeley County that are properly within its power and authority to act. Accordingly, we remand this matter to the circuit court for entry of an order finding that the Department has purged itself of the contempt rulings contained in the January 26 and February 7, 2005, orders and dismissing this contempt action from the docket of the trial court.

Remanded.

197 W. Va. 468, 475 S.E.2d 560

Supreme Court Of Appeals Of West Virginia

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES EX REL.
BRENDA WRIGHT, SOCIAL SERVICES WORKER, Petitioner Below, Appellee,
v.
IN THE MATTER OF BRENDA C., RODNEY C., CHRISTOPHER C. AND BRANDIE NICOLE C., Respondents Below,
BRENDA C., Appellant

No. 23290
Submitted: June April 25, 1996
Filed: July 19, 1996

SYLLABUS BY THE COURT

1. """W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, In re Beth, 192 W. Va. 656, 453 S.E.2d 639 (1994). Syl. Pt. 3, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

2. "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. Pt. 1, State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983),

For Appellee:
F. Jane Hustead, Assistant Prosecuting Attorney, Huntington, West Virginia
Joanna Bowles and Barbara L. Baxter, Assistant Attorney General, Charleston, West Virginia

For Brenda C:
Jerry Blair, Huntington, West Virginia

For Rodney C:

Keith L. Newman, Huntington, West Virginia

For Christopher and Brandie C.:
Lisa Fredeking White, Guardian ad Litem, Huntington, West Virginia

Per Curiam:
Brenda C. appeals from an order of the Circuit Court of Cabell County terminating her parental rights to her two infant children, Christopher C. and Brandie Nicole C. After reviewing whether Appellant's parental rights were properly terminated, we reverse and remand.

Appellant gave birth to Brandie Nicole C. on May 31, 1994. Shortly after Brandie's birth, the West Virginia Department of Health and Human Resources ("DHHR") filed a petition on June 3, 1994, alleging that both Brandie and Christopher were "neglected and/or abused children." Through the petition, the DHHR requested both temporary and permanent custody of the children; termination of parental rights; and the right to provide medical and foster care to the children. As support for its petition, the DHHR averred that as a result of Brenda C.'s addiction to drugs, Brandie was born addicted and was suffering withdrawal symptoms. The children's father was also alleged to be drug addicted. Simultaneous with its filing of the petition, the DHHR sought emergency custody of the children pursuant to oral, ex parte motion. The circuit court granted the DHHR emergency custody and scheduled further hearing on the case for June 6, 1994.

Appellant appeared at the temporary custody hearing on June 6, 1994, without counsel. The DHHR represented to the court that Christopher was at risk based on the fact that he was three years old, was not toilet trained, and refused to eat to avoid having to soil himself. Following this hearing, the court awarded temporary custody of both children to the DHHR; approved temporary placement of the children; appointed counsel for the respondents; granted additional temporary relief; and scheduled an adjudicatory hearing for June 16, 1994.

Appellant was represented by counsel at the June 16, 1994, hearing. During this hearing, the assistant prosecuting attorney appearing on behalf of the DHHR, represented to the court:

Prior to coming on the record, we have agreed through counsel to certain findings of fact, including the fact that there is eminent danger to the well-being--physical well-being of the children, that there is no reasonable alternative available to the removal of the children, and continuation in the home is not in their best interest. Because the child, Brandie, was born opiate addicted, and Mrs. C. . . .--I believe both Mr. and Mrs. C. . . . have admitted to substance abuse problems, and based

upon those findings, we have agreed that the children will remain in the temporary legal custody of the Department because there is no less drastic alternative to their removal.

After making these statements, the assistant prosecutor advised the court that "we need an adjudicatory hearing set." Appellant's attorney did not object to the above representations nor did he find fault with the request for an adjudicatory hearing. The hearing transcript contains no indication that any sworn testimony was taken or even that a proffer of evidence was made--only counsel's statements.

During the course of this hearing, the circuit court asked Appellant and her husband: "Mr. and Mrs. C. . . ., do you understand everything that was said here today?" After they both indicated their assent, the court inquired further, "And you-all are in agreement with this?" Again, Appellant and her husband stated "yes." The court then said, "I'll accept the agreed order and find that it is in everyone's best interest." No findings of fact or conclusions of law were made orally on the record at that time. The court did continue the matter to August 11, 1994, to permit the presentation of a "service plan" and to allow the parents to get substance abuse assistance. The assistant prosecutor requested that an adjudicatory hearing be set.

By order dated July 11, 1994, the circuit court stated its findings with regard to the June 16, 1994, hearing:

> Whereupon the parties represented to the Court that they had, subject to the Court's approval, entered into an agreement with regard to the conditions as they existed at the time of the filing of this petition and asked the Court to approve that agreement, which motion the Court, after due consideration of the representations of counsel, as well as the record and verified petition herein, did sustain.

Based upon the stipulation of the parties the Court does hereby FIND as follows;

> 1. That the infant children were abused and/or neglected at the time of the filing of the petition in this matter.
>
> 2. That the infant child, Brandie Nicole C. . . . was born opiate addicted due to her mother's addiction to drugs.
>
> 3. That the mother and father in this matter have admitted to substance abuse.

This order was signed by the assistant prosecuting attorney, but not by Appellant, her husband, or their respective counsel. The order reflects that the matter is continued to August 11, 1994, but fails to mention the scheduling of an adjudicatory hearing.

At the August 11, 1994, hearing the court granted a thirty-day improvement period to Appellant to permit enrollment in a residential drug treatment program and continued the matter to September 9, 1994, as reflected by a nunc pro tunc order entered on May 3, 1995. As a result of the September 9, 1994, hearing, the court continued temporary legal custody with the DHHR of the minor children; granted Appellant continued physical custody of Christopher for a four-month improvement period; and continued the matter to December 15, 1994, for a dispositional hearing.

The issue of termination or other disposition was apparently never addressed at the December 15, 1994, hearing. Instead, the court continued legal custody with the DHHR, but granted Appellant physical custody of Brandie and enlarged the previously granted four-month improvement period to twelve months. The case was continued to April 20, 1995, and a lengthy letter that Appellant apparently wrote to the trial judge was filed as a part of the record.

Appellant's original counsel was relieved by order of the court and new counsel appointed on March 7, 1995. From letters submitted by Appellant to the court, the record indicates that Appellant was in the Ohio Reformatory for Women at Marysville, Ohio, at this time with an expected release date of October 9, 1995. At the April 20, 1995, hearing Appellant was unable to attend due to her incarceration, but was represented by counsel. The court continued custody of the children with the DHHR at this hearing.

Prior to the final hearing scheduled for May 2, 1995, Appellant's counsel filed a motion to continue the hearing. See footnote 1 The court denied the motion at the May 2, 1995, hearing. Appellant's counsel raised as additional grounds for his motion seeking a continuance that he wished to conduct cross-examination on certain matters. Notwithstanding this objection, the court proceeded with the hearing and terminated Appellant's parental rights.

The transcript of the May 2, 1995, hearing indicates the following comment by the circuit court:

> My understanding from her letters is that she will be possibly getting out into a halfway house of some kind or some kind of a halfway measure, but that that would also be in the state of Ohio, and certainly she could not regain custody of her children even under

> that most propitious of situations in her mind, which again, I'm not certainly guaranteed. So, I do believe that this has gone on for a year-and-a-half. And she did make some admissions at the original adjudication of abuse and neglect which allowed us to adjudicate the situation. And I don't know that the time standards and the best interests of these children would allow me to continue this any further. She is responsible for her own situation and incarceration and her own future situation. In light of the fact that she has admitted the elements that allowed the Court to adjudicate in the first place, I do believe that I should go ahead, for the best interests of the children, with a termination hearing today.

The prosecuting attorney then proceeded to vouch the record to include the fact that "there was an initial adjudication of drug abuse and addiction by both parents" at the June 16, 1994, hearing.

By order dated May 3, 1995, the court terminated Appellant's parental rights, noting within its order, that she "has previously admitted in Court that she neglected and/or abused her infant children due to her habitual drug habits and a judicial determination of neglect and/or abuse was rendered in June of 1994.

As her single assignment of error, Appellant complains that the circuit court terminated her parental rights without ever holding a hearing on the merits wherein evidence was presented. She questions whether the "agreed order" entered after the June 16, 1994, hearing, where no testimony was adduced, is sufficient "to eventually terminate" parental rights. Appellant asserts that she was entitled to an evidentiary hearing before her parental rights were terminated, that clear and convincing evidence must be presented both for an adjudication of abuse and neglect and for a termination of parental rights. Additionally, Appellant states that the court could not rely on her letters to it since they were not introduced into evidence. In response, Appellees state that the documentary evidence and Appellant's own admissions provide adequate evidence to support the court's findings. See footnote 2

Parental rights can only be terminated pursuant to compliance with specific statutory procedures. Appellant argues that the circuit court failed to comply with the provisions of West Virginia Code 49-6-2(c) (1995). That provision states that:

> In any proceeding under this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or

> recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

Appellant's specific complaint regarding lack of compliance with West Virginia Code 49-6-2(c) focuses on the circuit court's complete reliance on the agreement represented by the assistant prosecuting attorney at the June 16, 1994, hearing in lieu of requiring the DHHR to put on any evidence to prove the allegations of its petition.

We stated in syllabus point three of In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995):

> """W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, In re Beth, 192 W. Va. 656, 453 S.E.2d 639 (1994).

In this case, both the assistant prosecutor and the circuit court appear to have assumed that the agreement referenced by the assistant prosecutor at the June 16, 1994, sufficed to constitute the clear and convincing proof of the petition's averments required by West Virginia Code 49-6-2(c). We agree with Appellant that the DHHR failed to meet its statutory burden of proof.

While West Virginia Code 49-6-2(c) "does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare [DHHR] is obligated to meet this burden[,]" what occurred in this case clearly falls short of statutory intent. In re Christina L., 194 W. Va. at 448, 460 S.E.2d at 694. The circuit court was not presented with a signed stipulation reflecting the

representations, which the assistant prosecutor made to the court, that could then properly be entered into evidence. If the stipulation had not been reduced to writing, the parties could have testified regarding their understanding of and assent to the terms of the agreement. Although the circuit court did engage in limited questioning of Appellant and her husband regarding their understanding and agreement concerning the assistant prosecutor's statements to the court, this did not constitute evidence. Significantly, neither Appellant, her husband, or their respective counsel signed the order dated July 11, 1994, which references and incorporates the agreement of the parties concerning the veracity of the petition's averments, including the finding that "the infant children were abused and/or neglected at the time of the filing of the petition."

As we explained in syllabus point one of State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983),

> In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

Id. at 48, 303 S.E2d at 686. In this case, the circuit court appears to have circumvented its duty of holding a hearing for the purposes of making a determination of abuse or neglect under West Virginia Code 49-6-2(c), or, in the alternative, of overseeing the formalization of the stipulation and its entry into evidence. The assistant prosecutor's request for an "adjudicatory hearing" after she informed the court regarding the agreement indicates that even she recognized the need for an evidentiary proceeding.

We do not suggest that a stipulation cannot be used to meet the requirements of West Virginia Code 49-6-2(c). Clearly, a stipulation is a valid means of establishing the parties' assent to the averments contained within an abuse or neglect petition. See T.C., 172 W. Va. at 52, 303 S.E.2d at 690 n.5 (noting use of stipulation to make showing of abuse and neglect); see also In re D.R., 673 A.2d 1259, 1270 (D.C. Ct. App. 1996) (finding that "[i]n a stipulation dated June 19, 1994, the mother admitted to both prenatal and postnatal drug abuse that impaired her ability to provide for her child"); In re Shollenberger, No. 1995CA00135, 1996 WL 363538, slip op. at 1 (Ohio Ct. App. May 20, 1996) (stating that "[o]n December 18, 1990, upon a stipulation by the parties, the children were adjudicated as being neglected"). We further note that the proposed West Virginia Rules of Child Abuse and Neglect Proceedings, which are currently under public comment until August 15, 1996, include an express rule that addresses the use of stipulations within abuse and neglect proceedings. Proposed rule 26 states that:

> **Stipulated Adjudication and Uncontested Petitions.** (a) Required Information. Any stipulated or uncontested adjudication shall include the following information:
>
> (1) Agreed upon facts supporting court involvement regarding the respondent's (s') problems, conduct, or condition;
>
> (2) A statement of facts asserted by the petitioner, but not admitted, which relate to respondent's (s') problems, conduct, or condition; and
>
> (3) A statement of respondent's (s') problems or deficiencies to be addressed at the final disposition.
>
> (b) Voluntariness of Consent. Before accepting a stipulated or uncontested adjudication, the court shall determine that the parties understand the content and consequences of the admission or stipulation and that they voluntarily consent.

While these rules have not been formally adopted, they clearly lend validity to the use of stipulations in connection with abuse and neglect proceedings.

While a stipulation may have been reached in this case, it was never sufficiently formalized. Not only was the agreement never reduced to writing or signed by the parties, the stipulation itself was never introduced into evidence. The agreement is not part of the record other than by the representations of the assistant prosecuting attorney and the lack of any response by Appellant or her counsel regarding its terms. Accordingly, we are compelled to conclude that the DHHR failed to meet its burden of demonstrating by clear and convincing proof the veracity of the statements in its petition. Because no evidence was ever introduced in this case, the circuit court's sole reliance on this loosely assembled stipulation was erroneous. The statute clearly contemplates the introduction of evidence to substantiate the averments of the petition, although such evidence may take the from of a properly prepared and tendered stipulation. See W. Va. Code 49-6-2(c).

Because the threshold issue of abuse and neglect was inadequately addressed, we reverse and remand for further proceedings. On remand, we direct the circuit court to determine whether in fact a stipulation was made. If such a stipulation was made and can be properly introduced into evidence, the court should proceed to make a determination of whether abuse or neglect existed at the time of the petition and subsequently, to make further disposition of this matter. See W. Va. Code 49-6-2(c). Under this Court's decision in State ex rel. Amy M. v. Kaufman, ___ W. Va. __, __ S.E.2d __ (No. 23212, April 8, 1996), we further instruct the circuit court that it may be entitled to proceed without granting a further pre-

adjudicatory improvement period. We note, however, that it would be in the court's discretion to consider granting a post-adjudicatory improvement period upon proper motion. See footnote 3 Under any circumstance, the court should act with great dispatch to bring resolution to Brandie's and Christopher's lives.

For the foregoing reasons, the decision of the Circuit Court of Cabell County is hereby reversed and remanded.

Reversed and remanded.

Footnote: 1 As grounds for the requested continuance, counsel represented that he had not been able to meet with his client; that a meeting required a drive of "five plus hours;" that the prison did not regard him as Appellant's counsel of record; that Appellant was scheduled to be released in June of 1995; and that the State would not be prejudiced by a continuance.

Footnote: 2 Appellees contend additionally that Appellant was not prejudiced by her absence from the termination hearing on two grounds: (1) she occasioned her own absence; and (2) she was represented by counsel. Further, Appellees argue that the circuit court retains the authority to modify its dispositional orders as circumstances change. Because we dispose of this case on other grounds, we do not address these contentions.

Footnote: 3 A new statute is now in effect which addresses the granting of improvement periods in cases of child neglect or abuse. See W. Va. Code 49-6-12 (1996).

Albright and Cleckley, Justices, concurring:

Although we concur with the decision to reverse and remand this cause for further proceedings, we believe that the majority has failed to address issues raised by the appellant's assignment of error and by a complete review of the record which was compelled by her contentions. The points we address are not mere hurdles, thoughtlessly thrust in the way of a benevolent state committed to the protection of its citizens. We address here principles and rules that give meaning in the difficult area of child abuse and neglect to the commitment of our people to live under a government of laws. One of the highest aspirations of our people, fully expressed in the laws of our State, is to protect children from abuse and neglect. We discuss here the methods by which, under law, our courts acquire and exercise jurisdiction to promote that aspiration, promptly and effectively, with justice for all. In fact, those methods are relatively plain and simple, well grounded in our jurisprudence and expressive of the fundamentals of due process of law. We submit that

attention to those principles and rules, reviewed here, will materially assist the courts and their officers in fulfilling the inherent duty of courts to protect the interests of children.

Petition. The petition which initiated the abuse and neglect proceeding before us is seriously defective as a charging instrument. The minimum requirements for a petition charging abuse and neglect are set out in W.Va. Code 49-6-1(a). See footnote 1 While it apparently seems self-evident to the majority that an allegation that a parent is addicted to drugs and that a child has been born addicted satisfies all requirements to plead a case that that parent's child is abused or neglected, we do not perceive the issue as being that simple.

The petition before us fails to allege how the specific conduct of the parents constituting abuse or neglect, in the words of the statute, "comes within the statutory definition of abuse and neglect with references thereto". The definitions of "Abused child" and "Neglected child" referred to are set out in W.Va. Code 49-1-3(a) and (g). See footnote 2

We believe that the petition should allege (1) the specific conduct constituting abuse or neglect, (2) the particular statutory definition or definitions relied upon, set forth verbatim, with Code references, and (3) how the specific conduct comes within those definitions.

The petition also fails to allege what supportive services, if any, were offered to the family by the Department of Health and Human Resources. West Virginia Code 49-6-1(c) requires that the State provide supportive services in an effort to remedy the circumstances detrimental to the child or children involved in the proceeding, and W.Va. Code 49-6-1(a), set out in footnote 1, requires that the petition allege what services, if any, have been provided. We recognize that in some extreme situations the Department of Health and Human Resources may be able only to take emergency custody and file the petition. However, reading the two statutory provisions together, we believe that some allegation regarding supportive services is not only advisable, but required.

Lastly, the petition before us names the children but does not allege their whereabouts or that they are residents of, or are found in, the county and State. Likewise, while the parents are named in the caption and mentioned by name and relationship to the children in the allegations of specific conduct, the petition fails to allege their whereabouts or place of residence. While we would not, at this stage, require amendment of the petition to further address these matters, we believe that, as an aid to the trial court in obtaining effective service on and jurisdiction over all necessary parties, petitions in child abuse or neglect case should contain separate allegations, setting out the names, ages or birth dates, and

residence or whereabouts of each child, and setting out the names and residence or whereabouts of each respondent, with a clear statement of any relationship to the children.

Notice. We regret that the majority did not address the fact that the record before us does not contain copies of any notice served on the respondents nor any return of service showing, prima facia, that respondents were ever served with copies of the petition and the notice required by law in lieu of summons or other process. West Virginia Code 49-6-1(b) See footnote 3 sets out the requirements for the contents of the notice to be served with a copy of the petition, in lieu of a summons or other process. We see compliance with the requirements that parents be given a notice stating the time and place for hearing the cause, the right to counsel, and that the abuse and neglect proceedings "can result in the permanent termination of the parental rights", as essential to the timely and effective protection of the interests of the children whose welfare is at issue. The absence of a clear record of the service of such a notice on the parents should be addressed in this cause, not only to give binding effect to otherwise sound decrees of the trial court altering the parents' rights, but also to give assurance that the steps taken to protect the children involved are operative.

Non-waiver of defects. We have additional reason for concern about full compliance with the statutory mandates regarding the petition and notice. The record does not disclose that either of the counsel appointed for the appellant in the course of this proceeding raised objection to the form of the petition or notice. While we have pointed out apparent defects in the petition, we cannot say that there are any defects in the notice or in the service of the petition and notice, since, as noted, there is no copy of the notice and return of service in the record. Moreover, because the appellant has personally appeared in this cause with counsel, one might ordinarily assume that defenses arising out of any defect in the notice or any defect in or absence of any return of service had been waived if no objections were timely made. See Manypenny v. Graham, 149 W.Va. 56, 138 S.E.2d 724 (1964).

However, we believe that is not a safe assumption in light of the provision of W.Va. Code 49-6-1(b), that: "Failure to object to defects in the petition and notice shall not be construed as a waiver." We regret that the majority failed to address the impact of that provision of law; we earnestly hope that the trial court will. Unfortunately, those who may be harmed the most by any uncorrected and material defects in the petition or notice are the children who are the subject of this proceeding.

We believe that both prosecutors and defense counsel should be attentive to the petition and notice issues discussed here. The failure to examine a petition or

notice for defects or to verify proper service and return of service -- sometimes with respect to a forgotten party -- can operate to deprive a client of sound representation or even to deprive the judgment of the court of its intended force and effect, as against one party or all parties. While such requirements as we have been addressing may appear burdensome at first blush, we respectfully suggest that careful attention to matters of this nature will serve petitioners and respondents and their counsel well. The pleader is likely in the process to ascertain any deficiencies in proof or practice, and the defender is likely to do the same, to the end that the result of the case, whatever it may be, will be prompt, satisfactory, and binding. To those who must prepare petitions, notices, returns of service, publication orders and the like, to comply with such technical or substantive requirements, we suggest that pre-printed or computerized forms can be readily utilized to permit the pleader to swiftly and thoughtfully demonstrate and assure compliance with such requirements.

Adjudication of abuse and neglect. We agree completely with the conclusion of the majority that "the DHHR failed to meet its statutory burden of proof" in this case with respect to proof of abuse and neglect by clear and convincing evidence. However, we believe the reasons assigned by the majority for its decision, while correct, are incomplete.

In dealing with what can constitute proof in a child abuse or neglect proceeding, the Legislature has specifically stated that "[t]he petition shall not be taken as confessed . . . ." W.Va. Code 49-6-2(c). Under the law, a matter is said to be confessed when its resolution results from the voluntary agreement of the parties rather than upon proof otherwise legally adduced. See Morehead v. DeFord, 6 W.Va. 316 (1879); and Third National Bank v. Devine Grocery Company, 97 Tenn. 603, 37 S.W. 390 (1896). It readily appears that the prohibition against taking the petition as confessed contemplates that default judgments will not be taken. We believe that the prohibition has a larger office than simply prohibiting default judgments. We note that the abuse and neglect statute does not provide that a custodial or parental respondent file an answer. See footnote 4 Thus, the present statutory scheme does not contemplate that the issues to be tried in such cases will be narrowed by admissions in a pleading. Rather, we believe that the statutory proscription against taking the petition as confessed requires that the allegations be proved by competent evidence adduced before the trial court, independent of any responsive pleadings.

We find support for this view in our case law. In Calhoun County Bank v. Ellison, 133 W.Va. 9, 54 S.E.2d 182 (1949), this Court considered the effect of admissions made by a committee, Rebecca Ellison, on behalf of her ward, a person considered to be under a disability by reason of mental illness, in pleadings responsive to a claim asserted by Edna Lochard, an adverse party. This Court likened proceedings

against an insane persons to those against an infant and, noting that a decree cannot safely be obtained against an infant "upon the mere fact of taking the bill pro confesso, or upon an answer in form by the guardian ad litem", applied that rule to the committee's ward: Speaking for this Court, Judge Haymond said:

> But even if the denials of the answer of the committee are not sufficient, or if the answer contains admissions detrimental or prejudicial to any right or interest of her ward, William M. Ellison, the allegations in the pleadings filed by the defendant, Edna Lockard, can not be taken for confessed against William M. Ellison or his committee, and the admissions of the committee detrimental to any right or interest of William M. Ellison can not have any binding effect on him. . . . "No one may waive or admit away any substantial rights of, or consent to anything which may be prejudicial to, an insane litigant, and this rule embraces a general committee or guardian." . . .
>
> This Court has said that . . . it is reversible error to decree against an infant upon a bill of complaint which is taken for confessed; and that averments in a bill of complaint which relate to the rights of an infant must be proved in the same manner as if they had been made against an adult and had been denied by answer.
>
> 133 W.Va. at 28-29; 54 S.E.2d at 193 (citations omitted) (emphasis added).

We are strongly persuaded by this reasoning. Above all else, child abuse and neglect proceedings relate to the rights of an infant. While we are mindful of the rights of parents to contest accusations of abuse and neglect which may result in the termination of their parental rights, we look first to the reality that a child abuse and neglect case is, in its essence, a proceeding which seeks to alter the rights of the child or children involved (a) in their relationship with their parents and (b) in their relationship with the State. We are of the opinion that, for all the reasons underlying the decision in Calhoun County Bank v. Ellision, the statutory provisions that prohibit the taking of a child abuse and neglect petition as confessed, mean that allegations in the petition must be proved in the same manner as if they had been denied by answer. For this reason, as well as those assigned by the majority, we believe that the allegations of the petition must be proved by competent evidence, properly adduced before the trial court.

In the context of a hearing to adjudicate whether a child is abused or neglected, we would emphasize, where the majority is silent, that the competent evidence required must constitute clear and convincing proof of specific conduct and how

that conduct falls within the statutory definitions of abuse and neglect relied upon by the State, from all of which the trial court may then make the ultimate finding that the child or children are indeed "abused" or "neglected" children, as defined by law. As the majority correctly noted, the law of this State requires that when an abuse or neglect petition has been filed, the burden is on the State to prove abuse or neglect by clear and convincing evidence. Specifically, in In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981), the Court stated that the burden of proof is upon the Department of Health and Human Resources and does not shift to the parent, guardian, or custodian of the child, even where an improvement period is granted. Further, the Court notes that "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syllabus point 6, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). See also Matter of Adoption of Schoffstall, 179 W.Va. 350, 368 S.E.2d 720 (1988); State v. Carl B., 171 W.Va. 774, 301 S.E.2d 864 (1983).

Admissions or Stipulations. In stating our conclusions, we do not mean to suggest that proper admissions or stipulations of facts by custodial or parental respondents cannot be considered by the trial court in an abuse and neglect proceeding or that such admissions or stipulations might not contribute to or support a finding of abuse and neglect. We agree with the majority comments regarding the so-called stipulation in this case: The circuit court was not presented with a signed stipulation that could be entered into evidence; the court did not and could not ascertain the parties' "understanding of and assent to the terms"; and, the assistant prosecutor's statement and the court's questioning of the parents "did not constitute evidence." We regret that the majority did not then address in positive terms the proper form, office, and limitations of stipulations or admissions in child abuse and neglect proceedings.

First, we note that W.Va. Code 49-6-2(c) expressly provides to parents a meaningful opportunity to be heard, the right to testify, and the right to present and cross-examine witnesses. In their headlong rush to approve stipulations generally and encourage the rehabilitation of the so-called stipulation in this case, the majority has given no attention to the interplay of these rights with the prohibition against taking allegations as confessed and the use of stipulations. We note again that confessed judgments or judgments by agreement are not, in our view, contemplated with respect to the ultimate issue of abuse or neglect; that is a matter for adjudication. Nevertheless, we would place on respondents desiring to assert the rights arising under W.Va. Code 49-6-2(c) an affirmative duty to advise the trial court of their desire to do so. In our view, it should be clearly understood by counsel for the parties that stipulations effectively waive the rights addressed by W.Va. Code 49-6-2(c), as to the subject matter of the stipulations. We commend the majority for suggesting, however gently, that testimony should be adduced

from the parties offering stipulations "regarding their understanding of and assent to the terms of the agreement." We would state additional requirements.

First, counsel to parents should be satisfied that their clients understand that, as to the subject matter of the stipultations, the rights addressed by W.Va. Code 49-6-2(c) are effectively waived. Second, we respectfully suggest that stipulations by parents are not a substitute for the judgment of the court on the ultimate issue of abuse or neglect. Instead, such stipulations may serve as an admission of specific conduct alleged in the petition, upon which the trial court might rely, along with any other evidence needed, to reach the ultimate conclusion of fact and the conclusion of law that the child or children are indeed abused or neglected. Third, we believe the stipulations admitted into evidence should be definite and accurately recorded. Fourth, we suggest that the trial court should be satisfied that the stipulations offered regarding specific conduct constituting or contributing to abuse and neglect should meet those tests for reliability contemplated by the West Virginia Rules of Evidence.

In considering these issues, we also note that the sworn testimony of one or more of the parties in such an action, elicited on either direct or cross-examination could clearly support one or more of the allegations. We find no prohibition in law against compelling the respondents to testify in an abuse and neglect case, save, of course, those privileges against self-incrimination guaranteed by the United States and West Virginia Constitutions and such other privileges, if any, as may arise from other sources.

In summary, to find child abuse or neglect, we would require that the trial court should have before it evidence, properly received and considered, sufficient to meet the standard of clear and convincing proof enunciated by this Court and our Legislature, and sufficient to prove the required allegations of an otherwise sound petition charging abuse and neglect. Where that evidence arises from sources other than sworn testimony, from extra-judicial statements, stipulations, or documentary evidence, the trial court should be satisfied that the evidence admitted meets the requirements for reliability provided by the West Virginia Rules of Evidence. Finally, stipulations received into evidence should not simply be an agreement to or admission of ultimate facts to be adjudicated, such as abuse, neglect, or other ultimate issues; instead, stipulations of fact should aid in providing a basis upon which the ultimate issues may be adjudicated by the court.

Finality of orders. We regret that the majority failed to address the finality of orders in light of the legislative directions that failure to object to defects in the petition or notice shall not be construed as a waiver and that the petition shall not be taken as confessed. In keeping with our concern for prompt disposition of these cases and conscious of the profound concern for the welfare of abused or

neglected children evidenced by the extensive attention given that subject in the laws of this State, we cannot conclude that the Legislature, by providing these explicit protections in the course of an abuse or neglect proceeding, intended to deny finality to judgments rendered in such cases after they had been fully litigated. Therefore, while we would willingly give full effect to those legislative directions during the proceedings, as we have indicated in this opinion, we are of the opinion that, except as to constitutional issues that may not be waived, defects in the petition or notice and allegations taken as confessed in a child abuse or neglect case should not deprive orders of finality once such finality otherwise attaches by operation of law and should not be the basis for any collateral attack upon such orders once final. We regret that the majority has not so concluded.

Termination of parental rights. As the majority notes, the statutory scheme for addressing the needs of abused and neglected children contemplates that after adjudication of abuse or neglect, a separate, dispositional process will be undertaken to ferret out the best solution for the children. If the State seeks the termination of parental rights to carry out that plan, then the statute contemplates that certain facts be proven as a prerequisite to the termination of such rights. Those ultimate facts are detailed in W.Va. Code 49-6-5(a)(6) and W.Va. Code 49-6-5(b). At dispositional hearings, the parties are again entitled to a meaningful opportunity to be heard and the right to testify and present and cross-examine witnesses, provided by W.Va. Code 49-6-2(c). Moreover, a trial court undertaking to terminate parental rights must make detailed findings from the evidence before it. We note further that the use of stipulations in the dispositional phase of the case should, in our view, be subject to like qualifications and limitations as those we suggest for adjudicatory hearings: Any stipulations should be certain and accurately recorded and, in so far as they constitute the admission of facts, duly admitted into evidence. The same concern for reliability and understanding suggested by the majority should attach, as, in our view, should those we have suggested. Lastly, we suggest that the ultimate issues in a dispositional hearing, like those in an adjudicatory hearing, ought to be decided by the court, not simply agreed to by the adult parties present. In our view, the same underlying policy reasons attach to both hearings: The rights and relationships of children with their parents, on the one hand, and with the State, on the other, ought be adjudicated in such proceedings and not be simply the subject of a contract between the State and the parents.

Lastly, we note that in the case before us, the trial court conducted a hearing for the termination of appellant's parental rights in which it found, as fact, the following:

> Ms. C . . . has been incarcerated in the Ohio Reformatory for Women since the fall of 1994 and has an expected release date of

> October, 1995 with a possibility of release to a work center in Ohio in June of 1995.

We regret that the majority has failed to address the impact of that finding upon the proceeding.

In State ex rel. Acton v. Flowers, Id., the Court specifically stated, in syllabus point 2:

> A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.

We respectfully suggest that the failure of the majority to forthrightly address the thorny issues presented by the appellant's incarceration during the pendency of the cause before us requires that the trial court now resolve those issues as, in its sound discretion, it may be advised.

Consideration of court records. In this appeal, the appellant questioned whether the trial court could properly consider as evidence in the termination hearing the letters apparently written by the appellant to the court, which the judge, acting through the court clerk, filed in the case record of this proceeding after furnishing copies to the various parties' counsel. The majority has failed to deal with this issue.

We believe that Rule 5(e) of the West Virginia Rules of Civil Procedure, one of the few rules of civil procedure applicable to juvenile abuse and neglect cases, abrogates historic requirements for admitting material to the record by order or bills of exception, and permits papers to be added to the record by the action of a party simply filing them with the clerk of the court for inclusion in the record. See M. Lugar and L. Silverstein, West Virginia Rules of Civil Procedure, Commentary on Rule 5, p. 60 (1960).

We would conclude that in this case, when the trial judge filed the letters, they became part of the file and became "public records" within the meaning of Rule 1005 of the West Virginia Rules of Evidence. See footnote 5 We would also conclude that they then became a part of the record in this case. In our view, a trial court, through judicial notice, is entitled to rely on such papers as a part of the record of the case and as public records. W.Va.R.Evid. 201. We would find no error in the court treating those letters as proffered evidence with respect to rulings rendered after their filing.

Although such letters may be considered proffered evidence for judicial notice, we note that, in conjunction with actually taking judicial notice of the letters, the parties to the proceeding are entitled to an opportunity to be heard as to the propriety of taking judicial notice of the proffered evidence and on its tenor. On this point, Rule 201(e) of the West Virginia Rules of Evidence provides:

> Opportunity to be heard. -- A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In our view, it is the duty of the party wishing to be heard on the issues relevant under Rule 201(e) of the West Virginia Rules of Evidence to make a timely request for such a hearing. At any such Rule 201(e) hearing, it may be anticipated that the parties may wish to be heard on the other provisions of the law relating to the taking of judicial notice. See footnote 6 As a practical matter, a party should be alert to the possibility that matters filed in the court record might be relied upon by the court at any stage in the proceedings. Fairness suggests that a party desiring to be heard make such request as soon as practicable, on the one hand, and, on the other hand, not be taken by surprise by action taken on the basis of such material unexpectedly or so soon after its filing that there is little or no time to prepare for it.

We also note that, in addition to the letters in the file in the present case, there is also a lengthy report prepared by a welfare worker. We recognize that in juvenile abuse and neglect proceedings, it is common, if not indispensable, for the trial court to receive numerous reports and documents and file the same in the court file, as a matter of course. In our view, the principles relating to the taking of judicial notice, just discussed, should apply to such reports. See footnote 7 We believe that it is incumbent upon counsel to make clear to the court any desire by the parties to inquire under Rule 201(e). Likewise, it may be helpful and save time for the court to require each party give early advice to the court and to the other parties of any such papers of which they desire the court to take judicial notice, and for the court itself to give such notice for documents to be considered, sua sponte. We would leave all of that to the discretion of the trial court, seeking only to encourage, as we have said, the fair, prompt, and satisfactory resolution of these difficult abuse and neglect cases.

CONCLUSION

We believe that in failing to address the matters we have discussed, the majority has ignored substantial issues raised by the record of the present case. This proceeding may effectively terminate infant children's access to most elements of

their natural parents' contact, attention, and love. Even though, in many of these sad cases, the prospect for such contact, attention, and love may be or may appear to be minimal, we believe that the courts should consider and adjudicate such cases with due regard to the provisions of law. While we believe that the incidence of child abuse and neglect is all too frequent in our society, the interests of justice require that the courts act in this sensitive and sad area on sound proof, in accord with the requirements of law. This concurring opinion is intended to aid in the efficient and speedy administration of that law. In our view, the procedures followed by the circuit court failed to meet those standards and the majority has failed to address many of the essentials necessary to getting the cause before us promptly and properly resolved.

Footnote: 1 West Virginia Code 49-6-1(a) states:
If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child. When there is an order for temporary custody pursuant to section three [49-6-3] of this article, such hearing shall be held within thirty days of such order, unless a continuance for a reasonable time is granted to a date certain, for good cause shown.

Footnote: 2 W.Va. Code 49-1-3(a) and (g), read as follows:
(a) "Abused child" means a child whose health or welfare is harmed or threatened by:
(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or
(2) Sexual abuse or sexual exploitation; or
(3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen [48-4-16], article four, chapter forty-eight of this code.

* * *

(g) (1) "Neglected child" means a child:
(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education,

when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;
(2) "Neglected child" does not mean a child whose education is conducted within the provision of section one [18-8-1], article eight, chapter eighteen of this code.

Footnote: 3 West Virginia Code 49-6-1(b) provides:
The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice, and notice shall be given to the state department. In cases wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person. If said person signs the certificate, service shall be complete and said certificate shall be filed as proof of said service with the clerk of the circuit court. If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three [59-3-1 et seq.], chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

Footnote: 4 This Court has approved for public comment the "Draft of Rules of Procedure for Child Abuse and Neglect Proceedings", which provide for answers to be filed by respondents and other changes in procedure in these cases. This concurring opinion suggests that the proper office of an answer, if authorized by the rules ultimately adopted, may be more limited than the draft rules suggest. However, we address the absence of a current statutory provision for an answer only as an aid to our analysis of the statutory proscription against taking the petition as confessed.

Footnote: 5 Rule 1005 of the West Virginia Rules of Evidence provides:
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Footnote: 6 The letters in the present case have been purportedly written by the appellant, but it is conceivable that they were written by some party other than the appellant. Obviously, one of the purposes of Rule 201(e) of the West Virginia Rules of Evidence is to afford an effective opportunity to raise and explore this type of issue and similar issues.
Without attempting to be exhaustive, the Court notes that there might also be questions of relevancy and competency, and certainly the questions of context and meaning of words in such materials might appropriately be raised and explored.

Footnote: 7 In addition to the possible evidentiary problems raised in conjunction with the letters, the Court perceives that there might be hearsay or expert opinion problems connected with such reports.

194 W. Va. 623, 461 S.E.2d 129

Supreme Court Of Appeals Of West Virginia

IN THE MATTER OF BRIAN D., JEFFREY D., SHERRIE D. And ALLEN D., ABUSED AND NEGLECTED CHILDREN, Infants,
BARBARA JOHNSON, Respondent Below, Appellant,
v.
JOHN NANNY, DIRECTOR OF ATTENDANCE, OHIO COUNTY SCHOOLS, and WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioners Below, Appellees.

No. 22558
Submitted: January 10, 1995
Filed: July 19, 1995

SYLLABUS

1. "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. Pt. 1, State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983).

2. "Under W. Va. Code, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days." Syl. Pt. 4, State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).

3. "The purpose of the family case plan as set out in W. Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. Pt. 5, State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).

4. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. Pt. 4, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

5. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

6. "The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

7. Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).

8. "When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code, 49-6-1 (1992)." Syl. Pt. 6, In re Christina L., Nos. 22803 and 22804, ___ W. Va. ___, ___ S.E.2d ___ (filed July 11, 1995).

9. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

10. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, In re Christina L., Nos. 22803 and 22804, ___ W. Va. ___, ___ S.E.2d ___ (filed July 11, 1995).

For Jeffrey D.:
Randy Dean Gossett, Guardian Ad Litem
Wheeling, West Virginia

For Barbara J.:
Gregory A. Gellner, Artimez & Gellner
Wheeling, West Virginia

For West Virginia Department of Health and Human Resources
George P. Surmaitis, Assistant Attorney General
Charleston, West Virginia

Workman, Justice:
Appellant Barbara Johnson appeals from the May 6, 1993, order of the Circuit Court of Ohio County terminating her parental rights to her son, Jeffrey D. See footnote 1 Given the lengthy and convoluted procedural history of this case, we ordered on January 27, 1995, that an immediate home study be completed and returned to this Court by February 10, 1995. We further ordered that telephone communication between Jeffrey and Appellant be immediately restored and suggested that supervised visitation be arranged, provided that the home study did not indicate that visitation would be harmful to Jeffrey. See footnote 2 After reviewing this matter in full, we reverse the termination order and remand this case to the court below to consider fashioning a meaningful improvement period and ultimately to determine whether it is in the best interests of Jeffrey to be returned to his mother's custody.

I. Seven Years of a Child's Life

In his concurring opinion in In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), Justice Thomas B. Miller called the majority opinion "the bible not only for our circuit courts, but for all who are involved in this sensitive and difficult field." Id. at 633, 408 S.E.2d at 385 (Miller, J., concurring). The protracted procedural history of this case, as well as its substantive disregard of the rights of all the parties, could make the record below the bible for how not to handle an abuse and neglect case. Furthermore, the muddled state of the record in this matter has made this case difficult to sort out. It is especially troubling that although there are strong intimations of significant neglect and possible abuse, the only allegation of neglect or abuse ever formally alleged was truancy from kindergarten. Yet this matter has now lingered in the court system for almost seven years, without any permanent resolution for Jeffrey.

On December 8, 1988, John Nanny, the director of attendance for the Ohio County schools filed a petition against the Appellant See footnote 3 pursuant to West Virginia Code §§ 49-6-1 to -11 (1992 & Supp. 1994),See footnote 4 alleging neglect on the grounds that Jeffrey had missed twenty-four days of kindergarten out of a possible thirty-two days as of mid-October. See footnote 5 On December 9, 1988, a hearing was held on the neglect petition which resulted in the entry of

an order directing that psychological evaluations be performed on Appellant, as well as her four children. The circuit court held a status hearing on the petition on January 27, 1989, and concluded that because Jeffrey was not emotionally ready for kindergarten, his attendance was voluntary pursuant to state law. See footnote 6 Rather than dismissing the petition as to Jeffrey, however, the court delayed its ruling pending receipt of the previously-ordered psychological evaluation.

A status hearing was held on February 17, 1989, at which time the court ordered that a court summary prepared by a protective service worker for the West Virginia Department of Human Services (hereinafter referred to as "DHS")See footnote 7 be filed and scheduled a hearing on June 2, 1989, for the purpose of reviewing the written psychological evaluations. See footnote 8 At the June 2, 1989, hearing, the court heard the testimony of John Nanny and the DHS protective service worker. The DHS worker asked the court to extend the improvement period See footnote 9 through November 1989 on the grounds that he had seen no indication that Jeffrey was going to start attending kindergarten in the fall. See footnote 10 He further testified that parenting classes had not been offered to Appellant as the examining psychologist had not felt that she would benefit from such classes. See footnote 11 The hearing was continued until June 30, 1989, to permit the State to call Corey Roman, the psychologist who performed the evaluations.

The prosecutor chose not to call Mr. Roman at the June 30, 1989, hearing, See footnote 12 but Mr. Nanny informed the court that Jeffrey had successfully begun attending a summer school session. See footnote 13 The court opined that the improvement period "is probably bearing fruit" and continued the matter until September 28, 1989, with the comment that "if the children's attendance is reasonable during that month then we could just dismiss this action . . . ."

The record reflects that the next action taken in connection with this case was the court's entry of an order on August 2, 1989, terminating the "paternal parental rights of Wilbur White and of any person claiming to be the father of any or all of said children . . . ."See footnote 14 A review of the record suggests that the impetus for terminating Mr. White's parental rights was a motion seeking to be relieved See footnote 15 by counsel originally appointed to represent the rights of the unknown father. See footnote 16

The record is unclear as to whether the scheduled hearing for September 28, 1989, ever took place. Two documents in the file, however, were obviously prepared in anticipation of such a hearing. First, a court summary bearing the date of September 20, 1989, by the DHS worker was ordered filed by Judge Callie Tsapis on September 25, 1989. Interestingly, that summary contains the recommendation that "[t]he Court order that the educational neglect petition against Barbara

Johnson be dismissed." Second, a letter which is dated September 28, 1989, from John Nanny to Judge Tsapis states that: "I am pleased to share with the Court the improved attendance pattern of the . . . [D.] children as of this date. I would like to see an informal, unsupervised improvement period throughout the current school year."

The record suggests that this neglect case languished for almost two years before any further action was taken. The next entry in the abuse and neglect case court file pertaining to Jeffrey is a "Petition for Review of Custody," which was filed by the DHS on July 2, 1991. This petition indicates that Jeffrey had been residing at the St. John's Home for Children "continuously from March 16, 1990." The petition further reflects that Jeffrey "is in foster care by virtue of a Court order of the Juvenile Referee through the Circuit Court of Ohio County dated March 16, 1990." While the court record is completely devoid of any order bearing the date of March 16, 1990, counsel for Appellant obtained a copy of an order dated March 19, 1990, signed by George J. Fahey as Juvenile Referee, which directed that Jeffrey be "placed in the temporary custody of the West Virginia Department of Human Services, with said Department given the necessary authority to place the juvenile at St. John's Home for Children See footnote 17 . . . ." The order states no basis for Jeffrey's placement. See footnote 18

On August 2, 1991, a hearing was held before the circuit court on the petition for review filed in connection with Jeffrey's placement for more than a year at St. John's. See footnote 19 The October 4, 1991, order reflecting this proceeding indicates that due to the necessity of appointing new counsel See footnote 20 to represent Appellant, a new hearing date was scheduled on the petition for August 9, 1991. The order further reflects that by mutual agreement of the parties the court included a directive restraining Wilbur White from being present at the home of Appellant until further order of the court.

The August 9, 1991, hearing was an evidentiary proceeding which resulted in the entry of an order, entered on October 4, 1991, finding the children of Appellant to be abused "in that the . . . [Appellant] is unable to cope with or to supervise them or control them[.]"See footnote 21 The testimony proffered at this hearing included that of Daniel Tennant, a family therapist at St. John's, who stated that Appellant required individual counseling and that he could not provide the same as his job was limited to family counseling. During the testimony of Mr. Tennant, reference was made to possible physical abuse in the nature of corporal punishment by Wilbur White. See footnote 22 This issue, however, was addressed only in passing and without any specific testimony offered to support the allegations. The only specific problem identified by protective services worker Timothy Randolph was "an inability [on Appellant's part] . . . to cope with the demands of the children and an apparent need of avoiding confrontations with

them[.]" The court granted a six-month improvement period See footnote 23 as to Jeffrey and a three-month improvement period concerning Appellant's three other children. Jeffrey's placement at St. John's was continued, whereas the three older children were permitted to remain in the custody of Appellant. The order also directs that Jeffrey cannot continue with overnight home visitation "until Wilbur White . . . leaves the home of" Appellant. The order further continues and encourages Appellant's regular visitation of Jeffrey at St. John's.

During a status conference held on November 15, 1991, Mr. Nanny moved for the termination of Appellant's parental rights. Because the record does not include a transcript from this proceeding, it is unclear as to what specifically prompted the motion for termination of parental rights. See footnote 24 The only reference to Jeffrey in the order concerning the conference is a ruling that his placement at St. John's is to continue.

A hearing was held on January 24, 1992, for the purpose of permitting evidence to be presented with regard to Mr. Nanny's motion for termination of parental rights. As a result of this hearing, the court entered an order dated March 6, 1992, finding that any neglect by Appellant towards her children was of a passive nature and further finding that Appellant "has made progress toward improvement of her passivity." See footnote 25 The court continued Jeffrey's placement at St. John's, but ordered home visits every other weekend. The order further enjoined Mr. White "from having any contact with . . . [Appellant's] children and from being present in the home of the children at any time while they are there. . . ." The court scheduled a review proceeding for May 1, 1992, which resulted in a further continuation of Jeffrey's placement at St. John's as well as the alternating weekend home visits.

On May 18, 1992, a hearing was held during which the court entertained Appellees' motion to place Jeffrey in foster care. Jeffrey's guardian ad litem interjected that "the counselors at St. John's believe that Jeffrey would be better off in a less restrictive environment[]" as the basis for such motion. After considering testimony regarding Jeffrey's progress, the court ruled that foster care arrangements should be arranged to commence on June 8, 1992. The court stated that after sixty days of foster care, it would review the situation and consider permitting him to live at home with Appellant if the foster care situation was working. The court further ordered that Appellant's home visits with Jeffrey were to continue.

At the sixty-day follow-up to Jeffrey's foster-care placement on August 6, 1992, the court directed that Jeffrey was to be returned to Appellant for a ninety-day trial visit. See footnote 26 The order directing the trial visit expressly forbade Appellant from permitting Wilbur White from having any contact with her family

and directed her to contact her attorney in the event Mr. White showed up at the family's residence. The record in this case indicates that Mr. White was present in the home during several of Jeffrey's home visits prior to the ninety-day trial visit.

As a result of Jeffrey missing three of the first six days of school in September 1992, the parties returned to court on September 9, 1992. After hearing testimony from John Nanny regarding his discovery of Wilbur White in an alley behind Appellant's residence when he visited the home because of Jeffrey's absence from school, the court revoked the trial home visit and ordered that Jeffrey be returned to "whatever facility or foster home [the DHS] deemed to be best for said child." See footnote 27

A hearing was held on November 6, 1992, and Appellant was, for the first time, permitted to testify regarding the problems she had in trying to keep Wilbur White away from her family and home. See footnote 28 By order entered January 28, 1993, the court stopped all but supervised visitation pending proof that Wilbur White had left the area. See footnote 29 The court did order that Jeffrey be permitted to telephone Appellant "when he so desires, within reasonable limitations." The court obviously was reluctant to accept that Mr. White had indeed left the area, as the order directs the family to seek group counseling and to invite Mr. White to participate in the sessions. Because Judge Tsapis was leaving the bench at the end of 1992, the case was transferred to Judge Broadwater.

On February 16, 1993, Judge Broadwater held his first hearing in this case and endeavored to bring focus and direction to this case. He indicated that the case was ready for disposition, and the guardian ad litem again recommended termination of Appellant's parental rights. A dispositional hearing was then scheduled for March 4, 1993.

Dispositional Hearing

The dispositional hearing began initially on March 4, 1993, and was then continued to March 24, 1993. At the first hearing, the State proffered the testimony of Dr. Maceiko, a psychologist who had seen Jeffrey approximately forty times; John Nanny, and Donna Frader, a DHS protective services worker. Dr. Maceiko testified that his recommendation was to permit Jeffrey to continue in foster care and that he not be returned to Appellant based on her pattern of passive neglect. John Nanny testified that he never intended that Appellant's rights should be terminated but that if forced to make a recommendation, he would choose termination. He further stated that he would have no problem with supervised visitation even at the post-dispositional stage. Ms. Frader agreed with Dr. Maceiko's recommendation that Jeffrey not be returned to Appellant's home. At the continuation of the dispositional hearing on March 24, 1993, Jeffrey testified that he wanted to return home and that he is attached to Appellant. Evidence was

proffered that Jeffrey called and spoke to Appellant almost every night. At the conclusion of the hearing, the court directed the parties to return on April 5, 1993.

At the proceeding held on April 5, 1993,See footnote 30 the guardian ad litem renewed his motion for termination of Appellant's parental rights while the State did not render any recommendation. Appellant asked the court for additional help, but the court indicated that it intended to terminate her parental rights as to Jeffrey.

By order entered on May 6, 1993, the court terminated Appellant's parental rights, finding that Appellant was unable to provide the continuity of care required by Jeffrey due to her lack of mental capacity and parenting skills. The court found that Appellant was unable to respond adequately or follow through with the DHS care plan by acquiring adequate parenting skills or conforming her behavior to such plan. The court further observed that there was no reasonable likelihood that the conditions of neglectful behavior could be substantially corrected and, noted additionally, the absence of a less restrictive alternative to termination. Finally, the order noted that the "[r]eunification of the child Jeffrey D. with his . . . mother [wa]s not in the best interests of the child[.]" The court's termination ruling also reflects its dissatisfaction with Appellant for her failure to comply with court directives to keep Wilbur White away from her home and Jeffrey.

By order entered on December 30, 1993, the court stayed the enforcement of the termination order pending the outcome of her appeal of said order, but denied visitation rights to Appellant during the stay. Appellant filed her petition for appeal seeking a reversal of the termination order on July 13, 1994. This Court granted the petition on October 13, 1994, and placed the matter on an expedited briefing schedule. Although this matter was originally scheduled for oral argument before this Court on November 29, 1994, a motion to continue was made due to the failure of the State and the guardian ad litem to file briefs, See footnote 31 and the matter was continued to the January 1995 term of this Court.

II. The Appeal

Appellant protests initially that the court did not have jurisdiction over Jeffrey at the time the order finding neglect was issued. She maintains that once the circuit court concluded in its order of April 5, 1989, that Jeffrey's kindergarten attendance was voluntary pursuant to state law, See footnote 32 the court no longer had jurisdiction over Jeffrey since the only ground alleged in the petition was truancy. As the State correctly explains, the circuit court properly had jurisdiction over Jeffrey following the entry of the April 5, 1989, order under the authority of West Virginia Code § 49-6-3. That statute provides, in pertinent part:

> Upon the filing of a [neglect or abuse] petition, . . . [i]n a case where there is more than one child in the home, . . . the petition shall so

> state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding.
> W. Va. Code § 49-6-3(a) (emphasis supplied).

Accordingly, Jeffrey was properly under the court's continuing jurisdiction at the time the neglect order was entered since the neglect petition at issue also named Jeffrey's siblings. By virtue of the court's continuing jurisdiction over his brothers and sister, the court had the authority to monitor the welfare of Jeffrey. See W. Va. Code § 49-6-3.

Appellant next alleges that the circuit court failed to follow the statutory framework for terminating her rights. In syllabus point one of State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983), this Court held that:

> In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case.

Id. at 48, 303 S.E.2d at 686. Appellant finds fault with Judge Tsapsis' finding of neglect on the sole grounds that the State was the only party which offered testimony at the hearing on August 9, 1991, at the conclusion of which the finding of neglect was made. Upon review of the record, we observe that Appellant was represented by counsel at this hearing, albeit newly appointed, See footnote 33 and that Appellant was not prevented from offering evidence during this hearing, from raising any objections to the testimony elicited at such hearing, or from seeking a continuance if more time was needed to prepare her case. Appellant further argues that she was not notified that the August 9, 1991, hearing was to be adjudicatory in nature. The record, however, does not reflect any objection raised by Appellant regarding this issue.

The next assignment Appellant raises is the failure of the State to prepare a written case plan prior to the dispositional hearing held on May 3, 1993. Pursuant to West Virginia Code § 49- 6-5(a),

> [f]ollowing a determination pursuant to section two [§ 49-6-2] of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term case plan means a written document that includes, where applicable, the

> requirements of the family case plan as provided for in . . . [§ 49-6D-3], . . . and that also includes at least the following: A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent(s) home, facilitate return of the child to his or her own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child. . . . Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.
>
> W. Va. Code § 49-6-5(a).

The obligation to formulate a case plan arises upon the granting of an improvement period under West Virginia Code § 49-6- 2(b). See Syl. Pt. 3, State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987). We expounded on the time period permitted statutorily for preparing case plans and the purpose of such plans in syllabus points four and five of Cheryl M.:

> Under W. Va. Code, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days.
>
> The purpose of the family case plan as set out in W. Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.
>
> 177 W. Va. at 688-89, 356 S.E.2d at 181-82, syl. pts. 4, 5.

More recently, we have enunciated, at length, the critical importance of developing and complying with meaningful improvement periods and family case plans in Carlita B. See 185 W. Va. at 624- 29, 408 S.E.2d at 376-81. We explained in syllabus point four of Carlita B. that,

> [i]n formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi- disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.
>
> Id. at 616, 408 S.E.2d at 368. We further explained:
>
> The goal [of improvement periods and case plans] should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the D.H.S. and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.
>
> Id. at 625, 408 S.E.2d at 377.

In this case, the Appellees readily concede that the statutorily-required case plan was not filed prior to or at the time of the dispositional hearing. See footnote 34

The only term imposed by the circuit court in connection with the six-month improvement period ordered at the August 9, 1991, hearing and reflected by an October 4, 1991, order was that "the children and the respondent [Appellant] shall attend family counseling and such individual counseling as is appropriate and recommended by the Department of Health and Human Resources and the staff at St. John's Home[.]" The record reflects that a family therapist at St. John's testified at the August 9, 1991, hearing that Appellant's primary problem was her nonassertiveness. Mr. Tennant testified:

> Since Jeffrey has come to Saint John's last June, Barbara J., Jeffrey's mom, has been the only family member to attend family therapy. She's attended one time weekly faithfully. Unfortunately, family therapy can be done with one person but, unfortunately, not with

> Barbara. She lacks the ability to learn to take charge and control her family, regardless of her coming to therapy. Her family situation hasn't changed at all since I met them, because of her inability -- it's no fault of hers. I think that this is just one of her problems that she has; being nonassertive. That can be worked out in individual counseling, but my job at Saint John's is family counseling. (emphasis supplied)

At the August 9, 1991, hearing Mr. Tennant explained his recommendation of another six-month improvement period See footnote 35 by stating, "I think that Barbara is willing to change. I think that the change can occur in six months." However, despite the recognized need for individualized counseling for Appellant, the record does not reflect that Appellant ever received this type of specialized help during this six-month improvement period. We cautioned against improvement periods being nothing but a "mere passage of time" in Carlita B., yet it appears that this is exactly what occurred in the instant case. See 185 W. Va. at 625, 408 S.E.2d at 377.

We recognized in Cheryl M. that Appellant "was entitled to a meaningful improvement period to demonstrate her ability to care for her child as required by W. Va. Code, 49-6-2." 177 W. Va. at 695, 356 S.E.2d at 188. Given the failure of the State to provide Appellant with any individualized counseling aimed at addressing her lack of assertiveness, plus the absence of any additional measures taken to assist Appellant "in dealing with any problems which interfere[d] with . . . [her] ability to be an effective parent[,]" the various improvement periods cannot be viewed as meaningful consistent with this Court's rulings in Cheryl M. and Carlita B. See 177 W. Va. at 695, 356 S.E.2d at 188; 185 W. Va. at 625, 408 S.E.2d at 377. Accordingly, we reverse on the grounds that Appellant was not provided the meaningful improvement period to which she was entitled.

III. The Need for Monitoring

In Carlita B., we pronounced that "[c]hild abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." 185 W. Va. at 615, 408 S.E.2d at 367, Syl. Pt. 1, in part. As the procedural history of this case illustrates, Jeffrey's case has unnecessarily failed to reach the point of finality for many years. This case amplifies our observations in Carlita B. that

> [t]he bulk of the most aggravated procedural delays . . . are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall

> through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children--the most voiceless segment of our society--aren't left to languish in a limbo-like state during a time most crucial to their development.
>
> Id. at 623, 408 S.E.2d at 375.

Despite our directive in Carlita B., abuse and neglect cases still are not being accorded priority status, and many circuit courts are still doing a woefully inadequate job of monitoring and managing the progress of these cases. The instant case is one of the more aggravated examples of how courts permit these cases to flag along with no real focus or direction. Carlita B., Canon 3 of the Code of Judicial Conduct, See footnote 36 and Rule 8See footnote 37 of the Time Standards for Circuit Courts place an affirmative duty on circuit court judges to manage the progress of cases. Therefore, this Court reiterates that circuit court judges must take whatever steps are necessary to monitor abuse and neglect cases pending before them in a diligent and expeditious fashion.

We are immensely troubled by the record's suggestion that Jeffrey's removal from his home was by order of a juvenile referee rather than a circuit court, even though an abuse and neglect case was pending. West Virginia Code § 49-5-8 (1995) provides for the circuit court's entry of an order directing that a child be taken into the state's custody if one of four grounds exist. See footnote 38 Given this Court's frustrated attempt to secure the complete juvenile record pertaining to Jeffrey, however, we cannot state with certainty that a circuit court order was never entered in connection with Jeffrey's removal from his home. We can only state that the documentation that has been lodged with this Court by the circuit court clerk, and represented as "the complete record," contains no such order.

We simply cannot fathom why it took so many years and an order by this Court to get a permanency plan developed. See footnote 39 As late as February 10, 1993, it was noted on a progress report that "[a] long term goal has not been developed for Jeff at this time." See footnote 40 This child, as well as numerous others who are not currently before the Court, deserve much better. They deserve to know where and with whom they are going to live and to be secure in the knowledge that there will eventually be some continuity in their fragile lives. Consistent with our recognition in syllabus point five of James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home[,]" the obligations of the courts and the DHS similarly do not dissipate until a permanent resolution is made. Id. at 649, 408 S.E.2d at 401.

IV. A Meaningful Improvement Period

Despite all the so-called "improvement periods" in this case, none of them appear to have comported with the kind of focused, goal-oriented plan that we have previously mandated. Upon remand, the court, in formulating a meaningful improvement period, should adopt the consolidated, multi-disciplinary approach we recommended in Carlita B., giving regard not only to the provision of individual counseling for the mother, but also conducting a plenary review of the child's needs--physical, emotional, educational, and needed services. See footnote 41

In this connection, however, it should be noted that the home study provided to this Court on February 19, 1995, suggests a potential obstacle to such an improvement period. Appellant repeatedly indicated that she is unwilling to participate in any counseling programs offered to her by the DHS. She is quoted as stating that "she does not want an[y] involvement with the Department of Health & Human Resources, and sees our department as vindictive and harassing." The home study further indicates that Appellant "feels that she will not need any help adjusting to Jeffrey's return and has refused our offer of Family Preservation or Family Counseling Services, but states she will allow Jeffrey to continue seeing his therapist, if needed." Given this alleged unwillingness to engage in counseling services that the DHS has concluded are necessary, the circuit court on remand may inquire into this matter and if it finds that Appellant refuses to participate in individual counseling, then an improvement period would be for naught. Furthermore, a circuit court always has the authority to terminate an improvement period if there is evidence that the parent is not following the conditions prescribed or is failing to make improvement. The record is replete with indications that the Appellant has lacked insight in recognizing her parental deficits and in cooperating with the DHS to remedy the underlying problems. If a record is established on remand that the Appellant has been offered individual counseling in the past and has refused such counseling, then it may proceed to disposition.

At the conclusion of the improvement period, if given, the court should proceed to the determination set forth in syllabus point six of Carlita B.:

> 'the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.'
>
> 185 W. Va. at 616, 408 S.E.2d at 368, Syl. Pt. 6, in part.

In making this determination, the reality of Jeffrey's life during the last several years, including the fact that he has now resided with the Harrises for approximately three years cannot be ignored. Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). Thus, how Jeffrey has fared educationally and emotionally with these foster parents and Jeffrey's own feelings and emotional attachments should be taken into consideration by the lower court.

As we said in Lemley v. Barr, 176 W. Va. 378, 343 S.E.2d 101 (1986), a case involving the rights of natural versus adoptive parents:

> 'The day is long past in this State, if it had ever been when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude.'
>
> Id. at 386, 343 S.E.2d at 109 (quoting In re Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976)).

Another critical factor which must be examined is the living arrangements and potential presence of Wilbur White in Jeffrey's life, and the ability of the mother (or the lack thereof) to adequately protect Jeffrey. While the record in this case is very limited as to the actual harm that Mr. White has inflicted on Jeffrey, the various orders, psychological reports, court summaries, and recommendations from the guardian ad litem all concur on one point--Wilbur White's presence is harmful to Jeffrey. The failure of the mother to comply with earlier court orders not to permit Mr. White in the home with Jeffrey may also be considered on remand. The home study submitted to this Court on February 10, 1995, includes information that attempts made to verify Mr. White's current residence indicate that Mr. White receives his mail at the same address at which Appellant currently resides. This fact alone may, upon introduction of proper evidence verifying that Mr. White does pose a continuing problem with regards to Jeffrey, prevent Appellant from receiving custody of Jeffrey. Clearly, it would be disastrous to permit Jeffrey to return to his mother's home on a permanent basis without

resolving this issue of Mr. White's presence and the potential that his presence, permanent or sporadic, would have a deleterious effect on Jeffrey's continued progress.

Should the court eventually determine that Jeffrey should be reunified with his mother, such change should be accomplished with a sufficient gradual transition period to enable Jeffrey to accept such change with as little upheaval as possible to his life. See Syl. Pt. 3, James M., 185 W. Va. at 649, 408 S.E.2d at 401 (recognizing need for gradual transition when permanent custodial arrangements are altered.)See footnote 42

In In re Christina L., Nos. 22803 and 22804, ___ W. Va. ___, ___ S.E.2d ___ (filed July 11, 1995), we recently pointed out that West Virginia Code § 49-6-1 (1995) sets forth mandatory notice requirements in abuse and neglect cases. See footnote 43 In the instant case, it appears that the rights of Wilbur White were terminated without any allegation of abuse or neglect. Indeed, such rights appear to have been terminated on the basis of a finding of abandonment without there ever having been a formal allegation of abandonment. See footnote 44 Although the issue of the rights of Wilbur White are not before the Court at this time, we urge the lower court on remand to clean up the record, if not for the father's benefit (who from the record before us has indicated very little interest in the child), at least for Jeffrey's benefit.

We spoke with disapproval in Christina L. of the practice of not including allegations of abandonment in petitions for abuse and neglect, effectively leaving the child's legal status in limbo. In syllabus point six of Christina L., we said: "When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code, 49-6-1 (1992)." If the rights of the father were terminated without due process, Jeffrey's future status could be subject to challenge.

V. Right of Child to Continued Associationy

In the event the proceedings on remand result in a termination of Appellant's parental rights, the court should consider whether the child should have continued visitation with his mother and/or his siblings, notwithstanding the termination of rights. Previously, this Court recognized the need for continuing association between siblings or step-siblings following a parental rights termination in syllabus point four of James M.:

> In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in

> other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.
>
> 185 W. Va. at 649, 408 S.E.2d at 401.

We recently extended this concept to include the possibility of visitation between the child and the parent whose rights have been terminated for abuse or neglect:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.
>
> Syl. Pt. 5, Nos. 22804 and 22804, ___ W. Va. ___, ___ S.E.2d ___ (filed July 11, 1995).

Accordingly, in the event that Appellant's parental rights are re-terminated, the court may consider awarding visitation rights to her consistent with the considerations identified in Christina L. If the court eventually returns custody to Appellant, it should inquire into the relationship Jeffrey has formed with his foster parents and, if it is in his best interests, fashion a plan for continued association between the foster parents and the child. As we said in Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989), a child has a right to continued association with those to whom he has formed an emotional bond. Id. at 452-53, 388 S.E.2d at 325-26.

Based on the foregoing, we hereby reverse the decision of the Circuit Court of Ohio County and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.

Footnote: 1 We identify the child at issue by initials given his juvenile status plus the sensitive factual nature of this case in accordance with this Court's previous decisions. See, e.g., In re Jonathan P., 182 W. Va. 302, 303, 387 S.E.2d 537, 538 n.1 (1989).

Footnote: 2 Our order re-establishing visitation was necessitated by: (1) the complete extinguishment of visitation between Jeffrey and Appellant since December 30, 1993, based solely on a petition asserting neglect on the basis of Jeffrey's truancy from kindergarten at a time when he was not legally required to attend school; (2) evidence in the record of a close emotional bond between Jeffrey and Appellant; and (3) the granting of a stay of Appellant's termination pending appeal, but denial of continued contact.

Footnote: 3 Strangely enough, no allegations were made against Jeffrey's father in the neglect petition and he was not named as a party. The record is unclear as to whether he was served with a copy of the petition.

Footnote: 4 Because neither the 1992 or the 1994 amendments to the child neglect or abuse statutes affect the substantive provisions at issue, we do not cite to prior versions of the statutes which were in effect during earlier stages of this case.

Footnote: 5 The petition also named two of Jeffrey's siblings as being truant.

Footnote: 6 The order reflecting the January 27, 1989, hearing states that: "the Court heard testimony and reviewed West Virginia Code [§] 18-8-1 and West Virginia Code [§] 18-8-1a and determined that Jeffrey D. would not be compelled to continue attending kindergarten because he does not appear emotionally ready to attend school." West Virginia Code § 18-8-1 (1994) provides that: "Compulsory school attendance shall begin with the school year in which the sixth birthday is reached prior to the first day of September of such year or upon enrolling in a publicly sup[p]orted kindergarten program . . . ." West Virginia Code § 18-8-1a provides "[t]hat a child may be removed from such kindergarten program when the principal, teacher and parent or guardian concur that the best interest of the child would not be served by requiring further attendance . . . ." In making its ruling, the circuit court relied on Jeffrey's lack of emotional readiness plus the fact that he had not reached the age of six prior to the first day of September 1988, given his birthdate of December 2, 1982.

Footnote: 7 Notwithstanding the renaming of the DHS to the Department of Health and Human Resources, the department will be referred to as the DHS throughout this opinion for consistency.

Footnote: 8 Although the court-ordered psychological evaluations are dated as being completed on February 2, 1989, the record reveals that the circuit court did not receive such evaluations until sometime after April 3, 1989.

Footnote: 9 The record does not contain an order reflecting the granting of an improvement period for the period covering December 1988 until the June 2, 1989, hearing. The first reference to an improvement period that appears in the record is in a court summary dated May 31, 1989, wherein a DHS worker recommends the granting of an improvement period until November 1989. In the transcript from the June 2, 1989, hearing, Judge Tsapsis indicates that she is granting the recommended improvement period through November 1989. The only stated directive, which might be viewed as a term of such improvement period, was an admonition by the court during the June 2, 1989, hearing whereby "the burden [was placed] on you [Appellant] to see to it that Jeffrey attends those classes that the arrangements have been made for." The classes referred to were part-time summer instruction at Clay Elementary for speech.

The record does not contain an order reflecting the granting of the improvement period on June 2, 1989, or setting forth the terms and conditions of such improvement period. Appellee DHS states in its brief: "The dispositional order states that the Department filed a case plan pursuant to W. Va. Code § 49-6-5. Neither the court file nor Appellee's file reflect a case plan at the time of disposition." This is highly confusing as the record tendered to this Court contains a letter dated June 30, 1989, from Gary L. Smith, Protective Service Worker, to Judge Tsapis attaching a family case plan. That attached document provides as a goal that there are to be "[n]o unexcused days from school for children." It further requires that Appellant is to: "See to it that the children get up for school and go to school. Have doctor's excuses when children miss school. Have Jeffrey attend summer school."

Footnote: 10 DHS protective services worker, Gary L. Smith, testified at the hearing--"I'm very pessimistic that Jeffrey D. is going to start attending kindergarten as far as in the fall. I have seen no signs as of yet where his attitude is changing towards school."

Footnote: 11 The report prepared by Corey P. Roman, M.A., states that:

> *The examiner is not of the opinion that Ms. Johnson and her Family [sic] would gain benefit from outpatient counseling in order to deal with school attendance. The examiner suspects that limits in insight, understanding and, more importantly, motivation would circumvent successful outcome in this regard.*

Footnote: 12 The explanation offered by the State for this tact was a determination that Mr. Roman could not offer any additional information that was not already reflected in his reports.

Footnote: 13 The record reflects that Jeffrey had started attending the summer program on June 13, 1989, which involved a half-day kindergarten program on some days and on others, attendance in remedial speech and reading classes.

Footnote: 14 The record repeatedly sets forth that Wilbur White is the biological father of Jeffrey. According to the report of psychologist William Hewitt dated March 18, 1991, Jeffrey related that he had lived with his uncle for a time. It is suggested that Jeffrey's references to his uncle were in fact to Mr. White and were apparently geared at hiding the fact that Mr. White was living periodically at the Appellant's residence. Ironically, however, the petition for abuse and neglect is silent as to the identity of the father and as to any allegations against him.

Footnote: 15 Counsel's motion to be relieved was prompted by an apparent change in her employment status.

Footnote: 16 The record provides minimal information regarding Mr. White's termination. Judge Tsapsis stated at the June 2, 1989, hearing that she was going to find the children abandoned by their father and there would therefore be "no need to have a father being represented here any longer." In response to this statement, Appellant's former counsel informed the court that "Jeffrey's father is known" and that "[h]e has shown some interest on occasion." The record contains an order entered on August 2, 1989, which states that "notice by Class II publication as required by law was made to the father or fathers of the children that their parental rights . . . would be terminated . . . ." and "that the paternal parental rights of Wilbur White . . . shall be . . . terminated." The record reflects additionally that a "Notice of Hearing to Appeal Termination of Parental Rights" was filed on July 19, 1989, providing Mr. White with the opportunity to appeal the termination order on September 28, 1989. Mr. White, however, has never challenged the termination of his parental rights to Jeffrey.

Footnote: 17 The record provides no information on the nature of this facility, but according to the 1991 West Virginia Child Care Association Directory, it appears to be a small group home for boys ages 8-14.

Footnote: 18 Subsequent to the oral argument of this case, this Court undertook on its own to obtain a copy of the juvenile file pertaining to Jeffrey in an effort to ascertain the nature of Jeffrey's placement at St. John's. The limited documentation which this Court obtained failed to reveal any further information regarding what incident(s) prompted the placement. The only reference in the

record regarding the basis for the placement is noted in a psychological report dated March 18, 1991, and states that Jeffrey's placement was "court-ordered" "in part because of school refusal or school phobia."

Footnote: 19 West Virginia Code § 49-6-8(a) (1995) requires that,

"[i]f, twelve months after receipt (by the state department or its authorized agent) of physical custody of a child either by a court ordered placement or by a voluntary agreement, the state department has not placed a child in permanent foster care or an adoptive home or placed the child with a natural parent, the state department shall file with the court a petition for review of the case.

Footnote: 20 Apparently, Appellant's former counsel abandoned her without filing a motion with the court seeking to be relieved from his/her appointment as counsel.

Footnote: 21 There are in fact two orders that were entered on October 4, 1991: (1) the order appointing new counsel for Appellant and restraining Mr. White "from being present at the home of . . . [Appellant] until further order of th[e] Court[;]" and (2) the order finding Appellant's children to be abused.

Footnote: 22 Mr. White declared to a family therapist at St. John's and to a DHS caseworker that "'slapping Jeff around'" was his style of disciplining the child. This Court notes, however, that the allegation of physical abuse which surfaces periodically throughout these proceedings was never alleged in the petition and never formally addressed in any evidentiary proceeding, nor does it appear to be a specific basis for the various rulings entered throughout the years. Instead, the repeated negative references to Wilbur White appear to be based on his negative influence and effect on Jeffrey in general, as gleaned from the court summaries and testimony of Mr. Nanny and the various DHS workers.

Footnote: 23 As in 1981 at the time of the court's ruling, West Virginia Code § 49-6-2(b) (1995) provides for one improvement period of three to twelve months.

Footnote: 24 In reviewing the order which reflects the status conference proceedings, it appears that Appellant's daughter and her welfare were more the focus of the proceeding than Jeffrey.

Footnote: 25 The petition was dismissed as to Jeffrey's two brothers and an improvement period of three months was ordered with regard to his sister.

Footnote: 26 Only Jeffrey's guardian ad litem objected to the court's ruling that Jeffrey be permitted a trial home visit.

Footnote: 27 *Jeffrey was returned to foster care effective September 9, 1992.*

Footnote: 28 *One specific explanation given by Appellant to the court was that the police did not help her enforce the restraining order entered against Mr. White.*

Footnote: 29 *The order reflects that Mr. White was purportedly residing in Cleveland, Ohio.*

Footnote: 30 *Although the record and the transcript itself bear the date of April 5, 1994, as opposed to 1993, this proceeding would not have occurred post-termination and the parties themselves have referred to the proceedings reflected by such transcript as having occurred on April 5, 1993. Accordingly, we presume that an error was made in transcription.*

Footnote: 31 *The motion to continue filed by the West Virginia Attorney General on behalf of the DHS reflects that there was a definite lack of communication between the office of the attorney general and the Ohio County Prosecutor's office with regard to who was responsible for representation of the DHS in connection with this case. The motion further states that the scheduling order prepared by the clerk of this Court was not served on the Ohio County Prosecuting Attorney, the DHS, or the attorney general's office. The records of the clerk of this Court, however, reflect that two notices were sent to Randy Dean Gossett, guardian ad litem; Greg Gellner, Appellant's counsel; and Scott R. Smith, counsel for DHS regarding the original scheduling of this matter for oral argument on November 29, 1994. Additionally, it is alleged in the motion to continue that Appellant's brief, filed on November 4, 1994, was not served on the DHS or the attorney general's office. If this allegation is true, this constitutes an obvious violation of Rule 15 of this Court's Rules of Appellate Procedure.*

Footnote: 32 *See supra note 6.*

Footnote: 33 *Counsel representing Appellant had been appointed only seven days prior to the August 9, 1991, hearing.*

Footnote: 34 *But see supra note 9.*

Footnote: 35 *The DHS caseworker concurred in Mr. Tennant's recommendation regarding a six-month improvement period.*

Footnote: 36 *Canon 3 of the Code of Judicial Conduct requires that: "A judge shall perform the duties of judicial office impartially and diligently." Section B.(8) of that Canon provides that "[a] judge shall dispose of all judicial matters promptly, efficiently, and fairly."*

Footnote: 37 Rule 8 of the Rules on Time Standards for Circuit Courts, addressing abuse and neglect proceedings, provides:

(a) Applicability. The time standards set forth in this rule are not intended to supersede, but to supplement, statutory provisions applicable to civil abuse and neglect proceedings.

(b) Pre-Adjudicatory Motions. An order shall be entered on pre-adjudicatory motions within one week of hearing on the motions.

(c) Preliminary Hearing. If a preliminary hearing is held, it shall be conducted within two weeks from the filing of the petition.

(d) Adjudication. Unless continued for good cause to a date certain or unless a pre- adjudicatory improvement period is granted, the adjudicatory order shall be entered within one month of the filing of the petition if the child is not in temporary custody. If a pre- adjudicatory improvement period is granted, the adjudicatory order shall be entered within two weeks of the end of the pre-adjudicatory improvement period.

(e) Disposition. If abuse or neglect is found, the dispositional order placing the child shall be entered within six weeks of the adjudicatory order.

(f) Post-Adjudicatory Improvement Period. A further dispositional order shall be entered within two weeks of the end of the post-adjudicatory improvement period.

(g) Monitoring Improvement Period. An assessment of the status of the child(ren) and the progress of the parent(s) towards satisfying the conditions of the improvement period shall be conducted on a monthly basis.

(h) Modification. An order shall be entered on a motion to modify within one month of the filing of the motion.

(i) Foster Care Review. A further dispositional order shall be entered within one month of the filing of a petition for foster care review.

(j) Reporting Standard. The reporting standard from the filing of the petition to disposition shall be twelve months.

Footnote: 38 Those four grounds are:

(1) The petition shows that grounds exist for the arrest of an adult in identical circumstances; (2) the health, safety and welfare of the child demand such custody; (3) the child is a fugitive from a lawful custody or commitment order of a juvenile court; or (4) the child has a record of willful failure to appear at juvenile proceedings, and custody is necessary to assure his or her presence before the court.

W. Va. Code § 49-5-8(a).

Footnote: 39 Only when this Court directed, by order dated January 27, 1995, that a home study was to be conducted and "[a] copy of any permanency plan which has been prepared with regard to Jeffrey D. . . . forwarded immediately to this Court[]" was such a plan first formulated.

Footnote: 40 In the home study that was submitted to this Court on February 10, 1995, it is noted that: "The previous permanent plan for Jeffrey had been for Jeffrey to remain with the Harrises [foster parents], either in subsidized adoption or permanent foster care. Jeffrey would have had input as to which type of care he desired." This reference to a "previous permanent plan" is bewildering to this Court as the parties have stated that no previous plan had ever been prepared.

Footnote: 41 The record does reflect that Jeffrey has made steady progress during his years at St. John's and in foster care.

Footnote: 42 Based on Appellant's comment that she would need time to get reacquainted with Jeffrey when questioned in connection with the home study that was prepared at the direction of this Court, even she is cognizant of the need to gradually work towards any reunification or extended visitation period.

Footnote: 43 West Virginia Code § 49-6-1(b) states:

The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice, and notice shall be given to the state department. In cases wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person. If said person signs the certificate, service shall be complete and said certificate shall be filed as proof of said service with the clerk of the circuit court. If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

Footnote: 44 As we pointed out in syllabus point two of James M.: "Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify

the denial of an improvement period." 185 W. Va. at 649, 408 S.E.2d at 401. And as we further pointed out in Christina L., it also constitutes grounds for termination of parental rights. However, such abandonment must be alleged and proven.

209 W. Va. 537, 550 S.E.2d 73

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2001 Term

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June 1, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28731

RELEASED
June 4, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: BRIAN JAMES D.

Appeal from the Circuit Court of Upshur County
Honorable Thomas H. Keadle, Judge
Civil Action No. 00-JA-12

REVERSED AND REMANDED

Submitted: April 3, 2001
Filed: June 1, 2001

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The Opinion of the Court was delivered PER CURIAM.
JUSTICES DAVIS and MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany S. Marie*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.' Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." Syllabus Point 7, *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Upshur County entered on July 13, 2000. Pursuant to that order, the circuit court terminated the parental rights

of the appellant and respondent below, Brian L. D.,[1] to his child, Brian James D.[2] In this appeal, the appellant contends that the circuit court erred by terminating his parental rights based solely upon the fact that he committed the felony offense of delivery of a controlled substance. This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel.[3] For the reasons set forth below, the final order is reversed, and this case is remanded to the circuit court to develop and oversee a plan to reunify the appellant with his child.

I.

Abuse and neglect proceedings were initially instituted against the appellant and Brian James D.'s mother, Amanda K., in May 1999, after Amanda K. was incarcerated as a result of aiding and

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[1]We follow our past practice in child abuse and neglect proceedings and other cases involving sensitive facts and do not use the last names of the parties. *In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2]The parental rights of the child's mother, Amanda K., were also terminated, but she did not appeal the decision and is no longer a party in this case.

[3]At this point, we note that the child's guardian ad litem never filed a brief with this Court or appeared before us for oral argument. We find it disconcerting that the guardian has failed to represent his client at this crucial stage of the proceedings. In Syllabus Point 5 of *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), this Court held that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." In addition, we have advised guardians ad litem that "it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings." *In re Christina L.*, 194 W.Va. 446, 454 n.7, 460 S.E.2d 692, 700 n.7 (1995). We once again emphasize that a guardian ad litem's duty to represent a child includes filing briefs and appearing before this Court for oral argument when an appeal has been filed.

abetting sexual assault and sexual abuse of an unrelated juvenile.[4] The petition alleging abuse and neglect of Brian James D. contained numerous allegations against Amanda K. but only asserted that the appellant had failed to visit or have any contact with the child. As a result of a dispositional hearing on August 3, 1999, the allegations against both parents were dismissed, and the appellant was granted custody of Brian James D.[5]

On March 29, 2000, a second abuse and neglect petition was filed against the appellant and Amanda K. This petition stated that the appellant had been arrested and charged with delivery of a controlled substance, marihuana. The petition further alleged that the appellant had admitted to selling marihuana from his residence, thereby exposing Brian James D. to drug trafficking and its associated dangers. The petition also noted that the appellant's wife, Donna H. D., had been arrested and charged with the same felony and that Amanda K. remained incarcerated. Upon filing of the petition, Brian James D. was placed in the temporary physical and legal custody of the appellee and petitioner below, the West Virginia Department of Health and Human Resources (hereinafter "DHHR").

An adjudicatory hearing was held on May 3, 2000, at which time the appellant admitted that he had sold drugs from his residence while Brian James D. was present. Thus, the circuit court found that the appellant had abused and neglected Brian James D. by exposing him to drug trafficking and its

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[4]Pursuant to a plea agreement, Amanda K. is serving a three-to-fifteen-year sentence in the state penitentiary.

[5]We note that the appellant was not adjudicated as an abusive or neglectful parent in the first proceeding.

associated dangers as asserted by the DHHR. At the conclusion of the adjudicatory hearing, the appellant moved for leave to obtain a psychological evaluation regarding his fitness as a parent. The motion was granted, and a dispositional hearing was scheduled for June 7, 2000.

The dispositional hearing was continued to July 5, 2000, because the appellant's psychological evaluation was not yet complete. In the meantime, the DHHR filed a child case plan recommending that the parental rights of both the appellant and Amanda K. be terminated. In making this recommendation, the DHHR noted the possibility that the appellant, like Amanda K., might be incarcerated as a result of the criminal charges pending against him.

During the dispositional hearing on July 5, 2000, the psychological evaluation of the appellant completed by William Fremouw, Ph.D., was presented to the court. While Dr. Fremouw reported that the appellant denied the seriousness of his situation, he stated that the appellant has "no diagnosable psychiatric condition." Dr. Fremouw further stated that, "[t]he social summary dated 5/31/00 indicated that [the appellant] underwent a drug and alcohol assessment and was randomly drug tested on several occasions in 1999. These tests were negative for drugs and the assessment did not indicate drug or alcohol problems. This information does support [the appellant's] contention that he is not a regular drug or alcohol user."

Thereafter, the circuit court terminated the appellant's parental rights. Subsequently, the appellant pled guilty to two counts of delivery of a controlled substance and was given a one-to-five-year

sentence for each count. However, the appellant was granted home confinement on the first count after serving 120 days in jail to be followed by five years probation on the second count. This appeal followed.

II.

We begin our analysis of this case by setting forth our standard of review. In Syllabus Point 1 of *In the Interest of: Tiffany S. Marie*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With this standard in mind, we now consider the parties' arguments.

The appellant contends that the circuit court erred by terminating his parental rights based solely upon the fact that he was charged with and admitted to selling marihuana from his apartment, at times, while his child was present. After carefully reviewing and examining the record in this case, we agree.

In Syllabus Point 7 of *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), this Court held that "'[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.' Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." In other words, incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights. At the same time, we have also acknowledged that an individual's incarceration may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect. *Emily*, 208 W.Va. at __, 540 S.E.2d at 559.

The final order in this case, however, indicates that the appellant's parental rights were terminated because of his arrest for delivery of a controlled substance. The State did not allege that the appellant is addicted to or uses drugs, nor did the State assert that the appellant's parenting abilities were impaired by selling marihuana. In fact, during the dispositional hearing, Sarah Crum, the child protective service worker who handled this case for the DHHR, testified that the primary reason she was recommending that the appellant's parental rights be terminated was because the appellant was arrested for trafficking a controlled substance. Ms. Crum further testified that:

> I cannot think of any service that we could provide to [the appellant] that are going to correct the problem. [The appellant] has continually stated that he does not do drugs. We've had him tested for that, it came back negative. We had drug and alcohol assessment done and it came back and said that he had no problem with that. And I can think of no services that are going to correct the situation of selling drugs.

In addition, Dr. Fremouw reported that the results of random drug testing of the claimant in 1999 were negative indicating that the appellant does not have drug or alcohol problems.

This Court takes very seriously the fact that the appellant exposed his child to the substantial risks inherent in dealing drugs, and recognizes that such conduct clearly constituted abuse and neglect sufficient to trigger remedial action by the circuit court. We disagree, however, with DHHR's contention that the appellant's conduct in this case demonstrates that "there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future...," as required by W.Va. Code § 49-6-5(a)(6). While Ms. Crum testified that she did not envisage any services that could be provided to curb the appellant's drug dealing, we observe that he is now subject to a lengthy term of home confinement and probation, which presumably will provide the necessary supervision to ensure that the criminal conduct that brought rise to the present proceeding will not be repeated. Moreover, we stress that the appellant is now on notice that any repeat of such activity will likely warrant action terminating his parental rights.[6]

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[6]The circuit court in terminating the appellant's parental rights did so in part based upon Dr. Fremouw's observation that appellant did not expressly acknowledge that his drug dealing was a "bad decision." Our review of Dr. Fremouw's report, however, indicates that this observation was made in connection with an initial interview, and that at a subsequent interview the appellant succinctly admitted that his behavior in this regard was "stupid." Thus, so far as the circuit court's decision to terminate parental rights was predicated upon a factual finding that the appellant refused to acknowledge the irresponsible nature of his drug-dealing activity, we find it clearly erroneous. *See* Syllabus Point 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997) ("we review the circuit court's underlying factual findings under a clearly erroneous standard....").

The DHHR maintains that the circuit court did not err in terminating the appellant's parental rights not only because criminal charges were pending against him, but also because of the child's need for permanency. This Court is certainly aware of the fact that this child was placed in at least six different homes before his second birthday. However, with the exception of his current placement which resulted from this abuse and neglect proceeding, the evidence shows that these placements occurred while the child was in the custody of Amanda K. Without question, this child deserves permanency in his life. Having carefully examined the record, we conclude that this child can receive the permanency he needs in his father's custody. As discussed in detail above, the record shows that the allegations of abuse and neglect in this case stemmed solely from the appellant's arrest, and that his parental rights were terminated for that reason alone. In accordance with our case law holding that a criminal conviction *per se* does not warrant the termination of parental rights, we find that the circuit court erred by terminating the parental rights of the appellant to his child.

Having found that the appellant's parental rights were erroneously terminated, we remand this case to the circuit court to immediately develop and oversee a plan for reunifying the appellant with his child as promptly as practicable. According to the record in this case, Brian James D. has been in the custody of the DHHR for over a year. This Court has previously determined that in these circumstances, a gradual transition of custody is needed to give both the parent and child a sufficient adjustment period. *See James M. v. Maynard,* 185 W.Va. 648, 408 S.E.2d 400 (1991); *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989).

Therefore, for the reasons set forth above, the final order of the circuit court of Upshur County entered on July 13, 2000, is reversed, and this case is remanded to the circuit court to immediately develop and oversee a plan to reunify James Brian D. with his father as promptly as practicable.

Reversed and Remanded.

No. 28731 - In re: Brian James D.

FILED
June 1, 2001
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OF WEST VIRGINIA

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June 4, 2001
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OF WEST VIRGINIA

Maynard, Justice, dissenting:

I dissent because I do not believe that the circuit court terminated the appellant's parental rights only because he was arrested for delivery of a controlled substance. Moreover, I believe that the majority ignored the best interests of the child in this case.

The dispositional order shows that the circuit court's decision to terminate the appellant's parental rights was based on substantially more than the fact that the appellant had been arrested for delivery of a controlled substance and was facing the possibility of incarceration. It is clear that the appellant's failure to appreciate the seriousness of his felonious actions was an important factor in the circuit court's decision. During his psychological evaluation, the appellant told Dr. Fremouw that he was selling drugs to support his family, and he did not think he would get caught or that his son would be taken away. The appellant said he guessed he was "advertising to the wrong people." He repeatedly described his involvement in drugs as merely a business decision.

The appellant completed drug and alcohol assessments administered by Dr. Fremouw in an invalid manner suggesting that he was not being honest. In addition, his test scores showed a high level of resistance to treatment. It is apparent that the appellant never thought he was exposing his child to any

danger and would not have ceased his illegal drug activity had he not been arrested. Unlike the majority, I do not believe that the appellant's acknowledgment of his actions as "stupid" means that he has accepted responsibility for his conduct. Instead, the appellant's attitude leads me to conclude, as I am sure the circuit court concluded, that it is very likely that the appellant will engage in drug activity in the future.

The dispositional order also indicates that the circuit court considered the child's need for permanency and concluded that it would be in the child's best interests to terminate the appellant's parental rights. The circuit court's decision in this regard is consistent with this Court's vast case law holding that the best interests of the child are paramount in abuse and neglect proceedings. *See In re George Glen B. Jr.*, 207 W.Va. 346, 355, 532 S.E.2d 64, 73 (2000) ("[W]hen a petition alleging abuse and neglect has been filed, a circuit court has a duty to safeguard the child and provide for his or her best interests."); Syllabus Point 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child."); *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children.").

Although the majority recognized the child's need for permanency, I believe the real best interests of the child were disregarded. The record in this case shows that Brian James D. lived in six different homes, presumably with at least six different caretakers, all before his second birthday. He simply has never had any permanency in his life and as a result, is developmentally delayed. In addition, the child has exhibited symptoms of fetal alcohol syndrome.

This Court has held that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . ." Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). I firmly believe that this child will be exposed to the dangers of drug trafficking again if he is returned to his father's custody, which the majority concedes will warrant yet another abuse and neglect proceeding. The evidence in the record shows that this child needs permanency in his life now. Therefore, I would affirm the final order of the circuit court terminating the appellant's parental rights.

Accordingly, for the reasons set forth above, I respectfully dissent. I am authorized to state that Justice Davis joins me in this separate opinion.

192 W. Va. 363, 452 S.E.2d 454

Supreme Court Of Appeals Of West Virginia

IN RE: BRIANNA ELIZABETH M.,
KRISTA M., and LONNIE M., JR.

No. 22299
Submitted: September 20, 1994
Filed: December 8, 1994

SYLLABUS BY THE COURT

1. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989).

2. "'W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3, In re Betty J. W., 179 W. Va. 605, 371 S.E.2d 326 (1988)." Syl. Pt. 2, In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

3. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

4. "Termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

For West Virginia Department of Health and Human Services: Michelle L. Rusen, Prosecuting Attorney of Wood County, Parkersburg, West Virginia

For Children: Ralph E. Troisi, Waverly, West Virginia

For Lonnie M.: George E. Lantz, Lantz & Tebay, Parkersburg, West Virginia

For Carol M.:Susan Simmons, Elizabeth, West Virginia

Per Curiam:
This Petition on behalf of three minor children requests reversal of an August 14, 1992, order of the Circuit Court of Wood County granting Lonnie M., the father of the children (hereinafter "the father" or "Lonnie"), an improvement period. See footnote 1 The petition further requests reversal of an October 18, 1993, order awarding custody of the two surviving children to the West Virginia Department of Health and Human Resources (hereinafter "DHHR") but refusing to terminate the parental rights of the father. We find that the lower court erred in failing to terminate the parental rights of the father, and we order such termination and the continued legal custody of the two surviving children in DHHR.

I.

On January 24, 1992, Connie Jones, a DHHR Protective Services worker, filed a petition in the lower court seeking an adjudication that seven-year-old Krista M., two-year-old Lonnie M., and two-month-old Brianna Elizabeth M. had been neglected and/or abused. Specifically, DHHR alleged that one or both parents, Carol and Lonnie M., had, on January 1, 1992, intentionally inflicted physical abuse or had knowingly allowed such abuse to be inflicted upon their two-month-old daughter, Brianna. DHHR further requested termination of the parental rights of both parents. See footnote 2 Brianna was taken to St. Joseph's Hospital in Parkersburg, West Virginia, in the early morning hours of January 1, 1992. She vomited repeatedly, was unresponsive, and was apparently suffering from seizures. A CAT scan revealed that the seizures resulted from hematomas located in the front and back of her brain. These injuries were described by her pediatricians as subdural effusions, including a large area of cerebral atrophy in the midbrain. By the evening of January 1, 1992, Brianna began suffering tremors of the arms and legs. On January 2, 1992, three fractures of Brianna's ribs were discovered, and child abuse was thereafter diagnosed. See footnote 3 Based upon the CAT scan, chest x-rays, and other analyses, it was determined that at least two incidents of aggravated child abuse had occurred. Brianna was transferred to the Intensive Care Unit of Children's Hospital in Columbus, Ohio, on January 2, 1992. Pediatricians treating her at that facility explored all possible causes of the head and rib injuries and also concluded that Brianna was the victim of child abuse. The

pediatricians further concluded that two or more separate incidents of abuse had occurred and that Brianna had suffered permanent brain damage. See footnote 4 After reviewing the January 1992 petition, the lower court immediately removed all three children from their parents and placed them in the legal custody of DHHR, and in the physical custody of their paternal grandparents. See footnote 5 Subsequent to several adjudicatory hearings held on various dates from January through June 1992, the lower court determined that abuse upon Brianna had been committed by the mother and that both parents had committed neglect. Throughout the proceedings, the parents offered no plausible explanation for Brianna's injuries. They suggested such causes as a defective baby swing and botulism; however, no proof of any of these allegations was offered.

Lonnie consistently and repeatedly maintained that he had never seen his wife harm the children or verbally abuse them. Acquaintances of the parents, however, testified that they had witnessed Carol's physical and verbal abuse of her children. Janet Watson, a friend of the family, testified that she had witnessed an incident during which the mother "really lost it" and repeatedly struck the older daughter until Ms. Watson intervened. Ms. Watson also indicated that Carol had called Krista a "bitch" on at least one occasion. Carol had also apparently telephoned her mother when Krista was an infant to request her mother to take Krista because Lonnie had allegedly attempted to smother the child.

Linda Sandel, the counselor for the parents, testified that Carol suffered a personality disorder with passive/aggressive and paranoid tendencies. See footnote 6 Ms. Sandel also testified that Lonnie had described Carol's cycles of high energy and agitated states in which she verbally abused her husband and children. Ms. Sandel further testified that Lonnie employed repression and denial to deal with psychological conflicts and had not yet acknowledged that his wife had perpetrated the abuse.

The lower court, by order dated August 14, 1992, terminated the parental rights of the mother, from which she has not sought an appeal, but granted Lonnie a one-year improvement period based upon his alleged intention to divorce Carol. See footnote 7 Lonnie separated from his wife and resided in a camper behind his parents' home subsequent to the August 1992 order, and the children resided with Lonnie's parents. Brianna died on May 4, 1993, due to complications resulting from the original head injuries.

In August 1993, the Petitioner, by the Prosecuting Attorney of Wood County, sought to terminate the father's improvement period based upon his alleged consent to contact between the children and their mother. See footnote 8 Lonnie and Carol had still not finalized a divorce, and Carol resided in a home which had previously been the marital home within two blocks of the children's residence.

By the October 18, 1993, final dispositional hearing, Lonnie and Carol had obtained a divorce. DHHR worker Jane Dodd expressed concern at the hearing that Lonnie had not satisfied the conditions of his improvement period and explained that he had failed, in the fourteen months since his improvement period was granted, to complete "some of the crucial things that needed to be done to ensure that . . . [his] children will be safe." He had not, for instance, yet severed all ties with Carol, and he continued to permit her to remain in their marital home only a few blocks from the children. Ms. Dodd also emphasized that "most importantly, Mr. M. has not once expressed that he knows Brianna's injuries were caused by his wife. It does not appear that Mr. M. realizes the seriousness of what has occurred to his children." See footnote 9

The Petition presently before us seeks termination of Lonnie's parental rights and continued legal custody in the DHHR. DHHR joins in this appeal and also seeks termination of the parental rights of the father.

II.

In syllabus point 4 of In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989), we explained the following:

> 'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

Syllabus point 2 of In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993) further elaborates on that issue, as follows:

> 'W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3, In re Betty J. W., 179 W. Va. 605, 371 S.E.2d 326 (1988).

This Court also explained in syllabus point 3 of Jeffrey R. L. that when the perpetrator of child abuse has not been absolutely identified and when the

caretaker offers no explanation, those factors alone may justify termination of parental rights. Syllabus point 3 states:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.
>
> 190 W. Va. at 25-26, 435 S.E.2d at 163-64.

In syllabus point 2 of In re Scottie D., we developed our rationale for termination of parental rights of a parent who did not actually participate in the abuse, as follows:

> Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.
>
> 185 W. Va. at 192, 406 S.E.2d at 215.

As we noted in In re Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985), "it is ludicrous for [the nonparticipating father] to assert that he should be held blameless for his nonaction in protecting his child." Id. at 141, 331 S.E.2d at 873.

In the present case, the lower court granted the father an improvement period despite the absence of any acknowledgment of the abuse. The father insisted that he did not know how such horrendous injuries had been inflicted, and he repeatedly refused to acknowledge that his wife could be the abuser even in the fact of overwhelming medical evidence of extreme child abuse. As in the present case, the father in In re Scottie D. did not directly participate in the abuse. Yet we noted in that case that "[a]lthough the appellee's version does not expressly

support his wife's account, it is nonetheless supportive, and, importantly, inconsistent with the medical evidence presented." 185 W. Va. at 196, 406 S.E.2d at 219 (emphasis in original).

Further, in the present case, Lonnie permitted the children's mother to maintain unsupervised contact with them subsequent to the termination of her parental rights. This inability or unwillingness to prevent his former wife from having contact with the children evidences a disregard for the orders of the lower court and for the safety of his two surviving children.

Lonnie could conceivably have been unaware of the extent of his wife's abusive behavior prior to Brianna's injuries. The lower court conveyed the benefit of any doubt in that regard upon Lonnie when it granted him an improvement period rather than simply terminating his parental rights when Carol's rights were terminated. Yet Lonnie still maintained contact with his wife, permitted her to have contact with the children, and failed to acknowledge that his wife had inflicted serious injuries upon his daughter which ultimately caused Brianna's death.

Although sound public policy and the whole tenor of law seek generally to perpetuate the marital bond, the rights of children to be free from abuse require that a parent's first loyalty be to the protection of his or her children.

Upon thorough evaluation of this case, we reverse the decision of the lower court and remand this matter for an order terminating the parental rights of Lonnie M. to his surviving children. Pursuant to the recommendations of DHHR, however, it appears that supervised visitation See footnote 10 between Lonnie M. and his children may be in their best interest at this time. The children should remain in the legal custody of DHHR and in the physical custody of their paternal grandparents, with whom the evidence shows they have an emotional bond, as long as such custody arrangements prove beneficial to the best interests of the children. There remains some concern whether the paternal grandparents will be able to offer these children the protection and security they have not had from either parent. Thus, these children should be monitored closely by the DHHR over the ensuing months, and the circuit court should hold frequent reviews to determine whether such protection is being accorded and whether this placement is in the children's best interest. As part of these reviews, the court should also examine whether any additional services to the children or the grandparents are needed to facilitate their success. If the paternal grandparents become unwilling or unable to care for the children or to protect their interests, the DHHR should return to court to seek alternative permanent placement.

All children deserve the resolution in their lives of a permanent placement. Consequently, the court should hold a plenary review of this case in one year, and should determine at that time whether the grandparents have acted in such a manner that would justify placing the children in their permanent custody; and if they have done so, the court should make such permanent placement. See footnote 11 If the paternal grandparents become unwilling or unable to care for the children or to protect their interests, the DHHR should return to court to seek alternative permanent placement.

Reversed and remanded.

Footnote: 1 We continue our longstanding tradition of referencing the parties only by their first names to protect the anonymity of the children. See In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

Footnote: 2 The other two children, Krista and Lonnie, were alleged to have been abused and neglected by virtue of residing in the home where such abuse of Brianna had occurred.

Footnote: 3 Pediatricians treating Brianna testified that rib fractures in a six-week-old infant were extraordinary, since the flexibility of a newborn's bones make the bones very difficult to fracture.

Footnote: 4 The pediatricians explored such possible causes of Brianna's injuries as a serious automobile accident, serious fall, or intentional abuse. They determined that the rib fractures were of recent origin, within five days prior to the examination. They also estimated that the head injuries had occurred on two separate occasions, based upon bleeding which appeared to have originated within 72 hours of the CAT scan and older bleeding which originated two to six weeks prior to the CAT scan.

Footnote: 5 Krista and Lonnie continue to reside with their paternal grandparents.

Footnote: 6 Carol was hospitalized in January 1992, after suffering a mental breakdown.

Footnote: 7 During this August 14, 1992, dispositional hearing, DHHS requested termination of the mother's parental rights, but asked that the father be granted a one-year improvement period. The lower court noted that the father supported and colluded with the mother in defending both of them against charges of abuse. The court also recognized that the father had not yet admitted that the mother had perpetrated the abuse. Moreover, the attorney for the children requested immediate and permanent termination of parental rights of both parents. The lower court followed the recommendations of the DHHS, however, terminating the parental rights of the mother and granting the father a one-year improvement period.

Footnote: 8 Carol was not permitted to see the children after the termination of her parental rights, and Lonnie was required, as part of his improvement period, to prevent the children from having contact with their mother. The Motion to Revoke Improvement Period filed with the lower court alleges that the "respondent-father has allowed Carol [M.] to have contact with Lonnie and Krista [M.]." The petition also alleges that the parents "spend a great deal of time together" indicating the father's "refusal to comply with the spirit of the Court's Order." Testimony was elicited at an August 1993 hearing from a neighbor who had witnessed Carol returning Lonnie and Krista home to their grandparents' home from an outing. Another witness testified that he played in a band with Lonnie and had seen thechildren with their mother.

Footnote: 9 The requirements of Lonnie's improvement period included attendance at all sessions of one series of parenting classes, initiation of individual therapy, and preparation of a written report describing what, in hindsight, he could have done to prevent the removal of his children from him and his wife. He discontinued therapy shortly after it was initiated and failed to acknowledge that his children were removed because of the serious injuries inflicted upon Brianna. Lonnie was also required to take Krista for individual therapy and to engage the children in family therapy. He discontinued Krista's therapy and failed to attend family therapy.

Footnote: 10 On remand, the circuit court should consider the nature of the supervision, and determine whether the grandparents will be able to offer the necessary supervision and protection.

Footnote: 11 The court may include within such final order the right of permanent visitation in the father if he has acted in such a manner as to justify it.

230 W. Va. 355, 738 S.E.2d 21

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 11-1085

BROOKE B.,
Petitioner

v.

DONALD RAY C., II,
Respondent

FILED
January 24, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

Appeal from the Circuit Court of Kanawha County
The Honorable Paul Zakaib, Jr., Judge
Civil Action No. 11-MISC-136

REVERSED

Submitted: January 16, 2013
Filed: January 24, 2013

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JUSTICE KETCHUM delivered the Opinion of the Court.

CHIEF JUSTICE BENJAMIN, deeming himself disqualified, did not participate.

JUDGE J. D. BEANE, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is *de novo*." Syllabus Point 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 486 S.E.2d 782 (1997).

2. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

3. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syllabus Point 7, *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995).

4. "Pursuant to the plain language of W.Va. Code § 44–10–3(a) (2006) (Supp.2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. 'However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W.Va. Code § 44–10–3(a)." Syllabus Point 6, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008).

5. "In exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W.Va. Code § 48-9-103 (2001) (Repl.Vol. 2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." Syllabus Point 4, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

6. *W.Va. Code* §§ 51-2A-2(a)(17) [2012] and 44-10-3(a) [2006] clearly and unambiguously grant a family court the subject matter jurisdiction to hear questions concerning guardianship of a child.

7. *W.Va. Code* §§ 51-2A-2(a)(6) [2012] and 48-9-103 [2001] clearly and unambiguously grant a family court the subject matter jurisdiction to consider establishing a parenting plan, or to otherwise allocate custodial responsibility or decision-making responsibility, to someone who intervenes in an action alleging they are a psychological parent.

8. Jurisdiction is a court's inherent power to decide a case; venue, however, designates the particular county in which a court having jurisdiction may properly hear and determine the case.

9. "A man may live in several different places but he can have only one domicile. Domicile is a place a person intends to retain as a permanent residence and go back to ultimately after moving away." Syllabus Point 2, *Shaw v. Shaw*, 155 W.Va. 712, 187 S.E.2d 124 (1972).

10. "Because a determination of residency depends on the intent of the parties, it is typically a question of fact[.]" Syllabus Point 5, in part, *Farmers Mut. Ins. Co. v. Tucker*, 213 W.Va. 16, 576 S.E.2d 261 (2002).

11. It is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.

12. *W.Va. Code* § 44-10-3(a) [2006] places jurisdiction and venue of an infant guardianship action in the West Virginia county in which a minor resides. It is the minor's residency alone that controls, and not the residency of any other person such as a parent, guardian, or other person with custody or control of the minor. A determination of the minor's residency is typically a question of fact.

Ketchum, Justice:

Since the founding of our State, this Court has abided by the principle that issues of child custody are to revolve around the best interests of the child. This appeal demonstrates what happens when sight is lost of that polar star principle.

The petitioner in this appeal contends that she is the psychological parent of a child. The child's biological mother has virtually no contact with the child. After the child's biological, custodial father (the respondent) pleaded guilty to several crimes and anticipated being incarcerated, the petitioner filed a motion to intervene in an existing family court action and sought either shared parenting with the father, or guardianship of the child if the father was sentenced to prison.

Instead of responding to the petitioner's factual contentions, the biological father petitioned the circuit court for a writ of prohibition. The father's current counsel claimed that the family court lacked subject matter jurisdiction to consider a motion for either shared parenting or guardianship. The circuit court granted the writ of prohibition and halted the family court's consideration of the petitioner's motion.

We reverse the circuit court's order granting the writ of prohibition, and find that the family court plainly had subject matter jurisdiction to consider the petitioner's motion.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On February 1, 2003, the child at the center of this case – who we refer to as "A.C." – was born. Her biological parents are Leslie F. and the respondent, Donald C. In a paternity action filed in the Family Court of Cabell County in 2004, Donald was adjudicated as the biological father, and was granted primary physical and legal custody of A.C. Although Leslie was afforded visitation rights, she has had no meaningful relationship with the child and rarely sees her. One party asserts the biological mother last visited the child in 2007.[1]

Donald had discovered that he was A.C.'s father when she was 20 months old. At the time, he was dating and living with the petitioner, Brooke B. Brooke asserts that after Donald took custody of A.C., and with the assent and encouragement of Donald, she began performing more than half of the parenting tasks for A.C. including financially supporting, housing, feeding, clothing, bathing, dressing and teaching A.C. For the next seven years, Brooke had a continuous and uninterrupted relationship with the child. She took the child to school, to doctor's appointments, to haircuts, and to school and extracurricular activities. The child's guardian *ad litem* states that A.C. "perceives

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[1] The Family Court of Cabell County's paternity and custody order states, in part:

> [T]he parties agreed to cooperate in facilitating the Respondent [Leslie's] parenting time with the minor child so long as Respondent's parenting time occurs at a safe venue. . . .
>
> [B]ased upon the parties[']agreement . . . Petitioner Donald . . . shall pay unto the Respondent Leslie F[.] the sum of $400.00 per month as child support until further Order of the Court regardless of the current parenting arrangement.

Brooke . . . as her mother," and a psychologist reported that Brooke "fulfills the accepted description of a psychological parent."[2]

In 2009, Donald and Brooke ended their relationship. Brooke moved out of his house and into her own home in Kanawha County. However, through 2009 and 2010, A.C. allegedly spent the majority of her time living in Brooke's home, and Brooke continued to perform those parenting duties she had been performing throughout A.C.'s life. A.C. was enrolled in a private school in Kanawha County, had numerous friends in Kanawha County, and participated in extracurricular activities like plays and Girl Scouts in Kanawha County.

On January 6, 2011, Donald pleaded guilty to tax evasion and bank fraud in the United States District Court for the Southern District of West Virginia. His sentencing was scheduled for a later date, but he faced up to 35 years in prison. At approximately the same time, Donald refused to let A.C. stay at Brooke's house. Brooke

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[2] We adopted the following definition of a "psychological parent" in Syllabus Point 3 of *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005):

> A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. . . .

alleges that Donald acted "to establish himself as a single parent performing the majority of parenting duties . . . to impress the federal court and decrease his sentencing."

Less than two weeks later, on January 18, 2011, Brooke filed a motion to intervene in Donald's paternity case in the Family Court of Cabell County. Brooke's motion asserted that she has been A.C.'s psychological mother since the child was 20 months old, and that the child lived with her in Kanawha County. Brooke asked the family court for a share of parenting duties, and for an order appointing Brooke as A.C.'s legal guardian while Donald was incarcerated. Copies of the motion were served on Donald and on the biological mother, Leslie F.

The Family Court of Cabell County, however, did not rule on Brooke's motion. Instead, the family court entered an order transferring the case to Kanawha County "because the Petitioner [Brooke] resides in Kanawha County and the minor child resided with the Petitioner in Kanawha County at the time of the filing of the petition."[3]

Shortly thereafter, Donald's attorney filed a motion to dismiss with the Family Court of Kanawha County. The motion did not challenge venue in Kanawha County. Donald's motion only asserted, as a matter of fact, that Donald was the primary caretaker of A.C. and that Brooke was not a psychological parent.

[3] The Family Court of Cabell County appears to have transferred the case pursuant to *W.Va. Code* § 48-24-101(a) [2002], which permits transfers of venue in paternity actions to a county where a party resides "if judicial economy requires."

At a hearing on February 11, 2011, the family court declined to grant Donald's motion to dismiss[4] because resolution of the fact-based motion would require the taking of evidence and testimony. A hearing to take testimony was scheduled for March 17th. In the meantime, the family court, "based upon an agreement of the parties," ordered Brooke and Donald to divide their custodial time with the child equally. The family court also ordered that A.C. not be removed from her private school in Kanawha County.

Shortly thereafter, Donald hired a new lawyer. The new lawyer filed a motion to continue the March 17th hearing, ostensibly because he would not have enough time to gather evidence and prepare for the hearing. The family court had a teleconference on the motion to continue on March 16th. Counsel for Brooke objected because two physicians had cleared their schedules to appear at the hearing. As a compromise, the family court ruled that the March 17th hearing would be continued except for the taking of testimony from the two physicians.

It is at this point that counsel for Donald initiated a detour away from consideration of the best interests of the child. On March 16, 2011, at 9:11 p.m., counsel for Donald faxed a new 45-page motion to dismiss to the family court judge. Counsel's new motion asserted that Brooke had never filed or served any formal petition, complaint, or summons on Donald, and therefore "[w]hatever fugitive papers have collected to create this misbegotten process must be stricken from the docket as of no

[4] An order memorializing the family court's ruling was entered on March 8, 2011.

jurisdictional consequence." Donald's motion further asserted that he had "primary physical and legal custody" of A.C., and that Donald and A.C. "reside in Putnam County, West Virginia and have lived there for many years." On these grounds, counsel for Donald claimed that the Family Court of Kanawha County did not have subject matter jurisdiction to hear Brooke's case.

On the morning of March 17th, the family court convened the hearing to do nothing more than take the testimony of the two physicians. A.C.'s biological mother, Leslie, appeared at the hearing (but reiterated she was not asking for custody of A.C.). At the outset, counsel for Donald orally asserted that the family court didn't have subject matter jurisdiction to do anything. Counsel for Brooke contended that Donald's lawyer was not truly making a jurisdiction argument but rather a venue argument. However, Brooke's counsel asserted that Donald's prior lawyer had orally but explicitly chosen Kanawha County as the better venue over Putnam County, and had waived any venue objections. The family court declined to rule on Donald's new motion to dismiss because the court had not had time to review the motion, and allowed the lawyers to examine and cross-examine the two physicians.

At the conclusion of the March 17th hearing, the family court set a hearing for May 9th to consider Donald's new motion to dismiss. Nonetheless, minutes after the conclusion of the family court hearing, at 11:26 a.m., counsel for Donald filed a petition seeking a writ of prohibition from the Circuit Court of Kanawha County. Donald's lawyer repeated his claims that the Family Court of Kanawha County lacked subject matter jurisdiction because A.C. "lived" and "resided" with her father in Putnam County,

and that Brooke had never filed a formal petition or complaint in Kanawha County sufficient to invoke the family court's jurisdiction. Donald also argued that the family court was not giving Donald's counsel adequate time to prepare for hearings. Donald therefore asked that the circuit court prohibit the family court from proceeding any further on Brooke's motion for relief.

In an order dated June 29, 2011, the circuit court granted Donald a writ of prohibition. The circuit court prohibited the family court from taking any further action on Brooke's motion. The circuit court determined that, as a matter of law, A.C.'s residence was identical to that of her father's in Putnam County. As such, the circuit court concluded that "the family and circuit courts of Putnam County have subject matter jurisdiction to entertain a petition for appointment of a guardian . . ; the Kanawha County Family Court does not."

Shortly thereafter, Donald – who by now was a resident of Boone County – appears to have filed a guardianship proceeding in the Family Court of Boone County. In that proceeding, on July 18, 2011, Donald had his mother (that is, A.C.'s paternal grandmother) appointed as guardian of the child.[5] According to the parties, A.C. now resides with her grandparents in Logan County.

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[5] Brooke asserts that Donald's lawyer violated the *Rules of Practice and Procedure for Minor Guardianship Proceedings* [2009] in the Boone County action by omitting any mention of A.C.'s relationship with Brooke. Rule 3(a)(7) requires that a petition for the appointment of a guardian for a minor must contain a list of the "places where the minor has lived during the last five years . . . and present addresses of the persons with whom the minor lived during that period[.]" Rule 3(a)(8) requires the petitioner to describe "any past or current proceeding involving the minor's custody[.]"

Continued . . .

On September 21, 2011, Donald was sentenced to 51 months in prison by the federal district court.

Brooke now appeals the Circuit Court of Kanawha County's June 29, 2011, order granting a writ of prohibition.

II.
STANDARD OF REVIEW

"The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is *de novo*." Syllabus Point 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 486 S.E.2d 782 (1997). We therefore apply the same guidelines as the circuit court relied upon in considering whether to the issue a writ of prohibition.

W.Va. Code § 53-1-1 [1923] provides as follows:

> The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

Brooke asserts that Donald's lawyer failed to advise the family court of the Kanawha County proceedings, or that A.C. lived in Brooke's house in Kanawha County for the two years preceding the Boone County action.

On February 14, 2012, the Family Court of Boone County granted Brooke's motion to intervene in the guardianship action. The family court ordered that Brooke be permitted "visitation" with A.C., and during summer vacation 2012, ordered that Brooke receive 50/50, week on/week off, shared parenting. The family court also ordered alternating weekend shared parenting after A.C. returned to school in the fall of 2012.

On July 17, 2012, counsel for Donald filed a petition for a writ of prohibition with the Circuit Court of Boone County in an attempt to halt or to circumvent the family court's orders. The circuit court has not yet ruled on the petition.

Similarly, we have oft stated that a writ of "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

Utilizing those standards of review, we examine the circuit court's order determining that the Family Court of Kanawha County had no subject matter jurisdiction to consider Brooke's motion seeking guardianship or shared parenting of A.C.

III.
ANALYSIS

For a century-and-a-half, the courts of this State have been guided by the fundamental rule that, when addressing custody issues involving children, the best interests of the child trump all other considerations. It is the polar star that steers all discretion.[6] As we said in 1925, "we must not lose sight of the rule that obtains in most

[6]*See, e.g.*, *Kessel v. Leavitt*, 204 W.Va. 95, 174, 511 S.E.2d 720, 799 (1998) ("Superior to any rights of parents to the custody of their own children, however, is the overriding consideration of the child's best interests. Thus, the natural right of parents to the custody of their children is always tempered with the courts' overriding concern for the well-being of the children involved."); Syllabus Point 7, *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."); *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."); Syllabus Point 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948) ("In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided."); Syllabus,

Continued . . .

jurisdictions at the present day, that the welfare of the child is to be regarded more than the technical legal rights of the parent." *Connor v. Harris*, 100 W.Va. 313, 317, 130 S.E. 281, 283 (1925).

In the instant case, the best interests of the child appear to have been wholly disregarded. Brooke's initial motion (for guardianship or an allocation of custodial responsibility) facially sought what was best for A.C., and raised questions of fact that necessitated the taking of evidence. However, Donald's petition for a writ of prohibition sought to circumvent those questions of fact, and – as the family court noted – "seems to . . . throw everything against the wall and pray that something sticks." Nowhere in Donald's filings do we perceive any consideration of what is best for A.C.

The circuit court – at the urging of Donald's counsel – granted a writ of prohibition after concluding that the family court had no subject matter jurisdiction. On appeal, Brooke asserts that the circuit court's decision was wrong. After consideration of the statutes creating the family court's authority, we agree with Brooke that it is clear that

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State ex rel. Palmer v. Postlethwaite, 106 W.Va. 383, 145 S.E. 738 (1928) ("In [a] contest over the custody of an infant, the welfare of the child is the polar star by which the discretion of the court is to be guided."); *Green v. Campbell*, 35 W.Va. 698, 702, 14 S.E. 212, 214 (1891) ("[T]he welfare of the infant is the polar star by which the court is to be guided in the exercise of its discretion; and the court . . . is not bound by any mere legal right of parent or guardian, but is to give it due weight as a claim founded on human nature, and generally equitable and just."); *Rust v. Vanvacter*, 9 W.Va. 600, 612-13 (1866) ("the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child."), *citing Armstrong v. Stone*, 9 Gratt 102, 107 (Va. 1852) ("the court will exercise its discretion according to the facts, consulting the wishes of the minor, if of years of discretion; if not, exercising its own judgment as to what will be best calculated to promote the interests of the child.").

the circuit court erred. Unquestionably, the Family Court of Kanawha County had jurisdiction to hear Brooke's motion for guardianship or shared parenting responsibility.

The subject matter jurisdiction of the family courts over guardianship proceedings and proceedings allocating custodial responsibility derives from various statutes.

As to guardianship proceedings, *W.Va. Code* § 51-2A-2(a)(17) [2012] gives a family court "jurisdiction over the following matters: . . . All proceedings relating to the appointment of guardians or curators of minor children[.]" Similarly, *W.Va. Code* § 44-10-3(a) [2006] states that a "family court of the county in which the minor resides . . . may appoint as the minor's guardian a suitable person."[7] *See also*, Syllabus Point 6, in part, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008) ("Pursuant to the plain language of W.Va. Code § 44–10–3(a) (2006) (Supp.2007), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian.").

As to shared parenting and "custody," *W.Va. Code* § 51-2A-2(a)(6) [2012] gives a family court "jurisdiction over the following matters: . . . All actions for the establishment of a parenting plan or other allocation of custodial responsibility or

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[7] The statute also confers concurrent jurisdiction over infant guardianship proceedings to circuit courts. Rule 2(a) of the *Rules of Practice and Procedure for Minor Guardianship Proceedings* [2009] clarifies the statute and states, in part:

> (a) *Jurisdiction*. 1) Circuit courts and family courts have concurrent subject matter jurisdiction over minor guardianship proceedings, whether involving guardianship of the person or estate of a minor, or both[.]

decision-making responsibility for a child[.]" Non-parents, such as petitioner Brooke, are specifically allowed to seek an allocation of custodial responsibility under *W.Va. Code* § 48-9-103(b) [2001], which provides in part that:

> In exceptional cases the court may, in its discretion, grant permission to intervene to other persons . . . whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The court may place limitations on participation by the intervening party as the court determines to be appropriate.

We specifically found, in Syllabus Point 4 of *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005), that the statute authorizes a psychological parent to intervene in a custody proceeding:

> In exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W.Va. Code § 48-9-103 (2001) (Repl.Vol.2004) when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication.

"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syllabus Point 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

These statutes plainly express a legislative intent to vest subject matter jurisdiction in the family courts to consider any action that concerns the custody and guardianship of a child. *W.Va. Code* §§ 51-2A-2(a)(17) and 44-10-3(a) clearly and

unambiguously grant a family court the subject matter jurisdiction to hear questions concerning guardianship of a child. *W.Va. Code* §§ 51-2A-2(a)(6) and 48-9-103 clearly and unambiguously grant a family court the subject matter jurisdiction to consider establishing a parenting plan, or to otherwise allocate custodial responsibility or decision-making responsibility, to someone who intervenes in an action alleging they are a psychological parent. The circuit court's order finding the family court was without subject matter jurisdiction was, therefore, plainly in error.

The arguments by Donald's counsel confuse jurisdiction with venue. Jurisdiction is a court's inherent power to decide a case; venue, however, designates the particular county in which a court having jurisdiction may properly hear and determine the case. Syllabus Point 9, *Hinerman v. Daily Gazette Co., Inc*., 188 W.Va. 157, 423 S.E.2d 560 (1992) ("Jurisdiction implies or imports the power of the Court, venue the place of the action."); *Sidney C. Smith Corp. v. Dailey*, 136 W.Va. 380, 388, 67 S.E.2d 523, 527 (1951). Donald essentially argues that venue did not lie in Kanawha County, but rather was vested in Putnam County where he then resided.

Donald's venue argument ignores Brooke's request for a parenting plan and a share of custodial and decision-making responsibility. Instead, it focuses solely on her request for guardianship. Donald's argument starts with a novel interpretation of the guardianship statute, *W.Va. Code* § 44-10-3(a), which creates jurisdiction in the "family court of the county in which the minor resides[.]" Donald argues that, as a matter of law, "the county in which the minor resides" is identical to that of a custodial parent. The basis for his position is *W.Va. Code* § 48-9-602 [2001], which states, in part:

> Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is scheduled to reside the majority of the time as the custodian of the child. However, this designation shall not affect either parent's rights and responsibilities under a parenting plan.

In 2006, the Family Court of Cabell County designated Donald as the custodian of A.C. He argues, therefore, that the child, as a matter of law, resided with him wherever he might live.

We reject Donald's suggested interpretation of our laws.

First, *W.Va. Code* § 48-9-602 applies only to "statutes which require a designation or determination of custody[.]" There is nothing in the guardianship statute that requires a court to first designate or determine the custody of a child before then determining who may be guardian of the child.[8] Accordingly, *W.Va. Code* § 44-10-3(a) is not one of the statutes envisaged by the Legislature when it crafted *W.Va. Code* § 48-9-602.

Second, the Legislature's choice of words in *W.Va. Code* § 44-10-3(a) and *W.Va. Code* § 48-9-602 indicates that the Legislature was aware circumstances could

[8] The "state and federal statutes" likely referred to in *W.Va. Code* § 48-9-602 include the Internal Revenue Code, 26 U.S.C. § 152 [2008] (which allows a custodial parent to claim a dependent deduction); the Food Stamp Program, 7 U.S.C. § 2015 [2008] (which requires a custodial parent to cooperate with state child support agencies); federal criminal statutes relating to parental kidnapping, 18 U.S.C. § 1204 [2003]; federal regulations issued on Veterans' Benefits, 38 CFR 3.24, 3.57, and 3.850, and Social Security, 42 U.S.C. § 1396r-1a [2000]; and statutes regarding finding a missing child and reuniting the child with their legal custodian, 42 USC § 5773 [2008] and § 5775 [1999]. *See Kimpel v. Kimpel*, 122 Wash.App. 729, 734 n.1, 94 P.3d 1022, 1024 n.1 (2004).

arise where a minor had more than one residence. In *W.Va. Code* § 44-10-3(a), the Legislature based a court's jurisdiction and venue in any county in which a minor has a residence, or "resides." The verb "'[t]o reside' and its corresponding noun *residence* are chameleon-like expressions, which take their color of meaning from the context in which they are found. The word 'residence' has been described as being 'like a slippery eel, and the definition which fits one situation will wriggle out of our hands when used in another context or in a different sense.'" *Farmers Mut. Ins. Co. v. Tucker*, 213 W.Va. 16, 21, 576 S.E.2d 261, 266 (2002) (citation omitted). And in *W.Va. Code* § 48-9-602, the Legislature required any parenting plan to specify where "the child is scheduled to reside *the majority of the time*;" the statute does not resolve whether the child resides in other places, but rather implies that a child can reside in multiple places.[9]

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[9] In the context of insurance, there is a bounty of case law discussing the numerous "residences" of a child of divorced or separated parents, or children who have temporarily left their parents' home to pursue an education, job, medical treatment, or the armed forces:

> Numerous other cases have found a child of divorced or separated parents -- even though living primarily under the roof of only one parent -- was a "resident" of both parents' "households" for purposes of insurance coverage. Courts note that children often leave belongings at both homes, have a room or area of their "own" in each home, and until the child expresses another intent, generally hold that the child is a resident of both homes. . . .
>
> Another common class of cases where courts usually find coverage involves children who have temporarily left their parents' insured house to pursue an education, a job, extensive medical treatment, or to join the armed forces. These individuals often establish a residence a substantial distance from the insured house, and maintain that residence for an extended period. When the facts establish that the

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It is an axiom in the law that residence and domicile are not synonymous, and that a person "may have several residences, but only one domicile." *Lotz v. Atamaniuk*, 172 W.Va. 116, 118, 304 S.E.2d 20, 23 (1983). This Court said in Syllabus Point 2 of *Shaw v. Shaw*, 155 W.Va. 712, 187 S.E.2d 124 (1972) that a person "may live in several different places but [she] can have only one domicile. Domicile is a place a person intends to retain as a permanent residence and go back to ultimately after moving away." *Black's Law Dictionary* says that residence must be distinguished from domicile:

> As "domicile" and "residence" are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home.

Farmers Mut. Ins. Co. v. Tucker, 213 W.Va. at 21, 576 S.E.2d at 266 (*quoting Black's Law Dictionary* 1309 (6th ed.1990))

We noted in Syllabus Point 5 of *Farmers Mut. Ins. Co.*, *supra*, that "[b]ecause a determination of residency depends on the intent of the parties, it is typically a question of fact[.]" Accordingly, since *W.Va. Code* § 44-10-3(a) places jurisdiction and venue of an infant guardianship action in *any* West Virginia county in which a minor resides, where the minor resides is generally a question of fact.

> child continues to call and treat their parents' house as "home," leaving their belongings there and returning when possible, courts usually find that the child is an insured "resident" of their parents' "household." . . .

Farmers Mut. Ins. Co. v. Tucker, 213 W.Va. at 22-23, 576 S.E.2d at 267-68 (citations and footnotes omitted).

Third, *W.Va. Code* § 44-10-3(a) vests jurisdiction in the county "in which the *minor* resides;" it does not mention anything about where the custodial parent of the minor might reside. We reject the respondent's invitation that we add jurisdictional limitations to *W.Va. Code* § 44-10-3(a) that the Legislature intentionally omitted.

> It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.

Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). The Legislature purposely created jurisdiction in courts where the minor resides. Our *Rules of Practice and Procedure for Minor Guardianship Proceedings* similarly specify that venue over a child's guardianship proceeding is determined solely with reference to the child and no one else. Rule 2(b) states:

> (b) *Venue*. A petition for appointment of a minor guardian shall be filed and heard in the county where the minor resides; or if the minor is a nonresident of the state, a county in which the minor has an estate. Any subsequent proceedings shall be heard in the county in which the guardian was appointed.

In summary, we believe that our infant guardianship statute is clear: *W.Va. Code* § 44-10-3(a) places jurisdiction and venue of an infant guardianship action in the West Virginia county in which a minor resides. It is the minor's residency alone that controls, and not the residency of any other person such as a parent, guardian, or other person with custody or control of the minor. A determination of the minor's residency is typically a question of fact.

The record shows that Brooke alleged that the child, A.C., resided with her at her home in Kanawha County. If this is true, then under *W.Va. Code* § 44-10-3(a) venue lies with the Family Court of Kanawha County to ascertain whether Brooke is competent and fit to be the minor's guardian, and whether it is in the minor's welfare and best interests.

IV.
CONCLUSION

As set forth above, the Family Court of Kanawha County plainly had subject matter jurisdiction to consider the petitioner's arguments. The Circuit Court of Kanawha County erred in issuing its June 29, 2011, order granting a writ of prohibition. The order is therefore reversed.

With the dissolution of the circuit court's prohibition order, the Family Court of Kanawha County should expeditiously proceed to resolve the parties' motions. We understand from the parties that a competing action involving the custody, parenting responsibilities, and/or guardianship of A.C. is pending in the Family Court of Boone County. This competing action was filed after petitioner Brooke filed her motion to intervene (requesting shared parenting or guardianship) that was transferred to the Family Court of Kanawha County. Pursuant to Rule 19(f) of the *Rules of Practice and Procedure for Family Court* [2007],[10] the Family Court of Kanawha County should

[10] Rule 19(f) of the *Rules of Practice and Procedure for Family Court* states:

Continued . . .

promptly order the Boone County action (and any other subsequently filed actions) transferred to Kanawha County.

The family court should then quickly resolve the questions raised by the parties' motions, including determining A.C.'s residency at the time Brooke's motion was filed and thereby whether venue is proper in Kanawha County. If so, the family court should then expeditiously resolve the shared parenting and guardianship issues raised by Brooke's motion.

Finally, the Clerk of the Court is directed to issue the mandate forthwith.

Reversed.

> (f) *Consolidation of simultaneous proceedings.* When two or more family court actions between the same two parties are pending before different family court judges, the court in which the first action was commenced shall order all of the actions transferred to it or any other family court in which such action is pending. The court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue in any of the actions; it may order all of the actions consolidated; and it may make such other orders concerning proceedings as may tend to avoid unnecessary costs or delay.

225 W. Va. 659, 695 S.E.2d 899

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

No. 35306

FILED
June 10, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE MATTER OF BRYANNA H. and SKYLAR H.

Appeal from the Circuit Court of Wood County
The Honorable John D. Beane, Judge
Civil Action No. 07-JA- 103 and 07-JA-104

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Submitted: February 10, 2010
Filed: June 9, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "W. Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the [Department of Health and Human Resources] is obligated to meet this burden." Syllabus point 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).

3. " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969).' Syllabus pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)." Syllabus Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

4. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus point 1, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1974).

5. "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syllabus Point 6, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1974).

6. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus point 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per curiam:

This appeal arises from the May 1, 2009, final dispositional order entered by the Circuit Court of Wood County in an abuse and neglect proceeding that resulted in the placement of the minor children in the home of their mother, Robin M., and her husband, Anthony M. In this appeal, Brian H., the appellant and respondent-father below, contends that the circuit court erred in granting the children's stepfather an improvement period, by adjudicating the children abused and/or neglected because of his own conduct, and by placing the children in the home of their mother and stepfather.[1] The mother, Robin M., and her husband, Anthony M., did not appeal any part of the order but did participate in this appeal.

The Court has before it the petition for appeal and the entire record in this matter. Based upon the briefs and arguments of the parties, and for the reasons set forth below, the order of the circuit court is reversed, and this case is remanded to the circuit court with directions to hold an immediate dispositional hearing that adequately contemplates the placement of the children in the home of Brian H., as a non-abusing parent.

[1] It was revealed at the oral argument of this case that one of the children who had been returned to Robin M.'s custody was in fact residing elsewhere. This fact did not appear to have been known by the Department, who had ceased monitoring the family.

I.

FACTUAL AND PROCEDURAL HISTORY

This proceeding commenced in the Circuit Court of Wood County with the filing of a petition on August 28, 2007, alleging that four children of the appellee-respondent, Robin M.[2] were abused and neglected children. The four children affected by this action were Bryanna H., born June 24, 1998; Skylar H., born April 24, 1996; and twins Holly T. and Hanna T., born November 9, 1994. The father of Bryanna H. and Skylar H. is Brian H., the appellant-respondent in this matter. The father of Holly T. and Hanna T. is Kenny T. The order appealed by Brian H. does not address the placement of Holly and Hanna T. and as such, Kenny T. did not participate in this appeal.[3] Counsel was appointed for all parties and a guardian ad litem was appointed to represent the minor children.

The original petition herein was signed and verified by Amy Rexroad, a representative of the West Virginia Department of Health and Human Resources, hereinafter referred to as "the Department." In it, the Department alleged that the children were abused

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[2]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full surnames. See *In the matter of Jonathan P.*, 182 W. Va. 302, 303 n.1, 387 S.E.2d 537, 538 n. 1 (1989).

[3]By Order entered April 29, 2009, the circuit court ordered, *inter alia*, that "in regards (sic) to the above named children, Holly and Hanna T. that physical and legal custody shall remain with the respondent father, Kenny T. and that the parents shall return to the original parenting plan with encouragement to expand visitation as desired by the children and the parent."

and/or neglected children within the definition of West Virginia Code §49-1-3 (2007) (Repl. Vol. 2009). The petition contained allegations that the children's health, safety and welfare was endangered by events as early as October of 2006, when Robert J., then the husband of the mother Robin M. and the children's stepfather, committed acts of domestic violence involving a firearm. Skylar H. and Holly T. were instrumental in disarming Robert J. on this occasion. Over the course of the next six months, the family received services including counseling for the children and domestic violence counseling for the family, but domestic violence continued in the home. In May, 2007, Robert J. left the residence that he shared with Robin M. and the four children.

At about the same time, Robin M. began a new relationship with Anthony M., an appellee in this matter. While the family was still receiving services from the Department related to when Robert J. Live in the family home, a new referral was made alleging that Robin M. and Anthony M. were engaging in drug use in the presence of the children. The children also informed social workers of a trip to a local tattoo shop where Anthony M. and Robin M. purchased drugs. The petition included an allegation that Anthony M.'s parental rights to his own children had been terminated in another proceeding by order dated May 27, 2005. Anthony M.'s parental rights were affected in part by his conviction on child abuse charges arising in the State of Florida, as well as by acts of domestic violence against his

former wife in the presence of his children. The petition also included an allegation that Anthony M. had an "extensive criminal history."

The concerns about the presence of Anthony M. in the home prompted social workers providing services to the family to approach Robin M. about signing a protection plan that included a condition that Anthony M. would not reside in the home. Robin M. refused to agree to this plan, calling it harassment on the part of the Department. The mother's failure to execute the protection or safety plan prompted the filing of the initial petition.

In the order filing the petition, the lower court found, *inter alia*, that "by removing Anthony M. from the home of the respondent-mother, the children can be protected and safe." The court order contained the following findings:

> There exists no imminent danger to the children if Anthony M. is not permitted to have contact with the children, and therefore if he is removed from the home, removal from the home of the respondent-mother would not be in the best interest of the children.
>
> It is accordingly ORDERED that Bryanna H., Skylar H., Holly T. and Hanna T. shall remain in the home of Robin J.
>
> It is further ORDERED that the alleged abusing person, Anthony M., is ordered to refrain from visiting or residing in the home of the children, and from having any unauthorized contact with the children.

> It is further ORDERED that if the respondent-mother continues to let Anthony M. live in her home or have contact with the children, then the children should be removed immediately from the home and placed in the custody of the Department, after which the Court should be immediately notified and a preliminary hearing will be held.

The order filing the petition required the Department to convene a multi-disciplinary team (MDT) meeting within 30 days of the filing of the petition, and required that the Department provide the respondent parents with forms to complete for the purposes of evaluating and establishing child support.

On August 28, 2007, the Department filed an amended petition with new allegations regarding Robin M.'s conduct since being served with the original petition. At the time of the filing of the amended petition Holly T. and Hanna T. were residing with their biological father. Skylar H. and Bryanna H. likewise were residing in the home their biological father, the appellant Brian H., and paternal grandmother. The amended petition included an allegation that Robin M. was not going to make Anthony M. leave the home and that they intended to get married. It was alleged that Anthony M. was disruptive during the process of carrying out the court's order and police officers attempted to escort him off the property, to the mother's protest.

The preliminary hearing on the amended petition was scheduled for September 4, 2007. After a hearing, the lower court found that imminent danger existed to the physical well-being of the children and that there were no reasonable alternatives to the removal of these children from the home of their mother, Robin M. The circuit court found that reasonable efforts were made to prevent the removal of the children including services by the Department and the opportunity offered to Robin M. to have the children remain in her home provided Anthony M. was not present. The lower court further found that Robin M. "refused to cooperate with the Department and further failed to comply with the previous Order of this Court in that she refused to keep Anthony M. away from her children." The Department was granted legal custody of Bryanna H. and Skylar H. and their placement was at the paternal grandmother's home.

An adjudicatory hearing was scheduled for September 19, 2007. The respondent mother, through her counsel, requested that this hearing be continued. The adjudication of this matter was rescheduled for October 20, 2007.

At an adjudicatory hearing on October 20, 2007, Robin M. and Anthony M. moved for a pre-adjudicatory improvement period pursuant to West Virginia Code §49-6-12(a) (1996) (Repl. Vol. 2009) and Rule 23 of the Rules of Procedure for Child Abuse and

Neglect.[4] In her motion for the improvement period, the appellee mother requested that the children remain with her during the pendency of the improvement period. The Department objected to the children's placement with their mother and Anthony M. on a period of improvement without appropriate evidence being received in support of the motion. The court continued the hearing to December 14, 2007, and ordered that Robin M. and Anthony M. be subjected to urinalysis to detect the presence of drugs in their bodies. Anthony M. acknowledged to the court that his urine screen would be positive for marijuana. At the hearing on December 14, 2007, Robin M. and Anthony M. withdrew their request for pre-adjudicatory improvements periods and announced that they wished to stipulate to the adjudication. The court continued the hearing to January 28, 2008. Evidence was taken on January 28, 2008, and the hearing was continued until March 7, 2008. This date was later changed to March 18, 2008. Because of the guardian ad litem's illness, this hearing was continued until April 18, 2008.

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[4]Both Robin M. and Anthony M. requested pre-adjudicatory improvement periods, which may be in effect for a period not to exceed three months. This contrasts with the post-adjudicatory improvement period defined by West Virginia Code §49-6-12(b), which may continue for a period not to exceed six months, and the dispositional improvement period contained in West Virginia Code §49-6-12(c), which allows for an improvement period for a period not to exceed six months. Both post-adjudicatory improvement periods and dispositional improvement periods may be extended for a period not to exceed three months pursuant to West Virginia Code §49-6-12(g) "when the court finds that the respondent has substantially complied with the terms of the improvement; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child."

On April 18, 2008, Robin M. and Anthony M. stipulated to the circuit court that the children were abused and neglected. Their written stipulation contained the following admissions:

1. Anthony M. has had his parental rights terminated to his own natural children. The underlying basis for the termination was physical abuse of a step-child and use of illegal controlled substances. Anthony was given an improvement period, which he failed to complete.[5]
2. Robin C.[6] has previously been married to Robert J. and while married, the children observed domestic violence between the two, including the use of a gun and leaving bruising to the respondent-mother. The Department opened a case in 2006 and Robin cooperated with the Department receiving parenting classes and counseling for the children. Robert J. finally moved out of the house in April, 2007.
3. Robin C. then began dating Anthony M., living in the home with the children and Robin.
4. Anthony M. continued to use illegal controlled substances and the children testified they saw him using illegal controlled substances as well as saw the illegal controlled substances and the paraphernalia used to consume said substances. Robin C. was aware of his use of marijuana.
5. Robin C. refused to have Anthony M. move out of her home.

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[5]At a hearing on January 28, 2008, John Arnott testified on behalf of the Department that he was the assigned child protective services worker working with the Anthony M. family. An abuse and neglect proceeding was instituted in 2005, that ultimately led to the termination of Anthony M.'s parental rights to his children with Bobby Jo M., his former wife, and the prohibition of continued contact with his stepchildren who were also named in the petition.

[6]Throughout the course of these proceedings the appellee-mother has been known by various surnames. At the time of the filing of the original petition, Robin M. was known by the name of Robin J. When she divorced her husband Robert J., she returned to her previous name of Robin C.

As a part of the stipulation and by agreement, Robin M. was granted a six-month post-adjudicatory improvement period. The stipulation and agreement did not include an improvement period for Anthony M. The Department, the appellant and the father of the other children involved in the proceeding objected to the granting of the improvement period to Anthony M. The lower court ruled, however, that Anthony M. should receive an improvement period. As result of their agreement and the court's order, the appellees were placed on a six-month post-adjudicatory improvement period. As noted above, at this time Bryanna H. and Skylar H. were residing in the home of their paternal grandparents, which was also the home of their biological father, Brian H.

After the entry of the adjudication against the appellee mother and Anthony M., the petition was amended on April 30, 2008, for a second time. This amended petition, which is the subject of this appeal, contained the first allegations of wrongdoing regarding the appellant, including that he had a history of domestic violence, which included pushing Robin M. "down in the street while the children are present and throwing items at the children (sic) October 1997." The petition also contained reference to a conversation between the guardian ad litem, the guardian ad litem's investigator and the children wherein it was reported that the children believed any mail they received from their mother, Robin M., was confiscated and hidden from them in a file in their grandparents' computer room.

The Department characterized this as "emotional abuse" on the part of the grandparents and on Brian H.'s part, because he knew the mail was being taken and it upset the children. It was further alleged that the children were not happy in their current placement at their paternal grandparents because their father was not around and they did not like his girlfriend. The petition also alleged that Brian H. was inappropriate in his interactions with personnel at his children's school and that he wrongfully attempted to remove the children from school.

At the adjudicatory hearing, the principal witnesses against Brian H. were Robin M. and the children. Robin M. testified that in 2005, she petitioned Wood County Family Court seeking cessation of his contact with the children. Robin M. testified that she sought this relief "because the girls were coming back crying about things he did to them and that happened to them when they was (sic) with him." While the record does not contain a copy of the applicable Family Court order, Robin M. stated that the order entered prohibited Brian H. from having contact with his children.[7] Despite the existence of this prohibition, Robin M. began letting the children see Brian H. again "right before all this started with me and Anthony."

[7]The failure of the record to include applicable Family Court orders is troubling to this Court. When the basis of the Department's prohibition of placement with a parent is another court's order, the parties should ensure that that particular document is in the record for this Court's review.

Skylar H. testified at the May 23, 2008, adjudicatory hearing that on one occasion after the filing of the petition, she and her sister Bryanna H. went to the home of their father's girlfriend, April G., and to Blockbuster. On several other occasions their father took them to McDonald's or to school without anyone else being present. Regarding what the circuit court ultimately concluded was emotional abuse on the part of Brian H., the following testimony was elicited between the assistant prosecuting attorney and the child:

Q. Now, when you stayed with your Grandma and your Grandpa H., were there things that kind of bothered you?
A. Yeah.
Q. Can you give me an example of some things that bothered you while you were there?
A. They'd hide our cards and letters that my mom gave us or sent.
Q. How did you know they hid them?
A. One day I was getting on the computer to check my Myspace page, and --
Q. You have a Myspace page?
A. Yeah.
Q. Is it good stuff on that page?
A. Yeah.
Q. Okay. All right.
A. And I went to drawing, and they had a file that said, "Letters," and I clicked on it. And it had a copy of all our letters.
Q. And who were they from?
A. My mom.
Q. Okay. Did they ever tell you you got those letters?
A. No.
Q. Did you ask them about it?
A. No.
Q. Was there anything else that bothered you while you were there?
A. Only that we didn't get to go very many places.

Other complaints included the paternal grandparents calling Robin M. names. Skylar H. testified that Brian H. was not present but that she complained to him about the name-calling. The state elicited the testimony of Skylar H. regarding an incident in which Brian H. was alleged to have violated the initial order in this proceeding by being alone with the children.

The adjudicatory order against Brian H. was entered by the circuit court on December 15, 2008, based upon hearings that were held on May 23, 2008, August 19, 2008, and September 16, 2008. The court found that Bryanna H. and Skylar H. were abused and /or neglected children, within the definition of West Virginia Code § 49-1-3(a)[8] (2007) (Repl.

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[8]The statutory definition of abused child in W. Va. Code §49-1-3(a) is as follows:

"Abused child" means a child whose health or welfare is harmed or threatened by:

> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or
>
> (2) Sexual abuse or sexual exploitation; or
>
> (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen, article four, chapter forty-eight of this code; or
>
> (4) Domestic violence as defined in section two hundred two, article twenty-seven, chapter forty-

(continued...)

Vol. 2009) and §49-1-3(j)(1) (2007) (Repl. Vol. 2009)[9]. The lower court made the following findings of fact relating to the testimony of Skylar:

> a. She saw April around her grandparents' house on several occasions, although she remained in the truck and did not come inside;
> b. She went with her Dad and Bryanna to Blockbuster to pick out a movie, during which time they saw "Uncle Lee." After picking out a movie, Skylar testified that they all went to April G.'s trailer to watch the movie with her. This did not constitute supervised visitation as Brian H. had the girls in his custody alone, without his parents or other suitable persons present;
> c. Her father, alone, took her to school, McDonald's, and Kroger;
> d. Her Dad, grandparents, and aunt would not let the girls have the cards and letters from their mother;

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[8](...continued)
eight of this code.

[9](j)(1) "Neglected child" means a child:

> (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
>
> (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

e. Her grandparents and aunt would make the girls stand and sit in the corner for extended periods of time, sometimes over an hour, as punishment;

f. Her grandparents would call her mother derogatory names, (sic) when she reported this to her Dad, he did nothing about it and accused her of lying;

g. A pair of tennis shoes given to Bryanna by her mother were urinated on by the dog and her grandparents and/or her Dad would not wash them and made Bryanna wear them to school where the other children called her names because of the smelly shoes;

h. Her Dad did not spend much time with either of the girls because of his work schedule (9:00 p.m. to 6:00 a.m. Monday through Friday). After he got off work he would apparently go to sleep and then wake up around 3:00 p.m. and pick up April's kids, take them to her house, and then come to his parent's home and only spend a short time with the girls. After spending only a short time with the girls at his parents' house, Brian H. would go running around until reporting to work at 9:00 p.m.

The court order concluded that there was clear and convincing evidence that Bryanna H. and Skylar H. had suffered emotional abuse by the appellant, Brian H., by his failure to make sure that the children were not being mentally abused and that appropriate supervision was being given. The adjudicatory order also stated that there was clear and convincing evidence that the children had been neglected by Brian H. by the "threat of harm to their mental and physical health" by Brian H., by "his present refusal to make sure that this children were not being mentally abused and that appropriate supervision was being given."

Despite a finding that the appellant was not directly responsible for these actions,[10] the order also concluded that the "pattern of inappropriate and derogatory remarks regarding the children's mother" as well as keeping the children's correspondence from their mother, the children suffered emotional abuse by the appellant. The adjudicatory order granted the father visitation, but required that his visitation be closely supervised "until he can demonstrate that he will fully comply with agreements and court orders and can demonstrate that he will be fully responsible for their care and protection when they are in custody." The children remained in the legal custody of the Department after the entry of this order.

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[10]The adjudicatory order stated, at paragraph 25:

> This abuse and neglect was perpetuated by the respondent-father's failure to follow through with complaints by the children that the grandparents were preventing them form getting their mail, calling the respondent-mother inappropriate and derogatory names, and providing inappropriate discipline, thereby knowingly permitting the children to be subjected to this activity. Additionally, this abuse and neglect was perpetuated by the respondent-father's failure to follow through with adequate supervision by permitting the children to be in the presence of April G[.], from whom the respondent-father was to keep the children away.

April G. was the former girlfriend of Brian H. The record indicates that the children did not feel comfortable around April G. but there is no substantive allegation regarding her fitness as a parent or stepparent. As a result of the children's protests, Brian H. was directed by the Department to keep the children away from April G.

The circuit court reviewed this matter on January 9, 2009. At this time the lower court granted the appellant an improvement period. A hearing was scheduled for February 3, 2009, to enter the terms and conditions of Brian H.'s improvement period. Both Anthony M. and Brian H. moved for unsupervised visitation with the children. Brian H. objected to the granting of unsupervised visitation to Anthony M. After a hearing on February 20, 2009, and through an order entered February 27, the circuit court granted Brian H.'s motion for unsupervised visitation and denied the stepfather Anthony M.'s request. Anthony M. was, however, allowed to be with the children when Robin M. was present.

The circuit court continued to have regular reviews of the progress of the parties as they worked through their improvement periods. A dispositional hearing for Robin M. and Anthony M. was scheduled for April 21, 2009, as well as a review of the father's improvement period. Prior to the hearing, Brian H. filed a motion for custody of the minor children. In his motion for the children to be placed with him, Brian H. stated that he had been compliant with the improvement period, had appropriate housing for himself and the children and reiterated his concern for the safety of the children if they were placed in the home of Robin M. and Anthony M. Brian H.'s motion contained the following plea to the Court:

> As the Court is aware, Mr. M[.] has been terminated to his own children in a prior abuse and neglect proceeding and has a lengthy criminal history including a felony child neglect for which he was incarcerated in the state of Florida. Mr. M[.]

> tested positive for drugs during the pendency of this proceeding. Mr. M[.] and the Respondent Mother married during the pendency of this proceeding after the mother was made aware of the West Virginia Department of Health and Human Resources (sic) concerns regarding Mr. M[.]

On April 21, 2009, a dispositional hearing was conducted by the circuit court. Robin M. and Anthony M. moved that the children be returned to the custody of their mother, Robin M., and Anthony M. The appellant, Brian H., moved that the children be placed in his custody. The guardian ad litem expressed her approval of the placement of the children with their mother and stepfather. The Department took no position. Brian H. objected to the proposed placement. The lower court found that it was in the best interest for Bryanna H. and Skylar H. to be placed in the physical and legal custody[11] of their mother, Robin M., and granted the motion. As such, the court below denied the motion of Brian H. From this order entered May 1, 2009, Brian H. pursues this appeal.

[11]At the oral argument of this case, the Court learned that one of the parties' children had left her mother's household and was now primarily living with the appellant. The Department did not appear to be aware of this fact. By letter dated March 9, 2010, counsel for the Department provided the Court with updated information regarding the safety of the child in her present placement. We are concerned that the Department did not appear to be cognizant of the significant change in circumstances from the lower court's dispositional order, but express our appreciation to counsel for providing this information.

II.

STANDARD OF REVIEW

Our standard of review of the findings and conclusions of the circuit court in regard to abuse and neglect proceedings is well established.

> "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety."

Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With this standard in mind, we review the circuit court's findings and conclusions.

III.

DISCUSSION

The appellant raises numerous errors in the lower court's adjudicatory order. These errors may be placed in the following categories: A) insufficient evidence to support the court's findings regarding abuse and/or neglect; B) error in granting the stepfather,

Anthony M., an improvement period; C) error in not granting custody of the children to Brian H.; and D) lack of due process because of the delay in adjudicating this matter. Each shall be addressed in turn.

A.

Sufficiency of the Evidence

At the heart of the claims of Brian H. is the sufficiency of the proof against him that led to the circuit court's conclusions that the children were indeed abused and neglected children as a result of his actions. Without the proper evidence, the findings are meaningless. As we have previously stated:

> W. Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus pt. 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).

Additionally, "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. pt. 6, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1974).

In its findings and conclusions, the circuit court concluded that the children were abused and neglected not so much by the acts of the appellant himself, but by the acts of others in their lives, especially the children's paternal grandparents, where the children were placed pursuant to court order. These conclusions were reached after more substantive abuse and neglect allegations had been levied against the children's mother and stepfather, including the charge that the stepfather's presence endangered the children's safety, and that the children's mother refused to end his presence around the children. We are ever mindful that any semblance of an issue regarding Brian H.'s fitness as a parent arose only during the course of these proceedings. Brian H.'s role in the children's life, while limited, was not in question at the time that the original petition was filed. This is not to say that this Court condones the father's actions, or as the case may be, his limited role in the children's lives. It is simply to view such behavior against the entire backdrop of these children's lives. We are especially concerned that the father may have condoned the interference with Robin M.'s communication with the children. Giving the trial court the deference it deserves under our standard of review, we find that there was no error in adjudicating the children abused and/or neglected with respect to their father.

B.

Role of Anthony M. in these proceedings

The appellant also objected throughout the course of the underlying proceeding to the granting of an improvement period to Anthony M., on standing issues as well as because of the prior termination of his parental rights to two other children. As to the standing, if any, of Anthony M. to participate in these proceedings, Anthony M. obviously was not the parent of any of Robin M.'s children. At the time of the filing of the initial petition alleging Robin M.'s children were abused and neglected, however, Anthony M. resided in the home of Robin M., along with the children, and acted in the role of stepfather to the children. We thus determine that inasmuch as Anthony M. resided with Robin M. and the children prior to the filing of this initial abuse and neglect petition, and in view of his actual involvement in the children's lives, he was a custodian entitled to fully participate in these proceedings. Anthony M. therefore has standing in this matter.

We must next address the effect of the prior termination of Anthony M.'s parental rights first as they related to Robin M., and secondly, in his role as a custodian of the children. We note from the outset that this is not a case where the Department would be required to seek the termination of Robin M.'s parental rights because of the previous termination of Anthony M.'s parental rights to his other children. The provisions of West

Virginia Code §49-6-5b (2006) (Repl. Vol. 2009), which detail when the Department must initiate or join in a proceeding to terminate parental rights, would not apply in this case, inasmuch as the children of Anthony M. are not siblings of Robin M.'s children. [12] That is not to say, however, that the effect of the prior termination of Anthony M.'s parental rights is not an important point for the circuit court's inquiry, and certainly so if the question is whether to extend to Anthony M. the right to an improvement period. Anthony M.'s presence in the case was attendant to his marriage to the mother of the children and his role as their stepparent. Again, we cannot conclude that it was error for the circuit court to allow

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[12]West Virginia Code §49-6-5b details those circumstances that require the Department to seek termination of parental rights as follows;

> (a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:
>
> > ...(3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children or to the other parent of his or her children; or the parental rights of the parent to a sibling have been terminated involuntarily.

Anthony M. to fully participate in these proceedings as the spouse of the children's mother and as their stepfather.

C.

Failure to grant Brian H. custody of the children

It seems clear throughout this lengthy proceeding that Brian H. was never perceived to be a likely candidate for custody of his biological children. From the beginning of this case, when all allegations regarding the abuse and neglect of these children were related to the conduct of their mother, the children were placed elsewhere. After the petition was amended to reflect conduct that happened during the course of these proceedings, while the Department's focus was on Robin M. and Anthony M., Brian H. complied with the terms and conditions of his improvement period. He was not, however, effectively considered to be a placement for his children. Indeed, though the children were returned to their mother, Brian H. did not have defined custodial time.

We glean from the record that the return of the children to the home of their mother was to restore the children's last placement prior to the intervention of the Department through the abuse and neglect petition. The authority for this position is readily ascertainable. We have stated:

> At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

Syl. pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

The right of a parent to the custody of his or her child is foremost in our jurisprudence. We have repeatedly emphasized the importance of parental rights and have stated:

> ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969).' Syllabus pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)."

Syl. pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

We have further held:

> "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions."

Syl. pt. 1, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129.

With these standards in mind, we now review whether the circuit court erred in placing the children with Robin M. and Anthony M., as opposed to placement with their father, Brian H. The circuit court's order concludes that it was in the best interests of the children to be placed with their mother, Robin M., and her husband, Anthony M. There is no mention whatsoever of why the home of Brian H. was not an appropriate placement for the children, or why it was apparently not even considered. It should have been. Hence, the record before us gives an insufficient view of the rationale of the lower court in making its determination. As such, we are limited in our review and consideration of the best interests of the children. In light of one child's return to her father's home despite the underlying order, we conclude that it was error to summarily place the children in the home of Robin M. and Anthony M. without consideration of the placement of the children with Brian H. The circuit court should forthwith reconvene a dispositional hearing to determine whether the children should live with Robin M. or Brian H. Such a hearing should also consider any updated information on the children and their best interests.

D. Timeliness of Adjudication

The appellant has raised an issue regarding the length of time between the filing of the amended petition below and the final order in this matter. In light of the

resolution of the other issues herein, we do not believe it to now be necessary to address this concern.

IV.

CONCLUSION

For the foregoing reasons, we conclude that the circuit court did not commit error in finding that Skylar H. and Bryanna H. were abused and/or neglected children as a result of their father's actions. We find error in the dispositional phase of this proceeding in that the circuit court failed to adequately consider the home of Brian H. as a placement for Skylar H. and Bryanna H. We therefore affirm that portion of the circuit court's order that adjudicated the children abused and neglected by the acts of Brian H. We reverse that portion of the order of the circuit court which placed the children in the home of Robin M. and Anthony M. We therefore remand this matter to the circuit court for a hearing on an appropriate placement of the children, with appropriate consideration being given to the father, Brian H., as the custodial parent. The mandate of the Court shall issue forthwith.

Affirmed in part, reversed in part and remanded.

174 W. Va. 120, 323 S.E.2d 601

Supreme Court of Appeals of West Virginia

John E. BURDETTE, II

v.

The Honorable Charles M. LOBBAN.

No. 16494

Dec. 6, 1984

Syllabus by the Court

1. Under W.Va.Code 49-6-2(a) [1984] a child who is the alleged victim of sexual abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of her counsel unless counsel waives that right on behalf of the child.

2. When a child's capacity to testify that she was the victim of a sexual abuse or neglect is present, the court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview.

Mary Beth Kershner, Asst. Atty. Gen., Lauren Young, Charleston, for petitioner.

Richard Gunoe, Asst. Pros. Atty., Hinton, for respondent, Judge.

David L. Parmer, Hinton, for M.J. and V.J.

Perry E. Mann, Hinton, for R.J.

NEELY, Justice:

The petitioners seek to prohibit the enforcement of certain provisions of a circuit court order permitting the interrogation of the alleged child-victim of sexual abuse outside the presence of her court-appointed attorney. Because of the clear language of W.Va.Code 49-6-2(a) [1984] providing that a child in a neglect or abuse proceeding shall have the right to be represented by counsel "at every stage of the proceedings", we award the writ. In addition, we hold that the court, in an abuse or neglect proceeding, may appoint a neutral psychologist or psychiatrist to inquire into the child's capacity to testify.

I

In this case a five-year-old girl was allegedly the victim of sexual abuse inflicted by her father. During a preliminary hearing on this matter, the circuit court issued an order that counsel for the respondent-parents and the guardian ad litem appointed for the child should "interview said child together and then privately." The court found no reason not to permit the child to be interviewed by her father's counsel without anyone else, including her own lawyer, being present.

W.Va.Code 49-6-2(a) [1984] reads in part: "In any proceeding under the provisions of this article, the child, ... shall have the right to be represented by counsel at every stage of the proceedings ..." Clearly this section is dispositive: a child who is the subject of a sexual abuse or neglect proceeding may not be interrogated at any time during such proceeding without the presence of her counsel unless her counsel waives that right.

This Court has previously held that in juvenile delinquency proceedings an immature minor is incapable of waiving his right to assistance of counsel except upon the advice of counsel. State ex rel J.M. v. Taylor, W.Va., 276 S.E.2d 199 (1981). Certainly, it is absurd to maintain that an alleged abuse victim five years old is capable, not only of exercising independent judgment during a private interrogation conducted by the lawyer representing the alleged perpetrator of the abuse, but also of withstanding the subtle pressure that such a lawyer might attempt, consciously or unconsciously, to exert.

A parent accused of sexual abuse by his minor child has a constitutional right to know of what his child accuses him in order to prepare his defense. But certainly the child victim has a concurrent right to be protected against unrestrained private examination by adverse interests. Child victims of sexual abuse doubtless have undergone a horrifying experience. For that reason it is necessary to assure the child a modicum of protection. See generally, Parker J., "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" 17 New Eng. L.J. 3 (1982); Note, "Evidentiary Problems in Criminal Child Abuse Prosecutions," 63 Geo. L.J. 257 (1974).

II

Often a child in an abuse proceeding is the only potential witness. Thus, the problem confronting any court at the outset of an abuse proceeding is whether the child is competent to testify against her parents. See footnote 1 When dealing with adult witnesses, the issues of competency and credibility are separable. These distinctions become blurred in the case of a five-year-old, however. In some situations a child may be engaging in phantasy. For example, the child may desire to "hurt" the parent for a real or imagined grievance. In other cases, the child may be incapable of making rational judgments on his own without being unduly influenced by others. See, Note, "Lawyering for the Abused Child: You Can't Go Home Again" 29 UCLA L. Rev. 1216, at 1241-44 (1982).

Therefore, we understand a trial court's concern to determine that a child is a competent witness before she is allowed to be the prime accuser. To do this the court should appoint a neutral child psychologist or psychiatrist to inquire into the child's capacity. However, the court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court and the guardian ad litem agree that the interview is best conducted in that manner. The corollary to the proposition that the guardian ad

litem must give permission, however, is that the trial court can refuse to allow the child to be a witness in the absence of an unimpeded interview with a child psychologist or psychiatrist who could then give some assurance of competency. Under W.Va.Code 49-6-2(c) [1984] this interview with the child psychologist or psychiatrist should be transcribed or recorded in an unobtrusive manner (unless waived by all the parties to the proceedings).

For the reasons stated above, the writ of prohibition prayed for is awarded.

Writ Awarded.

Footnote: 1 The traditional test in determining the competency of a child witness is whether the child "has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth." McCormick on Evidence § 62 (3d ed. E. Cleary 1984). Thus the judge usually considers the child's capacity to tell the truth and not simply his age.

235 W. Va. 16, 770 S.E.2d 516

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

FILED
March 2, 2015
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-0533

In Re: C.M. and C.M.

Appeal from the Circuit Court of Raleigh County
The Honorable John A. Hutchison, Judge
Civil Action Nos. 12-JA-113 & 114

REVERSED AND REMANDED
WITH DIRECTIONS

Submitted: January 13, 2015
Filed: March 2, 2015

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Department of Health and Human
Resources

CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.

JUSTICE LOUGHRY dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W. Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

4. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49–6–5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

5. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner

intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991).

Workman, Chief Justice:

This case is before the Court upon the appeal of the Mother, S.L.H.,[1] (hereinafter referred to as "the Mother") from the April 30, 2014, order of the Circuit Court of Raleigh County, West Virginia, terminating her parental rights. The Mother argues that the circuit court erred when it: 1) terminated her parental rights to her two children[2] because it was not the least restrictive alternative available; 2) abused its discretion by not granting her a dispositional period; 3) failed to place the children with their maternal grandmother;[3] and 4) allowed the children to remain in their paternal aunt's care. Based upon our review of the appendix record,[4] the parties' briefs and arguments, and all other matters before the

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[1]Following this Court's established practice in cases involving children and sensitive matters, we use parties' initials. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990) ("Consistent with our practice in cases involving sensitive matters, we use the victim's initials. Since, in this case, the victim ... [is] related to the appellant, we have referred to the appellant by his last name initial." (citations omitted)); *see also* W. Va. R. App. P. 40(e).

[2]The children are two boys, who are four years old and two years old. Both boys have names with the initials C.M.

[3]The maternal grandmother, pro se, filed a motion to intervene in this case on January 15, 2014. Contrary to the assigned error, the circuit court did not make any ruling regarding the grandmother's motion in its April 30, 2014, order that is the subject of the instant appeal. Moreover, by order entered May 20, 2014, the circuit court indicated that it had been advised that the grandmother "had filed a motion to intervene but after argument, the Court will consider her motion and will set a hearing on the motion in the future." Consequently, there is no factual or legal basis for this assigned error and the Court will not address it.

[4]The appendix record in this case does not comport with Rule 7 of the West Virginia (continued...)

Court, we reverse the circuit court's decision to terminate the Mother's parental rights and remand the case for the implementation of a gradual transition plan to return the children to the custody of their Mother.[5]

I. Procedural and Factual History

On August 28, 2012, an abuse and neglect petition was filed against both

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[4](...continued)
Rules of Appellate Procedure. Due to the inadequacy of the appendix record, this Court, by order entered January 16, 2015, requested the entire record in the case. From a review of the record below, it is evident that the West Virginia Department of Health and Human Resources ("DHHR") failed to include the case plans at issue in this case and failed to submit any written motion and supporting documents upon which the circuit court relied to terminate the Mother's parental rights. There were also salient orders entered by the circuit court that the parties failed to submit to this Court. Further, there are documents included in the appendix record that were not included in the record below. Those documents, which include certifications and letters regarding the Mother's treatment and case summaries prepared regarding visitation between the Mother and her children, may have been submitted as exhibits before the circuit court during hearings. The documents, however, were not contained in the record below.

We find it necessary to remind parties that they are bound to follow the West Virginia Rules of Appellate Procedure when pursuing an appeal before this Court, which includes the preparation and filing of an appendix record in compliance with our rules. The appendix record submitted in this case failed to comport with our rules; however, there was no objection to it by either the DHHR or the guardian ad litem.

[5]Because of the Court's decision to reverse the termination of the Mother's parental rights, we need not address the Mother's assignments of error regarding the circuit court's failure to grant her a dispositional period and to allow the children to remain in their paternal aunt's care.

C.R.M., who is the children's father,[6] and the Mother. The allegations in the petition concerned severe domestic violence, as well as alcohol and drug abuse in the presence of the infant children. The allegations included a referral to Child Protective Services ("CPS") on August 14, 2012, concerning both parents abusing alcohol and drugs, namely Oxycontin, and not providing a safe environment for the children. The petition also contained a referral to CPS on August 27, 2012, wherein the Mother, who was intoxicated, allegedly hid in the woods near the home with her two children, having fled due to a domestic altercation with the father. A preliminary hearing was held on October 18, 2012. By order entered October 26, 2012, the circuit court determined that probable cause existed warranting the removal of the children from the parents' home.

On December 6, 2012, the circuit court conducted an adjudicatory hearing. During the hearing, both parents stipulated to allegations of abuse and neglect. Specifically, the Mother stipulated "that she neglected her children through her drug abuse affecting her ability to parent her children." Both parents separately moved for post-adjudicatory improvement periods. The circuit court subsequently granted a six-month post-adjudicatory improvement period for each parent. The circuit court ordered that the Multi-Disciplinary

[6]The children's father's rights were also terminated by the circuit court as indicated in the April 30, 2014, order. The circuit court's termination of the father's rights is not before the Court.

Team ("MDT") was to meet by December 14, 2012,[7] and that a family case plan was to be developed and filed with the court by January 7, 2013. No case plan was placed in the record below or in the appendix record submitted before this Court.[8]

The appendix record also contained two monthly summaries for December 2012 and January 2013 prepared by Kelly Cook-Stevens, ASO Service Provider, regarding the Mother's visits with her children. In December 2012, Ms. Stevens supervised three visits between the Mother and her children. Ms. Stevens reported:

> [Mother]. . . is very interactive and affectionate with her children. She gets in the floor and plays with them and she made a tent with . . . [one child] and also played the Nintendo Wii. She balances the time equally between both boys and they

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[7]The Mother represents in her brief that the MDT met on December 11, 2012, and a case plan was developed for the Mother. The Mother represents, and neither the DHHR nor the guardian ad litem dispute, that the "major components" of that case plan were:

> 1. [The Mother] . . . is to complete a psychological evaluation and follow recommendations of the psychologist.
> 2. [The Mother] . . . is to work one-on-one with her service providers.
> 3. [The Mother] . . . will successfully complete an inpatient substance abuse program.

The Mother further maintains in her brief that: 1) she completed the psychological evaluation on January 7, 2013; 2) the DHHR did not make a referral for services until August 2013 and that is when the Mother started counseling, which she successfully completed; and 3) she has successfully completed an inpatient substance abuse program.

[8]West Virginia Code § 49-6-5(a) (2014) requires the DHHR to "file with the court a copy of the child's case plan, including the permanency plan for the child."

> interact very well with her. She changes their diapers throughout the visit and is very nurturing with both children. [One of the boys] cries at the end of the visits and she comforts him well and tries not to show any emotion.

In the January 2013 summary, Ms. Stevens reported:

> Provider supervised three visits during the month of January. [Mother] . . . is very interactive and affectionate with her children. [Mother]. . . was very loving with both boys and focuses on them the entirety of the visits. She balances the time equally between both boys and they interact very well with her. She changes [the younger boy's] . . . diaper throughout the visit and is very nurturing with both children. [The older boy] . . . cries at the end of the visits and she comforts him well and tries not to show any emotion. She graduated from Turning Point on January 31st and seems to be doing well in her recovery.

The record also contained a March 6, 2013, report prepared by a CPS worker for DHHR. This report indicated that the Mother "has made progress towards completing the goals set forth in her Family Case Plan. She successfully completed Turning Point on January 31, 2013, and has successfully maintained sobriety." Further, visits with her children were described as "positive." The Mother "interacts with her children well and makes up games to play with them. She balances her time equally between both boys and is nurturing to both children."

On March 7, 2013, the circuit court held an improvement period review hearing. By order entered March 22, 2013, the circuit court noted that it was "advised that respondent mother is progressing and when she obtains beds for the children, weekend

overnights will be started for her and reunification is the permanency plan for her."

A report of the guardian ad litem, dated June 7, 2013, indicates that a MDT meeting was conducted on May 21, 2013, wherein it was noted that visitation had been increased between the Mother and her children, but then decreased due to the Mother's housing situation. "The MDT concluded that as soon as the Respondent Mother established a new housing arrangement with her mother, visitation could resume to overnights and there would be no opposition by any party to a three (3) month extension." Further, "there were no concerns with drug use on the part of the Respondent Mother." The recommendation was to give the Mother a three-month extension on her improvement period.

The circuit court held another improvement period review hearing on June 13, 2013. By order entered July 29, 2013, the circuit court stated that "the MDT is proposing and moving for a three (3) month extension to transition the children back to respondent mother which motion the Court hereby GRANTS."

On September 26, 2013, the circuit court conducted another improvement period review hearing. By order entered November 19, 2013, the circuit court noted that during the hearing on September 26, the circuit court "was advised that Respondent Mother was progressing but had suffered a relapse based upon alcohol intoxication and loss of a

job[,] but[,] since September 3, 2013, she has been re[-]employed and tested negative for three (3) weeks." According to this order, "[t]he Department was willing to agree to an extension of her improvement period on a dispositional basis but due to her denial of a problem, the Court, after argument, will take under advisement whether it will deny or grant an extension of her improvement period."[9] The circuit also directed the MDT to meet "within ten (10) days and create a treatment plan for . . . [the Mother] and report to the Court." No treatment plan or report is contained in the record.[10]

The appendix record reveals that the Mother entered an inpatient treatment facility on November 14, 2013. According to a letter dated January 3, 2014, from the Mother's attorney to DHHR, the Mother successfully completed Prestera's Addictions Recovery Center Program on December 7, 2013. Included with the letter was a treatment narrative indicating that she successfully completed the short-term residential program.

After completing Prestera's inpatient treatment program, the Mother enrolled

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[9]Both the DHHR and the guardian ad litem represented in their respective briefs that by order dated September 26, 2013, the circuit court granted the Mother a requested extension of her improvement period. Contrary to this representation, according to the November 19, 2013, order, the requested extension was not granted. The circuit court only took it under advisement.

[10]Both the DHHR and the guardian ad litem represent that on October 4, 2013, the Mother signed a second case plan agreeing to attend inpatient rehabilitation. Once again, this case plan was not made a part of the record.

in Prestera's Co-Occurring Intensive Outpatient Program on January 16, 2014. On January 10, 2014, the mother also was accepted into the West Virginia Oxford House, a residential sober living program, located in Huntington, West Virginia.

The circuit court conducted another hearing on January 10, 2014. By order entered March 5, 2014,[11] as a result of the January hearing, the circuit court indicated that it "was advised that Respondent Mother is enrolled in the Oxford House in Huntington, WV, but the Department and *Guardian ad Litem* do not believe this facility is appropriate for her and that there is a bed at Storm Haven in Beckley, WV."[12] The case was continued status quo and another review hearing was scheduled for April 10, 2014. According to the April 30, 2014, order entered by the circuit court, "[a]nother identified problem with Oxford [H]ouse was that it was clearly not an appropriate place for children. This prevented the Department from beginning to reunite the children through overnight visitation and longer unsupervised visits."[13] The only reason given for this determination was found in the DHHR's brief wherein the following statement was made: "The facility was not considered

[11]Additionally, in this order the circuit court does not rule on whether it is going to grant the Mother a requested dispositional improvement period, but simply continues the case "status quo."

[12]The Mother indicated in her brief before the Court that the reason she chose the treatment program in Huntington was because she "felt she could be most successful in recovery to remove herself from the Beckley area where she had previously used and relapsed."

[13] This finding was not contained in the March 5, 2014, order.

to be an appropriate place for child visitation because it was apparently tended and staffed by recovering addicts." Notwithstanding this representation, there is no evidence in the record before the Court regarding why the DHHR and the guardian ad litem "believed" that the Oxford House was not appropriate for the Mother. Similarly, there is no evidence regarding why the Oxford House "was clearly not an appropriate place for children."

Also contained within the appendix record is a March 7, 2014, letter from Tara R. Henry, BA, a case manager with Prestera Center for Mental Health Services, Inc. Ms. Henry reports that the Mother is enrolled in Co-Occurring Intensive Outpatient Program that she started on January 16, 2014. Ms. Henry also indicates that the Mother is participating in "individual and group therapy, individual and group supportive intervention, as well as 12-step groups." Ms. Henry states that once the Mother graduates, she will be referred to the Substance Abuse Outpatient program to continue her recovery.

Further, the appendix record contains a letter, dated April 7, 2014, from Terry Johnson, an assistant outreach worker at the Oxford House. Ms. Johnson advises that the Mother

> has met all the requirements associated with membership and is in good standing. She is drug screened randomly and has passed them all. She has successfully found employment and is actively fulfilling her agreement with Oxford House West Washington by getting a sponsor, working steps and attending her choice of recovery meetings regularly.

A second undated letter in the record from Natalie Roe of the Oxford House indicates that the Mother "has become an amazing leader and accepted the responsibility of the house president. She has continued to gain employment and grow in her recovery." According to this letter, the Mother was scheduled to graduate on April 16, 2014, and she "maintains actively in the program through follow up therapy[,]" attending Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") meetings. She was also employed.

On April 10, 2014, the circuit court held a hearing[14] "on a motion to terminate the improvement periods of both parents, and for disposition of both parents." While the record contains a motion filed by the DHHR to terminate the father's parental rights, there is no motion filed by the DHHR seeking a termination of the Mother's parental rights.[15] The only mention in the record that disposition for the Mother might occur at this hearing was

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[14]Notwithstanding the parties' failure to submit an appendix record that comports with West Virginia Rule of Appellate Procedure 7, which is applicable to abuse and neglect appeals, *see* note four *supra*, the parties also elected to proceed in this matter without transcripts of the hearings below as permitted by Rule 11 of the West Virginia Rules of Appellate Procedure concerning abuse and neglect appeals. *See* W. Va. R. App. P. 11 (i) ("In order to provide an inexpensive and expeditious method of appeal, the petitioner is encouraged to perfect an appeal under this Rule without the transcript of testimony taken in the lower court. In lieu of filing all or part of the transcript of testimony, the petitioner *shall set out in the petitioner's brief a statement of all facts pertinent to the assignments of error*.") (Emphasis added). The parties, however, failed to include in their briefs "all the facts pertinent to the assignment of error." *See id*. The parties' respective factual recitations contained in the briefs lack any discussion of the evidence that was introduced at the dispositional hearing that resulted in the termination of the Mother's rights.

[15]If the DHHR orally moved to terminate the Mother's parental rights, there is nothing in the record which demonstrates that.

found in the March 5, 2014, order wherein the court sets "[a]n improvement period review hearing or dispositional hearing on . . . [the Mother]" for April 10, 2014. The April 30, 2014, order regarding this hearing indicates that the circuit court heard testimony that the Mother had signed a case plan on October 4, 2013, agreeing to attend an inpatient rehabilitation facility. According to the order, she

> filled out intake forms for four (4) rehab facilities and was contacted by John D. Good Recovery Center for a phone interview and she stated she did not need detox and was removed from the waiting list. Respondent Mother was later admitted to Prestera's twenty eight (28) day Addictions Recovery Center on November 14, 2013, but left the program.[16] The Department had asked the Respondent Mother to move to a facility in Beckley, WV, so that the Mother could spend more time with her children because of the difficulty of transporting the children to Huntington and because Oxford House is not appropriate for any children's visitation.[17]

(Footnotes added).

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[16]There is no evidence that the Mother left the program. The only evidence in the appendix record demonstrates that she successfully completed Prestera's twenty-eight day inpatient treatment program.

[17]As previously mentioned, there is no evidence in the record as to why Oxford House was not appropriate for children's visitation, only the DHHR's representation that the facility is "apparently tended and staffed by recovering addicts." Counsel for the Mother represented to the Court during oral argument that the treatment facility the DHHR recommended that the Mother go to in Beckley was similar to the Oxford House that the Mother enrolled in in Huntington. According to the website for Storm Haven, located in Beckley, like the Oxford House, it too is a "sober living environment"founded by Doug Stanley, who "was in recovery from alcohol addiction[.]" Storm Haven Recovery Home, http://stormhavenrecoveryhome.org (last visited March 2, 2015).

Following the April 10 hearing, but before the circuit court entered the April 30, 2014, order concerning that hearing, the Mother submitted a letter dated April 28, 2014, from Prestera Center indicating that the Mother "has completed 8 of the 9 interventions for her substance abuse treatment goal[,]" and had also "completed 3 of the 7 interventions of the goal for depression." The appendix record also contains a "certificate of completion" of "Prestera's Co-Occurring Intensive Outpatient Program" dated June 22, 2014, as well as log sheets showing that the Mother was attending AA/NA meetings.

By order entered April 30, 2014,[18] the circuit court found that: 1) the children had been in the custody of the DHHR for nineteen of the last twenty-two months; 2) the Mother had not substantially complied with the case plan she signed; 3) the Mother had not made sufficient progress towards reunification with her children; 4) the Mother was unwilling to make the reunification of her family her first priority; and 5) the Mother deliberately ignored reasonable directives of DHHR and recommendations contained in the treatment plan that she signed and agreed to follow. As the circuit court stated in its order, the Mother "refused to enter a long term intensive rehabilitation program, refused to move to a facility in Beckley where she could spend more time with her children, and failed to make any substantial progress toward reunification with her children in a timely manner."

[18]Following this order, on May 20, 2014, the circuit court entered an order allowing visitation by the Mother with her children to continue in Raleigh County "but not unsupervised or overnight."

Further, the order provided that the Mother "failed to show this Court by clear and convincing evidence that she will be able to comply with a future improvement period and further she has failed to prove by clear and convincing evidence that she is motivated to put her children's best interests ahead of her own personal pursuits." Based upon the foregoing, the circuit court terminated the Mother's parental rights to her two children, determined that "the infant children shall remain in the temporary legal and physical custody of the Department of Health and Human Resources with placement of the infant children to be in the discretion of the Department[,]" and found that "[t]he permanency has not been achieved but the Department has made reasonable efforts to achieve the same and that this hearing meets the requirements for foster care review . . . ." It is this ruling that forms the basis for the instant appeal.

II. Standard of Review

> This Court has explained that
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> > "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000).

In re J.S., 233 W. Va. 394, 400, 758 S.E.2d 747, 753 (2014). We have also applied the following standard of review to cases involving abuse and neglect proceedings:

> Although conclusions of law reached by a circuit court

> are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); *accord In re B. H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)(applying same standard of review in abuse and neglect proceeding where mother admitted to neglect, circuit court adjudicated the children abused and neglected, and issue before Court concerned whether mother had substantially complied with terms of her post-adjudicatory improvement period). We are also ever mindful of our strong precedence in abuse and neglect cases that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted); *see* Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."). Guided by these standards of review, we turn to the arguments before us.

III. Discussion

A. Termination of the Mother's parental rights.

The Mother argues that the circuit court erred in terminating her parental rights. More precisely, the Mother contends that the circuit court erred in finding that she left Prestera's Addictions Recovery Center early and that she had not made sufficient progress towards reunification with her children and had not substantially complied with the family case plan. Conversely, the DHHR argues that the circuit court properly terminated the Mother's parental rights because she failed to demonstrate a reasonable likelihood that the conditions of abuse and neglect could be corrected. The DHHR maintains that she "failed to comply with her improvement period or to consider recommendations that would result in her timely reunification with her children," because she ignored the DHHR's recommendations regarding where to enroll in treatment for her addiction thereby frustrating reunification with her children.

This Court has held that

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Moreover, we have held

that

> [a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under *W. Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Finally,

> [t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

In re R.J.M., 164 W. Va. at 496, 266 S.E.2d at 114, Syl. Pt. 2.

The undisputed evidence before the circuit court clearly demonstrated that the Mother successfully completed the twenty-eight-day inpatient rehabilitation at the Prestera Center. The record is completely devoid of any evidence that supports the finding that the Mother left this program. Moreover, completion of an inpatient treatment program was the requirement of her case plan and the record shows that she did complete such a program. Again, there is no evidence in the record, or in the circuit court's order, that supports any

finding that the Mother was directed by the circuit court to obtain treatment only where the DHHR recommended. Rather, the requirement placed on the Mother was that she had to undergo treatment. The Mother successfully completed both inpatient and long-term outpatient treatment programs for her addiction. She has also been participating in individual and group therapy, individual and group supportive intervention, as well as twelve-step groups. According to the Mother's brief, she has attended AA and NA meetings on a daily basis since January 10, 2014. Additionally, the Mother removed herself from the abusive relationship with the children's father. She remains sober, she is employed, she is going to attend college, and, according to her status update, she has obtained housing.[19]

The circuit court focused solely upon the Mother's failure to complete the treatment program in Beckley recommended by the DHHR. The DHHR maintained, and the circuit court found, that because of this, the Mother frustrated the goal of reunification with her children and failed to make her children her first priority.[20]

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[19]In her status update filed with the Court pursuant to West Virginia Rule of Appellate Procedure 11(j), the Mother is currently living in Vienna, West Virginia, in an apartment with a one-year lease. She has been working at Red Lobster since October 20, 2014. She was previously employed by SRBI, a telemarketer, from March 2014 to October 2014. She was supposed to start school at WVU-Parkersburg on January 12, 2015, with the goal of becoming a surgical technician. She will attend classes on Mondays and Wednesdays. She continues to screen weekly for drugs and her results have been negative.

[20]Visitation between parent and child during an out-of-custody improvement period is important in evaluating whether a parent is making strides towards reunification with the child. As we stated in *In re Carlita B.*, "[a] parent's level of interest in visiting with his or

(continued...)

The Mother's choice of undergoing treatment for her addiction in Huntington as opposed to Beckley may have made it more difficult to visit her children. Despite the representations by the DHHR and the guardian ad litem regarding the difficulty with visitation caused by the Mother undergoing treatment in Huntington, there is no evidence

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[20](...continued)
her child during an out-of-home improvement period is an extremely significant factor for the circuit court to review. A parent who consistently demonstrates a desire to be with his child obviously has far more potential for being a nurturant and committed parent than one whose interest in being with his child is erratic." 185 W. Va. at 628, 408 S.E.2d at 380. In the instant case, the Mother enunciated a sound reason for choosing the Huntington treatment program. Moreover, her interest in visiting her children was not at issue, rather the logistics of arranging visitations with the Mother was made more difficult due to her decision to enter a treatment program that was further away from her children. That decision was necessitated by her desire to remedy the thing that made her a neglectful mother – her addiction to drugs and alcohol. The DHHR, and the circuit court, therefore, lost sight of the purpose of the improvement period We also discussed the purpose of improvement periods in *In re Carlita B.* as follows:

> The goal should be the development of a program *designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result*. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the . . . [DHHR] and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

Id. at 625, 408 S.E.2d at 377.

regarding how visitation was made more difficult or, more importantly, how the Mother was purposely trying to thwart reunification with her children by obtaining treatment from one facility instead of the other. Likewise, despite statements in the DHHR's brief that the Oxford House in Huntington "was not considered to be an appropriate place for child visitation [including overnight visitation] because it was apparently tended and staffed by recovering addicts[,]" there was no evidence in the record to support this assertion. Nor was there any evidence in the record to indicate that Storm Haven in Beckley, which was the treatment facility recommended by the DHHR, was an appropriate venue for visitation, including overnight visitation. There is, however, evidence in the appendix record that demonstrates that the Mother maintained consistent visitation with her children during her improvement period. The record further demonstrates that during visitation with her children, the Mother was very nurturing and loving with them. She gave each child equal amounts of her time, prepared their meals, and played with them.

There is also a lack of evidence to support the circuit court's determination that "the Respondent Mother has shown that she is unwilling to make the reunification of her family her first priority." The record is devoid of evidence to support the circuit court's finding that "the Respondent Mother has deliberately ignored reasonable directives of the DHHR and recommendations contained in the treatment plan that she signed and agreed to follow." Neither does the record support the circuit court's finding that the Mother "failed

to make any substantial progress towards reunification with her children in a timely manner." Rather, the appendix record demonstrates that the Mother successfully completed multiple treatment programs, obtained housing and employment, enrolled in college, and participated in successful visitations with her children. Thus, based upon our review of both the record below and the appendix record, we find the Mother was making steady progress during the post-adjudicatory improvement period. The circuit court erred in its findings to the contrary, including its determination that there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. . . ." *See* W. Va. Code § 49-6-5(a)(6). Having found that the circuit court's findings supporting termination were clearly erroneous, *see In re Tiffany Marie S.*, 196 W. Va. at 223, 470 S.E.2d at 177, we reverse the circuit court's decision.[21]

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[21]West Virginia Code § 49-6-5 clearly establishes that termination of a parent's rights is the last resort. In this case, given the great strides made by the Mother, who by all accounts was and continues to be pursuing a path toward recovery from her addiction, there were other options short of termination of rights that the circuit court should have employed. According to West Virginia Code § 49-6-5:

> The court shall give precedence to dispositions in the following sequence:
>
> (1) Dismiss the petition;
>
> (2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;
>
> (3) Return the child to his or her own home under supervision of the department;
>
> (4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or

(continued...)

B. Transition Period

Because termination of the Mother's parental rights is not warranted in this case, the priority now is to reunify the Mother with her children. Our concern in this case, and every case involving children, is the welfare of the children. The two boys in this case have been in the care and custody of the DHHR and the paternal aunt for the majority of their lives. Consequently, this case calls for a gradual transition period of custody to the Mother in a manner that will cause the least amount of trauma and stress for the two children involved. As this Court first held in syllabus point three of *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991):

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[21](...continued)

> custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
>
> (5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. . . .
>
> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. . . .

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

See Honaker v. Burnside, 182 W. Va. 448, 453, 388 S.E.2d 322, 326 (1989). Further,

> [a]s this Court stated in *In re George Glen B., Jr.*, 207 W. Va. 346, 355, 532 S.E.2d 64, 73 (2000), "[e]xplicit in both *Honaker v. Burnside* and *James M. v. Maynard* is the principle that the circuit court, and not the Department or a private agency, bears the burden of crafting a plan for the gradual transition of custody." Moreover, "[w]hen a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren)." Syllabus Point 7, *In re George Glen B., Jr.*

Kristoper O. v. Mazzone, 227 W. Va. 184, 195, 706 S.E.2d 381, 392 (2011).

Upon remand, we direct the circuit court to expeditiously set this matter for a hearing to establish a clear gradual transition period plan for reunification of the children with their Mother. Even though the length of a gradual transition period is within the circuit court's discretion, due to the length of time that the children have been with their paternal aunt, a transition period of several months similar to the one we discussed in *Honaker* would be reasonable. *See* 182 W. Va. at 453, 388 S.E.2d at 326. As in *Honaker*,

> [f]or the transition period to be effective in accomplishing this purpose, it should provide for ever-increasing amounts of

> visitation for the natural . . . [Mother] so as to lead to a natural progression to full custody. Such transition plan should give due consideration to both . . . [the Mother's and the paternal aunt's] work and home schedules and to the parameters of the . . . [children's] daily school and home life, and should be developed in a manner intended to foster the emotional adjustment of these children to this change while not unduly disrupting the lives of the parties or the children.

Id. Additionally, the circuit court must impose specific conditions upon the Mother, such as attending regular AA /NA meetings, and must continue to closely monitor those conditions beginning with bi-monthly reviews for a reasonable period of time in order to be certain that the Mother continues her path to recovery.[22] On remand, the Mother also needs to demonstrate that she is able to care for her children, that her current residence is suitable for the children, that she is able to provide for the children and that she has childcare for the children when she is working and attending school. Lastly, it is in the best interests of the children for the circuit court to provide for the continued reasonable visitation between the children and their paternal aunt. The paternal aunt and these children undoubtedly have bonded and the close relationship formed as a result must be allowed to continue.[23]

This Court is fully aware that transitioning custody from the paternal aunt back

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[22]The circuit court can gradually increase the time period between reviews as it deems appropriate.

[23]The DHHR should do all it can to facilitate the transition period in this case, including assisting with the visits between the Mother, the paternal aunt and these children, by aiding with transportation needs if necessary.

to the Mother is no small feat, both logistically and emotionally, for all involved. As we recognized in *Honaker*, "[n]o matter how artfully or deliberately the trial court judge draws the plan for these coming months, however, its success and indeed the chances for . . . [the children's] future happiness and emotional security will rely heavily on the efforts . . . [of the Mother and the paternal aunt]. The work that lies ahead for both of them is not without inconvenience and sacrifice on both sides." *Id*. We are optimistic that the Mother and the paternal aunt will work together for the sake of the children to show them that they are loved and to give them security and stability they need in their lives.

IV. Conclusion

Based upon the foregoing, we reverse the decision of the circuit court and remand the matter for further proceedings consistent with this opinion. The Clerk of this Court is directed to issue the mandate in this case forthwith.

Reversed and remanded
with directions.

No. 14-0533 - In Re: C.M and C.M.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LOUGHRY, Justice, dissenting:

In this tragic case, the Court reverses the fully-warranted termination of the mother's parental rights and orders that she be reunified with her two-young children despite the fact that **they have been in the DHHR's custody twenty-nine of the last thirty-two months**. Given that the mother has never successfully completed the terms of her improvement period, the majority's decision to order reunification contravenes this Court's longstanding recognition that the children's best interest is the compass by which these decisions are to be governed. *See* Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) ("'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.'"). Had the majority felt compelled to give the mother additional time to demonstrate her fitness as a parent, the most generous procedural relief warranted under the circumstances of this case would have been to remand the case to the circuit court for the purpose of extending the previous improvement period.[1] Instead, the majority literally ignores the sound judgment of the circuit court, the DHHR, the members of the Multi-Disciplinary team, the guardian ad litem, the entire record

[1]The DHHR takes the position that the mother was not entitled to any further improvement periods under West Virginia Code §§ 49-6-5, 49-6-12(c) (2014).

below, and then unwisely chooses the interests of an abusive and neglectful mother over the best interests of two innocent victims. As grounds for its decision that reunification is justified, the majority imprudently relies upon the mother's self-serving assertions. For these reasons, I dissent from the majority's decision in this case.

The record below fully demonstrates why these young children have yet to achieve any permanency in their lives. When the subject abuse and neglect proceedings began in August of 2012, the mother admitted both to illegally ingesting a daily dose of Oxycontin for the last eight years and drinking in the presence of her children.[2] After stipulating to the abuse and neglect of her two children, who were then two years old and less than two months old, respectively, the mother signed a case plan whereby she agreed to attend an in-patient rehabilitation facility. Deciding against the **inpatient, long-term** intensive rehabilitation program in Raleigh County where her children live, as was recommended by the DHHR, the mother entered an **outpatient, short term** twenty-eight-day program at an addiction recovery center located two hours away in Cabell County. Four days shy of the completion date, she left the program.

As the basis for its termination ruling, the trial court found that the mother:

[2]Assuming that the mother was telling the truth when she admitted to ingesting Oxycontin on a daily basis, an obvious conclusion can be drawn that she was doing so during her pregnancies with both children.

- showed that she was unwilling to make the reunification of her family her first priority;
- deliberately ignored the DHHR's reasonable directives and recommendations as contained in the treatment plan that she signed and agreed to follow;
- refused to enter a long-term rehabilitation program;
- refused to move to a facility in Beckley which would allow her to spend more time with her children; and
- failed to make any substantial progress towards reunification with her children in a timely manner.

The trial court's ruling that the mother failed to establish that reunification with her family was her first priority is demonstrated by her repeated choices in treatment and living options that were several hours from where her children were residing with their paternal aunt. As indicated above, she chose to participate in a program outside the Beckley area where her young children were living. The DHHR continually voiced its frustration with the logistical difficulties presented by the distance between where the children were living and where the mother was residing. The mother acknowledged that although she is allowed to see her children on a weekly basis, she only sees them "at least once per month." From the record submitted in this case, it is clear that the mother's paramount concern was **not** the pursuit of treatment and living options in close proximity to her children. If visiting and maintaining frequent contact with her children was her first priority, it seems logical to conclude that the mother would have sought treatment as near to them as possible. Instead, she bypassed the

inpatient treatment plan she had originally agreed to complete, moved to Huntington, West Virginia, and later to Vienna, West Virginia.

Critically, since August of 2012, this mother has not built any meaningful relationship or bond with her two children and, according to the most recent report to the DHHR by the administrative service provider dated January 4, 2015, the mother currently has myriad unresolved parenting deficiencies including:

> Lack of knowledge and competence in providing safety for children, lack of appropriate supervision, hygiene, budgeting, obtaining and maintaining housing, obtaining and maintaining gainful employment, use of appropriate coping and problem solving skills, communication skills, basic home management skills, social and/or emotional support networks developed.

Nonetheless, in spite of the fact that there is nothing in the record to show that the mother is even remotely capable of caring for her young children, the majority blindly orders their reunification with her.

"[A] circuit court's substantive determinations in abuse and neglect cases on adjudicative and dispositional matters–such as whether neglect or abuse is proven, or whether termination is necessary–is entitled to substantial deference in the appellate context." *In re Rebecca K.C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723 (2003) (internal citations omitted).[3]

[3]This Court has explained that:

As this Court stressed in *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), "a judgment regarding the success of an improvement period is within the court's discretion . . ." Further, "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).[4] This Court has also

> "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

In re Timber M., 231 W.Va. 44, 53, 743 S.E.2d 352, 361 (2013).

[4]This Court has always remained mindful that

> whenever a child appears in court, he is a ward of that court. W.Va. Code § 49-5-4 (1996); *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them. As Justices Cleckley and Albright stated in *West Virginia Department of Health and Human Resources ex. rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996), "[a]bove all else, child abuse and neglect proceedings relate to the rights of an infant." *Id.* at 477, 475 S.E.2d at 569.

State v. Julie G., 201 W.Va. 764, 776, 500 S.E.2d 877, 889 (1997) (J. Workman, dissenting). Moreover, as we stated in *Timber M.*, 231 W.Va. 44, 743 S.E.2d 352,

> [I]t is clear from our [child abuse and neglect] procedural rules, as well as our prior case law, that "[t]here cannot be too much advocacy for children." *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 570, 490 S.E.2d 642, 657 (1997) (Workman, C.J., concurring). Indeed, if one thing is firmly fixed in our

recognized that "'it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting.' *W.Va. Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990)." *In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). Thus, "'[t]he assessment of the overall success of the improvement period lies within the discretion of the circuit court . . . . "regardless of whether . . . the individual has completed all suggestions or goals set forth in family case plans."' *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991)." *In re Jonathan Michael D.*, 194 W.Va. at 27, 459 S.E.2d at 138.[5]

In this same regard, this Court has previously observed that "[t]he question at the dispositional phase of a child abuse and neglect proceeding is not simply whether the

> jurisprudence involving abused and neglected children, it is that the "polar star test [is] looking to the best interests of our children and their right to healthy, happy productive lives[.]" *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). This Court has repeatedly stated that a child's welfare acts as "the polar star by which the discretion of the court will be guided." *In Re: Clifford K.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted).

231 W.Va. at 59-60, 743 S.E.2d at 367-68.

[5]*See also Matter of Brian D.*, 194 W.Va. 623, 636, 461 S.E.2d 129, 142 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). . . . and [the children's] own feelings and emotional attachments should be taken into consideration by the lower court.").

parent has successfully completed his or her assigned tasks during the improvement period. Rather, the pivotal question is what disposition is consistent with the best interests of the child." *In re Frances J.A.S.*, 213 W.Va. 636, 646, 584 S.E.2d 492, 502 (2003).[6] Nonetheless, with little analysis, the majority simply concludes that the trial court was wrong with its first-hand observations and determinations relative to the mother's compliance with her treatment plans and her unwillingness to abide by the DHHR's directives and recommendations. In this case, the trial court, after years of involvement in this matter, determined that the mother was **not** moving towards a successful reunification with her children. Usurping the trial court's function, the majority wholly discarded the lower court's findings and rulings and, instead, declared that "the Mother was making steady progress during the post-adjudicatory improvement period." I strongly disagree.[7]

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[6]This Court has also said:

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and *whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child*.

Syl. Pt. 6, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991) (emphasis added).

[7]The majority also states that the mother "obtained housing and employment, enrolled in college, and participated in successful visitations with her children." The evidence in the record regarding the mother's gainful employment comes from the mother's brief wherein her counsel maintains that she has worked at Red Lobster since October 20, 2014. The guardian ad litem, however, provides the mother's employment forms demonstrating that as of December 28, 2014, her year-to-date earnings were $68.42. With regard to the majority's

As indicated from the most recent reports submitted by the guardian ad litem to this Court, it appears that the mother has been seeing the biological father of the children and has spent several nights with him. This is alarming for innumerable reasons. The father's parental rights to these children were previously terminated due to his failure to complete a psychological evaluation, his positive test results on multiple drug screens, and later his failure to report for any further drug screens. He failed to complete the BIPPS program, failed to complete a substance abuse program, and did not participate in any of the parenting skills classes with the service providers. The DHHR's initial petition for termination of the father's rights was stayed due to his March 19, 2013, incarceration (which lasted for approximately one year) as a result of **selling illicit drugs out of his home**. This is the same man from whom the mother previously hid in the woods with one of the infant children because she feared for their safety. She was found with substantial injuries to her body, including bruises, bloody lacerations, and an inability to move her left arm. Because the father's rights were terminated and because the mother initially viewed herself as the

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statement that she "enrolled in college" the only "proof" is the assertion by her counsel that she **intended** to take classes to be a surgical technician in Parkersburg, West Virginia. There is no actual evidence that she started such a program. Furthermore, as far as the fact that the mother has apparently signed a lease for an apartment in Vienna, the DHHR points out that it is unknown whether such housing is suitable for these children. The DHHR maintains that the mother has not been available for home visits, which is further frustrated by the fact that she refuses to have direct contact with the DHHR and only communicates through her legal counsel. The DHHR contends that all of the mother's goals, including work and college classes, could have been achieved in Raleigh County where her children are currently living.

victim of his drug-related habits and life-style, there is obvious renewed concern that the mother may be sliding into an old pattern of behavior that is not indicative of someone seeking to stay away from environments where drug usage may be occurring. While no negative drug or alcohol screens have yet surfaced, the guardian ad litem notes several instances where required drug screens did not take place.[8] All of this adds further support to the trial court's conclusion that there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future."

This Court strives to attain permanent custodial arrangements for children determined to be abused and/or neglected with as much alacrity as possible. *See In Re Beth Ann B.*, 204 W.Va. 424, 429, 513 S.E.2d 472, 477 (1998) (recognizing need for circuit court to "act with great dispatch to bring safety, stability, security, and permanency" to lives of abused and or neglected children"). As previously discussed, the underlying abuse and

[8]The guardian ad litem states that during the month of October 2014, the mother did not have drug screens for three weeks and, on January 6, 2015, the same day as her visit with her children, she missed her drug screen in Parkersburg. She informed her provider that she would test either in Parkersburg or Beckley that same day; however, she did not make arrangements to test until several days later. The guardian ad litem maintains: "As the history with [the mother] in the record before the Circuit Court was that [the mother] abused both prescription drugs and alcohol which remain in an individual's system for just a period of a few days and a missed drug screen as late as last week, the Guardian is left to speculate as to whether she is abusing drugs or alcohol again. The mere fact that [the mother] failed to make arrangements at either of the drug screening locations on the day of her visit and after telling her provider that she would [take the] test suggests a failure to act as a responsible and stable adult."

neglect proceeding has been pending for nearly three years and the permanency plan for the children will once again be in a state of turmoil. *See* W.Va. R.P. Child Abuse & Neglect Proceed. 43 ("Permanent placement of each child shall be achieved within twelve (12) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay."). With regard to the time frame in which final disposition of abuse and neglect cases should be made, this Court has recognized that "[a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life. . . ." *Amy M.*, 196 W.Va. at 260, 470 S.E.2d at 214. Indeed, improvement periods are "regulated, both in their allowance and in their duration, by the West Virginia Legislature, which has assumed the responsibility of implementing guidelines for child abuse and neglect proceedings generally." *In re Emily*, 208 W.Va. at 334-35, 540 S.E.2d at 551-52. The circuit court understood this and acted in a manner that allowed these children to remain in the stable environment in which they had lived with their paternal aunt for the past two-and-one-half years. It is unfortunate that the majority of this Court has now destroyed that stability.

This is not a case where the mother has not had time to demonstrate her fitness as a parent. She simply has not stepped up to the plate with regard to the reunification aspect

of her improvement plan. She may have had early success with her drug-related issues, but as previously stated, she ignored the long-term drug and alcohol treatment program and, according to the DHHR, she still denies having any such dependency issues.

These children deserve a safe and stable environment and that environment has been continually provided by the paternal aunt in whose home the children have been residing since the inception of this matter. For the majority now to decide it knows better than the trial court what these children need–especially in light of the trial court's finding that it would not be in the best interests of the children to be returned to their mother–is both misguided and violative of the trial court's discretion in this matter. *See* Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W.Va. at 239, 470 S.E.2d at 193 ("[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.").

For the foregoing reasons, I respectfully dissent.

235 W. Va. 16, 770 S.E.2d 516

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

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OF WEST VIRGINIA

No. 14-0533

In Re: C.M. and C.M.

Appeal from the Circuit Court of Raleigh County
The Honorable John A. Hutchison, Judge
Civil Action Nos. 12-JA-113 & 114

REVERSED AND REMANDED
WITH DIRECTIONS

Submitted: January 13, 2015
Filed: March 2, 2015

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.

JUSTICE LOUGHRY dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W. Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

4. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49–6–5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. Pt. 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

5. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner

intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991).

Workman, Chief Justice:

This case is before the Court upon the appeal of the Mother, S.L.H.,[1] (hereinafter referred to as "the Mother") from the April 30, 2014, order of the Circuit Court of Raleigh County, West Virginia, terminating her parental rights. The Mother argues that the circuit court erred when it: 1) terminated her parental rights to her two children[2] because it was not the least restrictive alternative available; 2) abused its discretion by not granting her a dispositional period; 3) failed to place the children with their maternal grandmother;[3] and 4) allowed the children to remain in their paternal aunt's care. Based upon our review of the appendix record,[4] the parties' briefs and arguments, and all other matters before the

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[1]Following this Court's established practice in cases involving children and sensitive matters, we use parties' initials. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990) ("Consistent with our practice in cases involving sensitive matters, we use the victim's initials. Since, in this case, the victim ... [is] related to the appellant, we have referred to the appellant by his last name initial." (citations omitted)); *see also* W. Va. R. App. P. 40(e).

[2]The children are two boys, who are four years old and two years old. Both boys have names with the initials C.M.

[3]The maternal grandmother, pro se, filed a motion to intervene in this case on January 15, 2014. Contrary to the assigned error, the circuit court did not make any ruling regarding the grandmother's motion in its April 30, 2014, order that is the subject of the instant appeal. Moreover, by order entered May 20, 2014, the circuit court indicated that it had been advised that the grandmother "had filed a motion to intervene but after argument, the Court will consider her motion and will set a hearing on the motion in the future." Consequently, there is no factual or legal basis for this assigned error and the Court will not address it.

[4]The appendix record in this case does not comport with Rule 7 of the West Virginia (continued...)

Court, we reverse the circuit court's decision to terminate the Mother's parental rights and remand the case for the implementation of a gradual transition plan to return the children to the custody of their Mother.[5]

I. Procedural and Factual History

On August 28, 2012, an abuse and neglect petition was filed against both

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[4](...continued)
Rules of Appellate Procedure. Due to the inadequacy of the appendix record, this Court, by order entered January 16, 2015, requested the entire record in the case. From a review of the record below, it is evident that the West Virginia Department of Health and Human Resources ("DHHR") failed to include the case plans at issue in this case and failed to submit any written motion and supporting documents upon which the circuit court relied to terminate the Mother's parental rights. There were also salient orders entered by the circuit court that the parties failed to submit to this Court. Further, there are documents included in the appendix record that were not included in the record below. Those documents, which include certifications and letters regarding the Mother's treatment and case summaries prepared regarding visitation between the Mother and her children, may have been submitted as exhibits before the circuit court during hearings. The documents, however, were not contained in the record below.

We find it necessary to remind parties that they are bound to follow the West Virginia Rules of Appellate Procedure when pursuing an appeal before this Court, which includes the preparation and filing of an appendix record in compliance with our rules. The appendix record submitted in this case failed to comport with our rules; however, there was no objection to it by either the DHHR or the guardian ad litem.

[5]Because of the Court's decision to reverse the termination of the Mother's parental rights, we need not address the Mother's assignments of error regarding the circuit court's failure to grant her a dispositional period and to allow the children to remain in their paternal aunt's care.

C.R.M., who is the children's father,[6] and the Mother. The allegations in the petition concerned severe domestic violence, as well as alcohol and drug abuse in the presence of the infant children. The allegations included a referral to Child Protective Services ("CPS") on August 14, 2012, concerning both parents abusing alcohol and drugs, namely Oxycontin, and not providing a safe environment for the children. The petition also contained a referral to CPS on August 27, 2012, wherein the Mother, who was intoxicated, allegedly hid in the woods near the home with her two children, having fled due to a domestic altercation with the father. A preliminary hearing was held on October 18, 2012. By order entered October 26, 2012, the circuit court determined that probable cause existed warranting the removal of the children from the parents' home.

On December 6, 2012, the circuit court conducted an adjudicatory hearing. During the hearing, both parents stipulated to allegations of abuse and neglect. Specifically, the Mother stipulated "that she neglected her children through her drug abuse affecting her ability to parent her children." Both parents separately moved for post-adjudicatory improvement periods. The circuit court subsequently granted a six-month post-adjudicatory improvement period for each parent. The circuit court ordered that the Multi-Disciplinary

[6]The children's father's rights were also terminated by the circuit court as indicated in the April 30, 2014, order. The circuit court's termination of the father's rights is not before the Court.

Team ("MDT") was to meet by December 14, 2012,[7] and that a family case plan was to be developed and filed with the court by January 7, 2013. No case plan was placed in the record below or in the appendix record submitted before this Court.[8]

The appendix record also contained two monthly summaries for December 2012 and January 2013 prepared by Kelly Cook-Stevens, ASO Service Provider, regarding the Mother's visits with her children. In December 2012, Ms. Stevens supervised three visits between the Mother and her children. Ms. Stevens reported:

> [Mother]. . . is very interactive and affectionate with her children. She gets in the floor and plays with them and she made a tent with . . . [one child] and also played the Nintendo Wii. She balances the time equally between both boys and they

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[7]The Mother represents in her brief that the MDT met on December 11, 2012, and a case plan was developed for the Mother. The Mother represents, and neither the DHHR nor the guardian ad litem dispute, that the "major components" of that case plan were:

> 1. [The Mother] . . . is to complete a psychological evaluation and follow recommendations of the psychologist.
> 2. [The Mother] . . . is to work one-on-one with her service providers.
> 3. [The Mother] . . . will successfully complete an inpatient substance abuse program.

The Mother further maintains in her brief that: 1) she completed the psychological evaluation on January 7, 2013; 2) the DHHR did not make a referral for services until August 2013 and that is when the Mother started counseling, which she successfully completed; and 3) she has successfully completed an inpatient substance abuse program.

[8]West Virginia Code § 49-6-5(a) (2014) requires the DHHR to "file with the court a copy of the child's case plan, including the permanency plan for the child."

> interact very well with her. She changes their diapers throughout the visit and is very nurturing with both children. [One of the boys] cries at the end of the visits and she comforts him well and tries not to show any emotion.

In the January 2013 summary, Ms. Stevens reported:

> Provider supervised three visits during the month of January. [Mother] . . . is very interactive and affectionate with her children. [Mother]. . . was very loving with both boys and focuses on them the entirety of the visits. She balances the time equally between both boys and they interact very well with her. She changes [the younger boy's] . . . diaper throughout the visit and is very nurturing with both children. [The older boy] . . . cries at the end of the visits and she comforts him well and tries not to show any emotion. She graduated from Turning Point on January 31st and seems to be doing well in her recovery.

The record also contained a March 6, 2013, report prepared by a CPS worker for DHHR. This report indicated that the Mother "has made progress towards completing the goals set forth in her Family Case Plan. She successfully completed Turning Point on January 31, 2013, and has successfully maintained sobriety." Further, visits with her children were described as "positive." The Mother "interacts with her children well and makes up games to play with them. She balances her time equally between both boys and is nurturing to both children."

On March 7, 2013, the circuit court held an improvement period review hearing. By order entered March 22, 2013, the circuit court noted that it was "advised that respondent mother is progressing and when she obtains beds for the children, weekend

overnights will be started for her and reunification is the permanency plan for her."

A report of the guardian ad litem, dated June 7, 2013, indicates that a MDT meeting was conducted on May 21, 2013, wherein it was noted that visitation had been increased between the Mother and her children, but then decreased due to the Mother's housing situation. "The MDT concluded that as soon as the Respondent Mother established a new housing arrangement with her mother, visitation could resume to overnights and there would be no opposition by any party to a three (3) month extension." Further, "there were no concerns with drug use on the part of the Respondent Mother." The recommendation was to give the Mother a three-month extension on her improvement period.

The circuit court held another improvement period review hearing on June 13, 2013. By order entered July 29, 2013, the circuit court stated that "the MDT is proposing and moving for a three (3) month extension to transition the children back to respondent mother which motion the Court hereby GRANTS."

On September 26, 2013, the circuit court conducted another improvement period review hearing. By order entered November 19, 2013, the circuit court noted that during the hearing on September 26, the circuit court "was advised that Respondent Mother was progressing but had suffered a relapse based upon alcohol intoxication and loss of a

job[,] but[,] since September 3, 2013, she has been re[-]employed and tested negative for three (3) weeks." According to this order, "[t]he Department was willing to agree to an extension of her improvement period on a dispositional basis but due to her denial of a problem, the Court, after argument, will take under advisement whether it will deny or grant an extension of her improvement period."[9] The circuit also directed the MDT to meet "within ten (10) days and create a treatment plan for . . . [the Mother] and report to the Court." No treatment plan or report is contained in the record.[10]

The appendix record reveals that the Mother entered an inpatient treatment facility on November 14, 2013. According to a letter dated January 3, 2014, from the Mother's attorney to DHHR, the Mother successfully completed Prestera's Addictions Recovery Center Program on December 7, 2013. Included with the letter was a treatment narrative indicating that she successfully completed the short-term residential program.

After completing Prestera's inpatient treatment program, the Mother enrolled

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[9]Both the DHHR and the guardian ad litem represented in their respective briefs that by order dated September 26, 2013, the circuit court granted the Mother a requested extension of her improvement period. Contrary to this representation, according to the November 19, 2013, order, the requested extension was not granted. The circuit court only took it under advisement.

[10]Both the DHHR and the guardian ad litem represent that on October 4, 2013, the Mother signed a second case plan agreeing to attend inpatient rehabilitation. Once again, this case plan was not made a part of the record.

in Prestera's Co-Occurring Intensive Outpatient Program on January 16, 2014. On January 10, 2014, the mother also was accepted into the West Virginia Oxford House, a residential sober living program, located in Huntington, West Virginia.

The circuit court conducted another hearing on January 10, 2014. By order entered March 5, 2014,[11] as a result of the January hearing, the circuit court indicated that it "was advised that Respondent Mother is enrolled in the Oxford House in Huntington, WV, but the Department and *Guardian ad Litem* do not believe this facility is appropriate for her and that there is a bed at Storm Haven in Beckley, WV."[12] The case was continued status quo and another review hearing was scheduled for April 10, 2014. According to the April 30, 2014, order entered by the circuit court, "[a]nother identified problem with Oxford [H]ouse was that it was clearly not an appropriate place for children. This prevented the Department from beginning to reunite the children through overnight visitation and longer unsupervised visits."[13] The only reason given for this determination was found in the DHHR's brief wherein the following statement was made: "The facility was not considered

[11]Additionally, in this order the circuit court does not rule on whether it is going to grant the Mother a requested dispositional improvement period, but simply continues the case "status quo."

[12]The Mother indicated in her brief before the Court that the reason she chose the treatment program in Huntington was because she "felt she could be most successful in recovery to remove herself from the Beckley area where she had previously used and relapsed."

[13] This finding was not contained in the March 5, 2014, order.

to be an appropriate place for child visitation because it was apparently tended and staffed by recovering addicts." Notwithstanding this representation, there is no evidence in the record before the Court regarding why the DHHR and the guardian ad litem "believed" that the Oxford House was not appropriate for the Mother. Similarly, there is no evidence regarding why the Oxford House "was clearly not an appropriate place for children."

Also contained within the appendix record is a March 7, 2014, letter from Tara R. Henry, BA, a case manager with Prestera Center for Mental Health Services, Inc. Ms. Henry reports that the Mother is enrolled in Co-Occurring Intensive Outpatient Program that she started on January 16, 2014. Ms. Henry also indicates that the Mother is participating in "individual and group therapy, individual and group supportive intervention, as well as 12-step groups." Ms. Henry states that once the Mother graduates, she will be referred to the Substance Abuse Outpatient program to continue her recovery.

Further, the appendix record contains a letter, dated April 7, 2014, from Terry Johnson, an assistant outreach worker at the Oxford House. Ms. Johnson advises that the Mother

> has met all the requirements associated with membership and is in good standing. She is drug screened randomly and has passed them all. She has successfully found employment and is actively fulfilling her agreement with Oxford House West Washington by getting a sponsor, working steps and attending her choice of recovery meetings regularly.

A second undated letter in the record from Natalie Roe of the Oxford House indicates that the Mother "has become an amazing leader and accepted the responsibility of the house president. She has continued to gain employment and grow in her recovery." According to this letter, the Mother was scheduled to graduate on April 16, 2014, and she "maintains actively in the program through follow up therapy[,]" attending Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") meetings. She was also employed.

On April 10, 2014, the circuit court held a hearing[14] "on a motion to terminate the improvement periods of both parents, and for disposition of both parents." While the record contains a motion filed by the DHHR to terminate the father's parental rights, there is no motion filed by the DHHR seeking a termination of the Mother's parental rights.[15] The only mention in the record that disposition for the Mother might occur at this hearing was

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[14]Notwithstanding the parties' failure to submit an appendix record that comports with West Virginia Rule of Appellate Procedure 7, which is applicable to abuse and neglect appeals, *see* note four *supra*, the parties also elected to proceed in this matter without transcripts of the hearings below as permitted by Rule 11 of the West Virginia Rules of Appellate Procedure concerning abuse and neglect appeals. *See* W. Va. R. App. P. 11 (i) ("In order to provide an inexpensive and expeditious method of appeal, the petitioner is encouraged to perfect an appeal under this Rule without the transcript of testimony taken in the lower court. In lieu of filing all or part of the transcript of testimony, the petitioner *shall set out in the petitioner's brief a statement of all facts pertinent to the assignments of error*.") (Emphasis added). The parties, however, failed to include in their briefs "all the facts pertinent to the assignment of error." *See id*. The parties' respective factual recitations contained in the briefs lack any discussion of the evidence that was introduced at the dispositional hearing that resulted in the termination of the Mother's rights.

[15]If the DHHR orally moved to terminate the Mother's parental rights, there is nothing in the record which demonstrates that.

found in the March 5, 2014, order wherein the court sets "[a]n improvement period review hearing or dispositional hearing on . . . [the Mother]" for April 10, 2014. The April 30, 2014, order regarding this hearing indicates that the circuit court heard testimony that the Mother had signed a case plan on October 4, 2013, agreeing to attend an inpatient rehabilitation facility. According to the order, she

> filled out intake forms for four (4) rehab facilities and was contacted by John D. Good Recovery Center for a phone interview and she stated she did not need detox and was removed from the waiting list. Respondent Mother was later admitted to Prestera's twenty eight (28) day Addictions Recovery Center on November 14, 2013, but left the program.[16] The Department had asked the Respondent Mother to move to a facility in Beckley, WV, so that the Mother could spend more time with her children because of the difficulty of transporting the children to Huntington and because Oxford House is not appropriate for any children's visitation.[17]

(Footnotes added).

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[16]There is no evidence that the Mother left the program. The only evidence in the appendix record demonstrates that she successfully completed Prestera's twenty-eight day inpatient treatment program.

[17]As previously mentioned, there is no evidence in the record as to why Oxford House was not appropriate for children's visitation, only the DHHR's representation that the facility is "apparently tended and staffed by recovering addicts." Counsel for the Mother represented to the Court during oral argument that the treatment facility the DHHR recommended that the Mother go to in Beckley was similar to the Oxford House that the Mother enrolled in in Huntington. According to the website for Storm Haven, located in Beckley, like the Oxford House, it too is a "sober living environment"founded by Doug Stanley, who "was in recovery from alcohol addiction[.]" Storm Haven Recovery Home, http://stormhavenrecoveryhome.org (last visited March 2, 2015).

Following the April 10 hearing, but before the circuit court entered the April 30, 2014, order concerning that hearing, the Mother submitted a letter dated April 28, 2014, from Prestera Center indicating that the Mother "has completed 8 of the 9 interventions for her substance abuse treatment goal[,]" and had also "completed 3 of the 7 interventions of the goal for depression." The appendix record also contains a "certificate of completion" of "Prestera's Co-Occurring Intensive Outpatient Program" dated June 22, 2014, as well as log sheets showing that the Mother was attending AA/NA meetings.

By order entered April 30, 2014,[18] the circuit court found that: 1) the children had been in the custody of the DHHR for nineteen of the last twenty-two months; 2) the Mother had not substantially complied with the case plan she signed; 3) the Mother had not made sufficient progress towards reunification with her children; 4) the Mother was unwilling to make the reunification of her family her first priority; and 5) the Mother deliberately ignored reasonable directives of DHHR and recommendations contained in the treatment plan that she signed and agreed to follow. As the circuit court stated in its order, the Mother "refused to enter a long term intensive rehabilitation program, refused to move to a facility in Beckley where she could spend more time with her children, and failed to make any substantial progress toward reunification with her children in a timely manner."

[18]Following this order, on May 20, 2014, the circuit court entered an order allowing visitation by the Mother with her children to continue in Raleigh County "but not unsupervised or overnight."

Further, the order provided that the Mother "failed to show this Court by clear and convincing evidence that she will be able to comply with a future improvement period and further she has failed to prove by clear and convincing evidence that she is motivated to put her children's best interests ahead of her own personal pursuits." Based upon the foregoing, the circuit court terminated the Mother's parental rights to her two children, determined that "the infant children shall remain in the temporary legal and physical custody of the Department of Health and Human Resources with placement of the infant children to be in the discretion of the Department[,]" and found that "[t]he permanency has not been achieved but the Department has made reasonable efforts to achieve the same and that this hearing meets the requirements for foster care review . . . ." It is this ruling that forms the basis for the instant appeal.

II. Standard of Review

> This Court has explained that
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> > "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000).

In re J.S., 233 W. Va. 394, 400, 758 S.E.2d 747, 753 (2014). We have also applied the following standard of review to cases involving abuse and neglect proceedings:

> Although conclusions of law reached by a circuit court

> are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); *accord In re B. H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)(applying same standard of review in abuse and neglect proceeding where mother admitted to neglect, circuit court adjudicated the children abused and neglected, and issue before Court concerned whether mother had substantially complied with terms of her post-adjudicatory improvement period). We are also ever mindful of our strong precedence in abuse and neglect cases that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted); *see* Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."). Guided by these standards of review, we turn to the arguments before us.

III. Discussion

A. Termination of the Mother's parental rights.

The Mother argues that the circuit court erred in terminating her parental rights. More precisely, the Mother contends that the circuit court erred in finding that she left Prestera's Addictions Recovery Center early and that she had not made sufficient progress towards reunification with her children and had not substantially complied with the family case plan. Conversely, the DHHR argues that the circuit court properly terminated the Mother's parental rights because she failed to demonstrate a reasonable likelihood that the conditions of abuse and neglect could be corrected. The DHHR maintains that she "failed to comply with her improvement period or to consider recommendations that would result in her timely reunification with her children," because she ignored the DHHR's recommendations regarding where to enroll in treatment for her addiction thereby frustrating reunification with her children.

This Court has held that

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Moreover, we have held

that

> [a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under *W. Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Finally,

> [t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

In re R.J.M., 164 W. Va. at 496, 266 S.E.2d at 114, Syl. Pt. 2.

The undisputed evidence before the circuit court clearly demonstrated that the Mother successfully completed the twenty-eight-day inpatient rehabilitation at the Prestera Center. The record is completely devoid of any evidence that supports the finding that the Mother left this program. Moreover, completion of an inpatient treatment program was the requirement of her case plan and the record shows that she did complete such a program. Again, there is no evidence in the record, or in the circuit court's order, that supports any

finding that the Mother was directed by the circuit court to obtain treatment only where the DHHR recommended. Rather, the requirement placed on the Mother was that she had to undergo treatment. The Mother successfully completed both inpatient and long-term outpatient treatment programs for her addiction. She has also been participating in individual and group therapy, individual and group supportive intervention, as well as twelve-step groups. According to the Mother's brief, she has attended AA and NA meetings on a daily basis since January 10, 2014. Additionally, the Mother removed herself from the abusive relationship with the children's father. She remains sober, she is employed, she is going to attend college, and, according to her status update, she has obtained housing.[19]

The circuit court focused solely upon the Mother's failure to complete the treatment program in Beckley recommended by the DHHR. The DHHR maintained, and the circuit court found, that because of this, the Mother frustrated the goal of reunification with her children and failed to make her children her first priority.[20]

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[19]In her status update filed with the Court pursuant to West Virginia Rule of Appellate Procedure 11(j), the Mother is currently living in Vienna, West Virginia, in an apartment with a one-year lease. She has been working at Red Lobster since October 20, 2014. She was previously employed by SRBI, a telemarketer, from March 2014 to October 2014. She was supposed to start school at WVU-Parkersburg on January 12, 2015, with the goal of becoming a surgical technician. She will attend classes on Mondays and Wednesdays. She continues to screen weekly for drugs and her results have been negative.

[20]Visitation between parent and child during an out-of-custody improvement period is important in evaluating whether a parent is making strides towards reunification with the child. As we stated in *In re Carlita B.*, "[a] parent's level of interest in visiting with his or

(continued...)

The Mother's choice of undergoing treatment for her addiction in Huntington as opposed to Beckley may have made it more difficult to visit her children. Despite the representations by the DHHR and the guardian ad litem regarding the difficulty with visitation caused by the Mother undergoing treatment in Huntington, there is no evidence

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[20](...continued)
her child during an out-of-home improvement period is an extremely significant factor for the circuit court to review. A parent who consistently demonstrates a desire to be with his child obviously has far more potential for being a nurturant and committed parent than one whose interest in being with his child is erratic." 185 W. Va. at 628, 408 S.E.2d at 380. In the instant case, the Mother enunciated a sound reason for choosing the Huntington treatment program. Moreover, her interest in visiting her children was not at issue, rather the logistics of arranging visitations with the Mother was made more difficult due to her decision to enter a treatment program that was further away from her children. That decision was necessitated by her desire to remedy the thing that made her a neglectful mother – her addiction to drugs and alcohol. The DHHR, and the circuit court, therefore, lost sight of the purpose of the improvement period We also discussed the purpose of improvement periods in *In re Carlita B.* as follows:

> The goal should be the development of a program *designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result*. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the . . . [DHHR] and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

Id. at 625, 408 S.E.2d at 377.

regarding how visitation was made more difficult or, more importantly, how the Mother was purposely trying to thwart reunification with her children by obtaining treatment from one facility instead of the other. Likewise, despite statements in the DHHR's brief that the Oxford House in Huntington "was not considered to be an appropriate place for child visitation [including overnight visitation] because it was apparently tended and staffed by recovering addicts[,]" there was no evidence in the record to support this assertion. Nor was there any evidence in the record to indicate that Storm Haven in Beckley, which was the treatment facility recommended by the DHHR, was an appropriate venue for visitation, including overnight visitation. There is, however, evidence in the appendix record that demonstrates that the Mother maintained consistent visitation with her children during her improvement period. The record further demonstrates that during visitation with her children, the Mother was very nurturing and loving with them. She gave each child equal amounts of her time, prepared their meals, and played with them.

There is also a lack of evidence to support the circuit court's determination that "the Respondent Mother has shown that she is unwilling to make the reunification of her family her first priority." The record is devoid of evidence to support the circuit court's finding that "the Respondent Mother has deliberately ignored reasonable directives of the DHHR and recommendations contained in the treatment plan that she signed and agreed to follow." Neither does the record support the circuit court's finding that the Mother "failed

to make any substantial progress towards reunification with her children in a timely manner." Rather, the appendix record demonstrates that the Mother successfully completed multiple treatment programs, obtained housing and employment, enrolled in college, and participated in successful visitations with her children. Thus, based upon our review of both the record below and the appendix record, we find the Mother was making steady progress during the post-adjudicatory improvement period. The circuit court erred in its findings to the contrary, including its determination that there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. . . ." *See* W. Va. Code § 49-6-5(a)(6). Having found that the circuit court's findings supporting termination were clearly erroneous, *see In re Tiffany Marie S.*, 196 W. Va. at 223, 470 S.E.2d at 177, we reverse the circuit court's decision.[21]

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[21]West Virginia Code § 49-6-5 clearly establishes that termination of a parent's rights is the last resort. In this case, given the great strides made by the Mother, who by all accounts was and continues to be pursuing a path toward recovery from her addiction, there were other options short of termination of rights that the circuit court should have employed. According to West Virginia Code § 49-6-5:

> The court shall give precedence to dispositions in the following sequence:
>
> (1) Dismiss the petition;
>
> (2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;
>
> (3) Return the child to his or her own home under supervision of the department;
>
> (4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or

(continued...)

B. Transition Period

Because termination of the Mother's parental rights is not warranted in this case, the priority now is to reunify the Mother with her children. Our concern in this case, and every case involving children, is the welfare of the children. The two boys in this case have been in the care and custody of the DHHR and the paternal aunt for the majority of their lives. Consequently, this case calls for a gradual transition period of custody to the Mother in a manner that will cause the least amount of trauma and stress for the two children involved. As this Court first held in syllabus point three of *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991):

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[21](...continued)

> custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
>
> (5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. . . .
>
> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. . . .

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

See Honaker v. Burnside, 182 W. Va. 448, 453, 388 S.E.2d 322, 326 (1989). Further,

> [a]s this Court stated in *In re George Glen B., Jr.*, 207 W. Va. 346, 355, 532 S.E.2d 64, 73 (2000), "[e]xplicit in both *Honaker v. Burnside* and *James M. v. Maynard* is the principle that the circuit court, and not the Department or a private agency, bears the burden of crafting a plan for the gradual transition of custody." Moreover, "[w]hen a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren)." Syllabus Point 7, *In re George Glen B., Jr.*

Kristoper O. v. Mazzone, 227 W. Va. 184, 195, 706 S.E.2d 381, 392 (2011).

Upon remand, we direct the circuit court to expeditiously set this matter for a hearing to establish a clear gradual transition period plan for reunification of the children with their Mother. Even though the length of a gradual transition period is within the circuit court's discretion, due to the length of time that the children have been with their paternal aunt, a transition period of several months similar to the one we discussed in *Honaker* would be reasonable. *See* 182 W. Va. at 453, 388 S.E.2d at 326. As in *Honaker*,

> [f]or the transition period to be effective in accomplishing this purpose, it should provide for ever-increasing amounts of

> visitation for the natural . . . [Mother] so as to lead to a natural progression to full custody. Such transition plan should give due consideration to both . . . [the Mother's and the paternal aunt's] work and home schedules and to the parameters of the . . . [children's] daily school and home life, and should be developed in a manner intended to foster the emotional adjustment of these children to this change while not unduly disrupting the lives of the parties or the children.

Id. Additionally, the circuit court must impose specific conditions upon the Mother, such as attending regular AA /NA meetings, and must continue to closely monitor those conditions beginning with bi-monthly reviews for a reasonable period of time in order to be certain that the Mother continues her path to recovery.[22] On remand, the Mother also needs to demonstrate that she is able to care for her children, that her current residence is suitable for the children, that she is able to provide for the children and that she has childcare for the children when she is working and attending school. Lastly, it is in the best interests of the children for the circuit court to provide for the continued reasonable visitation between the children and their paternal aunt. The paternal aunt and these children undoubtedly have bonded and the close relationship formed as a result must be allowed to continue.[23]

This Court is fully aware that transitioning custody from the paternal aunt back

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[22]The circuit court can gradually increase the time period between reviews as it deems appropriate.

[23]The DHHR should do all it can to facilitate the transition period in this case, including assisting with the visits between the Mother, the paternal aunt and these children, by aiding with transportation needs if necessary.

to the Mother is no small feat, both logistically and emotionally, for all involved. As we recognized in *Honaker*, "[n]o matter how artfully or deliberately the trial court judge draws the plan for these coming months, however, its success and indeed the chances for . . . [the children's] future happiness and emotional security will rely heavily on the efforts . . . [of the Mother and the paternal aunt]. The work that lies ahead for both of them is not without inconvenience and sacrifice on both sides." *Id*. We are optimistic that the Mother and the paternal aunt will work together for the sake of the children to show them that they are loved and to give them security and stability they need in their lives.

IV. Conclusion

Based upon the foregoing, we reverse the decision of the circuit court and remand the matter for further proceedings consistent with this opinion. The Clerk of this Court is directed to issue the mandate in this case forthwith.

Reversed and remanded
with directions.

No. 14-0533 - In Re: C.M and C.M.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LOUGHRY, Justice, dissenting:

In this tragic case, the Court reverses the fully-warranted termination of the mother's parental rights and orders that she be reunified with her two-young children despite the fact that **they have been in the DHHR's custody twenty-nine of the last thirty-two months**. Given that the mother has never successfully completed the terms of her improvement period, the majority's decision to order reunification contravenes this Court's longstanding recognition that the children's best interest is the compass by which these decisions are to be governed. *See* Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) ("'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.'"). Had the majority felt compelled to give the mother additional time to demonstrate her fitness as a parent, the most generous procedural relief warranted under the circumstances of this case would have been to remand the case to the circuit court for the purpose of extending the previous improvement period.[1] Instead, the majority literally ignores the sound judgment of the circuit court, the DHHR, the members of the Multi-Disciplinary team, the guardian ad litem, the entire record

[1]The DHHR takes the position that the mother was not entitled to any further improvement periods under West Virginia Code §§ 49-6-5, 49-6-12(c) (2014).

below, and then unwisely chooses the interests of an abusive and neglectful mother over the best interests of two innocent victims. As grounds for its decision that reunification is justified, the majority imprudently relies upon the mother's self-serving assertions. For these reasons, I dissent from the majority's decision in this case.

The record below fully demonstrates why these young children have yet to achieve any permanency in their lives. When the subject abuse and neglect proceedings began in August of 2012, the mother admitted both to illegally ingesting a daily dose of Oxycontin for the last eight years and drinking in the presence of her children.[2] After stipulating to the abuse and neglect of her two children, who were then two years old and less than two months old, respectively, the mother signed a case plan whereby she agreed to attend an in-patient rehabilitation facility. Deciding against the **inpatient, long-term** intensive rehabilitation program in Raleigh County where her children live, as was recommended by the DHHR, the mother entered an **outpatient, short term** twenty-eight-day program at an addiction recovery center located two hours away in Cabell County. Four days shy of the completion date, she left the program.

As the basis for its termination ruling, the trial court found that the mother:

[2]Assuming that the mother was telling the truth when she admitted to ingesting Oxycontin on a daily basis, an obvious conclusion can be drawn that she was doing so during her pregnancies with both children.

- showed that she was unwilling to make the reunification of her family her first priority;
- deliberately ignored the DHHR's reasonable directives and recommendations as contained in the treatment plan that she signed and agreed to follow;
- refused to enter a long-term rehabilitation program;
- refused to move to a facility in Beckley which would allow her to spend more time with her children; and
- failed to make any substantial progress towards reunification with her children in a timely manner.

The trial court's ruling that the mother failed to establish that reunification with her family was her first priority is demonstrated by her repeated choices in treatment and living options that were several hours from where her children were residing with their paternal aunt. As indicated above, she chose to participate in a program outside the Beckley area where her young children were living. The DHHR continually voiced its frustration with the logistical difficulties presented by the distance between where the children were living and where the mother was residing. The mother acknowledged that although she is allowed to see her children on a weekly basis, she only sees them "at least once per month." From the record submitted in this case, it is clear that the mother's paramount concern was **not** the pursuit of treatment and living options in close proximity to her children. If visiting and maintaining frequent contact with her children was her first priority, it seems logical to conclude that the mother would have sought treatment as near to them as possible. Instead, she bypassed the

inpatient treatment plan she had originally agreed to complete, moved to Huntington, West Virginia, and later to Vienna, West Virginia.

Critically, since August of 2012, this mother has not built any meaningful relationship or bond with her two children and, according to the most recent report to the DHHR by the administrative service provider dated January 4, 2015, the mother currently has myriad unresolved parenting deficiencies including:

> Lack of knowledge and competence in providing safety for children, lack of appropriate supervision, hygiene, budgeting, obtaining and maintaining housing, obtaining and maintaining gainful employment, use of appropriate coping and problem solving skills, communication skills, basic home management skills, social and/or emotional support networks developed.

Nonetheless, in spite of the fact that there is nothing in the record to show that the mother is even remotely capable of caring for her young children, the majority blindly orders their reunification with her.

"[A] circuit court's substantive determinations in abuse and neglect cases on adjudicative and dispositional matters–such as whether neglect or abuse is proven, or whether termination is necessary–is entitled to substantial deference in the appellate context." *In re Rebecca K.C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723 (2003) (internal citations omitted).[3]

[3]This Court has explained that:

As this Court stressed in *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), "a judgment regarding the success of an improvement period is within the court's discretion . . ." Further, "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).[4] This Court has also

> "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

In re Timber M., 231 W.Va. 44, 53, 743 S.E.2d 352, 361 (2013).

[4]This Court has always remained mindful that

> whenever a child appears in court, he is a ward of that court. W.Va. Code § 49-5-4 (1996); *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them. As Justices Cleckley and Albright stated in *West Virginia Department of Health and Human Resources ex. rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996), "[a]bove all else, child abuse and neglect proceedings relate to the rights of an infant." *Id.* at 477, 475 S.E.2d at 569.

State v. Julie G., 201 W.Va. 764, 776, 500 S.E.2d 877, 889 (1997) (J. Workman, dissenting). Moreover, as we stated in *Timber M.*, 231 W.Va. 44, 743 S.E.2d 352,

> [I]t is clear from our [child abuse and neglect] procedural rules, as well as our prior case law, that "[t]here cannot be too much advocacy for children." *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 570, 490 S.E.2d 642, 657 (1997) (Workman, C.J., concurring). Indeed, if one thing is firmly fixed in our

recognized that "'it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting.' *W.Va. Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990)." *In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). Thus, "'[t]he assessment of the overall success of the improvement period lies within the discretion of the circuit court . . . . "regardless of whether . . . the individual has completed all suggestions or goals set forth in family case plans."' *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991)." *In re Jonathan Michael D.*, 194 W.Va. at 27, 459 S.E.2d at 138.[5]

In this same regard, this Court has previously observed that "[t]he question at the dispositional phase of a child abuse and neglect proceeding is not simply whether the

> jurisprudence involving abused and neglected children, it is that the "polar star test [is] looking to the best interests of our children and their right to healthy, happy productive lives[.]" *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). This Court has repeatedly stated that a child's welfare acts as "the polar star by which the discretion of the court will be guided." *In Re: Clifford K.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted).

231 W.Va. at 59-60, 743 S.E.2d at 367-68.

[5]*See also Matter of Brian D.*, 194 W.Va. 623, 636, 461 S.E.2d 129, 142 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). . . . and [the children's] own feelings and emotional attachments should be taken into consideration by the lower court.").

parent has successfully completed his or her assigned tasks during the improvement period. Rather, the pivotal question is what disposition is consistent with the best interests of the child." *In re Frances J.A.S.*, 213 W.Va. 636, 646, 584 S.E.2d 492, 502 (2003).[6] Nonetheless, with little analysis, the majority simply concludes that the trial court was wrong with its first-hand observations and determinations relative to the mother's compliance with her treatment plans and her unwillingness to abide by the DHHR's directives and recommendations. In this case, the trial court, after years of involvement in this matter, determined that the mother was **not** moving towards a successful reunification with her children. Usurping the trial court's function, the majority wholly discarded the lower court's findings and rulings and, instead, declared that "the Mother was making steady progress during the post-adjudicatory improvement period." I strongly disagree.[7]

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[6]This Court has also said:

> [a]t the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and *whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child*.

Syl. Pt. 6, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991) (emphasis added).

[7]The majority also states that the mother "obtained housing and employment, enrolled in college, and participated in successful visitations with her children." The evidence in the record regarding the mother's gainful employment comes from the mother's brief wherein her counsel maintains that she has worked at Red Lobster since October 20, 2014. The guardian ad litem, however, provides the mother's employment forms demonstrating that as of December 28, 2014, her year-to-date earnings were $68.42. With regard to the majority's

As indicated from the most recent reports submitted by the guardian ad litem to this Court, it appears that the mother has been seeing the biological father of the children and has spent several nights with him. This is alarming for innumerable reasons. The father's parental rights to these children were previously terminated due to his failure to complete a psychological evaluation, his positive test results on multiple drug screens, and later his failure to report for any further drug screens. He failed to complete the BIPPS program, failed to complete a substance abuse program, and did not participate in any of the parenting skills classes with the service providers. The DHHR's initial petition for termination of the father's rights was stayed due to his March 19, 2013, incarceration (which lasted for approximately one year) as a result of **selling illicit drugs out of his home**. This is the same man from whom the mother previously hid in the woods with one of the infant children because she feared for their safety. She was found with substantial injuries to her body, including bruises, bloody lacerations, and an inability to move her left arm. Because the father's rights were terminated and because the mother initially viewed herself as the

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statement that she "enrolled in college" the only "proof" is the assertion by her counsel that she **intended** to take classes to be a surgical technician in Parkersburg, West Virginia. There is no actual evidence that she started such a program. Furthermore, as far as the fact that the mother has apparently signed a lease for an apartment in Vienna, the DHHR points out that it is unknown whether such housing is suitable for these children. The DHHR maintains that the mother has not been available for home visits, which is further frustrated by the fact that she refuses to have direct contact with the DHHR and only communicates through her legal counsel. The DHHR contends that all of the mother's goals, including work and college classes, could have been achieved in Raleigh County where her children are currently living.

victim of his drug-related habits and life-style, there is obvious renewed concern that the mother may be sliding into an old pattern of behavior that is not indicative of someone seeking to stay away from environments where drug usage may be occurring. While no negative drug or alcohol screens have yet surfaced, the guardian ad litem notes several instances where required drug screens did not take place.[8] All of this adds further support to the trial court's conclusion that there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future."

This Court strives to attain permanent custodial arrangements for children determined to be abused and/or neglected with as much alacrity as possible. *See In Re Beth Ann B.*, 204 W.Va. 424, 429, 513 S.E.2d 472, 477 (1998) (recognizing need for circuit court to "act with great dispatch to bring safety, stability, security, and permanency" to lives of abused and or neglected children"). As previously discussed, the underlying abuse and

[8]The guardian ad litem states that during the month of October 2014, the mother did not have drug screens for three weeks and, on January 6, 2015, the same day as her visit with her children, she missed her drug screen in Parkersburg. She informed her provider that she would test either in Parkersburg or Beckley that same day; however, she did not make arrangements to test until several days later. The guardian ad litem maintains: "As the history with [the mother] in the record before the Circuit Court was that [the mother] abused both prescription drugs and alcohol which remain in an individual's system for just a period of a few days and a missed drug screen as late as last week, the Guardian is left to speculate as to whether she is abusing drugs or alcohol again. The mere fact that [the mother] failed to make arrangements at either of the drug screening locations on the day of her visit and after telling her provider that she would [take the] test suggests a failure to act as a responsible and stable adult."

neglect proceeding has been pending for nearly three years and the permanency plan for the children will once again be in a state of turmoil. *See* W.Va. R.P. Child Abuse & Neglect Proceed. 43 ("Permanent placement of each child shall be achieved within twelve (12) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay."). With regard to the time frame in which final disposition of abuse and neglect cases should be made, this Court has recognized that "[a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life. . . ." *Amy M.*, 196 W.Va. at 260, 470 S.E.2d at 214. Indeed, improvement periods are "regulated, both in their allowance and in their duration, by the West Virginia Legislature, which has assumed the responsibility of implementing guidelines for child abuse and neglect proceedings generally." *In re Emily*, 208 W.Va. at 334-35, 540 S.E.2d at 551-52. The circuit court understood this and acted in a manner that allowed these children to remain in the stable environment in which they had lived with their paternal aunt for the past two-and-one-half years. It is unfortunate that the majority of this Court has now destroyed that stability.

This is not a case where the mother has not had time to demonstrate her fitness as a parent. She simply has not stepped up to the plate with regard to the reunification aspect

of her improvement plan. She may have had early success with her drug-related issues, but as previously stated, she ignored the long-term drug and alcohol treatment program and, according to the DHHR, she still denies having any such dependency issues.

These children deserve a safe and stable environment and that environment has been continually provided by the paternal aunt in whose home the children have been residing since the inception of this matter. For the majority now to decide it knows better than the trial court what these children need–especially in light of the trial court's finding that it would not be in the best interests of the children to be returned to their mother–is both misguided and violative of the trial court's discretion in this matter. *See* Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W.Va. at 239, 470 S.E.2d at 193 ("[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.").

For the foregoing reasons, I respectfully dissent.

173 W. Va. 651, 319 S.E.2d 775

Supreme Court of Appeals of West Virginia

STATE of West Virginia

v.

C.N.S., et al., Infants, etc.

No. 16147

May 8, 1984

Rehearing Denied July 11, 1984

SYLLABUS BY THE COURT

1. "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it m ay be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with child care." Syllabus Point 5, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

2. "W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' " Syllabus Point 1, in part, In the Interest of S.C., W.Va., 284 S.E.2d 867 (1981).

3. The State must produce clear and convincing evidence that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" before a circuit court may sever the custodial rights of the natural parents pursuant to W.Va.Code § 49-6-5 (1980 Replacement Vol.).

4. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, In re R.J.M., W.Va., 266 S.E.2d 114 (1980).

Roger D. Curry, Fairmont, for appellants.

Jay Montgomery Brown, Asst. Pros. Atty., Fairmont, for appellee.

McGRAW, Justice:

This is a child neglect case emanating from the Circuit Court of Marion County. By order entered September 21, 1983, the circuit court permanently terminated the parental rights of the appellants, D.E.S. and J.N.S., over their four children. On appeal the appellants contend that evidence does not support the termination of parental rights and

that the circuit court erred in denying the appellants' motion for an improvement period prior to the entry of the order. We disagree, and we affirm the judgment of the circuit court.

These proceedings were instituted on November 5, 1982, upon the filing of a verified petition in the Circuit Court of Marion County by representatives of the West Virginia Department of Welfare. The Department sought immediate temporary custody of the appellants' four infant daughters, then ranging in age from 2 months to 3 1/2 years, on the ground that they were neglected children within the meaning of W.Va.Code § 49-1-3 (1980 Replacement Vol.).

The petition specified that the family had been referred to the Department's protective services in December 1981, and alleged a tendency on the part of the appellants to leave the jurisdiction during past investigations. By order entered the same day, the circuit court awarded the Department temporary legal custody of the children, with physical custody retained by the appellants, and appointed a guardian ad litem to represent the interests of the children.

The charge of neglect stemmed from the appellants' "inability to accept the responsibility involved in caring for their children." Exhibits attached to the petition and testimony adduced at preliminary hearings conducted on November 10, 1982 and December 9, 1982 showed that the children's father, D.E.S., then age 27, was totally disabled as a result of mental retardation and epilepsy of organic origin. D.E.S.' father, who also lived with the family, was characterized as an alcoholic and the dominant influence in the family.

The evidence also indicated that the children's mother and primary caretaker, J.N.S., then age 24, lacked fundamental parenting skills. Improper feeding habits had resulted in the hospitalization of the children for dehydration and for "failure to thrive", a condition characterized by failure to maintain normal weight gain. The youngest child had been hospitalized when she was less than a month old for choking after feeding, and the appellants' first child had died at the age of ten months after choking on a hot dog.

The Department also put on evidence to show that the appellants did not supervise or discipline the children. The older girls were allowed to roam about at will and to pick up and carry the babies. The children were often dirty and suffered from scabies and conjunctivitis. In addition, the appellants often delayed seeking necessary medical treatment for the children and frequently failed to keep the children's medical appointments. The appellants also demonstrated difficulty showing affection toward the children, and the two older girls had been classified as developmentally delayed.

Finally the evidence showed that the family had repeatedly failed to take advantage of support services, such as day care, parenting classes, homemaker services, family counseling and infant stimulation, which had been offered by the Department. Their failure to keep appointments made by the Department had resulted in the termination of the family's food stamps, AFDC benefits, and WIC coupons, which were used to buy formula for the babies.

On the basis of this evidence the Department originally recommended a three- month improvement period during which physical custody of the children would remain with the parents. In the interim between the preliminary hearings, however, the appellants' 2 1/2 year-old child was hospitalized after an injury in the home. On November 19, 1982, the Department filed an amended petition seeking immediate temporary physical custody of all four children.

A hearing was conducted that same day at which the appellants put on evidence showing that the child, in an unsupervised moment, had caught her arm in the wringer mechanism of a washing machine when she attempted to put a piece of clothing through the wringer. Although the evidence showed that the injury was serious enough to require indefinite hospitalization and possible future skin grafts, no attempt was made to call an ambulance, and the child was not transported to the hospital for approximately an hour and a half. Upon admission to the hospital, the child was dirty, had scratches, scabs and bruises on her face and had head lice. The protective services worker who investigated the incident found the home disordered, dirty and infested with cockroaches on the day of the injury. At the conclusion of the hearing, the circuit court ordered all four children removed from the home and placed in the legal and physical custody of the Department for a period not to exceed thirty days pending completion of the preliminary hearing.

When the preliminary hearing was resumed on December 9, 1982, testimony was offered to show that the appellants had improved the physical condition of the home. The evidence showed that they had fumigated the residence, painted the walls, installed carpeting and improved general housekeeping to the extent that the home provided an adequate physical environment for the children. Witnesses for the State noted, however, that the appellants continued to exhibit a general lack of knowledge about how to care for children and rarely followed up on Department recommendations for improving their parenting abilities.

At the conclusion of the preliminary hearing, the circuit court denied the appellants' motion for an improvement period for the purpose of correcting the conditions of neglect and ordered the Department's legal and physical custody to continue for a period not to exceed thirty days. The court further ordered the appellants to accept family counseling, to attend parenting and adult education classes and to submit to a psychological evaluation during this period.

Final hearings were conducted on January 7, 1983, and January 20, 1983. Testimony was offered to show the efforts of the appellants to maintain the improved physical condition of the home. It was also shown that they had complied with the conditions of the circuit court's order relating to counseling, education classes and psychological evaluations. On the witness stand, however, D.E.S. admitted that he had no idea why the Department had instituted proceedings for custody of the children, while J.N.S. explained that the proceedings were the result of their failure to keep appointments, to schedule regular meals and to spend more time with the children.

The psychologist who tested and interviewed the appellants expressed serious reservations as to the intellectual capacity of either parent to learn adequate child-rearing behavior or to acquire and maintain the parenting skills necessary to provide for the well-being of the children. He testified that both parents suffered from impaired short-term memory and had demonstrated an inability to follow instructions requiring timing and sequential skills. He also testified that the appellants' primary motivation in submitting to the circuit court's orders was their desire to have the children returned, rather than a desire to make a better home for them. He concluded from his experience in similar cases that, absent intensive training and direct supervision in the home, the appellants would revert to their former inadequate child-rearing practices once the children were returned to their custody. Department social services workers agreed with this assessment of the appellants' parenting capabilities and testified that the Department was unable to offer the type of intensive in-home training and supervision necessary to teach the appellants the proper skills.

On February 28, 1983, the guardian ad litem submitted to the court his written report of findings and recommendations. The guardian ad litem found no evidence of abuse and concluded that while the father, D.E.S., was unable to supply the children with the necessities of life, the mother, J.N.S., was capable of learning appropriate parenting behaviors. The guardian concluded, however, that neither parent would be able to provide the children with the kind of care they were receiving in the foster homes and recommended termination of the appellants' parental rights. Additional exhibits were submitted by both sides. On March 16, 1983, closing arguments were heard and the circuit court took the matter under advisement.

By letter dated September 6, 1983, the circuit court notified the appellants of his decision to terminate their parental rights. The court incorporated the findings of the guardian ad litem with the exception of the guardian's conclusion that the mother was capable of supplying the children with the necessities of life. The circuit court made a separate finding that the mother lacked the necessary basic parenting skills and concluded that the children would continue to be neglected so long as they remained in the custody of their parents.

By order dated September 21, 1983, the circuit court found that the children were neglected within the meaning of Chapter 49, Article 6 of the Code and that there was no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future. The court concluded that it was necessary for the welfare of the children to terminate the appellants' parental rights and ordered the children committed to the permanent guardianship of the Department of Human Services, See footnote 1 with full power and authority to provide for their adoption. It is from this order that the appellants appeal.

The appellants' first contention is that the circuit court erred in refusing to return the children to their custody for an improvement period for the purpose of correcting the conditions of neglect giving rise to the petition. W.Va.Code § 49-6-2(b) (1980 Replacement Vol.) permits a parent in a neglect proceeding to request, at any time prior to final hearing, an improvement period of from three to twelve months duration. The statute further provides that "[t]he court shall allow such an improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department of another agency during the improvement period." The court's failure to state on the record the compelling circumstances warranting the denial of an improvement period under this section constitutes reversible error. State v. Scritchfield, W.Va., 280 S.E.2d 315 (1981). The appellants contend that there were no compelling circumstances specified by the circuit court which would justify the ruling.

The motion for an improvement period was made at the conclusion of the preliminary hearing conducted on December 9, 1982. The circuit court predicated its denial of the motion on the living conditions in the home and the appellants' total disregard, prior to the removal of the children from their physical custody, of the efforts of social service agencies to improve the conditions of neglect. The circuit court also expressed on the record strong feelings that recent efforts at ameliorating the conditions in the home would cease once the children were returned to the appellants' custody and noted the past propensity of the family to change residences and to leave the jurisdiction to avoid neglect charges.

We believe the circuit court demonstrated on the record sufficient justification for refusing to allow the appellants an improvement period. The evidence supports the conclusion that a potential danger existed to the welfare of the children if they were returned to the home. "In a case such as this where return of the child to the parents might result in their absconding the jurisdiction and removing the child from effective supervision, there are certainly compelling reasons to justify the denial of an improvement period." In re R.J.M., W.Va., 266 S.E.2d 114, 117 (1980).

The appellants' second contention is that the circuit court abused its discretion in ordering the termination of their parental rights. They assert that the court did not follow the procedures set out in W.Va.Code § 49-6-1 et seq. (1980 Replacement Vol.) and that the evidence did not warrant imposition of the most extreme disposition under the statute.

We have long recognized that the fundamental right of a natural parent to custody of his or her minor children, though constitutionally protected, is not absolute and may be terminated by the State if the parent is shown to be unfit to care for the children. In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). The statutory procedure for terminating parental rights in child abuse and neglect cases is essentially a two-step process. In the initial phase, the circuit court is required by W.Va.Code § 49-6-2 to determine whether the child has been abused or neglected. State v. T.C., W.Va., 303 S.E.2d 685 (1983). "W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' " Syllabus Point 1, in part, In the Interest of S.C., W.Va., 284 S.E.2d 867 (1981).

Once there has been a proper finding of abuse or neglect, the proceedings move into the dispositional phase, which is governed by W.Va.Code § 49-6-5. The statute provides a number of dispositional alternatives which the court may consider, giving precedence to the least restrictive alternative appropriate to the circumstances. Termination of parental rights, the most restrictive alternative, is authorized only "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child." W.Va.Code § 49-6-5(a)(6). The State must produce clear and convincing evidence to support this finding before the court may sever the custodial rights of the natural parents. State v. Carl B., W.Va., 301 S.E.2d 864 (1983); In re Willis, supra.

The appellants do not seriously contend that the circuit court erred in finding that the children were neglected within the meaning of the statute. The petition in this case was predicated upon the appellants' apparent intellectual inability to provide basic child care. In State v. Scritchfield, supra at 321, we stated:

> We do not question that the definition of "neglected child" contained in W.Va.Code § 49-1-3 includes those children whose well-being is endangered or impaired by the inability of the parent, as the result of a mental condition, to perform the most fundamental and essential of the parental obligations--to feed, clothe, shelter, supervise, educate and provide medical care. Under such circumstances, neglect may be proved upon a showing of an ongoing condition or course of conduct which has been or is likely to be detrimental to the physical or mental well-being of the child and which the parent has been unwilling or unable to correct.

The State here presented clear and convincing evidence of "an on going condition or course of conduct" amounting to neglect on the part of the appellants at the time the petition was filed and ample evidence of their failure up to that time to correct their conduct.

The appellants do assert error, however, at the dispositional stage of the proceedings. They contend that the circuit court's order violated W.Va.Code § 49-6-5 in that no consideration was given to any less restrictive dispositional alternative than severance of the parental rights and that the State did not meet its burden of showing "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected."

In In re R.J.M., supra, we noted that although W.Va.Code § 49-6-5 requires the court to give precedence to the least restrictive dispositional alternative, "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened...." Syllabus Point 1, in part. We held at Syllabus Point 2:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

Consequently the determination of whether the circuit court here properly ordered the most restrictive disposition turns on the propriety of its finding that there was no reasonable likelihood of correcting the conditions of neglect found to exist at the time the petition was filed.

As we implied in In re R.J.M., supra, to support a finding of "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected", the circuit court must find the existence of one or more of the statutory grounds enumerated in W.Va.Code § 49-6-5(b). See footnote 2 The court here found that the appellants "have not responded to or followed through with reasonable rehabilitation efforts of social, medical, mental health, or other rehabilitative agencys [sic]", as provided by W.Va.Code § 49-6-5(b)(3).

We believe the evidence presented by the State clearly supports this finding. It is uncontroverted that for almost a year prior to the filing of the petition the appellants had repeatedly failed to avail themselves of numerous support services offered by the Department. During this period the Department prepared no less than six comprehensive

rehabilitative plans to assist the parents in improving the quality of their child care, none of which was completed. Social service workers testified that although the appellants appeared receptive to their suggestions, they rarely followed up on them. Moreover, the evidence shows that the appellants' pattern of disregarding Department recommendations for improving their parenting skills continued even after the petition was filed and the children were removed from the home.

The appellants point out that they did make efforts to improve and maintain the physical condition of the home and attended family counseling sessions and adult education classes. We agree that to this extent they responded to the Department's rehabilitative efforts. The evidence also shows, however, that the appellants did not take these steps until ordered to do so by the circuit court.

In addition, the State's evidence indicated that the appellants' failure to respond to the recommendations of the Department resulted from a limited ability to comprehend the necessity to improve the quality of their child care. The psychologist testified that neither parent really understood why the Department had instituted neglect proceedings, and the appellants themselves were unable to articulate with clarity the conditions which had ultimately resulted in the removal of the children from the home. The expert testimony also indicated that the intellectual capacity of both parents was such that the services available through the Department would be ineffectual in teaching them to modify their behavior so as to provide adequate parenting for the children.

In short, the State produced clear and convincing evidence to show that not only had the appellants failed to respond to or follow through with Department efforts to correct the conditions of neglect in the past, but also that they were intellectually incapable of doing so in the future. In view of the evidence indicating a substantial probability that the conditions of neglect would recur if the children were returned to the custody of the parents, we cannot say that the circuit court abused its discretion in finding "no reasonable likelihood that the conditions of neglect can be substantially corrected" and in terminating the appellants' parental rights pursuant to the provisions of W.Va.Code § 49-6-5.

As a final matter we note that the truly tragic aspect of this case is that the evidence indicates that the appellants bear genuine love and affection for their children. There was no evidence of any deliberate misconduct or malicious neglect. Much as we might sympathize with the appellants' feelings of loss, however, we cannot ignore the fact that they simply do not have the ability to function adequately as parents. Consequently we conclude that the State was justified in intervening in this case to protect the welfare of the children.

Accordingly, we affirm the judgment of the Circuit Court of Marion County permanently terminating the parental rights of the appellants and placing the four infant children in the permanent custody of the Department of Human Services.

Affirmed.

Footnote: 1 *The West Virginia Department of Human Services is the successor to the West Virginia Department of Welfare. See W.Va.Code § 9-2-1a (1984 Replacement Vol.).*

Footnote: 2 *W.Va.Code § 49-6-5(b) states:*
As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that: (1) the parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parenting ability has been seriously impaired and the parent has not responded to or followed through with recommended and appropriate treatment which could have improved the capacity for adequate parental functioning; (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan designed to lead to the child's return to the parent or parents; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the neglect or abuse of the child, as evidenced by the continuation of substantial or repeated acts of neglect or abuse after the provision of such services; (4) the parent or parents have abandoned the child; or (5) the parent or parents have repeatedly or seriously physically abused the child.

171 W. Va. 774, 301 S.E.2d 864

Supreme Court of Appeals of West Virginia
STATE of West Virginia
v.
CARL B., et al., etc.
No. 15512
March 31, 1983

SYLLABUS BY THE COURT

"W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus point 1, In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981).

Mary Beth Kershner, Asst. Atty. Gen., Charleston, for appellee.

P. Lee Clay, Fairmont, for appellants.

PER CURIAM:
This is a child neglect case emanating from the Circuit Court of Marion County. The circuit court permanently terminated the appellant's parental rights over two of her children, Carl B. and Teekonia C. On appeal the appellant contends that the court's ruling was not supported by the evidence and that the court failed to conduct the proceedings in a manner sufficient to protect her legal rights. We disagree, and we affirm the decision of the Circuit Court of Marion County.

In 1976, prior to the enactment of our present Child Welfare Act, W.Va.Code, 49-6-1, et seq. [1977], the West Virginia Department of Welfare petitioned for the temporary custody of the appellant's two children, Carl B. and Teekonia C. Hearings were held at which it was established that the appellant had neglected Teekonia C. by leaving her in the custody of an inappropriate caretaker. It was also shown that the appellant was not taking proper care of Carl B. It was ordered that the two children be committed to the temporary custody of the Department of Welfare. See footnote 1 The appellant was, however, granted court-approved improvement periods with the understanding that if she corrected certain deficiencies the children would be returned to her. See footnote 2 During the improvement periods the Department of Welfare extended extensive financial, counselling and homemaker aid to the appellant. After a time Carl B. was returned to

the appellant's care, and visits by Teekonia C. were arranged with the thought of gradually returning her to the appellant's care.

Approximately two years after the Department of Welfare first became involved with Teekonia C. and Carl B., on October 27, 1978, Diana Walker, an employee of the Department of Welfare, filed a petition with the circuit court praying that the Department be granted permanent custody of Teekonia C. The petition alleged that:

> "[T]he mother took the child out of the home in the middle of the night without proper clothing and the mother has failed to maintain the home in a healthful condition; that the condition of the home is so deplorable in that she allows garbage and food to build up in the home and upon the floors and furniture and that the condition of the home with said food attracted rats and roaches which effect the health and welfare of the infant child; ..."

The petition also noted that Carl B. was in the appellant's care and that the caring and supervision of him was beyond the appellant's parenting abilities. Later in January, 1979, a social worker visited the appellant's home and found that there was no food in it suitable for Carl B. She thereupon petitioned that permanent custody of Carl B. be transferred to the Department of Welfare.

The proceedings for the termination of custody of the two children were consolidated, and hearings were held on February 8, 1979, April 3, 1979, and May 11, 1979. The appellant was represented by counsel at all the hearings, and guardians ad litem were appointed to represent the interests of the children. See footnote 3 At the conclusion of the hearings the court found:

> "As to the ultimate issue the Court is of the opinion that there is no reasonable likelihood that the neglect of the children by the parents can be substantially corrected in the near future and further the Court believes the welfare of the children demands that all parental rights be terminated and permanent custody be committed to the West Virginia Department of Welfare with the right to consent to their adoption by some responsible person or agency."

By way of assignment of error, counsel raises a number of rhetorical questions, which essentially present the question of whether the trial court's ruling was supported by the evidence. See footnote 4 The thrust of the argument of appellant's counsel is that the State failed to prove that there existed a situation of imminent danger to Carl B. and Teekonia C. at the time of the hearings. He argues that proof of such imminent danger was necessary before the court could properly terminate the appellant's parental rights. In taking that position he relies on the provisions of W.Va.Code, 49-6-3 [1977].

W.Va.Code, 49-6-3 [1977], authorizes the immediate, temporary taking of custody of a child by the Department of Welfare when there exists an imminent danger to the physical well-being of the child. In State ex rel. Miller v. Locke, 162 W.Va. 946, 253 S.E.2d 540 (1979), we recognized that it allows a taking only in an emergency situation in which the welfare or the life of the child is endangered. However, W.Va.Code, 49-6-5 [1977], governs the final disposition of cases of child neglect or abuse. It provides, in relevant part:

> "(a) Following a determination pursuant to section two [§ 49-6-2] of this article, [That is, a finding that a child is abused or neglected] the court may request from the state department information about the history, physical condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard....
> "(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency...."

In the proceeding before us, which involved the question of permanent termination of parental rights W.Va.Code, 49-6-5 [1977], rather than W.Va.Code, 49-6-3 [1977], governed. W.Va.Code, 49-6-5 [1977], required that the court find that Carl B. and Teekonia C. had been neglected or abused and that there was no reasonable likelihood that the conditions of neglect or abuse would be made in the near future. The court made the finding that the children had been neglected and that there was no reasonable likelihood that the conditions would be corrected in the near future. There was no requirement that the court find that the children were in imminent danger.

After carefully reviewing the transcripts of the hearings conducted by the circuit court and the other documents contained in the record, we conclude that the court's findings were supported by the evidence although a portion of the evidence was conflicting. The Department of Welfare's attention was first directed to the children in 1976 when the woman to whom the appellant had committed the care of Teekonia C. was observed changing her diapers on the floor of a public restroom. The woman had placed no padding under the six- week-old child who was observed to be dirty and afflicted with sores. An inspection of the appellant's home revealed generally unsanitary conditions. Teekonia C. and Carl B. were temporarily committed to the Department of Welfare. After that happened the appellant was granted improvement periods, and extensive financial homemaking, and counselling services were offered to her. In spite of the

assistance of the Department of Welfare, the appellant was unable to improve the condition of her home on a consistent basis. One welfare worker, Diana Walker, described the home as follows:

> "She could have it appropriately clean or she could have it very bad, and unfortunately it was usua lly bad, until the end when she thought we were coming back to court and she would tr y to m ake im provements. Usually there were dirty dishes, garbage dum ped outside the door, roaches, garbage swept up on the floor and left for a week at a time. No sheets or blankets for the beds. Just generally dirty and I was surprised she didn' t even m ake an attempt to keep it up, try to make it better."

Another witness testified that the garbage that the appellant left in her house drew rats. One witness, Sandra Feorene, described the house more than two years after the Department of Welfare began assisting the appellant:

> "At the time I was there, it was pretty much in a mess. There were two dogs running around at the tim e and the fl oor area, the first level level, there was dog waste and scraps of food."

In addition to evidence that the appellant failed to keep her home in a sanitary condition Diana Walker testified:

> "Carl was im properly clothed for the wi nter. It would be a very cold morning where you would need a coat and he would have on a T-shirt, I don't feel he was properly fed all the tim e. She would be irresponsible in letting her assistance case be closed a nd food stam ps stopped. Carl didn' t have all of his immunizations. She would tend to put things off."

Carol Starkey, a woman acquainted with the appellant, testified that normally the appellant did not have much food after the 20th of the month. She ascribed the situation to the appellant's being good-hearted and having many friends, but "It seemed like whenever she would run out of food, everybody would get up and leave and her and the children would be without." Shortly before the final hearings in the case a welfare worker found that the appellant had no food in the house suitable for Carl B. and that she had no definite plans for getting any. As summarized by one welfare worker:

> "During the time I worked with J..., she wasn't really interested in helping herself or trying to im prove things for her children. She wasn' t able to provide proper care for Carl and visits with Teekie were pretty bad."

In Syllabus point 6 of In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973), we stated:

> "The standard of proof required to support a court order limiting or terminating parental rights to custody of minor children is clear, cogent and convincing proof."

That standard has been incorporated in our present Child Welfare Act, W.Va.Code, 49-6-2(c) [1980], which we recognized in Syllabus point 1 of In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981):

> "W.Va.Code, 49-6-2(c) [1980] , requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden."

We believe that in the case before us the State established by clear and convincing evidence that the appellant neglected Teekonia C. and Carl B.

In addition to asserting that the circuit court's conclusions were not supported by the evidence, the appellant claims that there were several procedural defects in the proceeding. First she claims that W.Va.Code, 49- 6-1(a) [1977], requires that the petition be verified by the oath of some credible person having knowledge of the situation and that that was not done. We have examined the petition instituting the proceeding to terminate the appellant's right over Teekonia C., and we note that it was verified by Diana Walker, a welfare worker who worked extensively with the appellant. The petition for change of the permanent custody of Carl B. is not in the record, but an earlier petition for the temporary custody of him was likewise verified by Diana Walker. Secondly, the appellant argues that the trial court failed to appoint her an attorney within the time period required by W.Va.Code, 49- 6-2(a) [1977], when Teekonia C. and Carl B. were first taken by the Department of Welfare in 1976. It appears that Teekonia C. and Carl B. were first taken in 1976 in an emergency situation.

In re Willis, supra, recognized that in such a situation the immediate appointment of counsel was not necessary. The record of the 1976 proceeding is not before us, but an order dated October 26, 1976, which related to the hearing following the emergency taking shows that the appellant was represented by a court-appointed attorney. We, therefore, find that the appellant's assertions regarding procedural defects are not supported factually.

For the foregoing reasons the judgment of the Circuit Court of Marion County is affirmed.

Affirmed.

Footnote: 1 Prior to enactment of the 1977 Child Welfare Act, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973) delineated the standards for taking children in child-neglect situations.

Footnote: 2 It appears that the appellant was granted at least four improvement periods--under agreements entered into on September 27, 1976; June 17, 1977; June, 1978; and September 11, 1978.

Footnote: 3 At the times of the hearings, the whereabouts of the fathers of Teekonia C. and Carl B. were unknown. The representation of their interests is not an issue in the case.

Footnote: 4 Among the appellant's assignments of error are:
a. "Can the State take children from parents when it does not prove that the children are abused, neglected or in imminent danger?"
b. "Does the State have a right to keep children it has removed from parents on the basis of alleged neglect, abuse or imminent danger, when the alleged condition has been corrected?"
c. "Does the law and justice require that if a petitioner misrepresents the facts to the Court and causes the children to be removed that such children be returned to the parents once the true facts disprove the misrepresentation?"

185 W. Va. 613, 408 S.E.2d 365

Supreme Court of Appeals of West Virginia
In the Interest of CARLITA B.
No. 19899
Submitted Feb. 5, 1991
Decided July 29, 1991
Concurring Opinion of Chief Justice Miller July 31, 1991

SYLLABUS BY THE COURT

1. Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts.

2. " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d [798] (1969).' Syl. pt. 2, Hammack v. Wise, 158 W.Va. 343, 211 S.E.2d 118 (1975)." Syl. Pt. 1, Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987).

3. "Under W.Va.Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984)." Syl. Pt. 3, State ex rel. West Virginia Dept. of Human *616 **368 Serv. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987).

4. In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

5. The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

6. At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

7. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened...." Syl. Pt. 1, in part, In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980).

8. Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

9. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, In re James M., 185 W.Va. 648, 408 S.E.2d 400 (1991).

Barbara L. Baxter, West Virginia Legal Services, Wheeling, for appellant.

Mario J. Palumbo, Atty. Gen., Jeffrey K. Matherly, Asst. Atty. Gen., for State of W.Va.

WORKMAN, Justice:

Justina N. See footnote 1 appeals from an order of the Circuit Court of Ohio County which terminated her parental rights to her daughter, Carlita B. The circuit court found that the appellant was guilty of abuse and neglect of Carlita and that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future. The appellant contends that the circuit court erred in terminating her parental rights because 1) neither the Department of Human Services (hereinafter "D.H.S.") See footnote 2 nor the specific D.H.S. caseworker assigned to the case made a reasonable effort to reunify the family as required by W.Va.Code § 49-6-5 (1988); 2) the assigned D.H.S. caseworker failed to develop a realistic case plan for the appellant as

required by W.Va.Code § 49-6D-3 (1984); 3) the circuit court erred in finding that the appellant suffered from erratic behavior and outbursts of anger to the extent that such behavior made her incapable of exercising proper parenting skills; and 4) the circuit court erred in finding that the appellant abused her children other than Carlita because such evidence was (a) not relevant to this proceeding and should have been excluded, and (b) in the alternative, was not established by clear and convincing evidence. We disagree with the contentions of the appellant and affirm the order of the Circuit Court of Ohio County.

I. FACTS

The appellant is the mother of four children. Her parental rights to her oldest child, Justin, were terminated when the child was approximately three years of age, based upon the appellant's abusive actions toward the child. She apparently beat him on the legs and back, pulled out large areas of his hair, and threatened, in the presence of a D.H.S. caseworker, to drown both the oldest child and her second child, Christopher. See footnote 3

At the initiation of this action regarding Carlita, born on October 22, 1985, the appellant was living with Robert B., Carlita's father. On March 27, 1987, Dixie Laudermilt, a caseworker for the D.H.S., filed a petition to have Carlita removed from the home. The petition was based upon the following: (1) an alleged March 25, 1986, incident in which Robert B. reported that the appellant had thrown five-month-old Carlita onto a bed in a violent manner; (2) a November 14, 1986, incident in which the Wheeling Police were called to the appellant's residence to investigate a domestic dispute and discovered a red hand print on Carlita's back See footnote 4 (Robert B. and the appellant both admitted that the appellant had slapped the child, then thirteen months old, subsequent to an argument between Robert B. and the appellant); (3) allegations that the appellant had taken the child to bars in the late night and early morning hours; (4) allegations that the appellant would occasionally fail to feed Carlita until Robert B. returned from work in the evening due to the appellant's lack of patience in feeding the young child (Once Robert B. returned from work, he would allegedly feed the child for the first time of the day); (5) allegations by neighbors that they had heard the appellant screaming at the child and had heard the child fall out of its crib.

The appellant contends that Ms. Laudermilt's decision to petition for termination of the appellant's parental rights to Carlita was also premised upon the deteriorating relationship between the appellant and Ms. Laudermilt. Ms. Laudermilt had become acquainted with the appellant's family while Justin and Christopher were both residing in the household. Ms. Laudermilt had been instrumental in removing Justin from the home and had been given the responsibility of attempting to reintegrate Christopher into the home. While Ms. Laudermilt had visited the appellant's home with Christopher, complete reintegration had not been accomplished. During a visit in January 1987, the appellant became angry

with Ms. Laudermilt when Ms. Laudermilt indicated that the visitation period had expired. As Ms. Laudermilt attempted to remove Christopher from the appellant's arms, the appellant kicked Ms. Laudermilt in the stomach. Ms. Laudermilt filed assault charges, and the appellant was jailed for two to three hours. When the appellant explained that she was pregnant, she was released from jail, and Ms. Laudermilt signed a mental hygiene petition to have her involuntarily committed to a behavioral health center.

A hearing on the petition for termination of the appellant's parental rights to Carlita was held on April 23, 1987. Testimony was elicited from Ms. Laudermilt; Bea Lahita, a homemaker services worker who had assisted the appellant with such household tasks as planning meals and preparing budgets; Gloria Johnston, a D.H.S. worker who had previously worked with the appellant; and Wheeling Police Officer Raymond LaRue, the officer who saw the red hand print on Carlita's back. At the conclusion of the presentation of evidence, the appellant was granted a six-month improvement period pursuant to W.Va.Code § 49-6-2(b) (1984). See footnote 5 Physical and legal custody of Carlita was given to the D.H.S. with supervised visitation permitted. The D.H.S. prepared and submitted a family case plan as required by W.Va.Code § 49-6D-3. See footnote 6 Two plans, dated November 20, 1987, and August 25, 1988, were formulated. See footnote 6

II. RESULTS OF FIRST IMPROVEMENT PERIOD

A hearing on the success of the improvement period was held on November 10, 1987. Ms. Laudermilt testified for the D.H.S. and explained that she had been involved with Carlita and her family during the improvement period which was originally granted on April 28, 1987. Ms. Laudermilt explained that there had been daytime visitation between the child and her parents two to three times per month. Ms. Laudermilt stated that the D.H.S. had experienced no difficulty during the home visitation and explained that the appellant and Robert B. had taken Carlita to the playground and had hosted a birthday party for her. With regard to gradual reintegration back into parental custody, Ms. Laudermilt stated that the prior visits had been of two to three hours duration and suggested that subsequent visitation be increased to six to eight hours with D.H.S. workers present 50 to 60 percent of the time. Ms. Laudermilt testified that Carlita "takes a while to make up to [the appellant and Robert B.] and it will be an hour before she will even go to them and play, especially with Robert."

Ms. Laudermilt also discussed physical confrontations and arguments between the appellant and Robert B., with the appellant being physically aggressive toward Robert B. Ms. Laudermilt explained that she and Bea Lahita had both received telephone calls from the morning to late hours of the night during the previous six months in which Robert B. had complained that the appellant was fighting with him or locking him out of the house. Ms. Lahita expressed her opinion that the relationship between the parties had not significantly improved and that it would not be in the best interest of the child to return to

the home at that time. At the conclusion of the hearing, the lower court stated that due to the lack of updated psychological reports and evaluations as a basis to determine whether Carlita would be safe in the home environment, the improvement period would be extended for an additional six months.

An evaluation of the appellant and Robert B. was conducted by social worker Laurie Taylor, and a report dated December 3, 1987, was submitted. Ms. Taylor found that the appellant and Robert B. lacked a clear understanding of the legal ramifications of Carlita's placement and that the appellant and Robert B. associated her placement with the ongoing personality problems between the appellant and Ms. Laudermilt. Ms. Taylor found the appellant and Robert B. to be angry, bitter, and disillusioned about the custody situation. The thrust of Ms. Taylor's report was that the parties' home was adequate for raising children and that they possessed all necessary furniture. Home visitation by Ms. Taylor was varied as to time and notice, and no problems were encountered with the couple or with neighbors. Ms. Taylor noted the conflict and adversarial relationship between the appellant and Ms. Laudermilt, recognized that such a relationship made appropriate work with the family difficult, and suggested a change of D.H.S. caseworkers.

Dr. Charles Hewitt, psychologist, also evaluated the appellant and Robert B. and submitted several reports to the D.H.S. Dr. Hewitt had been involved with the family through termination proceedings held on behalf of Justin and had previously evaluated the parties. He reported that the appellant was functioning in the borderline range with some indication of low average cognitive functioning, but stressed that she was not mentally retarded. Dr. Hewitt noted serious personality difficulties suffered by the appellant with noticeable abusiveness and insensitivity. He also stated that the appellant loves her children but has personality problems which interfere with her ability to manage their difficult behavior. He recognized the adversarial relationship between the appellant and Ms. Laudermilt and stated that such conflict may interfere with D.H.S. attempts to assist the family. Dr. Hewitt recommended the continuing use of homemaker services and suggested that an effort be made to reintegrate Christopher and Carlita into the household.

Dr. Dennis J. Maceiko, psychologist, also evaluated the appellant and submitted reports dated April 1986 and October 1988. See footnote 8 In his first report, Dr. Maceiko found that the appellant had a very low frustration level and was easily agitated. He felt uncomfortable allowing the appellant to have custody of Justin or Christopher and also felt that, due to the appellant's intense explosions, Carlita's safety was in jeopardy while she remained in the home. Dr. Maceiko's second report, dated October 5, 1988, was based upon a July 16, 1987, visit with the appellant and Robert B. Dr. Maceiko noted anger and poor impulse control in the appellant. He stated that she quickly varied from

cooperative to quite irritable during the interview, that she had difficulty dealing with stress, and that her frustration tolerance level was very low.

III. RESULTS OF SECOND IMPROVEMENT PERIOD

A hearing marking the conclusion of the second improvement period was scheduled for June 17, 1988. Due to the nonappearance of the appellant, the hearing was continued to July 26, 1988. See footnote 9 At the July 26, 1988 hearing, Ms. Laudermilt again testified regarding the appellant's lack of cooperation and apparent inability to control her emotional outbursts. Specifically, Ms. Laudermilt testified that the appellant had been provided with counselling during home visitation regarding necessary care for Carlita. Ms. Laudermilt stated that the home visits continued until approximately December 1987, "when things became more anxious ..." for the appellant. Ms. Laudermilt described "more screaming and hollering during home visits. [The appellant] was with Bobby [Robert B.] in the evenings and would fight and physically assault him." Ms. Laudermilt also explained that the appellant declined to participate in parenting classes offered through Dr. Hewitt, Dr. Maceiko, or Northern Panhandle Behavioral Health Center. Ms. Laudermilt testified that in approximately March 1988, she accompanied the appellant to a mothers' group organized for children and family services, but that the appellant left during the session and refused to return for future sessions.

Ms. Laudermilt described typical home visits as consisting of very little physical or verbal contact between the child and the parents. Most contact which was accomplished had been initiated by the D.H.S. workers rather than the parents. With regard to cooperation with suggestions of the D.H.S., Ms. Laudermilt testified that she had "seen a decline in improvement on [the appellant's] part for the fact that there is no cooperation there." Ms. Laudermilt provided examples of several attempts at visitation where the parents had overslept or had been up late watching television the night before and failed to appear. Ms. Laudermilt explained that the parents had sufficient prior notice of scheduled visits and still failed to appear. Ms. Laudermilt testified that the appellant had only visited with her children twice from January 1988 through July 1988. With regard to visitation, Ms. Laudermilt explained:

> Whenever we go at 9:00 o' clock [sic] 9:30, they would not be out of bed. When it was in the afternoon, say like 1:00 o' clock [sic], they would be there, and that usually was the times where Tina would becom e irrational and start scream ing and hollering at B obby or the kids or m yself or the other worker or all of us, and the ch ildren would be taken from the home at that point, and Bobby would supervise or walk with us to the car to take the kids to the car.

When asked what precipitated the appellant's outbursts, Ms. Laudermilt explained that it could be small or inconsequential things (e.g. "it could be the fact that Carlita would not

eat the rest of her cereal, that she would start becoming angry, and as things continued to go on, she would become more angry.")

Due to lack of time to present remaining witnesses during the July 26, 1988, hearing, the matter was continued to August 1, 1988. During the August 1, 1988, hearing, Bea Lahita testified that she began working with the appellant and Robert B. in January 1985 as a homemaker attempting to teach them cooking and budgeting skills. Ms. Lahita reported that she had experienced problems with the appellant or Robert B. calling her late at night once or twice a week with complaints of fighting with one another. Ms. Lahita also testified that she had attempted to schedule counselling for the appellant and Robert B., but that they had refused to participate. Ms. Lahita further stated that the appellant had refused to take medication which had been prescribed to control her anger. See footnote 10

Jamie Wharton, an outreach worker at the Florence Crittenton Home, also testified at the August 1, 1988, hearing regarding her involvement with the parties. The D.H.S. referred the parties to the Florence Crittenton Home for assistance in parenting skills, teaching basic skills such as interaction, diapering, feeding, and temperature taking. Ms. Wharton testified that the workers attempted home visits two to three times per month for such instruction. Although the parties cooperated with the workers immediately after Daniel's birth to receive assistance with his medical problems prior to his removal from the home, cooperation decreased significantly thereafter. From January 1985 through August 1988, the workers continued to attempt visitation with the parties in order to provide homemaker services, but frequently found no one at home.

At the conclusion of the August 1, 1988, hearing, the lower court indicated that it would render a decision after reading the files and the psychological evaluations. The court also ordered counsel for each party to submit a written argument stating their respective positions as to disposition of the matter. The court further stated that the matter would be taken under advisement pending the filing of written arguments.

On January 30, 1989, the lower court entered an order terminating the appellant's parental rights to Carlita. The court found that the appellant was guilty of abuse and neglect of Carlita and that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. See footnote 11 The court held that the appellant had failed to comply with the family case plan, had failed to appropriately participate in visitation, suffered from erratic behavior and outbursts of anger, and had a history of causing physical abuse to her infant children. Due to a delay in producing transcripts, the appeal period was extended for an additional four months by order dated September 25, 1989, and the final order from which the appellant now appeals was re-entered on January 24, 1990. The petition for appeal was filed on October 3, 1990, over eight months after the re-entry of the termination order. This

Court accepted the appeal on December 5, 1990, and expedited oral argument to February 5, 1991.

IV. PROCEDURAL DELAY

Before addressing the merits of this case, we examine the long and tortured procedural history this matter has endured. The petition to terminate parental rights in this case was filed on March 27, 1987. The first hearing on the matter was held on April 23, 1987, wherein an improvement period was granted; another hearing was held on November 10, 1987, wherein the improvement period was extended six months and psychological reports were ordered updated; additional hearings were held on July 26, 1988, and August 1, 1988, and parental rights were finally terminated on January 30, 1989. Due to problems in acquiring a transcript, the final appealable order was re-entered almost a year later on January 24, 1990. Thus, even prior to the appeal to this Court, Carlita remained in limbo for almost three years during the most formative stages of her young life.

Although Carlita's brother Christopher's case is not presently before the Court, its procedural progression is even more egregious. He was removed from the home as an infant in 1984 based upon the appellant's abuse of his brother Justin. It took until November 20, 1987, for the lower court to determine that he should be reintegrated into the home. The last visit between Christopher and his parents occurred in March 1989, and no requests for visitation were received after that time. Christopher has resided with his present foster family from March 1987 to the present. A hearing on Christopher's disposition has been scheduled for August 16, 1991. This child has now been in foster care for almost seven years with no real resolution of his future.

Such protracted procedural histories are far too common a phenomenon in child abuse and neglect cases, as well as other child custody matters. Several cases with which we have dealt have involved similar extended periods of time without any real resolution for the child.

In our recent opinion in In the Matter of Scottie D., 185 W.Va. 191, 406 S.E.2d 214 (1991), the original allegation of abuse and neglect was filed on February 11, 1985. Following proceedings in the matter, an order was entered on March 17, 1989, concluding that the appellee had not abused his children. Thus, the final order, from which appeal was taken, was not entered until over four years after the neglect proceeding was initiated.

In Department of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985), a child born in 1980 was voluntarily relinquished by her mother shortly after birth and resided in foster care for four years pending final resolution of a subsequent attempt to revoke the relinquishment of parental rights. We recognized in La Rea Ann,

that "[c]hild custody cases certainly should be decided promptly. Regardless of who is responsible for the delay in this case, the child is the unfortunate victim." Id. 178 W.Va. at 337 n. 8, 332 S.E.2d at 638 n. 8.

In State v. Scritchfield, 167 W.Va. 683, 280 S.E.2d 315 (1981), the Department of Welfare had petitioned to remove three children from the custody of their mother in June 1976. The two older children were returned in 1977, but the youngest child remained in foster care in the temporary custody of the Department of Welfare. 167 W.Va. at 686, 280 S.E.2d at 318. On September 1, 1978, the Department of Welfare sought to have the youngest child declared a neglected child, citing the medical condition of the mother and the fact that the child had been in foster care since 1976. Id. 167 W.Va. at 684, 280 S.E.2d at 317. On June 6, 1979, the court finally entered an order finding the child to be neglected and terminating the parental rights of the parents. Id. 167 W.Va. at 687-688, at 319. Again, we find an approximate three-year period in which the child's disposition remained unresolved.

Certainly many delays are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied overnight. The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them.

The bulk of the most aggravated procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children--the most voiceless segment of our society--aren't left to languish in a limbo-like state during a time most crucial to their human development.

As explained in J. Goldstein, A. Freud & J. Solnit, Beyond the Best Interests of the Child 32-33 (1973),

> Continuity of relationships, surroundi ngs and environm ental influence are essential for a child' s normal developm ent. Since they do not play the same role in later life, their im portance is often underrated by the adult world.
> Physical, emotional, intellectual, so cial, and m oral growth does not happen without causing the child inevitable intern al difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from ex ternal sources. Smooth growth

> is arrested or disrupted when upheaval s and changes in the external world are added to the internal ones. See footnote 12

This is especially true during the first three years of life. Burton L. White, Ph.D., in his book, The First Three Years of Life (1985), begins his preface as follows:

> After seventeen years of research on how hum an beings acquire their abilities, I have become convinced that it is to the first three years of life that we should now turn most of our attention. My own studies, as well as the work of m any others, have clearly indicated that the experiences of those first years are far more important than we had previously thought. In their simple everyday activities, infa nts and toddlers form the foundations of all later development.
>
> Id. at v.

In the first chapter of her book, The Critical Years: A Guide for Dedicated Parents (1984), Doris E. Durrell, Ph.D., explains the following:

> Throughout my years of experience in raising children and treating children in a clinical setting, I have been c ontinually impressed with the degree to which personality has been formed by the time a child is three years old. By this time, certain positive behavior s will have been established which will continue to bring your child pos itive responses, or negative behaviors may be established which will cause your child problems with peers and adults.
>
> Id. at 9.

Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts. Whether a simple tickler file system or an enhancement to a computerized case monitoring system, some means of systematic review of child neglect and abuse cases must be established. Otherwise, the statutory time frames that govern their processing and the mandatory, periodic status reports that must be filed with the court are too easily overlooked. If such safeguards are rendered meaningless by a failure or inability to monitor cases, neglected and abused children may become lost in the very system designed to rescue them.

V. THE PROCESS OF TERMINATION

The standard for determining the fitness of a parent to maintain custody of his child was recently reiterated in syllabus point 1 of Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987) (quoting Syl. Pt. 2, Hammack v. Wise, 158 W.Va. 343, 211 S.E.2d 118 (1975)). We stated the following:

> 'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit pers on because of m isconduct, neglect, immorality, abandonment, or other derelic tion of duty, or has waived such right, or by agreem ent or otherwis e has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child w ill be recognized and enforced by the courts. Syllabus, State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d [798] (1969).'

West Virginia Code § 49-6-5(a)(6) (1988) governs the procedure for termination of parental rights and unequivocally states that a parent's rights may be terminated "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child...."

The appellant contends that the D.H.S. failed to make a reasonable effort to reunify her family, pursuant to W.Va.Code § 49-6-5, and failed to develop a realistic family case plan as required by W.Va.Code § 49-6D-3. See footnote 13 The appellant requested and was granted a six-month improvement period, in accordance with W.Va.Code § 49-6-2(b). She was later granted a second six-month improvement period. As we stated in syllabus point 3 of State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987), "[u]nder W.Va.Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984)." Such plans were prepared for the appellant and filed with the circuit court in this case. The purpose of the family case plan "is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Cheryl M., 177 W.Va. at 693, 356 S.E.2d at 186 (quoting W.Va.Code § 49-6D-3(a)).

The D.H.S. certainly could have acted with greater dispatch in preparing the first family case plan, for it was not completed until some seven months after the beginning of the first improvement period. However, the appellant wasn't harmed as a result of this delay both because D.H.S. did take immediate steps to offer services and because the improvement period was extended an additional six months. Such delays do, however,

always harm the child, as the significance of a six-month period in the first three years of life must once again be viewed as an extremely vital time in the course of a child's human development.

In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multidisciplinary effort among the court system, the parents, attorneys, See footnote 14 social service agencies, and any other helping personnel involved in assisting the family. The goal should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the D.H.S. and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

Subsequent to the initial formulation of the improvement plan and family case plans, it is imperative that the progress of the parent(s) toward the achievement of enumerated goals be monitored closely. As provided in W.Va.Code § 49-6-2(d), proceedings filed under the child abuse or neglect provisions

> shall, to the extent practicable, be gi ven priority over any other civil action before the court, except proceedings under article two-A [§ 48-2A-1 et seq.], chapter forty-eight of this C ode [prevention of domestic violence] and actions in which trial is in pr ogress. Any petition filed under the provisions of this article shall be docketed immediately upon filing. Any hearing to be held at the end of any im provement pe riod and any other hearing to be held during any proc eedings under the provisions of this article shall be held as nearly as pr acticable on successive days and, with respect to said hearing to be held at the end of an improvement period, shall be held as close in time as possibl e after the end of said im provement period.

The clear import of the statute is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

During the improvement period, the status of the child(ren) and the progress of the parent(s) in satisfying the conditions of the improvement period should be monitored by the circuit court on a monthly basis. To the extent possible, such review should also incorporate the multi-disciplinary approach, with social workers and other helping personnel present in the court with attorneys and parties to review progress and assure the program is being followed and improvement being made. See footnote 15 At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

As we explained in West Virginia Dept. of Human Serv. v. Peggy F., 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve ... [the] overall attitude and approach to parenting." Thus, a judgment regarding the success of an improvement period is within the court's discretion regardless of whether or not the individual has completed all suggestions or goals set forth in family case plans.

> The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute, ... the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan.
>
> 184 W.Va. at 64, 399 S.E.2d at 464.

In the present case, two family case plans, dated November 20, 1987, and August 25, 1988, were formulated to assist the appellant. The appellant contends that the plans were unrealistic and that the success of the plans was dependent upon Ms. Laudermilt, with whom the appellant maintained an adverse relationship. The appellant bases her contention that the plans were unrealistic on the fact that the two psychologists involved in this matter, Dr. Hewitt and Dr. Maceiko, made recommendations for treatment of the appellant which were not specifically included in the case plan. Dr. Maceiko, for instance, recommended in his April 10, 1986, report that the appellant receive psychotherapy and chemotherapy for control of her violent impulses. See footnote 16 He also stated that the appellant would not be a good candidate for parenting groups "simply because of the many problems that she has to contend with-- intellectual, poor impulse control, stress management problem, etc."

Dr. Hewitt, however, explained in his April 30, 1988, report that "psychotherapy or counselling per se is not likely to be useful to [the appellant]." Dr. Hewitt further noted

that the conflict between the appellant and Ms. Laudermilt seriously interfered with the development of a meaningful plan to attempt to reintegrate the children back into the household. Dr. Hewitt further recommended in his April 30, 1988, report that meaningful attempts be made to reintegrate Christopher and Carlita into the household and to permit homemaker services to continue.

The appellant argues that the D.H.S., in formulating the family case plans, ignored the suggestions of the psychologists. Despite Dr. Maceiko's opinion that the appellant was not a good candidate for parenting groups, for instance, the case plan required the appellant to attend anger control group meetings, parental group classes, play therapy, and parenting assistance classes.

Upon review of the plans and the reports of the psychologists, we fail to discern any unfairness in the family case plans. They were realistic and appropriate in their attempts to address the particular needs of the family. Reports rendered by psychologists are certainly of assistance to a court in determining the psychological capacity of an individual to raise a child and of assistance to the D.H.S. in formulating the tactics to be employed in the attempt to remedy the familial problems. The family case plans, however, are not required to reflect the recommendations of a particular psychologist in every detail. On the issue of psychotherapy, for instance, the reports of Dr. Maceiko and Dr. Hewitt differed with regard to the potential efficacy of such treatment for the appellant. Thus, formulation of a family case plan in perfect congruity with both reports would have been difficult.

Furthermore, we find the appellant's argument that the success of the family case plans was dependent upon Ms. Laudermilt to be meritless. Ms. Laudermilt was not the only individual providing assistance to the appellant. Beatrice Lahita, a D.H.S. worker providing home services, was also involved in the framework of assistance to the appellant. Therapists at Northern Panhandle Behavioral Health Center and workers from the Florence Crittenton Home were also involved in attempting to provide parenting education and skills. All of these social work personnel found the appellant extremely difficult and not very receptive to accepting assistance.

In executing the improvement plan and the family case plans, the D.H.S. is also obligated to make reasonable efforts to reunify the family, and the "court shall consider the efforts made by the department to provide remedial and reunification services to the parent." W.Va.Code § 49-6-5(a)(6). Furthermore, the court's order is to specifically state "whether or not the state department made a reasonable effort to prevent the placement or that the emergency situation made such efforts unreasonable or impossible" and "whether or not the state department made a reasonable effort to reunify the family including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances." Id.

The thrust of the appellant's argument with regard to lack of reasonable effort is that the uncooperative relationship between the appellant and Ms. Laudermilt rendered it impossible for the appellant to fully comply with the improvement period and family case plans. The appellant contends that the D.H.S. should have removed Ms. Laudermilt from the appellant's case as it became apparent that an adversarial relationship was developing between Ms. Laudermilt and the appellant. The appellant further argues that the D.H.S.'s failure to attempt to remedy the hostility and mistrust which existed between the appellant and Ms. Laudermilt constituted a lack of "reasonable effort." The appellant stresses that the D.H.S. failed to make such reassignment even after it was recommended by Dr. Hewitt and Ms. Taylor. See footnote 17

We agree that the deteriorating relationship between the appellant and Ms. Laudermilt rendered complete cooperation unlikely. The D.H.S. together with all other entities involved in a child abuse and neglect case must bear in mind always its obligation to provide a cooperative, encouraging, and supportive environment designed to foster the eventual reconciliation of parent and child. Such an environment is important not only because it is what the law requires, but also because--in the event improvement is inadequate and termination must eventually be sought--the record can better support a conclusion that all reasonable efforts were made by the D.H.S., the other helping personnel, and the court. We believe that certainly once a D.H.S. caseworker and client's relationship deteriorates to the degree evidenced in the present case by a physical altercation and subsequent assault charges and involuntary commitment, the D.H.S. has an obligation to consider changing assigned workers if at all possible, within the parameters of the agency's resources and obligations. However, we recognize that the steady erosion of child protective services resources has created an enormous unmet need and earnestly hope the Legislature and D.H.S. will address this crisis. See footnote 18

In ascertaining the degree of "reasonable effort" made by the D.H.S., however, we must also consider the appellant's role in the proceedings and her response to efforts made by the D.H.S. The appellant was provided with a variety of other caseworkers and therapists on whom she could have relied and to whom she could have demonstrated her willingness and desire to reunify her family. From review of the record, it appears that the appellant completely refused to cooperate with the D.H.S. during her improvement period. In an attempt by the D.H.S., for instance, to assist the appellant in controlling her violent mood swings, the D.H.S. scheduled several appointments for the appellant with Northern Panhandle Behavioral Health Center, a community mental health services provider. While the appellant finally attended an initial evaluation, she refused to return for subsequent appointments.

Furthermore, Ms. Laudermilt testified that the appellant often refused to visit her children or would be late for visitation. At visits specifically scheduled for three and one-half

hour duration, for instance, the appellant would frequently appear for the visit one hour late. The appellant would also cancel visitation with Carlita, stating that if she could not see all of her children, she did not wish to see any of them.

A parent's level of interest in visiting with his or her child during an out- of-home improvement period is an extremely significant factor for the circuit court to review. A parent who consistently demonstrates a desire to be with his child obviously has far more potential for being a nurturant and committed parent than one whose interest in being with his child is erratic.

Outreach workers from Northern Panhandle Behavioral Health Center were scheduled to visit the appellant in an attempt to educate her regarding parenting and homemaking skills. When the workers would appear for the appointments, the appellant would not answer the door. Even after the workers left notes on the door with information regarding the scheduling of appointments, the appellant refused to participate in the program. Attempts by the D.H.S. to involve the appellant in a mothers' support group also failed. Ms. Laudermilt accompanied the appellant to the first meeting, but the appellant refused to return to additional meetings.

The D.H.S. also encouraged the appellant to participate in a variety of other activities designed to increase her ability to effectively care for her children. The appellant, however, refused to cooperate with such attempts. We do not believe that the lack of cooperation exhibited by the appellant is attributable in its entirety to the adverse relationship between the appellant and Ms. Laudermilt. The record reflects the appellant's almost complete disregard for and disinterest in the efforts of the D.H.S. to assist her in developing the control and skills necessary to regain her children. Whether the result of apathy, misunderstanding, or ignorance on the part of the appellant, the ultimate termination of her parental rights was attributable to her behavior rather than to any lack of reasonable effort by the D.H.S.

Despite the responsibility of the D.H.S. and the court to provide interventive resources and to aid the parents, the rehabilitation envisioned by an improvement period is not a task which anyone can accomplish for the parent. The natural parental instinct is to do the work necessary to regain full custody of the child. Evidence of that instinct and the concomitant energy required to achieve that goal is missing from this case.

In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the paramount and controlling factor must be the child's welfare. "[A]ll parental rights in child custody matters," we have stressed, "are subordinate to the interests of the innocent child." David M., 182 W.Va. at 60, 385 S.E.2d at 916. Syllabus point 1 of In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980), in part, states the following:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened....

We therefore conclude the improvement periods and the family case plans were more than adequately developed and implemented to assist the mother in the steps needed to remedy the problems which gave rise to these proceedings, and we find no merit to her assignment of error related thereto.

VI. EMOTIONAL INSTABILITY

The appellant also contends that the lower court erred by finding, as part of its determination that her parental rights should be terminated, that she suffered an emotional illness of such duration or nature as to render her incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills. See W.Va.Code § 49-6- 5(b)(6). See footnote 19 The appellant argues that only one alleged incident of physical abuse, the hand print on the child caused by a slap, occurred during the one and one-half year period during which the appellant had exclusive care of Carlita. The appellant further contends that the reports of Dr. Maceiko and Dr. Hewitt do not prove, by clear and convincing evidence, that she suffers an emotional illness of such nature or duration as to render her incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

Dr. Maceiko indicated in his October 5, 1988, report that Carlita should not be returned to the appellant due to the appellant's unstable psychological and emotional condition, exacerbated by her limited intelligence. Dr. Hewitt, however, recommended in his final report that Carlita be reintegrated into the household. The appellant encourages us to rely more heavily upon the report of Dr. Hewitt and argues that Dr. Hewitt's report is more thorough and exhaustive than the report of Dr. Maceiko. See footnote 20

The evidence reflects that the appellant suffers violent mood swings which have manifested themselves in both verbal and physical abuse. The appellant kicked the D.H.S. worker in the stomach, was incarcerated for assaulting her own mother, threw Carlita on a bed when the child was five months of age, slapped Carlita, causing a red hand print, when the child was thirteen months of age, has allegedly hit Robert B. on several occasions and has such a turbulent domestic situation that frequent calls to law enforcement authorities are necessary. The record also reflects several instances in which the appellant demonstrated her unwillingness to seek treatment or therapy for her condition.

Dr. Hewitt explained in his April 30, 1988, report that the appellant suffers from "serious personality difficulties with noticeable abusiveness and insensitivity." In his October 5, 1988, report, Dr. Maceiko noted the appellant's anger, poor impulse control, difficulty dealing with stress, and a low frustration tolerance level. Based upon these reports and the testimony contained in the record, we cannot conclude that the lower court erred in finding that the appellant suffers from an emotional disorder of such nature as to render her incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

VII. PREVIOUS ABUSIVE ACTS TOWARD OTHER CHILDREN

The appellant contends that the circuit court erred in admitting evidence of prior allegations of abuse involving children other than Carlita. Throughout the proceedings, the social service workers, having worked with the family even prior to Carlita's birth, testified with regard to the appellant's treatment of Justin and Christopher. With regard to the appellant's contention that her violent acts toward her other children are irrelevant to the abuse and neglect proceedings regarding Carlita, we disagree with the proposition that acts of abuse and neglect toward other children are inadmissible.

We find that evidence regarding the appellant's previous abuse of Justin was appropriately introduced to serve the broad, legitimate purpose of providing the court with an understanding of the appellant's home environment and of the appellant's propensity toward abusive and/or neglectful treatment of children. We further find that introduction of evidence of this nature in a parental rights termination case is not violative of W.Va.R.Evid. 404(b). See footnote 21 While we recognize that the probative value of such evidence may, at some point, be substantially outweighed by its unfair prejudicial impact, that balancing is within the sound discretion of the trial court, and its decision will be reversed only upon a clear abuse of discretion.

We therefore hold that prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court. While evidence of past acts is a relevant factor to be considered, it is not necessarily dispositive and will not necessarily preclude a finding of fitness. Our holding permitting evidence of prior abusive acts is consistent with our previous decisions regarding the admissibility of evidence of prior acts of parents under inquiry in a termination proceeding. For instance, in Nancy Viola R., we encountered a situation wherein the child's father had been convicted of first degree murder of the child's mother. In discussing the admissibility of the father's repeated acts of abuse and violence toward the mother, culminating in her death, we stated that such acts were relevant to the determination of parental fitness and should have resulted in a finding that the father was an unfit custodian for his five-year-old son. 177 W.Va. at 710, 356 S.E.2d at 464. We recognized that spousal abuse is a factor to be considered in

determining parental fitness for child custody in Nancy Viola R., as well as in Collins v. Collins, 171 W.Va. 126, 297 S.E.2d 901 (1982). We have not, however, prior to this time, had the opportunity to directly address the impact that prior abuse of children other than the one presently under consideration may have upon a determination of parental fitness. However, since prior spousal abuse is an appropriate factor in determining parental fitness, then clearly prior child abuse must be considered even more probative.

In pertinent part of syllabus part 2 of State v. Edward Charles L., 183W.Va. 641, 398 S.E.2d 123 (1990), a criminal case, we held the following:

> Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment....

Thus, even within the more stringent requirements of the criminal context, we found that certain prior acts are "so intrinsically related to the alleged offenses that they may be considered as part of the transactions with the children and so interwoven with ... [a] pattern of conduct ... that they are part of the res gestae of the crimes charged." 183 W.Va. at 649 , 398 S.E.2d at 131. See footnote 22 This approach is certainly equally applicable in the noncriminal context of a child neglect or abuse case.

Other jurisdictions have also resolved this issue by permitting introduction of evidence regarding prior acts of abuse or neglect against children other than the one whose termination is presently being contemplated. See footnote 23 For instance, records of prior neglect cases against the parent were permitted as evidence pursuant to a statute providing for their admissibility in In re Maria Anthony, 81 Misc.2d 342, 366 N.Y.S.2d 333 (1975). In response to the parent's objection to the receipt of the prior records as evidence, the court explained that prior records of neglect or abuse will not, standing alone, determine the present condition of the parent. Id. 366 N.Y.S.2d at 335. However, pursuant to statute, proof of previous abuse or neglect is admissible on the issue of present abuse or neglect. Id.

The principle underlying the Maria Anthony decision was expressed succinctly in § 1046(a)(1) of the New York Family Court Act. The same principle, however, is equally applicable even in the absence of such a clear statute. See footnote 24 In In re S.G., 153 Vt. 466, 571 A.2d 677 (1990), for instance, the Supreme Court of Vermont held that evidence of similar prior abuse of a sibling was admissible as relevant to the nature of the home environment directly impacting the well-being of the infant in question. 571 A.2d at 681.

In S.G., the testimony of a former social worker indicating that the appellant had abused her other child four years earlier was admitted over objection in the lower court. Id. 571 A.2d at 681. The appellant argued that such evidence of a prior bad act was barred by Vermont Rule of Evidence 404(b), See footnote 25 or, in the alternative, that its prejudicial effect outweighed its probative value. The appellant's defense in S.G. had been based upon the premise that the injury to the child then under consideration, a fracture of the right tibia of a two-month old infant, was caused by an accident. The social worker's testimony was presented to counter that defense and to prove that the mother's other child had suffered an unexplained fracture to her right arm four years earlier. Id.

In holding that Vt.R.Evid. 404(b) did not preclude such evidence, the court cited its previous holding in In re R.M., 150 Vt. 59, 549 A.2d 1050 (1988), and explained that evidence of previous abuse of other children was admissible in In re R.M. because it was " 'indicative of a broad pattern of abuse and neglect generally pervasive in this household and clearly relevant to R.M.,' " Id. 571 A.2d at 680, (quoting R.M., 549 A.2d at 1056). The prior bad act evidence was also admitted in R.M. to provide insight into the home environment rather than to demonstrate that the mother acted in conformity with any particular character trait. Id. "[T]he issue in juvenile proceedings is not whether the parent did a particular act or acted in conformity with a particular character trait but instead whether the child has proper care and his or her well-being is protected." Id. 571 A.2d at 681. Permitting evidence of prior bad acts in abuse and neglect proceedings, the court held, was "unique to juvenile proceedings because of the breadth of the inquiry and focus on the child." Id.

In the present case, the appellant's propensity toward violence and emotional instability, as revealed throughout the record and particularly with regard to her relationship with her other children, is relevant to a determination of her fitness and is probative of her present ability to provide a stable and permanent home for Carlita. We fail to perceive any error by the circuit court in allowing the introduction of evidence regarding the appellant's prior acts of physical and emotional abuse.

Based upon the foregoing, we affirm the decision of the Circuit Court of Ohio County. With regard to future disposition of Carlita and her siblings, the record is unclear as to whether Carlita enjoys any continued association with her siblings, Justin, Christopher, and Daniel. In syllabus point 4 of In re James M., No. 19948 --- 185 W.Va. 648, 408 S.E.2d 400 (1991), we explained the following:

> In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child' s best interests, and if such continued association

> is in such child' s best interests, th e court should enter an appropriate order to preserve the rights of siblings to continued contact.

Consequently, we encourage the D.H.S. to work with any temporary or permanent foster families or adoption placements involved in the custody of these siblings to endeavor to facilitate the children's continued association with one another.

Affirmed.

MILLER, Chief Justice, concurring:

My colleague, Justice Workman, has authored a comprehensive and superb opinion in regard to the handling of termination of parental rights cases. Hopefully, it will become the bible not only for our circuit courts, but for all who are involved in this sensitive and difficult field.

I have in the past been critical of this Court's broadening of the use of Rule 404(b) of the West Virginia Rules of Evidence in criminal cases, as outlined in Part II of my dissent in State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123, 143 (1990). However, I join in Syllabus Point 8 of the majority opinion in this case, which states:

> "Prior acts of violence, physical abus e, or em otional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court."

In addition to the reasons set out in the majority's opinion justifying the use of Rule 404(b) evidence, I would point out that termination of parental rights cases are heard only by the judge. Consequently, there is not the same possibility of unfair prejudice as when Rule 404(b) evidence of other crimes, wrongs, or acts are paraded before the jury in a criminal case. Certainly, the penal consequences are not as severe in a parental rights termination case as in a criminal case. Therefore, the general balancing test under Rule 403 of the West Virginia Rules of Evidence, which applies to Rule 404(b) evidence, see State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989), is less strict.

Footnote: 1 We adhere to our traditional practice in domestic relations and other sensitive cases and do not use the last names of the parties. See e.g., Nancy Viola R. v. Randolph W., 178 W.Va. 710, 356 S.E.2d 464, 465 n. 1 (1987), West Virginia Dept. of Human Serv. v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985).

Footnote: 2 The Department of Human Services is now known as the Division of Human Services, and is now a part of the Department of Health and Human Resources. See

W.Va.Code § 5F-2-1(d)(2) (1990); W.Va.Code § 5F-2- 1(j) (1990); W.Va.Code § 9-2-1a (1985).

Footnote: 3 While only Carlita is the subject of this action, it is worthwhile to note that both Justin and Christopher were removed from the home in 1984 based upon the appellant's abuse of Justin. In 1987, the Circuit Court of Ohio County ordered that Christopher be reintegrated into the home. By January 1990, only daytime visitation had been accomplished between the appellant and Christopher, and no overnight visitation had been scheduled. The D.H.S. contends that this lack of complete integration is due to the appellant's refusal to cooperate with the D.H.S. The appellant's fourth child, Daniel, was born with severe medical problems and was placed in a foster home to facilitate thorough medical care. Although it is not entirely clear from the record before us, it appears that Daniel was removed from the custody of his parents with their consent due to the necessity for constant medical attention. Neither Justin, Christopher, nor Daniel is involved in the present termination action.

Footnote: 4 According to the testimony of Raymond LaRue, the Wheeling Police had been summoned to the appellant's residence to investigate domestic disputes on three occasions during November 1986.

Footnote: 5 West Virginia Code § 49-6-2(b) provides as follows:
In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter. (emphasis added)
West Virginia Code § 49-6-5(c) (1988) also provides for a postdispositional improvement period as follows:
The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently terminated and the court shall require the parent to rectify the conditions upon which the determination was based. No more than one such postdispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section.
No specific guidelines or goals were included within the improvement period order entered in the present case. While the lack of specific goals in the improvement order certainly does not invalidate such order, a better practice would entail the inclusion of

distinct goals formulated by the court within the improvement period order. The family case plan and improvement period order could then be interrelated to provide a detailed guide to the achievement of the court-specified goals.

Footnote: 6 West Virginia Code § 49-6D-3(a) (1986), in pertinent part, provides as follows:
(a) Within the limits of funds available, the department of human services shall develop a family case plan for every family wherein a person has been referred to the department after being allowed an improvement period under the provisions of subsection (b), section two, or subsection (c), section five [§ 49-6-2(b) or § 49-6-5(c)], article six of this chapter, and for each family referred to the department for supervision and treatment following a determination by a court that a parent, guardian, or custodian in such family has abused or neglected a child.... The family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems. Every family case plan prepared by the department shall contain the following:
(1) A listing of specific, measurable, realistic goals to be achieved;
(2) An arrangement of goals into an order of priority;
(3) A listing of the problems that will be addressed by each goal;
(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;
(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;
(6) A list of the services which will be provided;
(7) Time targets for the achievement of goals or portions of goals;
(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and
(9) A designation of when and how often tasks will be performed.

Footnote: 7 The November 20, 1987, plan provided the following criteria for goal assessment:
1) Justina and Robert should go to Northern Panhandle Behavioral Health Center 2-3 times per month to learn positive parenting skills 90% of scheduled visits with therapist.
2) Justina and Robert be ready for home visits and have positive interactions with Carlita 95% of the time.
3) Justina and Robert prepare appropriate meals for Carlita.
4) Justina and Robert follow suggestions of West Virginia Department of Human Services' workers for parenting skills and proper meals 90% of the time.
The August 25, 1988, plan provided the following criteria for goal assessment:
1. Justina needs to attend 95% of her Anger Control Group meetings and only miss if medically proven by a doctor's note.

2. Justina and Robert go to therapy sessions with Mary Lou Petrisko 95% of the time. 3. Justina & Robert will follow through with homemaking and parenting suggestions given by WV Depart. of Human Ser. workers and go to scheduled Outreach meetings 95% of the time.
4. Justina & Robert will be up waiting for Christopher, prepare meals & follow suggestions of WV Depart. of Human Services staff 95% of the time. 5. Court will reunite family or terminate parental rights after 6 months on intervention.

Footnote: 8 It appears that Dr. Maceiko submitted his psychological reports on behalf of the D.H.S. and that Dr. Hewett submitted his report on behalf of the appellant and Robert B.

Footnote: 9 The appellant was apparently present prior to the beginning of the proceedings on June 17, 1988, but left before the proceedings actually began. Based upon her absence, the hearing was continued to July 26, 1988. Even at that July 26, 1988, hearing, the appellant did not appear, and the court proceeded in her absence.

Footnote: 10 The appellant had been prescribed an anger control medication by a Dr. Mendoza at Northern Panhandle Behavioral Health Center, but the appellant refused to take the medication on a consistent basis.

Footnote: 11 This finding by the lower court is specifically required by W.Va.Code § 49-6-5(a)(6) as a prerequisite to termination of parental rights.

Footnote: 12 The Goldstein, et al. presentation has previously been cited by this Court in other cases involving child matters. See David M. v. Margaret M., 182 W.Va. 57, 62, 385 S.E.2d 912, 917 n. 10 (1989); J.E.I. v. L.M.I., 173 W.Va. 194, 199-200 n. 2, 314 S.E.2d 67, 73 n. 2 (1984).

Footnote: 13 Although the appellant presents these interrelated issues as two separate assignments of error, we have combined them for purposes of discussion on appeal.

Footnote: 14 With regard to the appointment of attorneys to represent children in such actions, it is a better practice for courts to attempt to appoint attorneys who have demonstrated interest in such sensitive matters and who will be committed to achieving a result which will serve the best interest of the child. Furthermore, effectively representing children in abuse and neglect cases frequently requires far more than just legal ability. As courts have increasingly been thrust into the arena of social issues, it has become clear that lawyers and judges must deal with the human dimension of such problems. This requires the willingness and ability to communicate with parents, social workers, physicians, psychiatrists, psychologists and counselors, teachers, and--most importantly--children.

Footnote: 15 At the outset of an improvement period, the attorneys for the parents should apprise the court if their clients foresee any obstacles to compliance with the plan of

improvement, and the court should make any directives necessary to obliterate such obstacles. For instance, if the parent indicates he is unable to attend a specified program due to lack of transportation or conflict with hours of employment, the circuit court can direct the D.H.S. to assist with transportation or arrange a program which does not conflict with the parent's work schedule. The court bears an obligation, at the initiation of an improvement period, to facilitate communication amongst the parties so that there is no mistake as to what is expected of the parents and the department. In addition, the court should ascertain that someone is communicating with the children to assure they have some grasp of why their lives have turned so topsy-turvy, and to assure they are receiving counselling, tutoring, or any other services needed to provide them with as much stability and continuity as possible under the circumstances.

Footnote: 16 As mentioned earlier, appellant has indeed been prescribed an anger control medication, but refused to take it on a consistent basis.

Footnote: 17 The appellant also contends that the D.H.S. failed to make a reasonable effort to provide the appellant with a thorough understanding of the legal status of each of her children. It is clear, however, that the appellant did have legal representation throughout these proceedings.

Footnote: 18 In the present case, Ms. Laudermilt testified that she suggested such a reassignment, but that her supervisor declined to effect it, stating that he knew the appellant and that she would not change. Furthermore, the reality of the situation is that some counties in this state have almost no child protective services. According to the May 1991 Child Protective Services Report prepared by the Program Specialist for Child Protective Services in the Office of Social Services for Secretary Miller and Commissioner Panepinto, Region I employs 55 child protective service workers for the 16 county region, Region II employs 41 child protective service workers for the 11 county region, Region III employs 16 child protective service workers for the 15 county region, and Region IV employs 35 child protective service workers for the 13 county region. In a letter dated January 14, 1991, to personnel working in the child protective services field, Harry Burgess, Director, Office of Social Services of the West Virginia Department of Health and Human Resources explained that interim measures for case prioritization had been established in response to what he termed "the crises in child protective services." The interim measures were effectuated in response to a steady increase in referrals of child abuse and neglect cases and a corresponding reduction in staff which has occurred over the past ten years.

The interim measures recognized that the department had inadequate resources to adequately meet the needs of its clients and established a system for setting priorities as to which child abuse and neglect reports would be fully investigated and followed up. According to a memorandum dated July 5, 1991, to the Social Service Management Team, Kathie King, Program Specialist in Child Protective Services, indicated that the number of pending referrals is climbing (3,724 as of April 1991). Many of that backlog

have not yet been investigated. The department is currently receiving approximately 993 reports of suspected child abuse and neglect each month.

Footnote: 19 West Virginia Code § 49-6-5(b) provides the criteria for determining when there is " 'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected.' " Pursuant to § 49- 6-5(b)(6), such conditions shall be deemed to exist when "[t]he abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills."

Footnote: 20 Dr. Maceiko prepared a three-page report on April 10, 1986, and a two-page report on October 5, 1988. Dr. Hewitt examined the appellant on June 24, 1986, July 10, 1986, and December 3, 1987. His entire report consists of thirty-five pages.

Footnote: 21 Pursuant to W.Va.R.Evid. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." However, W.Va.R.Evid. 404(b) specifically allows evidence of prior bad acts admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." While W.Va.R.Evid. 404(b) has not typically been employed in the civil context, several jurisdictions, as subsequently discussed in detail in this section, have encountered situations in which parents or guardians accused of abuse or neglect have raised Rule 404(b) as an issue. Those courts have resolved the issue by permitting evidence of other crimes, wrongs, or acts to be admissible for other purposes as referred to in Rule 404(b) "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." A rather permissive approach has been taken toward evidence challenged under Rule 404(b) within the child abuse or neglect context.

Footnote: 22 As explained by the Fourth Circuit in United States v. Masters, 622 F.2d 83 (4th Cir.1980), past bad acts may be admissible to provide a full presentation of a case, to provide a setting or environment, or to provide an immediate context or "res gestae," where the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." Id. at 86 (citing United States v. Beechum, 582 F.2d 898, 912 n. 15 (5th Cir.1978), cert denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979)).

Footnote: 23 See e.g. S.C. v. State, 471 So.2d 1326 (Fla.Dist.Ct.App.1985) (parent's past conduct with respect to other children relevant); In re Schmeltzer, 175 Mich.App. 666, 438 N.W.2d 866 (1989) (manner of parental treatment of one child probative of how parent will treat another); In re S., 66 Misc.2d 683, 322 N.Y.S.2d 170 (1971) (evidence of previous child abuse case properly admitted in proceeding initiated to remove a

newborn from its parents); In re A.M.A., 439 N.W.2d 535 (N.D.1989) (evidence of prior abuse may be considered on whether abuse will continue); In re R.W.B., 241 N.W.2d 546 (N.D.1976) (evidence of prior termination proceedings relating to earlier child of same parents relevant and admissible).

Footnote: 24 By way of comparison, in regard to other children of the accused parent, guardian or custodian, W.Va.Code § 49-6-3(a) (1986) provides the following, in pertinent part: In a case where there is more than one child in the home, the petition shall so state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of such child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonably available alternatives to removal.
This section was amended in 1988 without change to the portion quoted above. Clearly, the tenor of this statute is that abuse or neglect of one child may indicate similar conduct toward another child.

Footnote: 25 West Virginia Rule of Evidence 404(b), Federal Rule of Evidence 404(b) and Vermont Rule of Evidence 404(b) are virtually identical.

181 W. Va. 383, 382 S.E.2d 577

Supreme Court of Appeals of West Virginia
In re CAROLYN JEAN T. and Terry Jo T.
No. 18870
July 14, 1989

SYLLABUS BY THE COURT

1. "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in nature and wisdom, will be respected unless they have been transferred or abandoned." Syllabus Point 8, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

2. " 'In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.' Syllabus Point 1, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus Point 1, State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987).

3. " 'Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with child care.' Syllabus Point 5, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus Point 1, State v. C.N.S., 173 W.Va. 651, 319 S.E.2d 775 (1984).

Annette Fantasia, Parkersburg, for Carolyn Jean T. and Terry Jo T., appellees.

Don Hall, Charleston, Joseph T. Santer, Robert W. Friend, Parkersburg, for Kathryn T., appellant.

PER CURIAM:
Kathryn T. See footnote 1 appeals from the final order of the Circuit Court of Wood County which terminated her parental rights to her infant children, Carolyn Jean T. and Terry Jo T. She asserts that there is a reasonable likelihood that the alleged conditions of neglect or abuse can be substantially corrected, that she was denied the full improvement period set by the court, that the circuit court erred in refusing to grant an additional

improvement period, and that the "Improvement Period Plan" (Plan) did not meet statutory requirements.
Kathryn T. is the natural parent of Carolyn Jean T., born September 17, 1985, and Terry Jo T., born July 7, 1984. See footnote 2 A child abuse petition was filed on April 7, 1986, after an x-ray showed that Carolyn Jean, then six and one- half months old, had sustained a skull fracture and bruises upon her face and body. The petition also alleged that both children were neglected. The West Virginia Department of Human Services (DHS) requested temporary custody of both children until Kathryn's parental rights could be permanently terminated and the children placed for adoption.

The circuit court granted DHS temporary custody and, after an adjudicatory hearing held on June 3, 1986, found that Kathryn inflicted or allowed the infliction of physical abuse upon Carolyn Jean, that Kathryn's explanation of the injuries was inconsistent with medical testimony, and that both children were neglected within the meaning of W.Va.Code, 49-1-3. On August 5, 1986, during a dispositional hearing, the circuit court granted Kathryn an improvement period lasting for a term of twelve months. The circuit court incorporated in its order a Plan agreed to and signed by the parties, their counsel, and counsel for the infant children.

The court closely monitored the improvement period, setting several hearings to determine what progress had been made. The improvement period was extended for an additional six months, with review scheduled for February 19, 1988.

The matter came on to be heard on January 28, 1988, by Special Judge George M. Scott. The circuit court found that there was no reasonable likelihood of substantial improvement in the reasonably foreseeable future as demonstrated by the "terrible lapse of time" which had transpired between the taking of the children and the final hearing and the "unfortunately weak response that has been forthcoming."

The adjudication of abuse and neglect is not contested in this appeal. Disposition of neglected or abused children proceeds, as this Court explained in Syllabus Point 8 of In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973):

> "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in nature and wisdom, will be respected unless they have been transferred or abandoned."

We described the constitutional dimension of the parental right in Syllabus Point 1 of State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987):

> " 'In the law concerning cu stody of m inor children, no rule is m ore firmly established than that the right of a natural parent to the custody of his or her infant child is param ount to that of any other person; it is a fundam ental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitu tions.' Syllabus Point 1, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)."

There are limits to parental rights. We stated in Syllabus Point 1 of State v. C.N.S., 173 W.Va. 651, 319 S.E.2d 775 (1984):

> " 'Though constitutionally protected, the ri ght of the natural parent to the custody of m inor children is not ab solute and it m ay be lim ited or terminated by the State, as parens patriae, if the pa rent is proved unfit to be entrusted with child care.' Syllabus Point 5, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)."

W.Va.Code, 49-6-5(c) (1984), provides that "[t]he court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months.... At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section."

The circuit court, at the close of the dispositional hearing, granted Kathryn a twelve-month improvement period. She contends that she substantially complied with the terms and conditions of the improvement period, although the Plan did not meet the requirements of W.Va.Code, 49-6D-3 (1984). See footnote 3 The Plan set out nine terms which had to be completed before the children might be returned to their mother for a trial period. The goal of the Plan was to provide a safe, stable home for the children. The terms included obtaining a permanent residence with adequate facilities, seeking employment, attending parenting classes, obtaining psychological treatment if suggested by psychological evaluation, applying for Housing and Urban Development (HUD) housing, and generally cooperating with DHS. The Plan also set terms to be implemented after the children were returned to their mother.

The Plan in this case, while not called a "family case plan," substantially met the requirements of W.Va.Code, 49-6D-3, by "clearly setting forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or

lessening these problems." State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M., 177 W.Va. at 693, 356 S.E.2d at 186.

The Plan's main deficiency, i.e., no indicated order of priority for the terms of the Plan, underlies Kathryn's argument that she substantially complied with the Plan. See footnote 4 Kathryn points out, and DHS's periodic reports to the court substantiate, that she complied with some of the terms of the Plan. DHS contends that while she completed parenting classes and fully cooperated with DHS by allowing visits in her home, she did not have a genuine desire to change herself, as evidenced by the lack of cooperation with counselors at the Western District Guidance Center.

In this case, any written deficiencies were remedied by the circuit court's clear articulation to Kathryn of its priority that in order to retain custody of her children she would be required to undergo counseling to appreciate the seriousness of the threat to her children's safety posed by the original conditions of abuse and neglect. The circuit court assisted Kathryn in obtaining counseling, held hearings every few months to monitor her progress, and on September 1, 1987, extended the improvement period an additional six months to give her an opportunity to continue with the counseling. The circuit court saw practically no effort by Kathryn to improve, but afforded her a last opportunity to demonstrate her compliance with the terms of the improvement period.

At the final dispositional hearing, the testimony as to her counseling did not show sufficient progress. The circuit court concluded that Kathryn was still markedly lacking in awareness of her responsibility to provide for the needs of her children and that, as a result, there was no reasonable likelihood of substantial improvement in the foreseeable future. We find that Kathryn had a meaningful improvement period and that the record supports the circuit court's termination of her parental rights.

We find no merit in Kathryn's argument that she was improperly denied a full improvement period because the final dispositional hearing was held three weeks early. This argument ignores the fact that Kathryn received not only the full twelve-month improvement period, but an additional five-and-one-half month extension. For this reason, we also find no error in the denial of an additional improvement period.

For the foregoing reasons, we affirm the order of the Circuit Court of Wood County terminating Kathryn T.'s parental rights in her children Carolyn Jean T. and Terry Jo T.

Affirmed.

Footnote: 1 Following our past practice in juvenile and domestic relations cases which involve sensitive facts, we do not utilize the last names of the parties. State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987); Nancy Viola

R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987); West Virginia Dep't of Human Serv. v. La Rea Ann C.L., 175 W.Va. 330 , 332 S.E.2d 632 (1985).

Footnote: 2 This proceeding did not address or resolve any paternal parental rights.

Footnote: 3 W.Va.Code, 49-6D-3 (1984), provides, in pertinent part:
"Every family case plan prepared by the department shall contain the following:
"(1) A listing of specific, measurable, realistic goals to be achieved;
"(2) An arrangement of goals into an order of priority;
"(3) A listing of the problems that will be addressed by each goal;
"(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;
"(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;
"(6) A list of the services which will be provided;
"(7) Time targets for the achievement of goals or portions of goals;
"(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and
"(9) A designation of when and how often tasks will be performed."

Footnote: 4 Certain terms of the Plan give the appearance of not meeting the "realistic" standard in W.Va.Code, 49-6D-3. For example, Kathryn was not eligible for HUD benefits while her children were not in her custody. Yet, to show she was progressing towards providing a stable home and complying with the Plan, Kathryn had to apply for HUD benefits once a month.

196 W. Va. 239, 470 S.E.2d 193

Supreme Court Of Appeals Of West Virginia

DIANA LYNN NEE SPEARS CARTER, Plaintiff Below, Appellant

v.

LONNIE ELMER CARTER, Defendant Below, Appellee

No. 22904

Submitted: January 10, 1996

Filed: March 21, 1996

SYLLABUS BY THE COURT

1. In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.

2. W. Va. Code 48-2-15 (1993) grants the circuit court in a divorce proceeding plenary power to order and enforce a noncustodial parent's visitation rights with his or her children. W. Va. Code 48-2-15(b)(1)(1993), the subsection specifically dealing with visitation, provides, in pertinent part:

The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent. . . .

3. Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

4. If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "credible evidence" (Mary D. v. Watt, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best

interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

5. In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.

Andrew A. Raptis, Esq., Charleston, West Virginia, Attorney for the Appellant

Thomas E. Esposito, Esq., Esposito & Esposito, Logan, West Virginia, Attorney for the Appellee

Recht, J.:
Diana Lynn Spears Carter appeals the order of the Circuit Court of Logan County finding her in contempt for failing to permit agreed visitation by Lonnie Elmer Carter, her former husband, with their minor children and ordering unsupervised overnight visitation for the children with Mr. Carter. On appeal, Ms. Carter maintains that supervised visitation should be continued because Mr. Carter abused his daughter and failed to establish a meaningful relationship with his daughter during supervised visitation. The parties have a daughter and a son, who were four and one and a half years old, respectively, when the parties' divorce was filed on August 8, 1990. Mr. Carter maintains that Ms. Carter lacks justification for insisting on supervised visitation and refusing to allow overnight visitation with his children. Based on our examination of the record, we find no error with the circuit court's finding that Ms. Carter's denial of unsupervised visitation was wrong and therefore, affirm the civil contempt order. Although we uphold the circuit court's civil contempt order, because of the lapse of about two years since Mr. Carter's last known visit with his children, he needs to reestablish his relationship with his children; accordingly, we remand this case to the circuit court to hold a hearing to determine the most effective way to enforce its previous order so as to address the children's trauma concerning the unsupervised overnight visitation and to protect the physical and emotional well being of the children.

I.
FACTUAL BACKGROUND

After almost five years of marriage Mr. and Ms. Carter were divorced on August 8, 1990 on the grounds of irreconcilable differences. The divorce order provided for a further hearing on visitation after evaluations of the daughter, then four and a half (4 1/2) years old, and the parties were completed. The visitation determination was delayed because of Ms. Carter's allegations that Mr. Carter had abused their daughter. In an order entered on March 30, 1992, the circuit court found that Ms. Carter "failed to prove by a preponderance of the evidence, that the Defendant had committed . . . those acts of sexual abuse and child abuse." See footnote 1 The March 30, 1992 order also found that the "children would not be harmed by

supervised visitation" and ordered supervised visitation. By order entered October 30, 1992, the supervised visitation was to be held at the home of Mr. and Mrs. Russell Spears, the children's maternal grandparents. The supervised visitation arrangement was continued in 1993 by order entered June 10, 1993. Based on an October 7, 1993 hearing before the family law master (the order was entered May 23, 1994), the supervised visitation was to continue for six months until April 1, 1994, and thereafter, Mr. Carter was to have unsupervised overnight visitation. The May 23, 1994 order provided that "prior to April 1, 1994, either party can file a motion before the Court if they have serious concerns that the children are not prepared for such overnight visitation." In the May 23, 1994 order, both parties expressly waived their rights to appeal the family law master's recommendations, and neither filed a motion to alter the implementation of the overnight visitation schedule.

According to Mr. Spears, Ms. Carter's father and the supervisor of the visitations, at the last visitation in February or March 1994, Mr. Carter said for the next visit "he'd come and get them (the children) whether they kicked and screamed or whatever, that he would take them." See footnote 2 Mr. Spears also testified that he heard Mr. Carter tell his daughter "that he'd have it out of her and in 30 days she'd be a different girl," which upset the little girl. Because of this visit, Mr. Spears testified that he did not want Mr. Carter visiting in his house. Ms. Carter testified that "both of the children were scared" and she did not know if either was ready for overnight visitation or would ever be ready for such visitation.

After the April 1, 1994 overnight visitation deadline passed without any additional visitation See footnote 3, on May 16, 1994, Mr. Carter filed his first contempt petition. By order entered September 8, 1994, the circuit court found Ms. Carter in contempt because she had not shown good cause for violating the visitation order. The circuit court ordered overnight visitation and fined Ms. Carter $300, which she paid. On the ordered overnight visitation of September 2, 1994, Ms. Carter testified that although she was attempting to comply with the court's visitation order by preparing to take the children to the visitation, she did not take the children to the Spears' house where Mr. Carter was supposed to pick up the children. Mr. Carter testified that after he waited about one and a half (1 1/2) hours at the Spears' house, he went to Ms. Carter's house but was told by a neighbor she was not there. At the next scheduled visitation, Mr. Carter again went to the Spears' house, where he waited about an hour to no avail.

Ms. Carter testified that shortly before the scheduled visitation, she ran a number of errands and that it must have been a few minutes before the visitation time when Mr. Carter came to her house. Ms. Carter said that when she saw Mr. Carter's car outside her house, she "got scared and I got the babies and got down at the bottom of the bed." Ms. Carter had no explanation why she was scared except

that Mr. Carter was not supposed to come to her house. See footnote 4 Ms. Carter alleged that several persons told her that Mr. Carter had a gun with him when he came for the visitation; however, Ms. Carter testified that she did not see any weapon and did not even see Mr. Carter. Ms. Carter provided no information concerning her failure to permit the second post contempt petition visitation of September 16, 1994.

At a hearing (date unknown), LaRee D. Naviaux, Ph.D., a psychologist who treated the daughter from 1990 until early 1994, testified that the daughter had been traumatized. See footnote 5 However, the record indicates that Dr. Naviaux was not treating the daughter at the time of the cancelled September 1994 visits and had not treated her since about February 1994. See footnote 6

After the hearing, the circuit court, by order entered on December 15, 1994, found that overnight visitation with Mr. Carter should occur and that Ms. Carter was to pay reasonable attorneys' fees and costs associated with the contempt proceeding. The circuit court noted that Mr. Carter had participated in the supervised visitation and that Ms. Carter had "continually failed to deliver the children on any regular basis citing various illnesses, mechanical difficulties and confusion" to avoid the court ordered visitation. Ms. Carter appealed to this Court and a stay of the circuit court's order was entered by this Court on November 4, 1994.

II.
STANDARD OF REVIEW

In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review. See Syl. pt. 1, Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995) and Syl. pt. 1, Dept. of Health and Human Services v. Morris, ___ W. Va. ___, ___ S.E.2d ___ (No. 22916 Dec. 15, 1996)(applying a similar three-pronged standard of review to findings made by a family law master that were adopted by a circuit court); Syl. pt. 4, Burgess v. Porterfield, ___ W. Va. ___, ___ S.E.2d. ___ (No. 22956 Mar. 11, 1996)(applying a similar three-pronged standard of review in a civil action).

We have long applied an abuse of discretion standard to questions relating to the maintenance and custody of the children. Syllabus, Nichols v. Nichols, 160 W. Va. 514, 236 S.E.2d 36 (1977), states:

> Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its

> action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused.

In accord Syl. pt. 2, Wood v. Wood, 190 W. Va. 445, 438 S.E.2d 788 (1993); Syl. pt. 8, Wyant v. Wyant, 184 W. Va. 434, 400 S.E.2d 869 (1990); Syl., Luff v. Luff, 174 W. Va. 734, 329 S.E.2d 100 (1985).

Because the central issue of the case sub judice concerns a civil contempt order requiring unsupervised visitation by the children's father, we review the circuit court's decision under an abuse of discretion standard.

III.
DISCUSSION

W. Va. Code 48-2-15 (1993) grants the circuit court in a divorce proceeding plenary power to order and enforce a noncustodial parent's visitation rights with his or her children. W. Va. Code 48-2-15(b)(1)(1993), the subsection specifically dealing with visitation, provides, in pertinent part:

> The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent. . . .

See Syl., Belinda Kay C. v. John David C., 193 W. Va. 196, 455 S.E.2d 565 (1995)(per curiam)(quoting W. Va. Code 48-2-15(b)(1), in part).

In Mary D. v. Watt, supra note 1, 190 W. Va. at 348, 438 S.E.2d at 528, we found W. Va. Code 48-1-15(b)(1) sufficiently broad to allow and in fact "contemplates . . . supervised visitation if there is evidence that one of the parents has sexually abused a child involved. [Footnote omitted.]" Syl. pt. 3 of Mary D. v. Watt, states:

Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Although the case sub judice, similar to Mary D. v. Watt, contains allegations of

sexual abuse, in this case, these allegations were not proven to the circuit court's satisfaction and that order was never appealed. However, thereafter the supervised visitation was ordered and it continued without significant problems for two years until February/March 1994. According to the agreed order, unless objected to, regular overnight visitation would begin on April 1, 1994. However, without following the agreed procedure for protesting the visitation order, Ms. Carter refused to allow the visitation. Ms. Carter's denial was based on the following: (1) Ms. Carter's ongoing fear of Mr. Carter because of his alleged history of sexual and child abuse; (2) stale allegations of sexual and child abuse that had previously been rejected by the circuit court; and (3) Mr. Carter's statements about preparing the children for the upcoming visitation to Mr. Spears, the supervisor of the visitation who had no knowledge of the agreed visitation changes. See footnote 7

After a hearing and a court order requiring visitation, because Ms. Carter still refused to comply, she was held in contempt again. On appeal, Ms. Carter seeks relief from this second contempt order. Given the agreed order, Ms. Carter's failure to protest timely the change in visitation, and Ms. Carter's refusal to obey an order directing her to allow regular overnight visitation, we find that the circuit court did not abuse its discretion in finding Ms. Carter in contempt and ordering visitation, and therefore, we affirm the order of the circuit court.

Recently in Belinda Kay C. v. John David C., 193 W. Va. at 199, 455 S.E.2d at 568, we discussed visitation with a noncustodial parent by stating:

> Implicit in what the Court has said in this opinion is its belief that child visitation with a noncustodial parent is a circumstance which normally will promote the welfare of a child. . . . If after a period of time there is evidence of bonding, and if the noncustodial parent demonstrates a clear ability to control the propensities which necessitated supervision then it would be appropriate for the trial court to diminish gradually the degree of supervision required with the ultimate goal of providing unsupervised visitation.

Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true. In In Interest of Carlita B., supra note 7, 185 W. Va. at 629, 408 S.E.2d at 381, we stated:

> In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the paramount and controlling factor must be the child's welfare. "[A]ll parental right in child custody matters," we have stressed, "are subordinate to the interest of the innocent child." David M. [v. Margaret M.], [182 W. Va. 57, 60,] 385 S.E.2d [912] at 916 [(1989)].

If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "credible evidence" (Mary D. v. Watt, supra note 1, 190 W. Va. at 348, 438 S.E.2d at 528) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

Although we find ample justification for the circuit court's contempt order, we are not unmindful of the passage of time and our lack of knowledge about recent events especially after our stay of the circuit court's order. In visitation as well as custody matters, we have traditionally held paramount the best interests of the child, a position from which we will not deviate. See Syl. pt. 3, Mary D. v. Watt; State ex rel. David Allen B. v. Sommerville, 194 W. Va. 86, 90, 459 S.E.2d 363, 367 (1995). In Syl. pt. 1, Holstein v. Holstein, 152 W. Va. 119, 160 S.E.2d 177 (1968), we stated:

> In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.

In accord Syl., Taylor v. Taylor, 168 W. Va. 519, 285 S.E.2d 150 (1981). Given these concerns, we find that the circuit court, rather than merely implementing its previous order requiring regular overnight visitation, should conduct a hearing to determine what arrangements are necessary, first, to assure that the children are "safe from the fear of emotional and psychological trauma which he or she may experience" (Syl. pt. 3, in part, Mary D. v. Watt), and second, to assure Mr. Carter's visitation rights with his children.

Child visitation and custody cases involve sensitive issues that must be resolved in a timely fashion in order to minimize the trauma to innocent children. See supra note 7 discussing the need for prompt resolution of child custody and visitation cases. In this case, delays continued the visitation battleground and created new

problems. Finally, after almost six years of visitation problems, the case arrived at this Court and today's decision cannot change those years. In addition to the delays, the record indicates that the custodial parent was reluctant to grant visitation and various excuses were given for the missed visitations. There are indications that the custodial parent may have attempted to sabotage the relationship between the noncustodial parent and the children. The visitation problems in this case are not unique and other jurisdictions have tried different approaches. See footnote 8 We believe it would be instructive to the bench and the bar to discuss the approaches taken by other jurisdictions.

In addition to the traditional court petition requesting a visitation order for a specific time and place, which was sought in this case, several jurisdictions have sought to discourage visitation interference by requiring family counseling, See footnote 9 mediation See footnote 10 or make up visitation time. A recent study conducted in two counties in California reported that the initial hostility between the spouses at the time of the divorce correlated with conflicting parenting patterns which in turn correlated with additional conflict in visitation and custody matters. See footnote 11 However the study found that negotiations during the divorce process helped resolve "nearly all of these disputes" and less than two (2) percent of these disputes required formal adjudication. See footnote 12 A portion of the successful negotiations in the study were stimulated by court-annexed mediation or a court-ordered evaluation. See footnote 13 Although there is substantial criticism of the use of mediation in cases in which the parties do not have equal bargaining power See footnote 14, most research indicates that mediation can reduce the initial level of conflict, which can in turn reduce the long term level of conflict.

In West Virginia, mediation is available in other civil matters, and the State Bar maintains a list of trained mediators. Although the State Bar does not currently have a list of trained domestic relations mediators See footnote 15, there are other mediators available, such as, family counseling specialists who have special training in domestic relationship mediation and are knowledgeable in the area of marriage, family and conflict reduction. See footnote 16

Although our Code does not specifically require mediation in family law matters, under W. Va. Code 48-2-15(b)(1) (1993), a circuit court or a family law master in an appropriate situation may require the parties to attempt mediation of their visitation differences. Optimally, the mediator should be mutually selected and have appropriate training. See supra note 15 for a discussion of qualifications for a mediator. When mediation is required by the circuit court or family law master, the process might follow the two-session model used by most states with mandatory mediation. In that model during the initial session, the mediator evaluates the parties' situation to determine the appropriateness of mediation (see

supra pp. 15-16 for a discussion of the lack of equal bargaining power caused by family violence) and whether the parties are willing to participate in good faith. During the initial session, the mediator usually discusses the process and the substantive issues See footnote 17 and develops a plan for dealing with the issues. During the second session the parties should try to reach an agreement. After the second session, the mediation process is evaluated by the parties and mediator and, when appropriate, terminated. Any agreement by the parties is reduced to writing and submitted to the court, for approval. Attendance and good faith participation at these sessions is generally sufficient to meet any mandatory requirement. See Christy L. Hendricks, The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview, 32 U. Louisville J.Fam.L. 491, 499-501 (1994).

Another option that a circuit court or family law master might use to encourage visitation cooperation is a make-up visitation plan. Under a make-up visitation plan, all missed or exceeded visitations are made up at a later date with the made up visitation mirroring the missed or exceeded visitation. Thus a missed holiday visitation is made up with visitation at the next holiday, or a weekend visitation stretched into a week is made up by withholding visitation for the time exceeded. See W. Va. Code 48A-5-7 (1993), repealed (1995) for a description of a make-up visitation policy. See footnote 18 The make-up visitation policy suggested is similar to programs used by other jurisdictions. See Mich. Comp. Laws Ann. 552.642 (1986); Michael G. Slaughter, Suspension of Child Support for Visitation Interference and the New Friend of the Court Acts, 3 Cooley L.R. 119, 129 (1985)(noting that the make-up visitation policy offers a circuit judge an additional option for enforcement of visitation rights, an option that does not interrupt "the flow of support to the child"); Nev. Rev. Stat. 125A.300 (1985)(additional visits to compensate for wrongful deprivation of right to visit); 750 ILCS 5/607.1(c)(3) (1994)(court may order "[m]ake up visitation of the same time period, such as weekend for weekend, holiday for holiday"); Colo. Rev. Stat. Ann. 14-10-129.5(2)(d) (1987).

When dealing with relatively minor visitation problems or when visitation problems are anticipated, a circuit court or a family law master may require family therapy or mediation See footnote 19 or may order a make-up visitation policy. Both options have shown to be successful in some cases and are easy to implement. See footnote 20 Thus the circuit court and the family law master should consider some of the above discussed approaches when resolution of a visitation dispute is not readily accomplished by traditional means. These approaches include: (1) referral to a mediator for an informal resolution; (2) referral to family counseling; (3) application of a visitation make-up policy; and (4) treatment of the matter as a criminal contempt proceeding under W. Va. Code 48-2-22 (1984). See supra note 20 for a discussion of W. Va. Code 48-2-22

(1984). We are not suggesting by this opinion that a circuit court or family law master is required to use any of these options or that these options are appropriate in every case. Certainly, if mediation is required, no sanctions should be imposed on parties who are unable, even with the help of mediation, to reach an agreement. See footnote 21

When, as in this case, the circuit court finds that a parent has committed a visitation violation and is in contempt, the circuit court has the option of requiring mediation or family counseling or imposing a make-up visitation plan, as well as the criminal contempt proceedings outlined in W. Va. Code 48-2-22 (1984).

On remand, the circuit court should consider the four options discussed in the preceding paragraph because of the intransigence of the visitation problems in this case. Although we agree that Ms. Carter violated a direct court order, the visitation problem was not solved by merely holding her in contempt. In addition, because of the stay ordered by this Court, the children may again require a brief period of supervised visitation before they are comfortable with regular unsupervised overnight visitation See footnote 22 or the children may require other arrangements to ease their trauma and to protect their physical and emotional well being.

We realize that such arrangements may further delay the overnight visitation to which Mr. Carter has a right, but the interests of the children may require such delay. If the circuit court determines that supervised visitation is necessary, the circuit court might adopt a visitation make-up policy to assure the supervised visitation occurs and that Mr. Carter's visitation rights are upheld. The circuit court might also require the parties to try to mediate their differences or attend family counseling in order to assure the interests of the children are protected. See footnote 23

Child custody and visitation cases are never easy, but the interests of the children continue to demand and, therefore, to receive special and unique attention in our judicial system. In this case, we find that the circuit court did not abuse its discretion in finding Ms. Carter in contempt; however, the immediate implementation of the two-year old order requiring unsupervised overnight visitation is an abuse of discretion. Due to the passage of time that has already occurred in this case, the circuit court, on remand, should ensure this matter receives an expedited hearing to resolve the issues raised in this opinion.

We, therefore, affirm the decision of the Circuit Court of Logan County finding Ms. Carter in contempt and remand this case for additional proceedings consistent with this opinion.

Affirmed and remanded.

Footnote: 1 *In Mary D. v. Watt, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992), we stated that "credible evidence of . . . sexual abuse allegations . . . [was] necessary for a family law master or circuit court to order supervised visitation." Because the March 30, 1992 order was not appealed to this Court, we do not address the question of whether "credible evidence" supported the order requiring supervised visitation.*

Footnote: 2 *Mr. Spears gave the following testimony concerning the February or March 1994 visitation:*
Mr. Spears: Well yes, ah, he went to the car and nothing was ever said to me, he went to the car then he come back, and he told me to tell Diana to prepare them children for visitation. That he would be after them. That he was tired of him go [sic] through court and to have them prepared so he'd be back after them on Easter Sunday.
Mr. Raptis (Ms. Carter's lawyer): What do you mean by be back after them, what do you think he meant?
Mr. Spears: Well he said he'd come and get them whether they kicked and screamed or whatever, that he would take them.
Mr. Raptis: Take them to his home?
Mr. Spears: Thats [sic] right [sic]
* * *
Mr. Raptis: Did that upset you?
Mr. Spears: Well yes [sic] it did, and I didn't think he'd do that [sic]
* * *
Mr. Raptis: Ok, but now, because of that incident, you didn't want Mr. Lonnie Carter to come back to your house?
Mr. Spears: Never [sic]

Footnote: 3 *Apparently, Ms. Carter's lawyer had personal health problems beginning on March 23, 1994 and continuing through May 1994 that caused him to remain out of his office.*

Footnote: 4 *Ms. Carter testified that both she and her children continue to fear abuse. However the record contains no direct evidence from the children concerning their relationship with their father. In State v. Edward Charles L., 183 W. Va. 641, 659, 398 S.E.2d 123, 141 (1990), we found the uncorroborated testimony of the children who were victims of sexual abuse very persuasive. See Mary Ann P. v. William R.P., Jr., ___ W. Va. ___, ___ S.E.2d ___ (No. 22959 Feb. 29, 1996)(per curiam) for examples of evidence of the children's feelings in a case involving domestic violence.*

Footnote: 5 The record indicates that the circuit court excluded Dr. Naviaux's testimony; however, Dr. Naviaux's testimony was part of the record as an avowal.

Footnote: 6 Dr. Naviaux repeated testimony previously considered by the circuit court. In addition some photographs referred to by Dr. Naviaux were incorrectly dated. Ms. Carter said, "I put the wrong date on em. [sic]"

Footnote: 7 Many of the problems in this case come from excessive delays. Supervised visitation is an extraordinary measure which should be used to safeguard a child's physical or emotional health or to assure a child's physical or emotional development. In this case, supervised visitation should have been a short term arrangement pending resolution of the abuse charges. However, it took one and a half years to determine the charges were not proven, a long time for young children not to visit their parent. After the abuse charges were dismissed, a brief transitional period of supervised visitation to ease the children into regular overnight visitation would have been appropriate. Two years of supervised visitation is not a brief transitional period. In this case, delay has hurt all the parties, but especially the children.

We have repeatedly emphasized the need for a prompt determination of matters involving custody and visitation. In In Interest of Carlita B., 185 W. Va. 613, 624, 408 S.E.2d 365, 376 (1991), we recognized the "[u]njustified procedural delays wreak havoc on a child's development, stability and security." Similarly, we have expressed our frustration at the inordinate delay in child abuse cases in In Interest of: Tiffany Marie S., ___ W. Va. ___, ___ S.E.2d ___ (No. 23198 Mar. 20, 1996). See Mary Ann P. v. William R.P., Jr., supra note 4, requiring an expedited hearing in a visitation case.

Footnote: 8 The serious problem of parental kidnapping led the federal government to enact the Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611, 94 Stat. 3569 (1980), 28 U.S.C 1738A (full faith and credit given to child custody determinations), and to ratify The Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 (see 18 U.S.C. 1204 (1993)). Subsequently the federal government enacted the International Child Abduction Act, Pub. L. 100-300, 102 Stat. 437 (1988), 42 U.S.C. 11601.

At least one state has determined that substantial interference with visitation by the custodial parent may constitute a substantial change of circumstance justifying a change in custody. See Pirrong v. Pirrong, 552 P.2d 383 (Okla. 1976) (insufficient evidence to conclude interference, but if mother continued to interfere with father's visitation, the court would approve a change of custody); Hoog v. Hoog, 460 P.2d 946 (Okla. 1969)(custodial parent's prevention of communication with noncustodial parent required change of custody).

Footnote: 9 This Court has encouraged the circuit court to consider counseling in appropriate cases. See White v. Williamson, 192 W. Va. 683, 694, 453 S.E.2d 666, 677 (1994); Belinda Kay C. v. John David C., supra; Mary Ann P. v. William R.P., Jr., supra note 4.

Footnote: 10 Mediation is a "process by which a neutral mediator. . . assists the parties in reaching a mutually acceptable agreement as to issues of child custody and visitation. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement." Kan. Stat. Ann. 23-601 (1995). The Wisconsin Code requires the mediator to "be guided by the best interest of the child and may . . . [i]nclude the counsel of any party or any appointed guardian ad litem." Wis. Stat. Ann. 767.11 (10)(West 1995).

Footnote: 11 Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social and Legal Dilemmas of Custody, 271-278 (1992) (hereinafter Maccoby).

Footnote: 12 Professors Maccoby and Mnookin estimate that without California's mediation program, about ten (10) percent of the divorces would require adjudication of custody. Maccoby, supra note 11, 272.

Footnote: 13 In 1981, California was the first state to adopt mandatory mediation in custody disputes. See Cal. Fam. Code 3170-3177 (West 1994). Similar requirements exist in Arizona (through local rules of practice), Delaware (Del. Fam. Ct. R. 16(b)(1)(1994)), Florida (Fla. Stat. 44.102(2)(b) (1994), Kentucky (Jefferson Fam. Ct. R. Prac. 612), Maine (Me. Rev. Stat. Ann. tit. 19, 752 (4) (West 1995), Nevada (Nev. Rev. Stat. 3.500 (1991), North Carolina (N.C. Gen. Stat. 50-13.1 (1995) and 7A-494 (1995)), Oregon (Or. Rev. Stat. 107.765(1)(1993), Utah (Utah Code Ann. 30-3-21 (1992)) and Wisconsin (Wis. Stat. Ann. 767.11(5)(West 1995).
Other jurisdictions allow, but do not require, mediation at the trial court's discretion. See Alaska Stat. 25.24.060 (1992); Colo. Rev. Stat. Ann. 14-10-129.5 (West 1987); 750 ILCS 5/607.1(c)(4) (1994); Iowa Code Ann. 598.41 (West 1996); Kan. Stat. Ann. 23-602 (1995); La. Rev. Stat. Ann. 9:351(a) (West 1996); Minn. Stat. Ann. 518.619 (West 1996); R.I. Gen. Laws 15-5-29 (1988); Wash. Rev. Code Ann. 26.09.015 (West 1996); Nev. R. Prac. 8th Jud. Dist. Ct. 5.70(a).

Footnote: 14 See Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impart of Informal Dispute Resolution on Women, 7 Harv. Women's L.J. 57 (1984); Charolette Germane et al., Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence, 1 Berkeley Women's L.J. 175 (1985); Arlene B. Huber, Children at Risk in the

Politics of Child Custody Suits: Acknowledging Their Needs for Nurture, 32 U. Louisville J.Fam.L. 33 (1994).

Footnote: 15 Most jurisdictions require a mediator to have at least a college degree with certified mediation training. Some of the most stringent requirements include specialized training in domestic violence (N. H. Rev. Stat. Ann. 328-C:5 (1992)), a license in psychology, social work, marriage and family therapy or law plus forty hours of mediation training (Utah Code Ann. 30-3-27 (1992) and N. C. Gen. Stat. 7a-494 (1989)), or a master degree in a behavioral science related to marriage and family and two years experience in counseling or psychotherapy (Cal. Fam. Code 3164 (West 1993)).

Footnote: 16 According to the Administrative Office of this Court, a parental education and mediation pilot project on custody and visitation is being planned for Family Law Master Region 17, which includes Berkeley, Jefferson and Morgan Counties. It is anticipated that the pilot project will be operational later this year. We note that at this time, no expansion into Logan County, where the parties in this case live, is planned.
Planning on the pilot project calls for a three part program emphasizing conflict reduction in divorce cases involving children through parental education and mediation. In the project, all divorcing parents would be required to attend parental education classes designed to focus on the special needs of children in the divorce process. If the parents are unable to reach an agreement concerning custody and visitation, mediation would be the next step for appropriately situated parents. If mediation does not produce an agreement or if mediation is inappropriate, an independent evaluation is made and the evaluation is submitted to the family law master.

Footnote: 17 The Cal. Fam. Code 20038 (West 1994) (formerly Cal. Civ. Code 4788) notes that at the initial meeting mediator may also discuss "the effect of separation and dissolution on children and parents, the developmental and emotional needs of children in those circumstances, time sharing considerations and various options concerning legal and physical custody of children, [and] the effect of exposure to domestic violence. . . ."

Footnote: 18 W. Va. Code 48A-5-7(c) and (d) (1993), repealed (1995), provided:
(c) Each family law master may formulate a visitation adjustment policy which may be implemented by the family law master after it is approved by the chief judge of the circuit. Such policy shall be applied to the following visitation violations:
(1) Where a noncustodial parent has been wrongfully denied visitation; or

(2) Where a custodial parent has had his or her right to custody infringed upon by the actions of a noncustodial parent who has abused or exceeded his or her right of visitation.
(d) A visitation adjustment policy formulated and approved under the provisions of this section shall include all of the following:
(1) An adjustment of visitation shall be applied of the same type and duration as the visitation that was denied by the custodial parent or exceeded by the noncustodial parent, including, but not limited to, weekend visitation for weekend visitation, holiday visitation for holiday visitation, weekday visitation for weekday visitation and summer visitation for summer visitation.
(2) An adjustment of visitation shall be scheduled to occur within thirteen months after the visitation violation occurred.
(3) The time of the visitation adjustment shall be chosen by the parent whose right of visitation or custody was violated.

Footnote: 19 Although the studies conducted by Professors Maccoby and Mnookin indicate that mediation is effective at reducing the initial level of parental conflict, nothing in their research suggests that mediation is limited to the initial stage. Maccoby, supra note 11. Even in a situation, such as the present case, involving a long term dispute, we do not discount that mediation might help these parents focus on their children's best interests. See Jessica Pearson & Jean Anhalt, Enforcing Visitation Rights, 33 Judges' J. 3, 39 (1994) (hereinafter Pearson)(discussing five state programs using mediation in visitation disputes, which resulted in some improvement for about half of the parents who previously had rare or no visitation before mediation; however, there was a decline in visitation after mediation for about half the parents exercising regular visitation). The record indicates that both Mr. and Ms. Carter are interested in their children and their children's well being, and therefore, if appropriate, the circuit court might consider whether mediation offers a viable option. We are not suggesting that on remand the circuit court require the Carters to attend mediation; rather, we are offering the option for the circuit court's consideration.

Footnote: 20 There is a correlation between child support and visitation. As a circuit judge the most frequently cited reason for nonpayment of child support that I heard was a lack of visitation with the children. Social science researchers have documented the interconnection between child support and visitation. See Pearson, supra note 19, 41. Although practically connected, the two issues are generally legally separated and considered. However, some courts link visitation and the payment of support to encourage the custodial parent to permit and encourage visitation. See Chazen v. Chazen, 107 Mich. App. 485, 309 N.W.2d 612 (1981)(per curiam)(allows suspension of child support payments unless such suspension adversely affects the children); Barker v. Barker, 366 Mich. 624, 115

N.W.2d 367 (1962)(termination of child support allowed because mother could adequately provide for the children).

Most jurisdictions have rejected this linkage as repugnant to the children's interests and have considered these issues separately. See Uniform Reciprocal Child Support Act, 42 U.S.C. 651 (1984)(intentional interference with visitation is not a defense for nonpayment of support); In re Marriage of Harper, 235 Mont. 41, 764 P.2d 1283 (1986)(child support cannot be conditioned on non-interference with visitation); County of Hennepin on Behalf of Johnson v. Boyle, 450 N.W.2d 187 (Minn. App. 1990)(interference with visitation not a factor in a modification of child support proceeding); Cuccia v. Cuccia, 773 S.W.2d 928 (Tenn. App. 1989); Syl. pt. 1, Wood v. Wood, 184 W. Va. 744, 403 S.E.2d 761 (1991) (per curiam) and Syl. pt. 1, Henderson v. Henderson, 183 W. Va. 627, 397 S.E.2d 916 (1990) (per curiam)(child support guidelines must be used to determine the amount of child support and the reason(s) for any deviation from the guidelines must set forth in writing).

Other jurisdictions have recognized the tort of interference with visitation. See Ruffalo v. United States, 590 F.Supp. 706 (W.D.Mo. 1984)(federal witness protection program interfered with mother's visitation rights); Sheltra v. Smith, 136 Vt. 472, 392 A.2d 431 (1978)(claim for intentional infliction of emotional distress allowed for a noncustodial mother who suffered distress because she was unable to visit or communicate with her child); but see, Hixon v. Buchberger, 306 Md. 72, 507 A.2d 607 (1986); Polittee v. Polittee, 727 S.W.2d 198, 201 (Mo. App. 1987)("Disarmament is needed to limit post-marital warfare, not additional armament to increase it"). Because the resolution of the case sub judice does not require us to address whether this Court would recognize such a tort, we decline to address that question in this context.

Some jurisdictions have criminalized intentional interference with visitation. See Alaska Stat. 11.51.125 (Michie 1978); Ark. Code Ann. 5-26.501 (1993); Mont. Code Ann. 45-5-631 (1995). Others, including West Virginia (W. Va. Code 61-2-14d (1984)), have incorporated intentional interference with visitation rights within the criminalized interference with custody rights' statutes. See Cal. Penal Code 278.5 (West 1996); Colo. Rev. Stat. Ann. 14-10-129.5 (West 1987); D.C. Code Ann. 16-1022 (1989); Ga. Code Ann. 16-5-45 (Michie 1987); Idaho Code 18-4506 (1995); Utah Code Ann. 76-5-303 (1995). W. Va. Code 61-2-14d (1984) criminalizes the concealment or removal of a minor child from his or her custodian or from the person entitled to visitation. Subsections (a) and (b) of the W. Va. Code 61-2-14d (1984) state:

(a) Any person who conceals, takes or removes a minor child in violation of any court order and with the intent to deprive another person of lawful custody or visitation rights shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, or in the discretion of the court, shall be imprisoned in the county jail not more than one year or fined not more than one thousand dollars, or both fined and imprisoned.

(b) Any person who violates this section and in so doing removes the minor child from this State or conceals the minor child in another state shall be guilty of a felony, and, upon conviction there, shall be imprisoned in the penitentiary not less than one nor more than five years or fined not more than one thousand dollars, or both fined and imprisoned.

A criminal contempt proceeding (the contempt proceeding in this case is civil), is available to compel a person to follow a circuit court's order in a domestic relations matter. W. Va. Code 48-2-22 (1984) allows the circuit court to consider an allegation of "criminal contempt" and permits, upon proof thereof, a commitment of "such person to the county jail for a determinate period not to exceed six months." W. Va. 48-2-22(a) (1984) Subsection (b) allows consideration of an allegation of "criminal contempt" as civil contempt and permits a "contemnor a reasonable time and method whereby he may purge himself of contempt." Failure or refusal to purge the contempt is punishable by confinement in "the county jail for an indeterminate period not to exceed six months or until such time as the contemnor has purged himself, whichever shall first occur." W. Va. 48-2-22(b) (1984). Subsection (e) allows the circuit court to "enter an order to attach forthwith the body of, and take into custody, any person who refuses or fails to respond to the lawful process of the court or to comply with an order of the court." W. Va. 48-2-22 (e) (1984). Subsections (c) and (d) address the failure of a defendant "to pay alimony, child support or separate maintenance."

Footnote: 21 This Court is mindful that the resources and costs necessary to implement either the mediation or the family counseling options are scarce. Until the Legislature would speak to these areas, of necessity, all costs must be assessed against one or both of the parties, in the discretion of the circuit judge or the recommendation of the family law master.

Footnote: 22 Professors Maccoby and Mnookin noted that generally when a father initially had only daytime visits, with no overnight visits, the contact between the father and his child declined over time. The professors note that "this arrangement [only daytime visits] proved quite unstable[, and]. . . it often evolved either to no regular visitation at all, or (less commonly) to overnight visitation." Maccoby, supra note 11, 274. See Maccoby, id., 170-77 noting that the number of overnight visitations between parents and children did not decline over their three-year study.

Footnote: 23 In this case, no guardian ad litem was appointed to represent the interests of the children. We suggest that when a case involves the unrepresented interests of a child, such as this case, the circuit court appoint a guardian ad litem to assure protection of the children's interest. See Rule 17 (c) (1978) of the W.Va.R.Civ.P; In the Matter of Lindsey C., ___ W. Va. ___, ___ S.E.2d ___ (No. 23065 Dec. 14, 1995) (requiring appointment of a guardian ad litem for a parent

in an abuse and neglect proceeding who was involuntarily hospitalized for mental illness).

228 W. Va. 89, 717 S.E.2d 873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2011 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35659

IN RE: CECIL T.

Appeal from the Circuit Court of Logan County
Honorable Eric O'Briant, Judge
Civil Action No. 09-JA-21

REVERSED AND REMANDED

Submitted: January 12, 2011
Filed: March 10, 2011

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JUSTICE MCHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "A biological parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses." Syl. Pt. 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970).

3. When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

4. "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

5. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the

health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

6. The eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

McHugh, Justice:

This matter involves the petition for appeal of Brett and Susan B.[1] [hereinafter "Appellants"] of the January 29, 2010, order of the Circuit Court of Logan County, as intervenors[2] and foster parents in the underlying abuse and neglect proceeding regarding the infant Cecil T. II [hereinafter "Cecil T."].[3] In that order, the circuit court denied the motion to terminate the parental rights of Cecil T. I [hereinafter "father" or "Appellee"] made by the West Virginia Department of Health and Human Resources [hereinafter "DHHR"], in which Appellants and the guardian ad litem of Cecil T. had joined. Appellants maintain that the lower court erred by not promoting the best interests of Cecil T. when it failed to terminate the father's parental rights and thereby delayed the establishment of a permanent placement plan for the child.[4] Having completed a thorough review of the arguments, including the

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[1]In keeping with our traditional treatment of cases involving sensitive facts, parties will be identified by using the first initial of last names rather than full surnames. *See e.g.*, *In re Abbigail Faye B.*, 222 W. Va. 466, 470 n.1, 665 S.E.2d 300, 304 n.1 (2008); *West Virginia Dept. of Human Services v. La Rea Ann C.L.*, 175 W.Va. 330, 332 S.E.2d 632 (1985).

[2]See Syl. Pt. 1, *In re Harley C.*, 203 W.Va. 594, 509 S.E.2d 875 (1998) ("Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.")

[3]It was established during the oral argument that Cecil T. was then 28 months old.

[4]DHHR as respondent in this matter has indicated by letter and during participation in the oral presentation of this case that it fully concurs with Appellants' arguments and position in this appeal. The guardian ad litem for the infant offers her (continued...)

response and report filed by the child's guardian ad litem, as well as the appellate record and relevant law, we reverse the decision of the lower court and remand the case for entry of an order terminating the father's parental rights and establishment of a permanent placement plan for Cecil T.

I. Factual and Procedural Background

Cecil T. was born on September 6, 2008. On September 9, 2008, DHHR filed the first abuse and neglect petition[5] with the circuit court seeking immediate legal and physical custody of the infant. It is uncontested that the original removal petition stated that the child was in imminent danger of abuse and neglect because: the parental rights of the biological mother had been involuntarily terminated with regard to two other children she had birthed; the baby was found presumptively positive for benzodiazepines, methadone and barbituates; and the father had admitted to use of a drug while felony drug charges were pending against him in magistrate court.[6] The petition related that no willing or physically

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[4](...continued)
support in equal measure.

[5]The first abuse and neglect petition is not in the record of the current case file.

[6]Appellee indicated in his brief that the felony charges against him were dismissed. However, the transcript of the dispositional hearing reveals that the State dismissed the criminal complaint for cultivation of marihuana in magistrate court so that it could pursue bringing the charge by grand jury indictment. According to the transcript, Appellee ultimately pled guilty to this charge for which he received a sentence of one to five years to serve concurrently with a federal possession of firearms charge explained in more
(continued...)

able relatives were found to care for the child. The resulting emergency order placed legal custody of Cecil T. with DHHR and physical custody with Appellants.

At a hearing in November 2008, Appellee was awarded a pre-adjudicatory improvement period after he advised the court that he and the mother were no longer living together as a couple. The mother's parental rights were terminated[7] at an adjudication hearing held on December 9, 2008, but the custody of the child remained unchanged with DHHR continuing to have legal custody and Appellants retaining physical custody.

At a February 9, 2009, hearing, the lower court determined that Appellee had substantially complied with the terms of his improvement period and that the conditions which led to the filing of the first abuse and neglect petition had abated. As a result, the court returned legal and physical custody of the then 5-month-old Cecil T. to his father on that date. Appellants represent that this decision was reached despite Appellee's admission to the court at the December 2008 adjudication hearing that he violated the terms of the improvement period by co-habitating for a short time with the baby's mother. Appellants also said that the guardian ad litem expressed concern during the February 9, 2009 hearing not only about the continuing relationship between Cecil T.'s parents, but also about the

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[6](...continued)
detail later in this opinion.

[7]This termination was not appealed.

father's abnormal drug screens which occurred on days when the baby was in the father's physical custody, and the lack of alternative care givers if Appellee were to be placed in jail as a result of the indictment pending against him.[8]

On March 6, 2009, Appellee was arrested in his home for selling firearms to undercover agents in violation of federal law barring possession of firearms by a convicted felon.[9] The indictment contains a list of six firearms which Appellee had in his possession. Cecil T. was present in the home at the time of the sale and arrest. While it is not entirely clear how it occurred, the child apparently was taken to the home of Appellee's mother, Verna M. when Appellee was arrested, and the child remained there for three days.

According to DHHR's March 9, 2009, "Petition for Immediate Custody of Minor Children in Imminent Danger," a DHHR child protective service worker [hereinafter "CPS"] responded on that date to a call from the grandmother's home where upon arrival at the home she found Cecil T. The conditions discovered in the home related by the CPS worker in this second abuse and neglect petition included that the grandmother had no appropriate bedding for the infant and the child was found lying in a playpen wearing a urine soaked diaper. It was further noted in the petition that the grandmother herself appeared to

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[8]*See* n. 6 *supra*.

[9]The federal indictment accompanying Appellant's brief notes that Appellee had been convicted of felony breaking and entering in 1992.

be in respiratory distress, but she refused the offer of the worker to call 911.[10] The petition also related that the father had assumed physical and legal custody of the child following the successful completion of an improvement period in a prior abuse and neglect proceeding, but that the father was no longer available to care for the child due to the father's arrest and incarceration on March 6, 2009, for federal firearms charges.

By the court's March 9, 2009, "Emergency Order for Removal of Children in Imminent Danger," the legal and physical custody of Cecil T. was returned to DHHR. On July 24, 2009, DHHR submitted an "Amended Petition," in which the agency reasserted all of the points of the March 9, 2009, petition for immediate custody, and further stated that the father had been indicted in federal court for sale of firearms and had entered into a plea agreement regarding the federal charges.

An adjudication hearing was held on July 27, 2009. As a result, the lower court entered an order on August 11, 2009, in which it found that Appellee "knowingly participated in illegal activities while the child was present which led to his arrest and subsequent plea" to federal criminal charges and that his "actions placed the child at a substantial risk and in imminent danger. His choices placed the child in a very risky

[10]According to the March 9, 2009, petition, the court had previously found that the grandmother would not be an appropriate caretaker due to her ongoing serious health problems.

situation." The order further states that "by his own actions, [the father] has been incarcerated and is unable to care for the child." The order then reflects the lower court's ultimate determination that clear and convincing evidence was presented to establish that Cecil T. was a neglected child. The order goes on to relate that DHHR was unable to employ reasonable efforts to reunify the infant with his father due to the father's incarceration, and that custody of the infant would continue with DHHR.[11]

Appellants' motion to intervene was filed in the court on August 24, 2009. In their motion, Appellants advised the court that they were Cecil T.'s foster parents and had served as such for all but three weeks of the life of the then 11-month-old infant. They also represented that they were prepared to offer testimony regarding the child's demeanor during and following visitation with Cecil T, as well as provide information regarding the baby's development and general state of health and well-being. Additionally, they requested to be considered as potential adoptive parents for Cecil T.

A dispositional hearing was held on October 28, 2009, at which Appellants' motion to intervene was granted. A motion for termination of the father's rights made by DHHR, and joined in by the guardian ad litem of Cecil T. and Appellants, was entertained. The motion was made on the basis that the conditions necessitating emergency removal of

[11]It is undisputed that the child was returned to the care and physical custody of Appellants after the emergency removal petition was granted.

the legal and physical custody of the child from the father could not be corrected in the near future. The facts asserted in support of termination included the father's history of criminal activity and pending incarceration, the father's failure to protect the child and provide him with the care necessary to ensure his health and well-being while Cecil T. was in the father's physical care, and the father's past failure in complying with the goals of an improvement period. The father countered by arguing that the sole allegation against him was his incarceration which is an insufficient basis for terminating parental rights pursuant to *In re Brian James D.*, 209 W.Va. 537, 550 S.E.2d 73 (2001).

At the conclusion of the hearing, the lower court denied the motion to terminate, with the court inferentially agreeing with the father's argument that parental rights could not be terminated on the sole basis of incarceration. In its January 29, 2010 order, the lower court concluded:

> The WVDHHR has failed to establish by clear and convincing evidence elements for termination. Additionally, the WVDHHR [h]as failed to prove by clear and convincing evidence that there is no reasonable likelihood that the conditions that led to the finding of neglect could be corrected after . . . [the father] is released from prison. . . . At the time of . . . [the father's] release from prison, should he wish to make a record that he is fit to resume exercising his parental rights, the appropriate forum to make such a record is in Family Court.

The order further assigned Appellants as the legal guardians of Cecil T., and provided that the child remain in the physical custody of Appellants while DHHR retain his legal custody.

Finally, the order reflects the finding that the best interests of the child would not be served by visitation with the father while he was incarcerated.

It is from the January 29, 2010, order that Appellants petitioned this Court for review, and for which appeal was granted by order dated June 22, 2010.

II. Standard of Review

A compound standard of review is applied in appeals resulting from abuse and neglect proceedings. *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). That compound standard is summarized in syllabus point one of *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), in the following manner:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

It is with these considerations in mind that we approach the issues raised in this appeal.

III. Discussion

Appellants maintain that the lower court erred by not terminating the parental rights of Appellee pursuant to West Virginia Code § 49-6-5(a)(6) because the failure to terminate does not provide a meaningful permanency plan for Cecil T., and wrongly places the father's parental rights above that of the best interests of the child. They point to the lower court's order which they maintain essentially places the child's permanency plan on hold until the father is released from prison and the father determines if he wants "to make a record that he is fit to resume exercising his parental rights."

Appellee argues the lower court was correct in its decision because the sole ground proposed for terminating his parental rights was his incarceration. He claims that the lower court simply followed the law as stated in syllabus point two of *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970), that "[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses." According to Appellee, this holding as stated in *In re Brian James D.*, 209 W.Va. 537, 550 S.E.2d 73 (2001), means that "incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights . . . [although it] may be considered along with other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect." *Id.* at 540-41, 550 S.E.2d at 76-77. Appellee further maintains that a meaningful

permanency plan exists for Cecil T. in that he has been placed in the guardianship of Appellants in accord with West Virginia Code § 49-6-5(a)(5) which provides that upon a finding that the abusing parent or parents are presently unwilling or unable to provide for the child's needs, commit the child temporarily to the custody of the state department, a licensed child welfare agency, or a suitable person who may be appointed guardian by the Court.

The dispositional phase of child abuse and neglect proceedings is governed by West Virginia Code § 49-6-5 (2006), which provides a number of alternatives the court may consider, with precedence given to the least restrictive alternative appropriate to the circumstances of a case. The disposition as ordered in this case is reflected in West Virginia Code § 49-6-5 (a)(5), which provides in pertinent part:

> Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court.

The more restrictive alternative disposition of termination of parental rights sequentially follows this provision in the statute at West Virginia Code § 49-6-5 (a)(6), which states in part:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected

> in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

The phrase "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" is defined later in subsection (b) of the statute as meaning that "based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help." Thereafter the statute contains a non-exclusive list of examples where no reasonable likelihood for correction is deemed to exist.

The following excerpt from the transcript of the dispositional hearing on which the January 29, 2010, dispositional order is based reflects the lower courts' express reasoning for not terminating the father's parental rights.

> The grounds for removal of course are serious in that the Adult Respondent was a convicted felon and was selling guns out of the home where he had custody of the child. That child had only been there for a short period of time and I don't find any strong emotional bond that existed based upon solely the age of the child. He was less than a year old when the removal took place I believe.
>
> The Department has failed to establish by clear and convincing evidence grounds for termination. I believe the appropriate finding to be made at this time is under 49-6-5 where the parents are unable to provide adequately for the child's needs, the child can be assigned a guardian and I will

> name the Intervener's [sic] as guardians for the child, to make all relevant decisions about the child's welfare.
>
> The Department has failed to prove by clear and convincing evidence that there is no reasonable likelihood that the conditions that led to the finding of neglect could be corrected after [the father] is released from prison. If he stops selling guns out of his house then he may otherwise be able to establish himself as a person to visit and/or resume custody of this child. But that is for another day and another time. This limbo period in between is not contemplated by the statu[t]e, recognized by the Court in these cases involving where one or both parents are incarcerated.
>
> So I believe not [the] disposition as defined in 49-6-5 but the Order in this case should be that [Cecil T.] be made the ward of the Intervener's [sic] and at the time of [the father's] release, should he wish to make a record that he is fit to resume exercising his parental rights, that he could do so in the appropriate Family Court.

Appellants maintain that the denial of the motion to terminate was based on an incorrect application of the statutory time period in which correction to the conditions of neglect or abuse had to occur. The standard for termination under the statute is proof that the conditions of neglect or abuse could not be "substantially corrected in the near future." W.Va. Code § 49-6-5 (a)(6). Essentially, Appellants argue that the lower court wrongly determined that "in the near future" for a person who is incarcerated is not until after the person is released from incarceration. *Id.*

It appears that the ruling of the lower court in question is influenced by Appellee's reasoning. Appellee correctly states the law as set forth in *State ex rel. Acton v. Flowers*: **conviction** of a criminal offense or offenses, standing alone, is not a sufficient basis upon which parental rights may be terminated. However, Appellee relies on the following statement appearing in the per curiam opinion of *In re Brian James D.*, seemingly restating the *Acton* holding as: "In other words, **incarceration**, *per se*, does not warrant the termination of an incarcerated parent's parental rights." 209 W.Va. at 540, 550 S.E.2d at 76. Incarceration was not at issue in *Acton*.[12] Additionally, incarceration is not a synonym for conviction, and this Court has never held that incarceration can not be the sole basis for terminating parental rights. We deem this dicta in *Brian James D.* to be unsound, not only

[12]The mother in *Acton* was not incarcerated when she sought to regain physical custody of the child, and it was never alleged that she had abused or neglected her child. The child was born to the unwed mother while she was serving a prison sentence and the mother chose to place the child with what is now DHHR on a temporary basis so that the needs of the child would be properly attended to while she completed her prison term. The temporary transfer of the physical custody was memorialized in a written agreement between the agency and the mother. When the mother was released from prison, she sought to have the child returned, but the foster parents who had separately contracted with DHHR to provide care for the child refused to relinquish the child to the agency. The mother then sought relief by petitioning the court for a writ of habeas corpus. Among the matters raised by the foster parents challenging the fitness of the birth mother to have the child returned to her was that she had been arrested a number of times in various states with four of these arrests involving convictions for felony offenses. The Court in *Acton* relied on the premise that a natural mother who has not been proven to be an unfit parent is entitled to custody of her child unless the right to custody had been validly transferred in a manner recognized by law. Rather than finding the mother as unfit due to her numerous arrests and convictions, the Court found that the mother in *Acton* had not forfeited her "parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses." Syl. Pt. 2, in part, *Acton*.

because incarceration had no bearing on the facts under consideration in that case,[13] but also because a later reference in the opinion to the same premise correctly reflects "our case law holding that a criminal conviction *per se* does not warrant the termination of parental rights." *Id*. at 541, 550 S.E.2d at 77.

This Court has addressed incarceration as a consideration in deciding termination of parental rights in the case of *In re Emily*, wherein we stated that:

> [this Court has] been reluctant to find that incarceration, *per se*, warrants the termination of an imprisoned parent's parental rights. . . . Instead, we have cautiously acknowledged that while certain incidences of incarceration certainly are more egregious than others and should be considered when contemplating the termination of parental rights, "[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses." Syl. pt. 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970) (emphasis added).
>
> Thus, while an individual's incarceration may be *a* criterion in determining whether his/her parental rights should be terminated, other factors and circumstances impacting his/her ability to remedy the conditions of abuse and neglect should also be considered when making such a disposition.

208 W.Va. at 341-42, 540 S.E.2d at 558-59.

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[13]The parental rights in *Brian James D*. had been terminated solely because of the father's *arrest* for delivery of marihuana, not because he was or even would be incarcerated.

Although we have not adopted a *per se* rule regarding the impact incarceration has on a termination of parental rights decision, we have likewise not said that the facts surrounding a parent's incarceration may never form the basis for terminating parental rights. Because incarceration does not *automatically* result in termination of a person's parental rights does not mean it may not affect the decision regarding permanent placement of a child. The reasons underlying the incarceration as well as the terms and conditions of incarceration can vary greatly. In some cases, a parent who is incarcerated may under the circumstances still be able to correct conditions of abuse and neglect "in the near future" through participation in an improvement period or otherwise. In other cases, incarceration may unreasonably delay the permanent placement of the child deemed abused or neglected, and the best interests of the child would be served by terminating the incarcerated person's parental rights. Thus while the mere fact that someone is incarcerated will not result in automatic termination of parental rights, the parental rights of an incarcerated person may be terminated. Accordingly, when no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the reason for the incarceration, the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the

incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

Here, the father's incarceration and terms thereof established Appellee's inability to correct the conditions of abuse and neglect in the near future and could have served as the basis for termination of parental rights. Furthermore, additional relevant facts supporting termination were before the court in this case. The father had been awarded custody of the five-month-old infant following an improvement period granted in the initial abuse and neglect petition. Nonetheless, his decision-making during the brief time the child was in his custody – a mere 26 days – shows an abject disregard for the child's general well-being. His actions actually put the child's health, welfare and safety squarely at risk. He possessed a number of firearms when he knew that he was prohibited by law from having guns, and thus jeopardized his ability to care for the infant. He knew he could be arrested for having firearms, and he knew if he were arrested there were no other family members located by DHHR who could or would care for the infant in his stead. Additionally, Appellee kept the guns in the home where the child was living and the actual sale of the deadly weapons occurred in the baby's presence. Once Appellee was arrested, the baby was taken to the home of his paternal grandmother, a placement previously found to be unsafe because of the woman's deteriorating health condition. It was from there that a CPS worker was called three days after the arrest and where she found the then five-month-old infant

laying in a playpen, because no appropriate bedding was in the house, wearing a urine soaked diaper. All of these factors show that the father, who seemingly succeeded in adhering to the requirements of an improvement period, proceeded in short order after assuming custody of Cecil T. to make improper choices regarding the infant by blatantly disregarding the child's best interests and placing Cecil T. directly in harm's way by selling firearms in the baby's presence. Furthermore, the father offered no explanation of how he could or proposed to remedy the situation of neglect and abuse. Also relevant and significant to the issue of termination of parental rights was the lower court's observation during the hearing that no strong emotional bond existed between the infant and Appellee since a majority of this child's life had been spent with Appellants as his caretakers.

We appreciate the lower court's obvious concern with terminating parental rights when the parent is incarcerated and is thereby limited in demonstrating the present ability to redress the apparent conditions of abuse and neglect. However, this Court has made it quite clear that under any circumstances "courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266

S.E.2d 114 (1980). We have further said that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

During its deliberations, the lower court expressly recognized this Court's holding in syllabus point five of *In re Emily*,[14] 208 W.Va. 325, 540 S.E.2d 542, and correctly chose not to enter an order granting a dispositional improvement period with a delayed onset date. However, by ordering that the child's legal custody remain with DHHR and his physical custody be continued with Appellants without terminating parental rights, the lower court allowed the father's incarceration to define the time period in which the father may attempt to rectify the conditions of abuse and neglect and thereby created another type of delay in developing a child's permanency plan. Doing so leads to the same timeliness problems discussed in *In re Emily*.

The case of *In re Emily* involved a situation quite similar to the one before us, except neither parent was immediately free to participate in a dispositional improvement period in a normal way because the mother was engaged in a long-term inpatient substance

[14]As stated in syllabus point five of *In re Emily*, "[t]he commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period."

abuse treatment program and the father was incarcerated. The lower court had granted delayed dispositional improvement periods to commence upon the discharge or release of each parent. We essentially found that no statutory authority existed to delay implementation of a dispositional improvement period since doing so would contradict the established legislative purpose of expediting abuse and neglect cases so as to safeguard the welfare of the children. We went on to say that "the delayed implementation of the respondent parents' improvement periods is particularly problematic because, by the very terms of the court's ruling, the delay is indefinite," and is based on a presupposition that there would come a time when the parents could be able to accomplish what they had previously been unable to do. *Id*. at 337, 540 S.E.2d at 554. The very same problems exist in giving a parent who is not able in the near future to alter the conditions causing the abuse and neglect of a child the opportunity to later demonstrate his or her ability to rectify the situation at some indefinite point in the future. Although aimed at the dispositional improvement periods under discussion, the admonition in syllabus point six of *In re Emily*[15] regarding adherence to statutory time limits and eligibility requirements has equal application to all abuse and neglect matters. 208 W.Va. at 328, 540 S.E.2d at 545. Decisions regarding parental rights and a child's needs for permanency and stability are no

[15]Syllabus point six of *In re Emily* states: "At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by W.Va. Code § 49-6-2 (1996) (Repl. Vol. 1999) [pre-adjudicatory and post-adjudicatory improvement period], W.Va. Code § 49-6-5 (1998) (Repl. Vol. 1999) [post-adjudicatory improvement period], and W.Va. Code § 49-6-12 (1996) (Repl. Vol. 1999) [improvement period generally].

exception. We find no provision anywhere in the abuse and neglect statutes giving courts discretion to create what the lower court termed a "limbo period" where a permanency plan for an abused or neglected child may be placed on hold indefinitely. Importantly, Rule 43 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings unequivocally directs that "[p]ermanent placement of each child *shall* be achieved within eighteen (18) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay." Emphasis added. This eighteen-month period is not a mere suggestion, but a standard to which courts should faithfully and routinely adhere except in the most extraordinary or unusual circumstances – circumstances which simply are not present here. Strict adherence to the eighteen-month period furthers the best interests of children victimized by abuse and neglect because their need for permanency in a secure environment is paramount. Consequently, we hold that the eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

Having found error as to a matter of law, we reverse the ruling of the lower court. We additionally find that the record relates sufficient facts and circumstances warranting termination of parental rights.

IV. Conclusion

Based upon the aforementioned reasons, the January 29, 2010, order of the Logan County Circuit Court is reversed, and the case is remanded for entry of an order terminating the father's parental rights and advancement of the permanent placement of the child.

Reversed and remanded.

221 W. Va. 249, 654 S.E.2d 373

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

FILED
October 25, 2007
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33317

IN RE: CESAR L.

Appeal from the Circuit Court of Berkeley County
Honorable Gray Silver, Judge
Abuse and Neglect Case No. 05-JA-10

AFFIRMED

Submitted: September 19, 2007
Filed: October 25, 2007

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the Minor Child, Cesar L.

CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES STARCHER AND ALBRIGHT concur in part, and dissent in part, and reserve the right to file separate opinions.

JUSTICE BENJAMIN concurs and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. The plain language of W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004) permits a child, a child's parent or custodian, or the West Virginia Department of Health and Human Resources to move for a modification of the child's disposition where a change of circumstances warrants such a modification. However, a child's disposition may not be modified after he/she has been adopted.

2. For purposes of W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004), "parent" means the biological or natural father or mother of a child; the adoptive father or mother of a child; or the legal guardian of a child.

3. W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004) permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under circumstances free from duress and fraud."

4. A final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a "parent" with regard to the

child(ren) involved in the particular termination proceeding.

5. A valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004), includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o) (1999) (Repl. Vol. 2004), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.

6. A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004), to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.

Davis, Chief Justice:

The appellant herein and respondent below, Tameka L. M. L.[1] [hereinafter "Tameka" or "mother"], appeals from orders entered October 11, 2006, and December 14, 2006, by the Circuit Court of Berkeley County. By order entered October 11, 2006, the circuit court determined that the mother does not have standing to request a modification of the minor child's, Cesar L.'s [hereinafter "Cesar"], disposition in accordance with W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004)[2] because she had voluntarily relinquished her parental rights and, thus, was no longer Cesar's parent. In response to this ruling, Tameka then sought to withdraw her earlier relinquishment. By order entered December 14, 2006, the circuit court found that Tameka's relinquishment was voluntary and free of fraud and duress and, accordingly, that it was a valid voluntary relinquishment pursuant

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[1]In light of the sensitive nature of the facts at issue in this proceeding, we follow our prior practice in similar cases and refer to the parties by their last initials. *See In re Clifford K.*, 217 W. Va. 625, 630 n.1, 619 S.E.2d 138, 143 n.1 (2005), and cases cited therein.

[2]W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004) directs that,

> [u]pon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, That a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5(a)(6)] shall not be modified after the child has been adopted. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department.

to W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004).[3] On appeal to this Court, Tameka claims that the circuit court erred by finding that she does not have standing to request a modification in Cesar's disposition and by refusing to set aside her voluntary relinquishment. Upon a review of the parties' arguments, the record of this matter, and the pertinent authorities, we affirm the October 11, 2006, and December 14, 2006, orders of the Berkeley County Circuit Court.

I.

FACTUAL AND PROCEDURAL HISTORY

This case began on February 23, 2005, with the birth of Cesar L. to his mother, Tameka. Shortly thereafter, on March 3, 2005, the appellee herein and petitioner below, the West Virginia Department of Health and Human Resources [hereinafter "the DHHR"], filed an emergency petition requesting that Cesar's care and custody be immediately transferred to the DHHR because the DHHR believed Cesar to be in danger insofar as Tameka's rights to three older children had been involuntarily terminated.[4] The

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[3]Pursuant to W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004), "[a]n agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud."

[4]In its petition seeking the emergency temporary custody of Cesar, the DHHR enumerated various aggravated circumstances in this case, including the fact that the mother has had her parental rights involuntarily terminated as to three older children: her rights as to two children were involuntarily terminated on August 24, 2001, as a result (continued...)

circuit court awarded the DHHR the temporary care and custody of Cesar by order entered March 3, 2005. The DHHR, in June 2005, placed Cesar in his aunt's care and custody.[5]

Subsequently, the DHHR filed an amended petition alleging that Cesar was an abused and/or neglected child based upon the fact that he tested positive for marijuana and amphetamines at the time of his birth and his mother, Tameka, tested positive for marijuana at the time of Cesar's birth.[6] Tameka filed an answer, admitting her drug abuse and stipulating that Cesar's case was an aggravated circumstances case.[7] By order entered May 25, 2005, Cesar was adjudicated to be an abused and neglected child.

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[4](...continued)
of abandonment, and her rights as to a third child were involuntarily terminated on November 26, 2002, due to aggravated circumstances in the 2001 case and her incarceration on felony charges involving check forgery. The petition further averred that all three of these children were adopted by Tameka's parents, with whom she still resides, and that, as a result of her living conditions, she continues to have unsupervised access to all three of these children. Furthermore, the petition represented that Tameka had a fourth child, born in 2004, who died at the age of three months, presumably while co-sleeping in a twin-sized bunk bed with Tameka.

[5]The record indicates that Tameka selected this relative placement for Cesar, and that this aunt has passed a home study and is presently a possible permanent placement for Cesar pending the conclusion of the underlying abuse and neglect proceedings.

[6]The DHHR also filed a second amended petition wherein it raised abuse and neglect allegations against Cesar's father, Lois A. L. Although the circuit court in the underlying proceedings has also made various determinations as to the status of Lois's rights vis-a-vis Cesar, such rulings have been raised in a separate petition for appeal and are not at issue in the instant proceeding.

[7]*See supra* note 4.

Following the adjudicatory hearing, Tameka planned to enter a drug treatment program in Beckley, West Virginia. While she was checking into this facility, a routine background check revealed an outstanding warrant for Tameka's arrest had been issued by the State of Virginia.[8] As a result, Tameka was arrested and incarcerated in Virginia. The circuit court then continued to postpone Cesar's dispositional hearing until such time as Tameka was released from incarceration. Ultimately, on September 29, 2005, Tameka, while she was still incarcerated, signed a voluntary relinquishment of parental rights, which her counsel later filed with the circuit court.[9] During a hearing held on November 30, 2005, mother's counsel presented Tameka's voluntary relinquishment to the circuit court, and the circuit court accepted it after counsel represented that the relinquishment was voluntary. Counsel for mother also requested the court to permit Tameka to have post-termination visitation with Cesar, which motion was granted subject to Cesar's best interests and the discretion of Cesar's care giver, his aunt.

The circuit court conducted numerous other proceedings regarding Cesar, his continued thriving in his aunt's care, and the rights of his father. On June 19, 2006,

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[8]Tameka earlier had been incarcerated in the State of Virginia on felony charges involving check forgery. *See supra* note 4. Although she had served the time for that crime, she failed to pay the accompanying $50 fine. Her nonpayment constituted a parole violation, and, thus, the warrant for her arrest was issued.

[9]See note 22, *infra*, for the language of Tameka's voluntary relinquishment of her parental rights to Cesar.

Tameka, by new counsel, filed a motion pursuant to W. Va. Code § 49-6-6 requesting the circuit court to modify Cesar's disposition vis-a-vis her parental rights. In support of her request for relief, Tameka asserted that she had been released from incarceration and that she wished to be reunited with her son. The circuit court conducted a hearing on September 28, 2006, and issued its order with regard to mother's motion to modify disposition on October 11, 2006. In summary, the circuit court determined that because Tameka had voluntarily relinquished her parental rights to Cesar, she did not have standing to request a modification of his disposition insofar as W. Va. Code § 49-6-6 plainly states that the only persons that may make such a motion are "a child, a child's parent or custodian or the state department." The circuit court did, however, suggest that Tameka could file a motion, in accordance with W. Va. Code § 49-6-7, to withdraw her voluntary relinquishment and that if her parental rights were reinstated, she could then request a modification of Cesar's disposition.

Tameka then filed an affidavit, on October 11, 2006, alleging that her relinquishment was not voluntary but had been obtained under duress during her incarceration in Virginia.[10] In further support of her affidavit, Tameka claimed that her attorney had not explained the ramifications of the voluntary relinquishment to her and that she had been led to believe that her parental rights would be terminated if she did not

[10]For the text of Tameka's affidavit, see *infra* note 23.

sign the relinquishment form. Following a hearing on this motion, the circuit court, by order entered December 14, 2006, concluded that Tameka was not subject to fraud or duress when she signed her voluntary relinquishment and denied Tameka's motion to withdraw her relinquishment. From the orders entered October 11, 2006, and December 14, 2006, Tameka now appeals[11] to this Court.

II.

STANDARD OF REVIEW

The instant appeal arose in the context of an abuse and neglect proceeding. When reviewing rulings rendered by a lower court in the abuse and neglect context, we consider carefully the various components of the court's ruling, according deference where warranted and reviewing *de novo* legal interpretations.

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury,

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[11]Tameka's petition for appeal was filed on December 12, 2006, and indicated that it was an appeal from an order "to be entered, [and] also" an order entered "Oct[.] 11, 2006." The circuit court entered its order denying Tameka relief pursuant to W. Va. Code § 49-6-7 on December 14, 2006. Insofar as the appellee herein, the DHHR, has conceded that Tameka is appealing from both orders and has fully briefed Tameka's arguments relating to both orders, we find there is no procedural barrier to considering Tameka's assignments of error as to both orders on appeal to this Court. *See* Syl. pt. 3, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998) ("When a defendant assigns an error in a criminal case for the first time on direct appeal, the state does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.").

> the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused and neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). In the case *sub judice*, the circuit court interpreted two different statutes, W. Va. Code §§ 49-6-6 and 49-6-7, and applied those interpretations to the facts before it. We previously have held that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995). *Accord* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). Guided by these standards of review, we proceed to consider the mother's assignments of error.

III.

DISCUSSION

On appeal to this Court, Tameka assigns error to the circuit court's rulings finding that she lacked standing to request a change of Cesar's disposition in accordance with W. Va. Code § 49-6-6 and refusing to set aside her voluntary relinquishment of her parental rights pursuant to W. Va. Code § 49-6-7. We will address each of these assignments in turn.

A. Standing pursuant to W. Va. Code § 49-6-6 (Order of October 11, 2006)

Tameka first assigns error to the circuit court's finding that she does not have standing to move for a modification of Cesar's disposition in accordance with W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004). By order entered October 11, 2006, the circuit court ruled that because Tameka had voluntarily relinquished her parental rights to Cesar, she was no longer Cesar's parent, and thus, she did not qualify as one of the enumerated individuals who are statutorily permitted to move for a modification of disposition. *See* W. Va. Code § 49-6-6.

Before this Court, Tameka argues that the circuit court erred by finding that she does not have standing to request a modification of Cesar's disposition. In support of her argument, Tameka suggests that W. Va. Code § 49-6-6 and W. Va. Code § 49-6-7

should be read independently of one another to permit parents who have voluntarily relinquished their parental rights to request modification of their children's dispositional orders. Otherwise, Tameka argues, the circuit court's application of W. Va. Code § 49-6-7 completely eradicates any rights she has as Cesar's parent to request relief pursuant to W. Va. Code § 49-6-6.

Likewise, the DHHR substantially agrees with Tameka's contention that the circuit court erred by finding that she does not have standing to move for modification under W. Va. Code § 49-6-6. In this regard, the DHHR claims that such an interpretation of W. Va. Code § 49-6-6 creates a procedural barrier to the permanency of children whose parents' rights have been terminated by voluntary relinquishment because those parents must prove that their relinquishments were obtained by fraud or duress before they can move for modification to demonstrate a change in circumstances and be reunited with their children.

By contrast, Cesar's Guardian ad Litem [hereinafter "the Guardian"] urges this Court to affirm the circuit court's ruling because when Tameka voluntarily relinquished her parental rights, her legal status as Cesar's parent was terminated. The Guardian further contends that it is not fair to a child to permit a parent to try to undo his/her voluntary relinquishment to seek to re-enter the child's life when that parent is virtually a stranger to the child. Moreover, the Guardian asserts that permitting a parent

under these circumstances standing to request a modification of disposition also unnecessarily delays the child's permanent placement.

1. W. Va. Code § 49-6-6. At issue in this assignment of error is the language of W. Va. Code § 49-6-6 and its application to the facts of this case. The portion[12] of W. Va. Code § 49-6-6 that is relevant to these proceedings permits

> [u]pon motion of a child, a child's parent or custodian or the state department[13] alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, That a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5(a)(6)] shall not be modified after the child has been adopted. . . .

(Footnote added). In order to assess the correctness of the circuit court's ruling regarding this section, however, we first must consider the language of the statute, itself.

We previously have held that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). When examining the text of a statutory provision, language that is plain need not be construed before it is

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[12]For the full text of W. Va. Code § 49-6-6, see *supra* note 2.

[13]For purposes of the child welfare statutes, of which W. Va. Code § 49-6-6 is a part, "state department" refers to "the state department of health and human resources." W. Va. Code § 49-1-4(5) (1998) (Repl. Vol. 2004).

applied to the facts of the case. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). *But see* Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992) ("A statute that is ambiguous must be construed before it can be applied.").

Nevertheless, where the Legislature has failed to provide a statutory definition for a word used in one of its enactments, the common, ordinary meaning of the word is relied upon to give meaning to the statute. "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). In other words, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982).

Applying these tenets of statutory construction to the legislative enactment at issue herein, W. Va. Code § 49-6-6, we find the language of this provision to be facially plain. Therefore, we hold that the plain language of W. Va. Code § 49-6-6 (1977) (Repl.

Vol. 2004) permits a child, a child's parent or custodian, or the West Virginia Department of Health and Human Resources[14] to move for a modification of the child's disposition where a change of circumstances warrants such a modification. However, a child's disposition may not be modified after he/she has been adopted. Although this statutory language is plain, the parties dispute the precise meaning of the word "parent" employed therein. Therefore, we must determine whether a person who has voluntarily relinquished his/her parental rights retains his/her status as a "parent" for purposes of W. Va. Code § 49-6-6.[15]

2. Definition of "parent." While the Legislature has not defined the word "parent" in the specific child welfare statutes encompassing W. Va. Code § 49-6-6, the Legislature has provided a definition for the word "parent" in the statutes criminalizing child abuse. In the criminal law context, "'[p]arent' means the biological father or mother of a child, or the adoptive mother or father of a child." W. Va. Code § 61-8D-1(7) (1988) (Repl. Vol. 2000).[16] This definition is particularly instructive insofar as it is part of the

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[14]*See supra* note 13.

[15]Insofar as the facts of the case *sub judice* involve Tameka's voluntary relinquishment of her parental rights, as opposed to the involuntary termination thereof, we will limit our discussion herein to voluntary relinquishments of parental rights.

[16]Following the institution of the instant proceedings, the Legislature amended W. Va. Code § 61-8D-1 (1988) (Repl. Vol. 2000), however the definition of "parent" was not affected by these changes. *See* W. Va. Code § 61-8D-1(7) (2005) (Repl. Vol. 2005).

general body of law concerning the abuse and neglect of minor children. *See* Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent."). *See also* Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 ("Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.").

Similarly, this Court has defined the term "parent" in Rule 3(j) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings: "'[p]arent' or 'parents' means the child's natural parent(s), custodian(s), or legal guardian(s)." This definition also is instructive to our decision herein because the Rules of Procedure for Child Abuse and Neglect Proceedings are intended to provide guidance in the absence of other authority or in the presence of conflicting authority. *See* W. Va. R. Proc. for Child Abuse & Neglect Proceed. 1 ("These rules set forth procedures for circuit courts in child abuse and neglect proceedings instituted pursuant to W. Va. Code § 49-6-1, *et seq.* If these rules conflict with other rules or statutes, these rules shall apply.").

Reconciling the legislative definition of "parent" in W. Va. Code § 61-8D-1(7) with the definition of "parent" contained in Rule 3(j) of the West Virginia Rules of

Procedure for Child Abuse and Neglect Proceedings, we find the discrete differences between these two definitions to be distinctions without a difference. Accordingly, we hold that, for purposes of W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004), "parent" means the biological or natural father or mother of a child; the adoptive father or mother of a child; or the legal guardian of a child.[17]

3. Effect of voluntary relinquishment of parental rights. The question remains, however, whether a parent who has voluntarily relinquished his/her parental rights retains his/her status as a "parent" after such relinquishment. W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004) sets forth the procedure a parent must follow in order to voluntarily relinquish his/her parental rights: "[a]n agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud." Applying the tenets of statutory construction discussed above, we find this statute also to be plain and in need of no further construction to understand its terms. Therefore, we hold that W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004) permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under

[17]It goes without saying that the definition of "parent" in W. Va. Code § 49-6-6 does not also encompass "custodian," as contemplated by Rule 3(j), insofar as § 49-6-6 distinguishes between "a child's parent or custodian."

circumstances free from duress and fraud." What this statute does not address, though, is whether, by virtue of a voluntary relinquishment of parental rights, the parent loses his/her status as the child's parent. The resolution of this query is critical to determining whether Tameka has standing to move for a modification of Cesar's disposition under W. Va. Code § 49-6-6.

The revocation of a parent's parental rights, whether by voluntary relinquishment or by involuntary termination, is a very serious matter. By definition, "parental rights" encompasses "any and all rights and duties regarding a parent to a minor child, including, but not limited to, custodial rights and visitational rights and *rights to participate in the decisions affecting a minor child*." W. Va. Code § 49-1-3(o) (1999) (Repl. Vol. 2004) (emphasis added).[18] As to the importance and sanctity of parental rights, we frequently have observed that "[n]othing is more sacred or scrupulously safeguarded as a parent's right to the custody of his/her child." *In re Clifford K.*, 217 W. Va. 625, 644, 619 S.E.2d 138, 157 (2005). *Accord* Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973) ("In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States

[18]This section has since been recodified, but the definition of "parental rights" was not changed. *See* W. Va. Code § 49-1-3(q) (2007) (Supp. 2007).

Constitutions."); Syl. pt. 1, *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960) ("A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.").

For this reason, the decision to end a parent's parental rights is not one that is made lightly, and this process of ending a parent's parental rights is guided by many stringent rules and regulations to protect the rights of both the parent and his/her child. *See generally* W. Va. Code § 49-6-1, *et seq.* (outlining procedure to be followed in child abuse and neglect cases); W. Va. R. Proc. for Child Abuse & Neglect Proceed. 1, *et seq.* (providing further guidelines to be followed in abuse and neglect proceedings). *See also* Syl. pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) (""'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternative when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989).' Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).").

Be that as it may, once a determination, whether voluntary or involuntary, has been made to revoke a parent's parental rights, we must accept the weighty considerations accompanying that decision and may overturn that ruling only if warranted.[19] *See* W. Va. Code § 49-6-7 (permitting rescission of voluntary relinquishment of parental rights where such relinquishment was obtained by fraud or duress); Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (delineating standard of review of circuit court orders in abuse and neglect proceedings).

Despite the importance of a parent's parental rights, in cases involving the relinquishment or termination of parental rights, the paramount concern remains the best interests of the children involved therein. "Although parents have substantial rights that must be protected, the primary goal . . . must be the health and welfare of the children." Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589. *Accord State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 638, 474 S.E.2d 554, 568 (1996) ("Although a parent has a protectable interest in a child, a parent's rights are not absolute: the welfare of the child is the paramount consideration to which all of the factors, including common law preferential rights of the parents, must be deferred or subordinated." (internal quotations and citations omitted)). Ensuring finality for these children is vital to safeguarding their

[19]In this case, in fact, Tameka has asked the lower court for leave to withdraw her voluntary relinquishment of parental rights. We will address the circuit court's denial of Tameka's request and her assignment of error in this regard in Section III.B., *infra*.

best interests so that they may have permanency and not be continually shuttled from placement to placement. *See* Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.").

Consequently, we typically have considered a termination or relinquishment of parental rights as achieving such finality through the cessation of that particular parent-child relationship, which then facilitates the child's permanent placement and/or adoption. In this regard, we previously have stated that "[w]hen an individual's parental rights have been terminated the law no longer recognizes such individual as a 'parent' with regard to the child or children involved in the particular termination proceeding." *Elmer Jimmy S. v. Kenneth B.*, 199 W. Va. 263, 268, 483 S.E.2d 846, 851 (1997). In light of our prior recognition of the effect of the revocation of a person's parental rights, we now hold that a final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a "parent" with regard to the child(ren) involved in the particular termination proceeding.

Thus, barring some egregious circumstances that would justify reinstating

the person's parental rights, an involuntary termination or a voluntary relinquishment of parental rights permanently severs the parent-child relationship and relieves such person of all the rights and privileges, as well as duties and obligations, considered to be "parental rights," W. Va. Code § 49-1-3(o) (1999). *See* W. Va. Code § 49-6-7 (invalidating voluntary relinquishment of parental rights obtained by fraud or duress); Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (limiting reversal of abuse and neglect rulings by a lower court to those decisions that are "clearly erroneous"). As a result, the person who formerly possessed such parental rights loses his/her status as the child's parent. Accordingly, we hold that a valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004), includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o) (1999) (Repl. Vol. 2004), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child. We hold further that a person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004), to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.[20] Applying these holdings to the facts presently before us,

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[20]Before this Court, the DHHR contends that this Court previously has permitted a person whose parental rights were involuntarily terminated to move for modification of disposition pursuant to W. Va. Code § 49-6-6 and that such a ruling would (continued...)

we conclude that the circuit court did not err by ruling that Tameka does not have standing as a parent to request a modification of Cesar's disposition in accordance with W. Va. Code § 49-6-6 because, by virtue of her voluntary relinquishment of her parental rights to Cesar, Tameka is no longer considered to be his parent.[21] Thus, the October 11, 2006, order of the Circuit Court of Berkeley County is affirmed.

B. Voluntariness of Relinquishment pursuant to W. Va. Code § 49-6-7 (Order of December 14, 2006)

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[20](...continued)
be inconsistent with a finding that Tameka lacks standing as a parent. *Citing* Syl. pt. 8, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003) ("A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2001), amend a parent's continuing support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages."). Such a construction is not accurate, however, and the Guardian correctly recognizes that the modification of disposition permitted by the *Stephen* case was limited solely to a modification of child support. Moreover, W. Va. Code § 48-11-105 (2001) (Repl. Vol. 2004) permits a party to move for modification of child support at any time there exists a "substantial change in circumstances."

[21]In their arguments to this Court, the parties, namely Tameka and the DHHR, have expressed concern that if a person who has relinquished his/her parental rights does not have standing to move for a modification of disposition under W. Va. Code § 49-6-6, then persons who have substantially corrected the conditions of abuse and neglect would never be able to present evidence of such improvement to the court. Without reiterating the limited circumstances under which a voluntary relinquishment of parental rights may be invalidated, it suffices to say that this opinion does not preclude any of the other persons permitted by W. Va. Code § 49-6-6 to request a change in the child's disposition from doing so if the relinquished parent's improved circumstances are such that they constitute "a change of circumstances" thereunder, and, as required by W. Va. Code § 49-6-6, such motion is made before the child has been adopted.

Tameka also assigns error to the circuit court's ruling finding her voluntary relinquishment of parental rights[22] to be valid. In its order of October 11, 2006, denying

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[22]The text of Tameka's voluntary relinquishment of her parental rights to Cesar provides:

RELINQUISHMENT OF PARENTAL RIGHTS BY MOTHER
REQUEST FOR POST-RELINQUISHMENT VISITATION

I, Tameka M[.]-L[.], the Respondent Mother of Cesar A[.] L[.], date of birth February 23, 2005, after thoughtful consideration of this matter, hereby acknowledge the following:

1. That I believe it is in the best interest of Cesar A[.] L[.] to remain in the custody of the West Virginia Department of Health and Human Resources;

2. I understand that I am entitled to be represented by counsel at all proceedings.

3. Heidi J. Myers has been appointed by this Honorable Court to represent my interests at these hearings.

4. I understand that I would be entitled to call witnesses, present evidence, testify on my own behalf, and have my attorney cross-examine any witnesses called at any hearing held in this matter;

5. I wish to waive my right to an adjudication and dispositional hearing in this matter and voluntarily relinquish all my parental rights to Cesar A[.] L[.]

6. I understand the Court would consider less drastic alternatives to termination, such as granting a pre or post adjudicatory improvement period, returning the child into my custody or simply having custody remain with West Virginia Department of Health and Human Resources.

(continued...)

[22](...continued)

7. I fully understand the consequences of this decision. I understand my decision will result in the termination of my parental rights as to Cesar A[.] L[.]

8. I understand that I have no right to custody or visitation in this matter, but request at this time that visitation be afforded to me in the future.

9. I understand that I will have no right to participate in the care, custody, control, education, training or any aspect of raising Cesar A[.] L[.] from this point forward.

10. I understand by relinquishing parental rights to Cesar A[.] L[.] that it is a final disposition as towards custody and therefore I leave the Court no less restrictive alternative or option other than termination of my parental rights.

11. I understand that I am authorizing West Virginia Department of Health and Human Resources to consent to the adoption of Cesar A[.] L[.], the right to change his name and I understand that I am waiving notice as to these proceedings.

12. I have read and discussed thoroughly with my attorney all the above-mentioned rights.

13. I fully understand the meaning and consequences of executing this document.

14. I have not been induced, coerced or threatened into signing this document.

15. No promises or rewards have been offered in consideration for my execution of this document.

I hereby freely, knowingly intelligently and voluntarily relinquish all my parental rights to Cesar A[.] L[.]

(continued...)

Tameka standing to move for a modification of Cesar's disposition because she earlier had relinquished her parental rights to this child, the circuit court indicated that if Tameka sought relief from her voluntary relinquishment, her parental rights potentially could be restored at which time she then would have standing to request that Cesar's disposition be modified. Pursuant to this order, Tameka filed an affidavit[23] seeking to withdraw her

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[22](...continued)
This document was signed by "Tameka M[.] L[.]," notarized, and dated "September 29, 2005."

[23]Tameka's affidavit states:

AFFIDAVIT OF TAMEKA L[.] CONCERNING WVA CODE 49-6-7 RELINQUISHMENT OF PARENTAL RIGHTS

Now comes Tameka L[.] L[.], and first being duly sworn, deposes and states the following:

1. That I relinquished my rights to my son Cesar L[.] under duress.

2. I was incarcerated at the time of any relinquishment in the State of Virginia.

3. That my attorney at the time Heidi Myers did not explain the relinquishment to me. I only spoke with her secretary once, and then a block was put on any further calls. Heidi Myers sent a form down for me to sign but no letter explaining it.

4. The secretary at the Myers Law Office informed me that if I did not relinquish I would be terminated from my son and then I could not get him back.

5. That it would be in the best interests of my child Cesar

(continued...)

voluntary relinquishment of parental rights. Thereafter, the circuit court, by order entered December 14, 2006, found that Tameka had not presented evidence sufficient to warrant an evidentiary hearing on her motion and denied the same, determining that Tameka's relinquishment was valid and had not been obtained by fraud or duress.

On appeal to this Court, Tameka complains that the circuit court erred by not affording her an evidentiary hearing and by refusing to set aside her relinquishment. In this regard, Tameka asserts that the circuit court should have permitted her to present evidence in a hearing before the court to prove that her relinquishment had been obtained under duress. As to her claim of duress, Tameka states that she was incarcerated at the time of her relinquishment and claims that although she was represented by an attorney at that time, she did not receive the advice of counsel prior to executing the relinquishment. The DHHR and the Guardian respond by urging this Court to affirm the circuit court's ruling insofar as Tameka failed to prove that her voluntary relinquishment

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[23](...continued)

> L[.] for the relinquishment to be set aside; that is the polar star to follow. I desire to be reunited with my son.
>
> 6. I am willing to testify further about this matter in Court and under oath.
>
> And further you[r] affiant sayeth not.

Appearing at the end of this affidavit was the signature of "Tameka L[.] L[.]," the notarization, and the date of October 4, 2006.

of her parental rights had been obtained by fraud or duress as required by W. Va. Code § 49-6-7 to invalidate an otherwise valid relinquishment.

The statute which permits a parent to voluntarily relinquish his/her parental rights and provides guidance as to when such a relinquishment should be invalidated is W. Va. Code § 49-6-7 (1977) (Repl. Vol. 2004). As we observed in the preceding section of this opinion, this statute provides that "[a]n agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud." *Id.* Having determined the language of this provision to be plain, we need only apply it to the facts presently before us.

1. Hearing on motion to withdraw voluntary relinquishment. Tameka first argues that the circuit court was required to permit her to present evidence, at a hearing before the court, to prove that she was improperly induced by fraud or duress to relinquish her parental rights to Cesar. We previously have addressed this issue and concluded that the decision to hold an evidentiary hearing rests within the court's sound discretion: "Under the provisions of *W.Va.Code*, 49-6-7, a circuit court *may* conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud." Syl. pt. 3, *State ex rel. Rose v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001) (emphasis added). Moreover, the word "may" generally is afforded a permissive connotation, which renders the referenced act discretionary, rather

than mandatory, in nature. *See State v. Hedrick*, 204 W. Va. 547, 552, 514 S.E.2d 397, 402 (1999) ("The word 'may' generally signifies permission and connotes discretion." (citations omitted)); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher*, 174 W. Va. 618, 626 n.12, 328 S.E.2d 492, 500 n.12 (1985) ("An elementary principle of statutory construction is that the word 'may' is inherently permissive in nature and connotes discretion." (citations omitted)). Thus, the circuit court had discretion to permit Tameka an opportunity to present evidence at a hearing for that purpose or to consider, without a hearing, Tameka's motion to withdraw her relinquishment. Under the facts of this case, we find that the circuit court did not abuse its discretion by denying Tameka the evidentiary hearing she requested. As will be discussed more fully below, Tameka did not present any new evidence in her affidavit that would tend to indicate that her relinquishment had been obtained by fraud or duress to warrant further development during an evidentiary hearing.

2. Proof of fraud or duress. Tameka also challenges the circuit court's ruling upholding her relinquishment as valid because she had failed to prove that it had been obtained by fraud or duress as required by W. Va. Code § 49-6-7. We previously have observed that,

> [w]hile *W.Va. Code*, 49-6-7 specifically permits a relinquishment of parental rights, it clearly suggests that such an agreement may be invalid if it is not entered into under circumstances that are free of duress and fraud. Whether there has been fraud or duress is a question of fact that must be

determined by the circuit court judge.

Rose, 209 W. Va. at 191, 544 S.E.2d at 406.

To guide lower courts in making a determination as to whether or not a relinquishment should be invalidated, the elements needed to prove fraud or duress, as well as the requisite burden of proof therefor, were explained at length in the concurrence to *Rose*:

> [A] relinquishment agreement that is made in writing and entered into under circumstances free from duress and fraud *is valid*. A parent attempting to show otherwise is faced with a challenging task. Indeed, the threshold for establishing duress and fraud in the context of the relinquishment of parental rights is extremely high. As to duress, this Court has held that, in the context of an adoption, duress "means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress[.]" Syl. pt. 2, in part, *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72 (1986). *See also Baby Boy R. v. Velas*, 182 W. Va. 182, 185, 386 S.E.2d 839, 842 (1989) ("[Duress] means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child."). With respect to fraud, we have held:
>
> > The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.
>
> Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66

(1981). . . .

> Finally, I wish to emphasize that a parent challenging a relinquishment of his or her parental rights on the grounds of duress and fraud has the difficult responsibility of establishing the elements outlined above by *clear and convincing* evidence. *See, e.g.*, [W. Va. Code §] 48-4-5(a)(2) (1997) (Repl. Vol. 1999) (allowing revocation of adoption due to fraud or duress only where "[t]he person who executed the consent or relinquishment proves *by clear and convincing evidence* . . . that the consent or relinquishment was obtained by *fraud or duress*" (emphasis added)) . . . .
>
> [I]t is clear that a parent has a heavy burden to establish duress or fraud once he or she has relinquished parental rights. . . .

Rose, 209 W. Va. at 192-93, 544 S.E.2d at 407-08 (Davis, J., concurring) (emphasis in original) (additional citations omitted).

Reviewing the contents of the affidavit by which Tameka sought to withdraw her relinquishment,[24] we agree with the circuit court's conclusion that she did not prove that she had been subject to fraud or duress at the time she relinquished her parental rights. Although we appreciate that, at the time she signed her voluntary relinquishment of her parental rights to Cesar, Tameka was incarcerated and thus not then able to care for her child, this simple fact, alone, is not sufficient to constitute duress. In this regard, we previously held that "[m]ere 'duress of circumstance' does not constitute duress." Syl. pt. 2, in part, *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72.

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[24]See *supra* note 23 for the contents of Tameka's affidavit.

Neither are we convinced that Tameka's former counsel coerced her into relinquishing her parental rights. Of particular relevance to this assertion in her subsequent affidavit are Tameka's own representations in the relinquishment document,[25] which sharply contradict her current assertions of duress, that she "fully understand[s] the consequences of this decision;" she has "read and discussed thoroughly with [her] attorney all the above-mentioned rights;" she "fully understand[s] the meaning and consequences of executing this document;" she has "not been induced, coerced or threatened into signing this document;" and she "freely, knowingly, intelligently and voluntarily relinquish[es] all [her] parental rights to Cesar A[.] L[.]"

The above-quoted statements contained in Tameka's relinquishment constitute judicial admissions by which she is bound and which she cannot now deny. *See* Syl. pt. 4, *State v. McWilliams*, 177 W. Va. 369, 352 S.E.2d 120 (1986) ("A judicial admission is a statement of fact made by a party in the course of the litigation for the purpose of withdrawing the fact from the realm of dispute."). "The significance of such an admission is that it 'will stop the one who made it from subsequently asserting any claim inconsistent therewith.'" *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 302, 517 S.E.2d 763, 779 (1999) (quoting *Clark v. Clark*, 70 W. Va. 428, 433, 74 S.E. 234, 236 (1912) (additional citations and quotations omitted)). *Accord Keller v. United*

[25]*See* note 22, *supra*.

States, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) ("Judicial admissions are formal concessions . . . or stipulations by a party or its counsel . . . that are binding upon the party making them. They may not be controverted at trial or on appeal."). Because Tameka is bound by the admissions contained in her relinquishment, we cannot condone her present attempts to recant these statements absent clear and convincing evidence of the duress to which she claims to have been subject at the time thereof.

Furthermore, because Cesar is the *fourth* child who the DHHR has removed from Tameka's custody as the result of an abuse and neglect proceeding, it may be presumed that Tameka is familiar with the abuse and neglect process. The fact that Tameka's parental rights to three of these children have been involuntarily terminated makes her present assertions that she did not appreciate the full import of her relinquishment even less convincing. In deciding this case, the circuit court determined that Tameka had failed to sustain her burden of proof, and, having reviewed the record in this case, we agree with the circuit court's ruling. Accordingly, the December 14, 2006, order of the Circuit Court of Berkeley County is affirmed.

IV.

CONCLUSION

For the foregoing reasons, the October 11, 2006, order and the December 14, 2006, order of the Circuit Court of Berkeley County are hereby affirmed.

Affirmed.

No. 33317 – *In re: Cesar L.*

FILED
October 25, 2007
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring in part, dissenting in part:

I concur with the majority opinion on the very limited basis that it reaches the proper legal result for the facts of the underlying case. I write separately to register my firm dissent to the manner in which the majority has seen fit to unreasonably extend its decision to facts not before the Court. I fear that the majority's zeal to eliminate entirely the possibility that biological parents might seek modification of court decisions involuntarily terminating parental rights in an abuse and neglect case wrongly establishes a new point of law. That new point of law overlooks the constitutional limitations of this Court, ignores legislative intent and disregards prior post-termination visitation rulings of this Court. The specific language of the majority opinion to which I refer appears in syllabus point four of the majority opinion and reads, in pertinent part: "A final order terminating a person's parental rights, *as the result of either an involuntary termination* or a voluntary relinquishment of parental rights, completely severs the parent-child relationship," thus denying such parents standing to seek modifications.

The underlying action involved a mother who *voluntarily* relinquished her parental rights. She subsequently sought to revoke her relinquishment and petitioned for

modification of the abuse and neglect dispositional order pursuant to the provisions of West Virginia Code § 49-6-6 (1977) (Repl. Vol. 2004). Section 4, article VIII of the West Virginia Constitution provides in relevant part that "[w]hen a judgment or order of another court is reversed, modified or affirmed by the [supreme] court, every point fairly arising upon the record shall be considered and decided." This Court has taken the enforcement of this provision seriously by entertaining and deciding only those matters fairly arising from the record. Syl. Pt. 9, *State v. Comstock*, 137 W.Va. 152, 70 S.E.2d 648 (1952) ("Under the West Virginia Constitution, . . .when a judgment or decree is reversed or affirmed by this Court, the Court will not consider and decide a point which does not fairly arise upon the record of the case."); *Thornton v. CAMC*, 172 W.Va. 360, 364, 305 S.E.2d 316, 320-21 (1983) (appellate review must be limited to those issues which appear in the record). The majority improvidently declined to adhere to this long-recognized, self-imposed restriction. Instead, the majority extends its holding to include cases involving involuntary termination of parental rights, a circumstance not present in this case. The issue was not raised in the facts and the issue was not properly developed before this Court through brief and argument. As a result the majority's decision is ill-considered and fatally flawed.

It is equally disconcerting that the conclusion reached in the majority opinion clearly ignores legislative intent. Proper reading of the statutory provision regarding modification necessarily results in the conclusion that a biological parent is permitted to seek

modification of a dispositional order in an abuse or neglect case. The statute expressly provides that a motion to modify a dispositional order may be made by a "child, a child's parent or custodian or the state department" and "[t]hat a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5 (a)(6)] shall not be modified after the child has been adopted." W.Va. Code § 49-6-6. West Virginia Code § 49-6-5 (a)(6) (2002) (Repl. Vol. 2004) includes the circumstances under which a court may proceed to involuntarily terminate parental rights. By using a direct internal cross-reference to the termination of parental rights provision, the Legislature has expressed the intent that biological parents whose rights have been judicially terminated have a narrow window of opportunity to seek modification of dispositional orders. The majority wrongly rebuffs that clear legislative intent in order to announce a judicially created social policy that closes the door in child abuse and neglect cases to modification by any natural parent, including those whose parental rights are involuntarily terminated by judicial decree.

Furthermore, by its holding the majority has created a conflict with established case law allowing post-termination visitation. No mention is even made in the majority opinion of the decision authored by Justice Cleckley in 1995 in the case of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). The relevant and significant holding in *Christina L.* involved the recognition that a close emotional bond between a parent and child may exist even when parental rights are terminated in abuse and neglect cases and that continued

visitation or other contact may be in the best interests of the child. *Id.* at Syl. Pt. 5. It is not surprising that the majority ignores *Christina L.* because any effort to distinguish that case would be at best disingenuous since visitation under *Christina L.* is conditioned upon the existence of a close emotional bond *between* the parent and child. Without addressing *Christina L.*, the majority has inappropriately created conflict in this very difficult and particularly sensitive area of the law.

At first blush, the approach taken in the majority opinion seemingly streamlines the adoption process by reducing potential impediments for placement of children who have been victims of abuse and neglect. However, it also turns a blind eye to what the future actually holds for too many of these children. Adoption often is not a viable possibility for "special needs children." Like it or not, the reality is that some children will never be candidates for adoption because of their age, mental or physical disability, race or other factor, and they will simply languish in foster care for any number of years. It is possible that a parent whose rights have been involuntarily terminated could, over time, effect a change in circumstances which would support countermanding the termination decision. It may very well be that it is these children the Legislature contemplated would be protected and served by the policy it adopted by enacting the modification statute and providing that narrow window of opportunity.

I do not understand the majority's desire to so drastically restrict the standing of parents whose rights have been judicially terminated to seek modification. Having standing to apply for modification and attaining modification are far from synonymous. A natural parent seeking to overturn a termination decision has an exceptionally heavy burden to overcome in proving timeliness of the motion, fitness to be a parent, the validity of the claimed change in the parent's errant ways and finally, the lodestar – that the change would be in the best interests of the child. It is the quantum of proof and not the elimination of the opportunity that has governed and should govern the rare modification of termination orders in abuse and neglect cases. *See Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996) (setting forth burdens and quantum of proof in proceeding by natural parent to regain custody of child either permanently or temporarily transferred to third party).

In sum, I concur with the majority's affirmance of the rulings of the court below in the instant case because no clear error was proven as to application by the lower court of the facts to the law with regard to voluntary relinquishment of parental rights.[1] However, I adamantly dissent from the majority's reaching beyond the matters fairly arising upon the record in order to foreclose the opportunity of natural parents whose rights have been involuntary terminated to seek modification of dispositional orders in abuse and neglect

[1]Of course, a person retains standing to challenge the existence of a valid voluntary relinquishment. Although Appellant's contest of the validity of the relinquishment was unsuccessful in this case, that challenge was rejected on the merits by both this Court and the lower court, not on the basis of a lack of standing.

case. The majority's policy statement is contrary to the expressed intention of the Legislature, is at odds with prior case law regarding post-termination visitation, and engineers a poor social policy by judicial fiat. As a result, I concur, in part, and dissent, in part.

I am authorized to state that Justice Starcher joins in this separate opinion.

No. 33317 *In re: Cesar L.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

This case is not about the mother. It is about Cesar L. It is about his welfare. The mother had counsel. The mother voluntarily relinquished her maternal rights. There was no fraud. There was no duress. This voluntary relinquishment was notarized. Cesar L. is entitled to permanency and stability. Judge Silver ruled correctly and in the best interests of this child. I concur in this affirmation.

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

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

FILED
April 16, 2004
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31563

IN RE: CHARITY H., COURTNEY H. AND VICTORIA H.

Appeal from the Circuit Court of Pendleton County
The Honorable Donald H. Cookman, Judge
Case Nos. 02-JA-03, 02-JA-01, 02-JA-02

Affirmed and Remanded

Submitted: February 10, 2004
Filed: April 16, 2004

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Wanda S.

Marla Zelene Harman
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See & Downing
Moorefield, West Virginia
Attorney for the Appellee,
Henry H.

The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "'"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).' Syllabus Point 1, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)." Syl. Pt. 1, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999).

2. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496,

266 S.E.2d 114 (1980)." Syl. Pt. 7, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989).' Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

4. "Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with

the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991).

5. "W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, *In re Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988).

6. "'Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).' Syllabus point 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)." Syl. Pt. 3, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999).

7. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

8. "'When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other

contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.' Syllabus Point 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)." Syl. Pt. 8, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

9. "A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." Syl. Pt. 11, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).

Per Curiam:

This is an appeal by Wanda S.[1] (hereinafter "Appellant") from a denial of motions for an improvement period and a decision to terminate parental rights to three children, Courtney H., Victoria H., and Charity H. The Appellant alleges that the lower court erred by denying her motions for a post-adjudicatory improvement period and a dispositional improvement period. Based upon this Court's review of the record, briefs, arguments of counsel, and pertinent authorities, we affirm the decision of the lower court and remand with directions to determine whether post-termination visitation between the Appellant and the children should be ordered.

I. Factual and Procedural History

The Appellant and Henry H. are the biological parents of the three children at issue in this appeal, Courtney H., Victoria H. and Charity H.[2] On December 29, 2001, the Appellant transported the children to the State Police barracks in Pendleton County to report

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[1]In cases involving sensitive facts, we adhere to our usual practice, referring to the parties by their last initials rather than by their complete surnames. *See, e.g., In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

[2]Courtney's date of birth is December 10, 1991; Victoria's date of birth is June 18, 1993; and Charity's date of birth is September 6, 1995.

allegations of sexual abuse by Henry H., the biological father of the children.[3] Troopers Teter and Kingery of the West Virginia State Police informed the Appellant that she should seek medical and psychological examinations of the children; thus, the Appellant states that she took the children to Rockingham Memorial Hospital in Harrisonburg, Virginia, to be examined for evidence of sexual abuse on or about December 31, 2001. Although the Appellant alleges that a nurse informed her that an examination would be untimely since the children last visited with their father during Thanksgiving 2000, the hospital has no record of the visit. The Appellant next took the children to Winchester Medical Center for a physical examination on April 22, 2002. Forensic Nurse Brenda Adams examined the children and found evidence of sexual abuse and sexual assault in all three children.

On May 6, 2002, the Department of Health and Human Resources (hereinafter "DHHR"), through its Child Protective Services worker Cary Waybright, filed an abuse and neglect petition against the Appellant, Henry H., and John S., the Appellant's husband at that

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[3]Henry H. was indicted for these offenses in February 2003. Although his parental rights were also terminated, he is not a party to this appeal. Henry H. has previously been convicted of the offense of third degree sexual assault of a female victim in May 1994. The Appellant and Henry H. had one more child, Charity, after Henry H.'s conviction and were divorced in 1998. At the divorce hearing, the Appellant failed to seek a protective visitation order between the girls and their father, failed to advise the court of Henry H.'s status as a sexual offender, and agreed to regular visitation between the girls and their father. The Appellant has testified during the current proceedings that she did not advise the divorce court of the sexual offenses or seek supervised visitation because she could not imagine that a father would sexually abuse his own daughters, even though she admitted that she had been sexually abused by her own father, Jackie W.

time. The petition alleged sexual abuse by Henry H. and further alleged that the Appellant was aware of the abuse but continued to permit the children to visit Henry H. The petition also alleged that the Appellant allowed the children to maintain contact with another known sexual offender, Jackie W., the Appellant's own father. Further, physical abuse, parental abuse of alcohol, and domestic violence were included in the petition.

The children were removed from their mother's custody and placed in foster care in Randolph County, where they have remained during the pendency of this action.[4] The DHHR amended the petition on July 24, 2002, to include allegations that John S. physically abused the children, that the Appellant failed to protect the children from that abuse; that the Appellant refused to pay for eye glasses for Courtney; that the Appellant threatened to commit suicide in front of the children; that the Appellant refused to treat the children's head lice; that there were fleas in the carpeting of the Appellant's place of residence; that John S. forced the children to sit of their hands for several hours as punishment for routine offenses;[5] that Henry H. forced the children to watch pornographic

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[4]The guardian ad litem for the children, Marla Zelene Harman, reports that the children have adapted well to the foster/pre-adoptive placement, that all three girls are special needs children, and that they have all been diagnosed with post-traumatic stress disorder, with the middle child showing hostage type symptomology.

[5]The reports also indicated that John S. punished the children by forcing them to stand in the corner for long periods of time based upon perceived transgressions concerning food or the failure to obtain a hand stamp at school. The children had regularly arrived at school with bruises, and teachers reported that the children were afraid to get on

(continued...)

movies; that Henry H. engaged in sexual intercourse with the children; and that both Henry H. and Jackie W. are registered sexual offenders with whom the children have regular contact.

In a July 3, 2002, psychological report, Dr. Thomas Stein observed that his examination revealed that the Appellant suffered from post-traumatic stress originating from the sexual abuse she endured in her early adolescence. Although Dr. Stein noted that the Appellant had received some treatment from a licensed professional counselor and earlier treatment following the abuse in Braxton County, Dr. Stein concluded that "it is obvious to this psychologist that those treatments were ineffective in adequately addressing her post-traumatic stress condition." Dr. Stein opined that the Appellant's inability to protect her children originated in her underlying personality which developed from the sexual abuse she suffered as a child. Dr. Stein further explained that the Appellant had sufficient intellectual capacity to benefit from appropriate psychotherapeutic intervention and that the "in-home services related to child management would do nothing to address the issues of [the Appellant's] own previous sexual abuse and concomitant personality tendencies. . . ." Dr.

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[5](...continued)
the school bus to go home in the evenings. The children also reported being hit with flyswatters, wood, and a fishing pole. In 1999, the DHHR entered into a "safety contract" with the family subsequent to an incident in which John S. struck six-year-old Victoria's hands with a board because she had eaten cheese belonging to the Appellant. The Appellant, however, testified during the adjudicatory hearing that she could hardly remember that incident.

Stein concluded that the "likelihood of [the Appellant] fully and completely discharging her parenting responsibilities in an appropriate manner would be dramatically enhanced" after effective treatment. Unfortunately, Dr. Stein did not identify a time span in which improvement could be expected for the Appellant.

An adjudicatory hearing was held on August 5, 2002,[6] and the lower court issued an adjudicatory order on October 8, 2002,[7] finding that each of the children had been neglected and abused by the Appellant, Henry H., and John S. Specifically, the lower court found that Henry H. had sexually abused the children; that John S. had repeatedly physically abused the children; that the Appellant had consistently failed to take protective safety measures by exposing the children to sex offenders, by failing to timely submit the children for medical examinations, and by failing to seek appropriate psychological treatment for the children after the sexual abuse was revealed. The lower court further found that the Appellant had failed to protect the children from the harsh discipline and physical and

[6]During the adjudicatory hearing, the lower court indicated that it wished to interview the children in chambers. On August 16, 2002, the children and their guardian ad litem were present with the lower court in chambers in Romney, West Virginia. Subsequent to this interview, the parties were provided with an audio tape of the interview by the court reporter. No order or other writing from the lower court addressed what determinations were made based upon the interview or how it influenced the lower court's ruling on the adjudicatory hearing issues.

[7]The original October 8, 2002, adjudicatory order was not forwarded to counsel for the Appellant by the guardian ad litem, Marla Zelene Harman. Thus, a revised adjudicatory order, with slight corrections in the statement of facts, was entered on November 26, 2002.

emotional abuse inflicted by John S., their step-father. The court further emphasized that the Appellant had failed to acknowledge the extent of the abuse or its impact on the children. In an October 16, 2002, child case plan prepared by the DHHR, it was noted that the Appellant had previously failed to cooperate with offered services and that she had repeatedly denied that she or John S. abused the children.[8]

On October 24, 2002, the Appellant divorced John S., and he was thereafter dismissed from these proceedings. On November 6, 2002, the lower court conducted a hearing on the Appellant's motion for a post-adjudicatory improvement period. The DHHR and the guardian ad litem opposed such motion. The Appellant testified with regard to her ability to fully participate in such improvement period. The lower court also heard the testimony of Ms. Toni Walters, the individual supervising the visits between the Appellant and her children. It appears from the record that Ms. Walters was affiliated with Try Again Homes and was not an employee of the DHHR. Ms. Walters supervised the visitations for approximately five to six months, and her reports indicated that the visitations had been successful and that the Appellant had behaved very appropriately. During the November 6,

[8]According to the record in this matter, this family has received social services since approximately 1993 in Braxton and Pendleton Counties. The services have included RESA child service, Potomac Highlands Guild, counseling through a local mental health guild and the Catholic Church, Right from the Start Early Intervention, and Action Youth Care family preservation services on multiple occasions. Courtney had also received a consultation with psychologist Dr. Mario Dennis in 1996 concerning allegations that she had been sexually abused. Dr. Dennis and social workers had advised the Appellant at that time to keep the children away from the Appellant's father, Jackie W.

2002, hearing, Ms. Walters testified that Cary Ours[9] of the DHHR expressed disapproval of the positive remarks made by Ms. Walters concerning the Appellant and indicated to Ms. Walters that "your reports are killing us." Ms. Walters was subsequently removed as the visitation supervisor.

Upon conclusion of the evidence on November 6, 2002, the lower court denied the motion for the post-adjudicatory improvement period, finding that the Appellant had received services for several years to little avail. Specifically, the lower court found that the Appellant failed to keep the children away from their grandfather, a registered sexual offender; failed to keep the children away from their father, a registered sexual offender; and failed to protect the children from the severe physical discipline imposed by John S., even after a "safety agreement" was entered into with the DHHR in August 1999 as a result of John S.'s unreasonable punishment of the children.

A dispositional hearing was conducted on December 9, 2002, and the lower court considered and denied the Appellant's motion for a dispositional improvement period based upon the absence of evidence that she could comply with the requirements of an improvement plan.[10] On January 6, 2003, the lower court entered a dispositional order,

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[9]Cary Ours also appears in the evidentiary record as Cary Waybright.

[10]In this regard, the lower court remarked as follows:

(continued...)

finding that the Appellant was unwilling or unable to provide for the children's needs and that she had failed to protect the children from abuse. The court further found that continuation in the home was contrary to the welfare of the children, that the DHHR had made numerous reasonable efforts to preserve the family, and that there was no reasonable likelihood that the conditions of neglect and abuse could be substantially corrected in the near future. The lower court consequently terminated the parental rights of both the Appellant and Henry H.

The Appellant appeals that determination to this Court, contending that the lower court committed reversible error by denying her motions for post-adjudicatory and dispositional improvement periods. The guardian ad litem and DHHR maintain that the lower court's decision was correct and in the best interests of the children since there is no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. The guardian ad litem and DHHR further argue that the Appellant has remained in denial regarding the degree and nature of abuse that the children have endured, has failed to respond positively to rehabilitative services offered over many

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[10](...continued)
Failure to protect has brought us here today and . . . to a large measure the Court believes that as far as the mother is concerned that boils down to failure to see. A failure to see her children being abused. A failure to see her children being neglected and that's the true essence . . . of why we're here today.

years, and has failed to demonstrate an ability to comply with terms which would be associated with an improvement period.

II. Standard of Review

In appeals from abuse and neglect proceedings, this Court has consistently applied a standard of review subjecting conclusions of law to *de novo* review and findings of fact to the clearly erroneous standard. In syllabus point one of *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999), this Court stated:

> "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 1, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999).

This Court further stated as follows in *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997): "The above standard of review requires deference by this Court to the findings of a circuit court in a civil abuse and neglect proceeding. The critical nature of

unreviewable intangibles justify the deferential approach we accord findings by a circuit court." 200 W. Va. at 562, 490 S.E.2d at 649. In *In re Emily & Amos B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000), this Court also acknowledged the deference owed to the lower court by stating that "the circuit court is the better-equipped tribunal" to make substantive determinations regarding termination of parental rights. 208 W. Va. at 340, 540 S.E.2d at 557 (rejecting allegation that incarceration should automatically result in termination).

III. Discussion

During the pendency of an abuse and neglect proceeding, an individual facing potential termination of parental rights may move the presiding court for an improvement period at several stages of the proceedings. The Appellant in the present case requested an improvement period following the final adjudicatory hearing and again as a dispositional alternative. Statutory authority for these improvement periods is provided in West Virginia Code §§ 49-6-2(b) (1996) (Repl. Vol. 2001), 49-6-5(c) (1998) (Repl. Vol. 2001), and 49-6-12(b) (1996) (Repl. Vol. 2001). West Virginia Code § 49-6-12(b)(2) specifies that entitlement to an improvement period is conditioned upon the ability of the parent/respondent to demonstrate "by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period. . . ." In *State ex. rel Virginia M. v. Virgil Eugene S.*, 197 W. Va. 456, 475 S.E.2d 548 (1996), this Court specified that the most

recent statutory enactments clarify that the burden of proof falls upon the parent requesting an improvement period. In footnote nine of *Virginia M.*, this Court explained as follows:

> We note that West Virginia Code § 49-6-12 (1996), recently enacted by the West Virginia Legislature, now requires a parent seeking an improvement period in cases of neglect or abuse to file a written motion requesting it, and to demonstrate by clear and convincing evidence that he or she is likely to fully participate in the improvement period. Thus rather than presuming the entitlement of a parent to an improvement period, as under *Cheryl M.*, . . . the law now places on the parent the burden of proof regarding whether an improvement period is appropriate.

197 W. Va. at 461 n. 9, 475 S.E.2d at 553 n. 9.[11]

Both statutory and case law emphasize that a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. Where an improvement period would jeopardize the best interests of the child, for instance, an improvement period will not be granted. As the pertinent part of syllabus point seven of *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991), succinctly emphasizes,

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[11]The *Cheryl M.* reference is to *State ex rel. West Virginia Dept. of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987), holding that a parent may move for and be granted an improvement period "unless the court finds compelling circumstances to justify a denial." 177 W. Va. at 691, 356 S.E.2d at 184. In this vein, we hasten to point out that this Court's prior inquiries into what may constitute "compelling circumstances," such as in *In re Darla B.*, 175 W. Va. 137, 331 S.E.2d 868 (1985), were based upon language in a former version of West Virginia Code § 49-6-2, prior to 1996 amendments, which stated that a court was to provide an improvement period unless compelling circumstances indicated otherwise. With the deletion of such language from the statute, the compelling circumstances concept is no longer relevant to this Court's investigation.

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . ." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

See also In re Erica C., ___ W. Va. ___, 589 S.E.2d 517 (2003). Additionally, if a parent is unable to demonstrate an ability to correct the underlying conditions of abuse and/or neglect in the near future, termination of parental rights may proceed without the utilization of an improvement period. *See* W. Va. Code 49-6-5(a)(6) (1998) (Repl. Vol. 2001). Syllabus point seven of *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996), accentuates this concept, as follows:

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989)." Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).

Termination of parental rights is also authorized where a parent contends nonparticipation in acts giving rise to the termination despite the existence of clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent

or stop such acts to protect the child. In syllabus point two of *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991), this Court explained as follows:

> Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

See also Syl. Pt. 3, *In re Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988) ("W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent").

A parent's right to an improvement period is carefully defined because the pre-eminent concern in abuse and neglect proceedings is the best interest of the child subject thereto. *See* Syl. Pt. 3, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999) ("'Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).' Syllabus point 7, *In re*

Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995).”). As this Court emphasized in syllabus point three of *In re Katie S.*, “‘[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.’”

In *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996), this Court addressed a situation similar to the one at bar, stating that:

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

197 W. Va. at 498, 475 S.E.2d at 874. The lower court in the present case specifically stated that “I don’t believe that her submissiveness or failure to be assertive can be corrected in any period of time that a[n] . . . improvement period might allow us.” That is precisely the type of factual determination to which this Court must give deference on appellate review.

Based upon the above precedent, as well as our review of the entire record in this case, it is clear that the Appellant failed to present evidence to demonstrate that there was a reasonable likelihood that the conditions of abuse and neglect suffered by her children

could be substantially corrected in the near future. Given the Appellant's refusal to acknowledge the seriousness of the continuous abuse her children have suffered, we uphold the lower court's conclusion that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future. The Appellant has simply failed to demonstrate any ability to protect her children from further abuse.

We further conclude that the lower court did not abuse its discretion by denying the requested improvement periods. The lower court's termination of the Appellant's parental rights was supported by clear and convincing evidence and was not clearly erroneous. Finally, we find that the lower court acted in the best interest of the children throughout the underlying proceedings.

IV. Relevant Concerns

While the evidence before the lower court undoubtedly justified its conclusions,[12] and we consequently affirm, there are troubling components of this case that

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[12]The lower court quite obviously struggled earnestly with this case. With regard to the Appellant's motion for a post-adjudicatory improvement period, the lower court explained as follows:

> I frankly wanted to try to find some evidence that would convince me that it should be granted, but I think we have to look at the – at the prior experience that has been made here based upon the services that were rendered to her previously and whether or not the referrals were substantiated or not. The

(continued...)

should not elude inquiry. One such issue is the apparent absence of any services directly aimed at remedying the Appellant's underlying personality characteristics which apparently led to her inability to protect her children. An extensive array of in-home parenting services were provided and are documented in the record. Yet, these services were not specifically devised to address the Appellant's real deficiencies. It is fundamentally unfair to castigate the Appellant for failure to improve when the services offered to her were not designed to promote improvement in the specific target area in which she was most deficient. Dr. Stein's opinion indicated that the Appellant could quite possibly, at some unknown point in the future, gain enough confidence and mastery over her own abusive past to become an adequate parent to her daughters. While we are concerned with this situation, the record compels the conclusion, as stated above, that there is no reasonable manner in which to

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[12](...continued)
fact remains that services had been rendered to [the Appellant] for a number of years, for at least nine years, and they appear to have done little if any good.

She acknowledges that her latest husband, John, was abusive after the services were rendered. She also acknowledges that she was told to keep the girls away from her father, but yet didn't, knowing that he is a sexual offender, and that she entered into a safety agreement as late as 1999. She says that she's willing to cooperate to do all these things, but her prior experience would – would indicate that she will not follow up with that. Consequently, I cannot grant her motion for an improvement period and would find the basis for same is that her prior refusal to comply with services that have been offered to her.

calculate when or if the Appellant would attain that ability. Thus, the lower court's determinations cannot be deemed erroneous.

Equally troubling in this case is the allegation that a caseworker for the DHHR expressed disapproval of a visitation supervisor's report which cast the Appellant in a positive light. Such expression of displeasure insinuates an adversarial position or an antagonistic approach which is inconsistent with the intended goals and methodology of the DHHR as an entity. West Virginia Code § 49-6D-2 (1984) (Repl. Vol. 2001) specifies that the DHHR's services are intended to provide a mechanism through which "family ties" will be preserved and strengthened where possible, "while recognizing both the fundamental rights of parenthood and the State's responsibility to assist the family in providing the necessary training and education of all children. . . ." The legislature has provided for "the offering of opportunities by the department whereby parents, guardians or custodians and their children may avail themselves of public and private resources offering programs and services which are primarily preventive and nonpunitive and *geared toward a rehabilitation of the home and a treatment of the underlying factors which cause or tend to cause abuse and neglect. . . .*" W. Va. Code § 49-6D-2(b)(1) (emphasis supplied). The legislature also states that the DHHR's objectives shall be carried out in a manner which ensures that assistance will be provided "without fear by the citizens that the State's exercise of that responsibility will be unfairly used as a means of terminating family ties[.]" W. Va. Code

§ 49-6D-2(b)(6). The praise of failure and the deprecation of success are concepts completely incongruous with the stated legislative purpose of providing nonpunitive assistance and insulating the parent from fear that the State will use its power unfairly.

We further note that the Appellant was frequently encouraged by the DHHR to separate herself and her children from her husband John, due to his abusive tendencies. She accomplished this goal by divorcing John, possibly in the expectation that the divorce would enhance the possibility of regaining custody of her children. The record also reflects, however, that the Appellant and John may still maintain a relationship of some nature.

V. Right to Continued Association

The record clearly reveals that an emotional bond exists between the Appellant and her children. Throughout the proceedings, the visitations have progressed well, and the children have expressed interest in continuing to maintain a relationship with their mother.[13] Based upon this emotional bond, as well as the efforts demonstrated by the

[13]The Appellant energetically participated in regular visitations with the children, as scheduled by the DHHR. Toni Walters, as supervisor of the visits, indicated that the time the mother spent with the girls was very beneficial and productive. The supervisor indicated in one of her visitation reports that she was "impressed with how the visits are going." "This supervisor has only been able to report positive things about this family." The supervisor stated that the children "adore" their mother, that the mother engages in "'hands on' interactions during the visits," that she "brings a picnic lunch, not McDonalds, but the things to make sandwiches together." The supervisor stated that she was "impressed with this family and feels positive about the reunification."

Appellant with regard to counseling, divorcing her husband, and actively seeking a relationship with her children, the lower court, upon remand, shall examine the emotional bond between the Appellant and her children. The lower court may grant the Appellant post-termination visitation with the children, provided that such continued relationship is in the children's best interests and "would not unreasonably interfere with their permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996). As this Court explained in syllabus point eight of *In re Katie S.*,

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

198 W. Va. at 82, 479 S.E.2d at 592; *see also* Syl. Pt. 11, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996) ("A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child").

Thus, upon remand, the lower court is instructed to hear argument from all parties on this issue of post-termination visitation and take additional evidence, if necessary, to determine whether continued visitation or other contact with the Appellant is in the best interests of the children.

VI. Conclusion

For the reasons set forth above, the final order of the Circuit Court of Pendleton County is affirmed, and this case is remanded with directions.

Affirmed and remanded with directions.

No. 31563 - In re Charity

FILED
July 6, 2004
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this case the majority has affirmed a decision of the circuit court terminating a mother's parental rights without first giving her the benefit of either a post-adjudicatory or pre-disposition improvement period.[1] Given the particular facts presented in this case, the result reached by the majority is simply wrong. I strongly believe that the appellant, Wanda S., was entitled to the benefit of an improvement period before the decision to terminate her parental rights was made. For this reason, I dissent.

While the evidence in this case makes clear that past efforts to provide services to Wanda S. had not been successful, the record is equally clear that the services in no way addressed Wanda S.'s fundamental problem, her post-traumatic stress condition. As the majority opinion recognizes, a psychological report filed by Dr. Thomas Stein opined that Wanda S.'s "inability to protect her children originated in her underlying personality which developed from the sexual abuse she suffered as a child." Maj. op. at 4. Dr. Stein concluded

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[1]This woman likewise did not receive a pre-adjudicatory improvement period. She filed a motion for a pre-adjudicatory improvement period, but then withdrew the motion at the adjudication hearing.

that the "likelihood of [Wanda S.] fully and completely discharging her parenting responsibilities in an appropriate manner would be *dramatically enhanced*" following effective treatment.

I believe that Dr. Stein' conclusions, when considered along with the steps this woman did take to protect her children, i.e. reporting their sexual abuse when she became aware of it, divorcing her abusive husband, and the positive reports generated from her visits with her children following their removal from her home, constitute clear and convincing evidence that Wanda S. was "likely to fully participate in the improvement period . . . ." W. Va. Code § 49-6-12(b)(2) (1996) (Repl. Vol. 2001). Consequently, Wanda S. should have been granted an improvement period before any decision of whether or not to terminate her parental rights was made.[2]

In view of the foregoing, I respectfully dissent.

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[2]When considering the result reached in this case in connection with another case rendered this Term of Court the message the majority seems to be sending is that when a young man is subjected to sexual abuse as a child, and as a result thereof he becomes a sexual predator who prays on young children, he is deserving of every conceivable chance that may be given him. Conversely, when a woman has been subjected to sexual abuse as a child, and as a result thereof she does not become a sexual predator, but by virtue of the emotional scars of her abuse finds herself unable to protect her children from abuse at the hands of others, she is not deserving of a reasonable chance to receive appropriate psychotherapeutic intervention prior to having her parental rights to her children terminated.

207 W. Va. 358, 532 S.E.2d 358

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

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February 24, 2000
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OF WEST VIRGINIA

No. 26844

RELEASED
February 25, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, AND ON BEHALF OF CHASTITY D., JAMES D., LESLEY C., ROSEMARY C., JEFFREY I., PRISCILLA I., CHRYSTAL M., SHANE M., CYNTHIA M., BRANDY W., AND CIERA S.,
Petitioner

v.

HONORABLE GEORGE W. HILL, JR.,
JUDGE OF THE CIRCUIT COURT OF WOOD COUNTY,
Respondent

Petition for Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: January 11, 2000
Filed: February 24, 2000

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Honorable George W. Hill, Jr.

JUSTICE SCOTT delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. " ' " 'A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.' Syllabus Point 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969)." Syllabus point 2, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995).' Syllabus point 2, *Ewing v. Board of Education of Summers County*, 202 W.Va. 228, 503 S.E.2d 541 (1998)." Syl. Pt. 1, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999).

2. "In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual's parental rights." Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998).

3. In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision,

even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 (1999) and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

Scott, Justice:

In this original-jurisdiction proceeding, the petitioner, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), seeks a writ of mandamus compelling the respondent, the Honorable George W. Hill, Jr., Judge of the Circuit Court of Wood County, to conduct disposition hearings pursuant to West Virginia Code § 49-6-5 (1999) in six child abuse and neglect cases in order to

resolve the status of the parental rights of the biological fathers, who allegedly abandoned their children. In each case, the mother's parental rights have been terminated, but the respondent judge has left unresolved the issue of whether the father's parental rights should be terminated. Under the circumstances of the cases before us, we conclude that disposition hearings regarding termination of the fathers' parental rights are required as part of the abuse and neglect proceedings. Accordingly, the writ of mandamus is granted.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The six abuse and neglect cases giving rise to this mandamus action involve a combined total of eleven children, who have been adjudged abused and neglected, and seven biological fathers,[1] who have allegedly abandoned their children.[2] While the cases differ somewhat factually, they share two important commonalities--(1) DHHR filed a child abuse and neglect petition in the Circuit Court of Wood County seeking, *inter alia*, termination of the father's parental rights, and (2) the respondent judge refused and/or failed to conduct a disposition hearing on the issue of whether the father's parental rights should be terminated. The salient facts in each case are outlined below.

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[1] Hereinafter, we use the word "father" to refer to a biological father.

[2] DHHR indicates in its petition for writ of mandamus that the fathers in these cases are either "unknown" or have "otherwise abandoned" their children. In *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), this Court recognized that abandonment of a child by a parent "constitutes grounds for termination of parental rights." *Id.* at 456, 460 S.E.2d at 702.

A. *Chastity D.,*[3] *James D., Leslie C., Rosemarie C., Jeffrey I., Jr., Priscilla I., and Brandy W.*

In four of the abuse and neglect cases, Judge Hill entered an "agreed" order terminating the parental rights of the "unknown" father without a disposition hearing. Each "agreed" order was signed by counsel for the father, the assistant prosecuting attorney, and the children's guardian ad litem.[4] The children involved in these cases are Chastity D., James D., Leslie C., Rosemarie C., Jeffrey I., Jr., Priscilla I., and Brandy W.[5]

The four agreed orders were substantially the same, each stating that "the parties advised the Court that the respondent-unknown father waived the adjudicatory and dispositional hearings and it being in the best interests of the child the parties agree that the unknown father's parental rights should be **TERMINATED** to the above-named children." The orders contained specific findings, including "that the respondent-father neglected the above-named children in that he has abandoned the said child [sic];

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[3] We adhere to our usual practice in family law cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In re Beth Ann B.*, 204 W. Va. 424, 425 n.1, 513 S.E.2d 472, 473 n.1 (1998); *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 250 n.1, 496 S.E.2d 198, 200 n.1 (1997); *In re Katie S.*, 198 W. Va. 79, 83 n.2, 479 S.E.2d 589, 593 n.2 (1996).

[4] The validity of the consent given by the attorneys for the fathers is not at issue. But we are mystified by the practice illustrated upon the record of these cases whereby an agreed order is signed by the attorney for an "unknown" father, ostensibly signifying the father's consent to termination of his parental rights, when the attorney has never met nor spoken with his or her client. Obviously, an attorney cannot consent to, waive, or surrender any rights of a client who is unknown or cannot be located. Under such circumstances, the only way in which an "unknown" father's parental rights can be terminated is upon a proper hearing pursuant to West Virginia Code § 49-6-5.

[5] There is no indication of the children's ages on the limited record before us.

that there is no reasonable likelihood that the conditions of neglect . . . can be substantially corrected in the near future; . . . and that the Court has no other recourse than to terminate the parental rights of the respondent-father . . . ." In addition, Judge Hill awarded DHHR legal and physical custody of the children and authorized DHHR to consent to their adoption.[6]

B. *Chrystal M., Shane M., and Cynthia M.*

The fifth abuse and neglect case concerned several children, but the instant mandamus petition relates to only three of those children: Chrystal M., born March 7, 1979; Shane M., born July 10, 1986; and Cynthia M., born November 27, 1987. Because Chrystal M. is now twenty years old and no longer subject to the circuit court's jurisdiction for purposes of abuse and neglect proceedings,[7] our decision herein does not pertain to her.

On March 14, 1996, DHHR filed a petition alleging, *inter alia*, that Shane M. and Cynthia M. were abused or neglected children. In the petition, the children's mother was identified as Donna M., and their father was identified as Steve A., address unknown. DHHR alleged that the children were residing

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[6] The agreed order in the Chastity D. and James D. matter was entered on July 22, 1999. The agreed order in the case involving Rosemarie C., Jeffrey I., Jr., and Priscilla I. was entered on July 23, 1999. The agreed order in the Leslie C. matter was entered on July 27, 1999, and the agreed order in the Brandy W. matter was entered on August 4, 1999.

[7] West Virginia Code § 49-1-2 (1999) defines a "child" as used in chapter 49 to mean "any person under eighteen years of age." Thus, a circuit court's jurisdiction over a child abuse and neglect proceeding, governed by article 6 of chapter 49, terminates when the child turns eighteen. In this particular case, the abuse and neglect proceeding should have been dismissed as to Chrystal M. when she attained the age of eighteen.

with their mother and Phillip B.[8] at a certain Parkersburg address. The petition contained specific allegations of physical abuse by Donna M. and implicated both Donna M. and Phillip B. as being guilty of neglect. At the close of the petition, DHHR requested that the "parental rights of the aforementioned parents . . . be permanently terminated . . . ."[9]

On March 14, 1996, Judge Hill entered an order which found imminent danger to the physical well being of the children and directed that they be delivered into the custody of DHHR, pending a preliminary hearing. In the order, notice was given of a preliminary hearing and a "final hearing" on March 21, 1996, at 3 p.m. and April 26, 1996, at 1:15 p.m., respectively. At the conclusion of the order, the clerk of the court was directed to deliver copies of the petition, order, and notice to the county sheriff to be served upon the children's mother and Phillip B., who were "made the Respondents to this cause." In addition, attorneys were appointed to represent the designated respondents and the children. This order made no mention of Steve A., the children's father.

Following the preliminary hearing on March 21, 1996, the respondent judge entered an order on March 22, 1996, awarding DHHR temporary custody of the children and granting the "respondent-

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[8] Phillip B. is the father of two children who were named in the abuse and neglect petition but are not involved in this mandamus action.

[9] The sufficiency of the abuse and neglect petition is not at issue here. We observe, however, that given DHHR's apparent belief that the father of Shane M. and Cynthia M. had abandoned them, the facts relating thereto should have been alleged in the petition. In syllabus point one of *Katie S.*, this Court held that a non-custodial parent can be found to have abused and neglected his or her child, expressly overruling *State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978). 198 W. Va. at 86, 479 S.E.2d at 596.

parents" a six-month improvement period.

On January 16, 1997, DHHR filed a supplemental abuse and neglect petition alleging sexual abuse of the children by their mother and Phillip B. On April 4, 1997, May 21, 1997, and June 13, 1997, an adjudicatory hearing took place, and on July 9, 1997, an adjudicatory order was entered, finding the children were abused and neglected and the abuse and neglect was inflicted by Donna M. and Phillip B. Upon these findings, it was ordered that temporary legal and physical custody of the children remain with DHHR. Also, in the adjudicatory order, Judge Hill set a date and time for the disposition hearing and directed the court clerk to provide a certified copy of the order to the "parties."

On August 4, 1997, Judge Hill held a disposition hearing, and on August 20, 1997, a disposition order was entered which terminated the parental rights of Donna M. and Phillip B. The order was silent regarding the parental rights of Steve A. As indicated earlier, previous orders did not recognize Steve A. as a party to the proceeding, even though he was named in the abuse and neglect petition and DHHR requested termination of his parental rights.

On September 23, 1999, Judge Hill entered an agreed order, signed by the assistant prosecuting attorney and guardian ad litem, continuing DHHR's custody of the children.[10]

C. *Ciera Faith S.*

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[10] Previously, on August 27, 1999, the respondent judge had entered an order granting DHHR permission to authorize separate placement and adoption of the children.

The sixth abuse and neglect case now in question involves Ciera Faith S. and her putative father, with regard to whom no disposition hearing has been held. On September 23, 1999, Judge Hill conducted a hearing on an amended abuse and neglect petition, filed by DHHR, pertaining to the "unknown" father of Ciera Faith S.[11] At the hearing, the assistant prosecuting attorney, who was serving as counsel for DHHR, stated that DHHR sought to have the "unknown" father "adjudicated of neglect by virtue of abandonment." The prosecuting attorney acknowledged that the child's mother alleged a man named James S. was the father and that "[h]e was to come in for a [paternity] test and never did."[12] In addition, the prosecuting attorney stated that Ciera Faith S. was going through an adoption. Thereafter, the following exchange ensued between Judge Hill and the prosecuting attorney:

> THE COURT: That is fine. Go through with the adoption.
>
> MS. LITTLE: That is where we run into problems. The department has a policy --
>
> THE COURT: The hell with their policy. I don't approve of their policy. That is an order of the Court. I see nothing to do but to proceed with the adoption. I am going to overrule the objection of the department when it comes to that. Their policies are not set by statute.

Later during the September 23, 1999, hearing, the child's guardian ad litem expressed her concern about going through with the adoption given the unaddressed allegation that James S. was Ciera Faith S.'s father. Judge Hill abruptly dismissed this concern, stating: "The adoption statute provides if there is no father. Okay. This is a waste of time and money, and a waste of the lawyer's time and the taxpayer's money, and

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[11] Ciera Faith S. was two years old at the time of the hearing.

[12] James S. did not appear in person at the hearing, but he was represented there by counsel.

abuse and neglect proceedings. The policy of the department is just wasteful of everybody's time, including theirs."

On October 1, 1999, Judge Hill entered an order which declared: "this proceeding with regard to the respondent-father's parental rights is moot and shall be considered at the adoption hearing." By the same order, Judge Hill dismissed the case from the circuit court's docket.

II.

STANDARD FOR WRIT OF MANDAMUS

This case is before this Court on the petition of DHHR seeking the extraordinary remedy of mandamus. The standard for determining whether issuance of a writ of mandamus is proper in a particular case entails a three-prong inquiry:

> " ' "A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).' Syllabus point 2, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995)." Syllabus point 2, *Ewing v. Board of Education of Summers County*, 202 W.Va. 228, 503 S.E.2d 541 (1998).

Syl. Pt. 1, *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 533-34, 514 S.E.2d 176, 184-85 (1999). Thus, our task is to ascertain whether DHHR has satisfied these criteria and thereby demonstrated its entitlement to mandamus relief. *See id.* at 534, 514 S.E.2d at 185.

III.

DISCUSSION

Following this standard, we consider (1) whether DHHR has a "clear legal right" to the writ of mandamus compelling Judge Hill to conduct disposition hearings in the abuse and neglect cases now before us; (2) whether Judge Hill has a "legal duty" to do that which DHHR seeks to compel; and (3) whether mandamus relief is the only "adequate remedy" available to DHHR.

In our analysis, we explore one determinative question: In each of the six abuse and neglect cases, was Judge Hill required to hold a disposition hearing and decide whether the father's parental rights should be terminated during the abuse and neglect proceeding? For the reasons outlined below, we answer it affirmatively.

This Court has repeatedly condemned the practice of failing to determine the status of the father's parental rights during an abuse and neglect proceeding. In *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), an abuse and neglect case in which the natural mother's parental rights to two children were terminated, this Court found it was reversible error for the Circuit Court of Wood County to authorize DHHR to consent to the children's adoption without addressing the father's parental rights. Even though the father was named in the abuse and neglect petition filed by DHHR, and it was alleged in the petition that he resided "somewhere in Parkersburg" and had not been in contact with the children for a number of years, the circuit court failed to include him in the proceeding. We identified two serious problems with the circuit court's approach in that case. First, it "strips [the father] . . . of any parental rights without affording

him due process." *Id.* at 455, 460 S.E.2d at 701. Second, and "[p]erhaps even more importantly, it leaves the status of the children dangling, and the validity of a future adoption subject to challenge." *Id.* Based on this rationale, we forcefully rejected DHHR's argument that the father could move to protect his rights if and when persons to adopt the children were found:

> It would be ludicrous for this Court to allow this matter to linger while Christina and Kenneth are in foster care. Should they be fortunate enough to form a bond with their foster parents and the foster parents move for adoption, it would be all the more devastating to the children to have to go back into court to litigate whatever rights the natural father may possess. Dangling, unresolved parental rights also have a chilling effect on potential adoptive parents. We choose to resolve this issue in a timely manner rather than to leave this potential timebomb unresolved.

194 W. Va. at 456, 460 S.E.2d at 702.

In *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996), this Court reiterated its concern for resolution of the status of the father's parental rights as part of the abuse and neglect proceeding. The abuse and neglect petition filed by DHHR in *Katie S.* sought termination of the parental rights of both parents of two children. The father was named in the petition; his address was listed as "unknown;" and the evidence strongly suggested that he had abandoned his children. At the end of the disposition hearing, the circuit court terminated the mother's parental rights, but found that the father was not a proper party and dismissed him. On review, this Court was critical of the fact that "no action was taken [by the circuit court] concerning the parental rights of the children's father":

> We again emphasize that the practice of waiting until adoption proceedings to determine the status of such a parent's parental rights, leaves "the children in 'No Man's Land' with regard to any resolution in their lives," may discourage persons who want to adopt the children, and leaves "the

> validity of a future adoption subject to challenge" (when due process has not been afforded to a natural parent). *In re Christina L.*, 194 W.Va. at 455-56, 460 S.E.2d at 701-2.

198 W. Va. at 85-86, 479 S.E.2d at 595-96. We concluded in *Katie S.* that "the circuit court should have considered the allegation that the father had abandoned his children when the abuse and neglect petition was presented." *Id.* at 87, 479 S.E.2d at 597. Therefore, we directed the circuit court to consider upon remand the issue of the father's parental rights. *Id.*

In two of the cases *sub judice*, the respondent judge did not decide whether the father's parental rights should be terminated.[13] Judge Hill's failure to resolve the status of the father's parental rights was clearly contrary to both *Christina L.* and *Katie S.* By leaving "[d]angling, unresolved parental rights" in these cases, Judge Hill created a "potential timebomb" which, if left unattended, could obliterate the children's chances of being placed into adoptive homes.[14] *Christina L.*, 194 W. Va. at 456, 460 S.E.2d at 702.

For these reasons, we conclude that the respondent judge should have resolved the status of the father's parental rights in all six abuse and neglect cases here presented. We further conclude, under well-settled law, that a disposition hearing was necessary to make such a determination.

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[13] As discussed in Part I, *supra*, in the other four cases, Judge Hill terminated the father's parental rights by entry of an agreed order and without a disposition hearing, an approach which violates Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings. *See supra* note 4 and *infra* note 15.

[14] Pursuant to West Virginia Code § 49-6-5(a)(6), "[n]o adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final." Thus, where an abuse and neglect proceeding has been instituted seeking termination of the father's parental rights, timely resolution of the status of the father's rights is crucial.

West Virginia Code § 49-6-5, the statute governing the dispositional phase of abuse and neglect proceedings, provides in relevant part: "The court shall forthwith proceed to disposition giving both the petitioner [normally DHHR] and respondents [normally the child's parents] an opportunity to be heard." W. Va. Code § 49-6-5(a).

Recently, in *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998), this Court spoke succinctly on the requirement of a disposition hearing. The sole issue in *Beth Ann B.* was whether a circuit court may terminate parental rights in a child abuse and neglect proceeding without first conducting a disposition hearing, when the parent has signed an agreed order containing stipulations of facts which, if proven, would support a termination of parental rights under West Virginia Code § 49-6-5. Despite the existence of such an agreed order, signed by the children's natural mother and her counsel, we decided that a disposition hearing was required and reversed the decision of the circuit court. In syllabus point two of *Beth Ann B.*, we held:

> In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual's parental rights.

Id. at 425, 513 S.E.2d at 473. Our holding was based upon the statutory scheme applicable in child abuse and neglect proceedings and the Rules of Procedure for Child Abuse and Neglect Proceedings.[15] In reaching our holding, we stated:

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[15] The Rules of Procedure for Child Abuse and Neglect Proceedings were adopted by order of this Court on December 5, 1996, and became effective on January 1, 1997.

> Clearly, the statutory scheme contemplates a disposition hearing prior to termination of an individual's parental rights. This Court recognized as much in syllabus point one of *West Virginia Department of Welfare ex rel. Eyster v. Keesee*, 171 W.Va. 1, 297 S.E.2d 200 (1982), where we held:
>
> > "West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing." Syl. pt. 2, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).
>
> Our decision in *Keesee* preceded the advent of the *Rules of Procedure for Child Abuse and Neglect Proceedings*, adopted by order of this Court on December 5, 1996, and effective on January 1, 1997. But the mandatory prerequisite of a disposition hearing where parental rights are being terminated is plainly incorporated in the *Rules*.

204 W. Va. at 428, 513 S.E.2d at 476; *see also* Syl. Pt. 2, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973) ("West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing."); *In re Sutton*, 132 W. Va. 875, 880, 53 S.E.2d 839, 842 (1949) ("A parent, in our opinion, cannot be divested of parental rights without notice and opportunity for hearing.").

In every case now before this Court, Judge Hill failed to hold a disposition hearing, which we have previously found to be a "mandatory prerequisite" to the termination of parental rights. *Beth Ann B.*, 204

W. Va. at 428, 513 S.E.2d at 476. Because we have determined that Judge Hill should have decided whether to terminate each father's parental rights during the abuse and neglect proceeding, as discussed above, we must also conclude that he should have conducted a disposition hearing prior to rendering that decision.

Accordingly, under the facts of the cases before us, we hold that in a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 (1999) and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed. Adoption proceedings should not be burdened unnecessarily with this issue.

IV.

CONCLUSION

Based upon the foregoing, we conclude that the three criteria for mandamus relief, discussed in Part II, are fully satisfied. Therefore, we grant the writ of mandamus requested by DHHR and order Judge Hill to hold a proper disposition hearing in each case in order to address and resolve the issue of whether the father's parental rights should be terminated.

Writ granted as moulded.

177 W. Va. 688, 356 S.E.2d 181

Supreme Court of Appeals of West Virginia

STATE ex rel. W.VA. DEPARTMENT OF HUMAN SERVICES

v.

CHERYL M., et al.

No. 17156

April 2, 1987

SYLLABUS BY THE COURT

1. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

2. W.Va.Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.

3. Under W.Va.Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984).

4. Under W.Va.Code, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days.

5. The purpose of the family case plan as set out in W.Va.Code, 49-6D- 3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.

J. David Judy, III, Judy & Judy, Moorefield, for appellant.

Kenneth Knopf, Asst. Atty. Gen., Charleston, William Bean, Pros. Atty., Moorefield, for appellee.

MILLER, Justice:

Cheryl M. appeals from the final order of the Circuit Court of Hardy County which terminated her parental rights to her infant child, Amanda. See footnote 1 She assigns as error the trial court's retention of temporary custody of Amanda beyond statutory limits,

the trial court's failure to allow a statutory improvement period, and the trial court's failure to adopt the least restrictive alternative that is appropriate to the circumstances.

Cheryl M. and Mark J. are the natural parents of Amanda, born July 19, 1983, in the State of Maine where her parents were residents. See footnote 2 In April, 1984, Cheryl and Amanda came to Wardensville, West Virginia, to see Mark, who was traveling with a carnival which was giving a performance in that area. The child abuse incident occurred during Cheryl's argument with Mark over his lack of monetary support.

The argument began at the motel where he was staying with his cousin and her husband who also worked for the carnival. They claimed that Cheryl dropped the baby while arguing with Mark. Cheryl claimed she placed Amanda on Mark's bed. The argument continued outside where Mark's relatives claimed Cheryl dropped Amanda. Cheryl stated she slipped on wet grass, fell, and the baby landed on top of her. The final incident occurred when she placed the baby on an open porch while still arguing with Mark and the baby rolled to the edge, but was caught by Mark.

Dr. Thomas Peck, examining Amanda at the DHS's request on the day of the incident, found a "well child physically" of average height and weight. He concluded, "I see no evidence on my exam to support that there has been significant injury from this abuse event." X-rays revealed no evidence of any acute or chronic trauma. A medical report submitted by Dr. E.R. Caldwell, III, of a May 21, 1984 examination stated that Amanda's growth and development were normal and her EEG was also found to be completely normal. The doctor concluded she appeared healthy and was social and smiling.

On April 28, 1984, after this incident, the West Virginia Department of Human Services (DHS), was called and took physical custody of Amanda. A petition requesting temporary custody filed later that day was granted by the Circuit Court of Hardy County. See footnote 3 The DHS in its petition did not address the availability of alternatives other than the impossibility of transferring physical custody to the father who worked for a carnival. The circuit court made no finding about alternatives less restrictive than the removal of the child and placed physical custody with the DHS which, in turn, placed Amanda in a foster home.

On May 10, 1984, at the preliminary hearing, the DHS recommended that Amanda be returned, through the Interstate Compact on the Placement of Children, See footnote 4 to the State of Maine. This would permit the Maine Department of Human Services to supervise her reunification with her mother who had family living in Maine. Cheryl and court-appointed counsel for Amanda concurred with this recommendation. The circuit court deferred acting on this motion and requested that the DHS obtain a placement plan from the Maine Department of Human Services. See footnote 5 The circuit court continued temporary custody of Amanda with the DHS pending receipt of a plan for

services from the State of Maine. Cheryl returned to Maine in anticipation of her child following.

Maine submitted a plan dated July 16, 1984, to the DHS, which was received on July 23, 1984. The DHS sent the plan to the circuit court on September 12, 1984, including it as an attachment in a request for termination of all parental rights. At an October 16, 1984 hearing, the DHS obtained permission to amend its petition to terminate Cheryl's parental rights. Cheryl, who had recently returned from Maine, See footnote 6 appeared at this hearing.

On November 7, 1984, the DHS filed its amended petition requesting the termination of Cheryl's parental rights. On November 15, 1984, Cheryl through her attorney filed a response to the amended petition in which she sought an improvement period. The court held a hearing on December 13, 1984, in which the facts surrounding the original abuse were developed and a finding of abuse and neglect was made, but no action was taken to terminate Cheryl's parental rights or on her request for an improvement period. Further hearings were held on April 15 and 18 and July 8, 1985, and at the July hearing, the parental rights were terminated.

This Court has long recognized the constitutional protections surrounding the right of a natural parent to the custody of his or her infant children, stating in Syllabus Point 1 of In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973):

> "In the law concerning cust ody of m inor children, no rule is m ore firm ly established than that the right of a natural parent to the custody of his or her infant child is param ount to that of any other person; it is a fundam ental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions."

See also State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983); State ex rel. Miller v. Locke, 162 W.Va. 946, 253 S.E.2d 540 (1979).

We relied in Willis on Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551, 559 (1972), where the United States Supreme Court stated:

> "The integrity of the fam ily unit ha s found protection in the Due Process Clause of the Fourteenth Am endment, Meyer v. Nebras ka, [262 U.S. 390, 399, 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923)] , the Equal Protection Clause of the Fourteenth Am endment, Skinner v. Ok lahoma, [316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942)] , and the Ninth Amendment, Griswold v. Connectic ut, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring)."

Stanley retains its constitutional vitality as is evidenced by Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599, 606 (1982), where the Supreme Court, after concluding that parental rights cannot be terminated under the due process clause upon less than a "clear and convincing" evidence standard, declared:

> "The fundam ental liberty interest of natural parents in the care, custody, and m anagement of their child does not evaporate sim ply because they have not been m odel parents or have lost tem porary custody of their child to the State. Even when blood relations hips are strained, parents retain a vital interest in preventing the irretrieva ble destruction of their family life." See footnote 7

Our statute, W.Va.Code, 49-6-2(c) (1984), also requires "clear and convincing" proof. In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981).

W.Va.Code, 49-6-2(b) (1984), See footnote 8 permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial. We explained in State v. Scritchfield, 167 W.Va. 683, 692-93, 280 S.E.2d 315, 321 (1981):

> "Clearly, the statute presumes the entitle ment of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child neglect or abuse proceeding is based pending final adjudication, no doubt in recognition of the fundam ental right of a parent to the custody of m inor children until the unfitness of the parent is proven. See, e.g., In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). The statute perm its the court to deny such a request only upon a finding of 'compelling circumstances.' "
>
> See also In re Thaxton, 172 W.Va. 429, 307 S.E.2d 465 (1983).

Once the DHS amended its petition seeking permanent custody of Amanda, Cheryl moved the court for an improvement period. The trial court did not rule on the motion until the final adjudicatory hearing in July, 1985, when the court in effect denied it by terminating her parental rights. The court reasoned that for all practical purposes an improvement period had existed since the first hearing.

This conclusion cannot be supported by the facts. We can only conclude that the DHS provided, at best, only minimal assistance and that, although Cheryl cooperated, the DHS never altered its position that her parental rights should be terminated. As we have earlier noted, this position was taken by the DHS in its September 12, 1984 report to the court, See footnote 9 before Cheryl had returned to this State. The initial basis for the

recommendation for total parental severance was based on what appears to be a misreading by the DHS of the Maine report of July 16, 1984, See footnote 10 which was received by the DHS on July 23, 1984. This was clarified in Maine's letter of October 12, 1984. See footnote 11

In October, 1984, Cheryl had contact with the DHS and followed its recommendation to utilize the local mental health agency. From November through December 13, 1984, the DHS paid for this counseling. At a hearing in April, 1985, Nikki Kesner, Cheryl's counselor at the mental health agency, testified that in December, 1984, the DHS indicated it would no longer pay for Cheryl's counseling. This was apparently because the counseling was in opposition to their position favoring removal of the child from Cheryl.

Ms. Kesner testified that as part of her counseling on parenting skills, she requested increased visitation between Cheryl and Amanda from only one hour once a week. She stated the DHS denied her request. According to Ms. Kesner, Cheryl continued working with the mental health agency after the DHS stopped paying for her sessions. She testified that Cheryl cooperatedand progressed in her skill level during these sessions. She also testified that she saw no imminent danger in reunifying Cheryl with her child.

A DHS social worker testified that Cheryl had been given material on budgeting and meal planning which she read, but did not extensively discuss. Cheryl was said to be cooperative, but reserved by the DHS personnel. They admitted that her attitude might be a result of its petition to sever her rights.

In October, 1984, after Cheryl had returned to this State, the DHS did assist her in finding a trailer to live in, but it lacked a cook stove. In January, 1985, the pipes in the trailer froze. Subsequently, Cheryl moved in with her boyfriend who was employed and whom she later married. The DHS worker commented that she had found the trailer to be clean and neat.

The DHS also encouraged Cheryl to find a job at a local chicken processing plant. She applied, but the plant had no permanent jobs available. She was placed on the on-call list which meant that if an employee was off, she might be called to fill-in. She was called twice in a ten-day interval. Cheryl then decided to maintain her steady work as a waitress and cashier at a local supper club. Because her child was in a foster home, she was not eligible for any regular benefits from the DHS.

Part of the problem in this case is the lack of a court-approved family case plan. As a result of a 1984 amendment to W.Va.Code, 49-6-2(b), See footnote 12 when an improvement period is authorized, then the court by order shall require the DHS to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984). Under W.Va.Code,

49-6D-3, the DHS is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days. See footnote 13 The purpose of the family case plan as set out in V.Va.Code, 49-6D-3(a), "is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." See footnote 14

This case aptly illustrates the legislative wisdom behind W.Va.Code, 49-6D- 3. It is designed to foreclose a natural parent from being placed in an amphorous improvement period where there are no detailed standards by which the improvement steps can be measured. It also provides a meaningful blueprint that the DHS can monitor and which will also give the court specific information to determine whether the terms of the improvement period were met. Without such a plan, a court is then confronted with general testimony as to whether the natural parent has shown the requisite "improvement."

The point that bears emphasizing is that under W.Va.Code, 49-6-2(b), the family case plan is triggered when a court orders an improvement period. Here, the court took no formal action to order an improvement period and, as a consequence, there was never any court-approved family case plan as required by W.Va.Code, 49-6D-3(b).

It must be remembered that W.Va.Code, 49-6D-3, is a part of a larger enactment known as the West Virginia Child Protective Services Act (CPSA), W.Va.Code, 49-6D-1, et seq. Its purpose and intent are set out in W.Va.Code, 49-6D-2, which emphasizes that "the intention of the legislature [is] to provide for the removal of a child from the custody of the child's parents only when the child's welfare cannot be otherwise adequately safeguarded." (Emphasis added).

The DHS is given primary responsibility for the implementation of this act which became effective on June 10, 1984. See footnote 15 It may well be that because of its relatively recent enactment, the DHS and the lower court were not entirely familiar with its terms. From a review of the record in this case, we find that the DHS fell far short of the goals envisioned by the CPSA and provided little relevant assistance to the mother in this case.

We cannot accept the DHS's position that good faith efforts were made toward a rehabilitative plan when its court position as early as September, 1984, was to have Cheryl's rights terminated. This was before any parenting assistance was extended to Cheryl by the DHS. The April 15 and 18, 1985, hearings clearly show that they were designed to determine whether to permanently sever Cheryl's parental rights as requested by the DHS. At the conclusion of these hearings, the court asked the DHS if it was satisfied and was assured that it was and the matter was then submitted for a decision. See footnote 16

Curiously, following this hearing, the DHS prepared a revised family case plan for Cheryl, but appears not to have obtained any court approval under W.Va.Code, 49-6D-3(b). See footnote 17 Over the objection of Cheryl's counsel, a further hearing was held on July 8, 1985, at which point two DHS caseworkers testified about Cheryl's failure to meet the amended plan.

In the ordinary case where there are no compelling reasons to reject an improvement period under W.Va.Code, 49-6-2, we do not believe that the DHS should move for total severance of the parental rights in advance of a meaningful improvement period. Such an action appears contrary to the provisions of the CPSA, which stresses the need to preserve the family relationship.

We, therefore, conclude that the court erred in permanently terminating the mother's rights to Amanda for several reasons. First, the mother was entitled to a meaningful improvement period to demonstrate her ability to care for her child as required by W.Va.Code, 49-6-2. There were no "compelling circumstances to justify a denial." W.Va.Code, 49-6-2(b). Second, the DHS did not comply with the provisions of W.Va.Code, 49-6D-3, in regard to preparing an appropriate family case plan for submission to the court and, of equal importance, the rendering of good faith efforts to provide assistance and counseling for the mother under it. Finally, the evidence did not reach the clear and convincing standard as required by procedural due process and as embodied in W.Va.Code, 49-6-2(c) (1984), to terminate Cheryl's parental rights.

We recognize that the child has been with the foster parents for almost three years and are aware that there are undoubtedly bonds of attachment between the child and the foster parents. However, constitutional considerations as reinforced by the CPSA mandate preservation of parental rights. It is only when bona fide attempts at counseling fail or the original abuse and neglect is so egregious that an improvement period will be of no avail that a court may be warranted in severing parental rights. Neither of these conditions is met in this case.

Because the mother did not voluntarily consent to give up her rights to her child, the application of the rule regarding the best interests of the child is not controlling. The Supreme Court of Connecticut in In re Juvenile Appeal, 177 Conn. 648, 671-72, 420 A.2d 875, 886-87 (1979), aptly described the reason why the best interests rule is not applicable in a case involving the involuntary severance of parental rights:

> "In contrast to custody proc eedings, in which the best interests of the child are always the param ount considerati on and in fact usually dictate the outcome, in term ination proceedings the statutory criteria m ust be m et before term ination can be accom plished and adoption proc eedings begun. No all- encompassing ' best interests' standard vitiates the requirement of

compliance with the statutory criteria. See Alsager v. District Court of Polk County, Iowa, [406 F.Supp. 10 (S.D.Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir.1976)]; In re Adoption of Children by D., 61 N.J. 89, 293 A.2d 171 (1972); Malpass v. Morgan, 213 Va. 393, 192 S.E.2d 794 (1972); Ketcham & Babcock, 'Statutory Standards for the Involuntary Term ination of Parental Rights,' 29 Rutgers L.Rev. 530, 539 (1976); com ment, 'Termination of Parental Rights in Adoption Cases: Focusing on the Child,' 14 J.Fam.L. 547, 550 (1975).

"Insistence upon strict com pliance w ith the statutory criteria before termination of parental rights and subsequent adopti on proceedings can occur is not inconsistent with concern for the best interest s of the child. Rather, it enhances the child' s best interests by prom oting autonom ous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusi on disguised under the rubric of the child' s 'best interests.' See Wald, ' State In tervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Term ination of Parental Rights,' 28 Stan.L.Rev. 623, 638- 39 (1976)."

The Connecticut Supreme Court went on to explain a recurrent social problem that courts and commentators have observed with regard to terminating natural parents' rights to their children when the parents are economically deprived-- the existence of a bias in favor of having the child with someone who is more economically secure:

"Petitions for termination of parental rights are particularly vulnerable to the risk that judges or social work ers will be tempted, consciously or unconsciously, to com pare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on su ch comparisons rather than on the statutory criteria. The United St ates Suprem e Court has forcefully recognized this danger: ' Commentators have ... noted ... that middle- and upper-income families who ne ed temporary care services for their children have the resource to purchase privat e care.... The poor have little choice but to submit to state-supervised child care when family crises strike.... Studies also suggest that social workers of m iddle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family ra ther than return the child to his natural family, thus reflecting a bias th at treats the natural parents' poverty and lifestyle as prejudicial to the be st interests of the child. [Citations

> omitted.] This accounts it has been said , for the hostility of agencies to the efforts of natural parents to obtain the return of their children.' Smith v. Organization of Foster Families fo r Equality & Reform, 431 U.S. 816, 834-35, 97 S.Ct. 2094, 2104- 2105, 53 L.Ed.2d 14 [28-29] (1977)." 177 Conn. at 672-73, 420 A.2d at 886-87.
>
> See also In Interest of B.M., 335 N.W.2d 321 (N.D.1983); In re Kristina L., 520 A.2d 574 (R.I.1987).

Here, as we pointed out earlier, the policy of the legislature is to favor rehabilitating the family unit before severing parental rights. Thus, the rule regarding the best interests of the child is not controlling in this proceeding. See footnote 18

For the foregoing reasons, the judgment of the Circuit Court of Hardy County is reversed and this case is remanded for further proceedings not inconsistent with this opinion. These proceedings will consist of approving an appropriate family case plan under W.Va.Code, 49-6D-3(a), and ultimately determining whether or not to reunite Cheryl with her daughter.

Reversed and Remanded.

Footnote: 1 We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties. See, e.g., West Virginia Dept. of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985); State v. Ellsworth J.R., 175 W.Va. 64 n. 1, 331 S.E.2d 503 n. 1 (1985).

Footnote: 2 Mark J. did not object to the circuit court's termination of his parental rights on April 15, 1985. He made no appearance in this matter after May, 1984. His only concern as articulated through his court- appointed counsel was to thwart any effort by Cheryl to regain custody of Amanda.

Footnote: 3 We note that W.Va.Code, 49-6-3(a) (1977), requires that a petition for emergency child custody be filed before the DHS can obtain physical custody, and, in pertinent part, provides:
"Upon the filing of a petition, the court may order that the child be delivered for not more than ten days into the custody of the state department or a responsible relative, pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such child to the state department or a responsible relative."

In 1984, the legislature amended W.Va.Code, 49-6-3, by adding a new subsection (c), which enables the DHS to obtain physical custody without a prior court order in certain extreme situations and sets a prompt post- seizure hearing. The 1984 amendments did not become effective until June 10, 1984.

Footnote: 4 W.Va.Code, 49-2A-1, et seq. (1975).

Footnote: 5 It does not appear that the Interstate Compact on the Placement of Children requires a placement plan from the receiving state in this situation. Under W.Va.Code, 49-2A-1, Article III(b), the sending state forwards its request and reasons for intending to send the child to the receiving state, which then notifies the sending state in writing that they concur. The receiving state's only responsibility is to find "that the proposed placement does not appear to be contrary to the interests of the child." W.Va.Code, 49-2A-1, Article III(d). See In re Matter of Pima County v. Fisher, 125 Ariz. 430, 610 P.2d 64 (1980); Sinhogar v. Parry, 53 N.Y.2d 424, 425 N.E.2d 826, 442 N.Y.S.2d 438 (1981).

Footnote: 6 A report from the Maine DHS dated October 24, 1984, indicates that Cheryl after returning to Maine had been in contact with the Maine DHS regarding the return of her daughter on some thirteen occasions. When it appeared further hearings were required in West Virginia, she returned to this State in October, 1984.

Footnote: 7 Santosky, 455 U.S. at 763-64, 102 S.Ct. at 1400, 71 L.Ed.2d at 613, also makes some penetrating observations in regard to the potential for overmatch in a parental termination case: "The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney ... enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.13 "The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no 'double jeopardy' defense against repeated state termination efforts."
Note 13 of Santosky, 455 U.S. at 763, 102 S.Ct. at 1400, 71 L.Ed.2d at 613, states, in relevant part:
"In this case, for example, the parents claim that the State sought court orders denying them the right to visit their children, which would have prevented them from maintaining the contact required by Fam. Ct. Act § 614.1(d).... The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof

of the agency's 'diligent efforts' and their own 'failure to plan' for the children's future." This same pattern can be seen in this case.

Footnote: 8 W.Va.Code, 49-6-2(b) (1984), provides:
"In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter." This section was amended effective June 10, 1984, to add the last sentence.

Footnote: 9 From this report, it appears that one of the reasons the DHS moved for severance was that the foster parents had indicated a desire to adopt Amanda.

Footnote: 10 There was an earlier report of May 2, 1984, from the Maine DHS which the court had before it at the May 10, 1984, hearing where the parties recommended the interstate transfer of Amanda to Maine. This report revealed that Cheryl's other daughter had been removed from her custody and placed with her family in Maine several years before when it was determined that her boyfriend had sexually abused the child in Cheryl's absence. Despite these adverse facts, the court was willing to accede to the DHS's recommendation that Amanda be returned to the Maine DHS.

Footnote: 11 The text of the letter of October 12, 1984, reads:
"Thank you for the copy of the report(s) you sent to Mr. Bean in support of the hearing scheduled for October 16, 1984. For the record, we wish to clarify what may be misinformation that may be presented to the court.
"1. In your 'Report to the Court' dated September 12, 1984, page # 1, item '2)' is incorrect. The Maine Department of Human Services has not offered any plan to Amanda's mother relative to rehabilitation/reunification efforts. It has been our information that the court wanted a plan proposed to it by Maine D.H.S. (item four of court order entered 5-15- 84). Hence, we have not been authorized to offer any specific services to the family until approved by the court.
"2. Relative to item '5)' of the report of 9-12: The Dept's prognosis for rehabilitation is 'guarded' (see letter of 7-16 from K. Edgecomb) and we believed that any replacement of the child (into a Maine foster home or with family) ought not occur until the family has been engaged in a (court approved) reunification effort for at least three (3) months. While your conclusion of 'no reasonable likelihood of rehabilitation' may ultimately be supported by evidence, we must reiterate that to date, no services have been offered to

Amanda's mother subsequent to the order of this May. "3. In Dr. Life's letter to you of 7-10-84, he notes Amanda '... apparently had a long history of child abuse'. While not knowing the basis of that impression, our report of 5-2-84 to the court does not reveal any prior (before 4-28) abuses of Amanda but rather a risk of harm by virtue of her parent's conflictive relationship.
"I trust that this information will be used to aid the court in making the best possible decision for Amanda."

Footnote: 12 For the complete text of W.Va.Code, 49-6-2(b) (1984), see note 8, supra.

Footnote: 13 W.Va.Code, 49-6D-3(b), in relevant part, states:
"[T]he family case plan described in subsection (a) of this section shall be furnished to the court within thirty days after the entry of the order referring the case to the department, and shall be available to counsel for the parent, guardian or custodian and counsel for the child or children. The department shall encourage participation in the development of the family case plan by the parent, guardian or custodian, and, if the child is above the age of twelve years and the child's participation is otherwise appropriate, by the child. It shall be the duty of counsel for the participants to participate in the development of the family case plan.... The court shall examine the proposed family case plan or any modification thereof, and upon a finding by the court that the plan or modified plan can be easily communicated, explained and discussed so as to make the participants accountable and able to understand the reasons for any success or failure under the plan, the court shall inform the participants of the probable action of the court if goals are met or not met."

Footnote: 14 W.Va.Code, 49-6D-3(a) (1984), also provides general goals for a family case plan:
"Every family case plan prepared by the department shall contain the following:
"(1) A listing of specific, measurable, realistic goals to be achieved;
"(2) An arrangement of goals into an order of priority;
"(3) A listing of the problems that will be addressed by each goal;
"(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;
"(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;
"(6) A list of the services which will be provided;
"(7) Time targets for the achievement of goals or portions of goals;
"(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and
"(9) A designation of when and how often tasks will be performed."
W.Va.Code, 49-6D-3(b), has a thirty-day time period for the preparation of the plan along with further details for its implementation.

Footnote: 15 *Even before the enactment of the CPSA, it is clear from W.Va.Code, 49-6-1, et seq., that the DHS had the primary responsibility for providing effective home counseling and psychiatric, medical, and other services to the parents of neglected and abused children.*

Footnote: 16 *This dialogue is reflected at pages 241 through 242 of the April 18, 1985 hearing:*
"BY THE COURT: I understand that, but this has been, during the last several months, a time when you've been trying to rehabilitate or reconstruct or construct a relationship and abilities that would enable her to care for the child or restructure her life and attitude so that she would be suitable for, care for the child. Are you satisfied that she's now reached the maximum that she's going to? In other words, you don't need any more any additional time?
"A. I don't know for what purpose.
"Q. It would serve no useful purpose that you can see, then? All right. Well, with that understanding, we'll, we're ready, I think, for a final conclusion in the matter. The Court is not prepared today to give you that decision. I do want to review the file in the matter and will get in touch with the attorneys, then, later on."

Footnote: 17 *W.Va.Code, 49-6D-3(b) (1984), in relevant part, states: "The family case plan may be modified from time to time by the department to allow for flexibility in goal development, and in each such case the modifications shall be submitted to the court in writing."*

Footnote: 18 *We distinguish cases where the natural parent has voluntarily consented to the adoption and afterwards seeks to regain the child from foster parents seeking to adopt or from adoptive parents. In this situation, where the child has been away from the natural parent for a considerable period of time, we have indicated that a court could consider among other factors the best interests of the child. E.g., Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101 (1986); West Virginia Dept. of Human Services v. La Rea Ann C.L., supra.*

NEELY, Justice dissenting:

I dissent because the record in this case conclusively demonstrates that the appellant is incapable of improvement and the child's welfare will be jeopardized by a return of custody to the natural mother.

The record before us discloses a plethora of pertinent facts not discussed in the majority's opinion. Cheryl has an older daughter by a previous liaison, Danielle, who currently lives with her maternal grandparents in Maine. Cheryl was forced to relinquish her custodial rights to Danielle when the Maine Department of Human Services intervened

after discovering that Cheryl had left Danielle with a male babysitter who had given Danielle gonorrhea. On 22 April 1984, Cheryl was observed in Wardensville, West Virginia pushing Amanda in her carriage up and down the streets of Wardensville in the rain. This apparently continued for approximately a half an hour, while Amanda was scantily clad and wrapped in a soaking wet blanket. That evening, Cheryl and Mark, Amanda's biological father, entered a local bar and grill and sat down to eat dinner. Amanda, meanwhile, was left outside the bar and grill, unattended. Mark and Cheryl retrieved Amanda only upon the protests of fellow patrons.

After leaving Wardensville at the request of Mark, Cheryl and Amanda spent approximately a week in Maryland. When Mark did not come to Maryland with provisions he had promised, Cheryl returned with Amanda to Wardensville. When Cheryl located Mark, she proceeded to assault him verbally and physically. Cheryl was so intent on avenging herself against Mark that, within the space of one hour, she dropped Amanda three times. Moreover, witnesses testified that Cheryl continued to assault Mark even after Amanda had made it clear through her screams of pain that she required attention.

Mark's parental rights have been terminated, and he pays no child support. Cheryl does not currently have a job, has evidenced an inability to hold a job in the past, and has been resistant to attempts to help her find steady employment consistent with the responsibilities of a single parent. Moreover, Cheryl appears to be unable to maintain her own residence. She now lives with her boyfriend in his mobile home. See footnote 1 Dr. Stein, with whom Cheryl has had several counseling sessions, testified that Cheryl "has a very pronounced pattern of putting her own needs for romantic relationships in a superior position to the needs of the child." Dr. Stein states that he has "very serious reservations that the interest of the child would be best served by returning custody to the biological mother."

Dr. Life, Amanda's pediatrician, testified that, when Amanda was first placed in foster care, she appeared malnourished. Dr. Life testified that Amanda's physical and emotional health have improved greatly since Amanda has been placed with foster parents, but that Amanda continues to suffer physiological setbacks and emotional problems following her weekly visits with Cheryl.

Testimony elicited at the hearings indicated that Cheryl was generally inattentive to Amanda's safety, clothing, nourishment, and sanitary needs. Cheryl has apparently been generally uncooperative with, and unpleasant toward, departmental caseworkers who have been attempting to help her improve her parenting skills. Moreover, Cheryl's personal life is and has been for some time in considerable disorder. She has children by two different men (Amanda out of wedlock), and has been deserted by and since

divorced Amanda's father. Moreover, Cheryl reportedly attempted suicide in the summer of 1985.

In Syl. pt. 1 of In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980), we held:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 [1977] will be employed; however, courts are not required to e xhaust every speculative possibility of parental im provement before term inating parental rights where it appears that the welfare of the child will be seriously threatened, and that is particularly applicable to children under the age of three years who are more susceptible to illne ss, need consistent clos e interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

See also In Interest of Darla B., --- W.Va. ---, 331 S.E.2d 868 (1985). The majority correctly notes that, as a matter of technical doctrine, the doctrine of "the best interest of the child" is not applicable to this case. However, that academic observation does not imply that the interest of Amanda should be a matter of utter indifference to this Court. In determining whether "compelling circumstances" exist under W.Va.Code, 49-6-2(b) [1984], we must, as R.J.M. suggests, weigh the probability that a child will suffer irreparable physical or psychological harm against the speculative possibility that a natural parent with an established record of chronic neglect and abuse may some day bring his or her behavior within the acceptable tolerances of parenting conduct. After all, "it must be remembered that we are not * * * [dealing with] a piece of property, but rather with a feeling, vulnerable, and sorely put upon little human being." Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101 (1986).

The Department of Human Services, Dr. Stein, Dr. Life, the guardian ad litem for the child, and even Amanda's natural father believe that Amanda's interest would be ill-served by being returned to Cheryl. On the record before it, the trial court had ample evidence upon which it could find that there was "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W.Va.Code, 49-6-5(a)(6) [1984]. Although no family case plan was prepared by the Department of Human Services, department workers had been working with Cheryl for close to one year before her parental rights were terminated. During that time Cheryl showed little promise of improvement. It makes little sense for this Court to reverse the determination of the trial court and order the Department to prepare a family case plan when Amanda appears to be happy and thriving with her foster parents (who want to adopt her), and Cheryl has already amply demonstrated a marked inability to mend her ways. I would therefore hold that this case presents "compelling circumstances to justify

a denial" within the meaning of W.Va.Code, 49-6-2(b) [1984], and would affirm the trial court.

I am authorized to say that BROTHERTON, J., joins in this dissent.

Footnote: 1 At oral argument it was represented that Cheryl and her boyfriend are now married. However, there has been no evidence presented about Cheryl's new husband's employment, income or character. The character of this man and the quality of the home he would provide for Amanda are certainly issues to which the trial court should devote close scrutiny in its further proceedings.

226 W. Va. 363, 700 S.E.2d 815

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2010 Term

No. 35443

FILED
September 23, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: CHEVIE V.

Appeal from the Circuit Court of Marshall County
Honorable David W. Hummel, Jr., Judge
Civil Action No. 08-JA-46

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED

Submitted: September 8, 2010
Filed: September 23, 2010

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. "A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. C. P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Syllabus point 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

3. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus point 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

4. "'The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.' Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va.

330, 325 S.E.2d 120 (1984)." Syllabus point 6, *State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, 222 W. Va. 588, 668 S.E.2d 217 (2008).

5. Pursuant to the plain language of W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009), a circuit court "may . . . order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

6. When a circuit court orders the West Virginia Department of Health and Human Resources to pay for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009), the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

Davis, Chief Justice:

The appellant herein, the West Virginia Department of Health and Human Resources (hereinafter referred to as "DHHR"), appeals from orders entered July 30, 2009, and August 24, 2009, by the Circuit Court of Marshall County. Through its order of July 30, 2009, the circuit court required the DHHR to pay the costs associated with the expert witness retained by the minor child's mother in the underlying abuse and neglect proceeding. In its August 24, 2009, order, the circuit court upheld its earlier ruling, denying the DHHR's motion for relief therefrom. On appeal to this Court, the DHHR assigns error to the circuit court's order and contends that the subject expert witness fees and expenses should be assessed to the West Virginia Public Defender Corporation (hereinafter referred to as "Public Defender Corporation"). Alternatively, the DHHR contends that if it is found to be the party responsible for paying the mother's expert witness costs, the DHHR, itself, should be permitted to establish the fee schedule for such payment. Upon a review of the parties' arguments, the record designated for appellate consideration, and the pertinent authorities, we affirm, in part, and reverse, in part, the decisions of the Marshall County Circuit Court and remand this case for further proceedings consistent with this opinion. Specifically, we affirm the circuit court's rulings insofar as the lower court required the DHHR to pay the mother's expert witness costs. However, we reverse the circuit court's orders to the extent that the lower court required the DHHR to make such payment in accordance with the fee schedule adopted by the Public Defender Corporation.

Accordingly, we remand this case to the circuit court for a recalculation of the allowable expert witness fees in accordance with the DHHR's fee schedule set forth in W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009).

I.

FACTUAL AND PROCEDURAL HISTORY

The underlying abuse and neglect case commenced in November 2008 with the DHHR's filing of a petition alleging that the minor child, Chevie V.,[1] had been abused and/or neglected by her mother, her father, and/or her mother's live-in boyfriend. Specifically, marks had been discovered on Chevie's neck spelling out the word "WIMP," which marks were suspected to be caused by burns from a lit cigarette.[2] The petition alleged that Chevie's mother had placed these marks on Chevie's neck.[3] Chevie's mother denied that she had harmed her child and disputed that the marks were cigarette burns.[4]

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[1]In keeping with our longstanding practice of referring to children in cases involving sensitive facts by their last initials rather than by their full names, we will refer to Chevie by her last initial. *See, e.g.*, *In re Abbigail Faye B.*, 222 W. Va. 466, 470 n.1, 665 S.E.2d 300, 304 n.1 (2008); *In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007); *In re Clifford K.*, 217 W. Va. 625, 630 n.1, 619 S.E.2d 138, 143 n.1 (2005).

[2]Chevie was six years old when the abuse and neglect petition was filed in November 2008.

[3]An amended petition filed in December 2008 included findings of several additional marks on Chevie's back, arm, and ankles.

[4]Following the filing of the initial petition, Chevie's mother was charged with (continued...)

In January 2009, Chevie's mother moved the circuit court to grant her permission to hire an expert to refute the DHHR's allegations as to the nature and origin of Chevie's injuries. This request to hire an expert was conditioned upon the DHHR's use of an expert to prove its allegations regarding the source of Chevie's injuries; if the DHHR did not intend to use an expert witness, Chevie's mother indicated that she would withdraw her request. In her motion, Chevie's mother also indicated that the law is not clear as to who is responsible for paying for a parent's expert witness in an abuse and neglect proceeding but that, based upon her research and inquiries, the Public Defender Corporation was believed to be the responsible party.[5] By order entered February 23, 2009, the circuit court granted Chevie's mother's request to obtain an expert witness and directed that "said expert witness must accept the fee as set forth by [the] Public Defender Corporation fee schedule." Thereafter, Chevie's mother retained Dr. Mary Carrasco as her expert witness and requested the circuit court to approve her as her expert witness and to approve her payment by the Public Defender Corporation, both of which the court ordered on February 27, 2009:

> Accordingly, it is ORDERED that Respondent Mother's expert, Dr. Mary Carrasco, shall be paid by and from [the] West Virginia Public Defender Corporation at an hourly out of

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[4](...continued)
six counts of malicious assault, five counts of child abuse, and one count of child abuse resulting in injury in connection with Chevie's injuries. Chevie's mother currently is awaiting trial on these charges.

[5]Chevie's mother was represented by appointed counsel during the underlying abuse and neglect proceeding, but said counsel was not provided by the Public Defender Corporation.

> court fee of $325.00 per hour and in court fee of $350.00 per hour; it is further
>
> ORDERED that said expert's mileage shall be paid at 44.5 cents per mile and hotel and car rental with itemized invoices attached[.]

During the course of the abuse and neglect proceedings, the mother's attorney requested reimbursement of the fees and expenses she had paid to the mother's expert witness. By order entered July 30, 2009, the circuit court "ORDER[ED] that the West Virginia Department of Health and Human Resources reimburse [Chevie's mother's attorney] the amount of $6,810.63 paid by [the mother's attorney] for services and expenses rendered and incurred by Dr. Mary Carrasco[.]" The DHHR objected to this ruling, which contradicted the court's earlier order charging the Public Defender Corporation with payment of the mother's expert witness and, accordingly, filed a "Motion for Reconsideration of Payment Order."[6] By order entered August 24, 2009, the circuit court

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[6]The DHHR's motion was in the nature of one filed pursuant to West Virginia Rule of Civil Procedure 60(b) whereby a party requests relief from a prior order or judgment of the court. *See* W. Va. R. Civ. P. 60(b) (permitting circuit court to relieve party from court's judgment or order for variety of reasons). Despite the DHHR's designation of its motion as a "motion to reconsider," we take this opportunity to again reiterate that "the West Virginia Rules of Civil Procedure do not explicitly recognize a 'motion for reconsideration.'" *Builders' Serv. & Supply Co. v. Dempsey*, 244 W. Va. 80, 83, 680 S.E.2d 95, 98 (2009) (per curiam) (citations omitted). *Accord Richardson v. Kennedy*, 197 W. Va. 326, 329, 475 S.E.2d 418, 421 (1996) ("Despite our repeated direction to the bench and bar of this State that a 'motion to reconsider' is not a properly titled pleading in West Virginia, it continues to be used."); *Savage v. Booth*, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996) (continued...)

upheld its earlier order directing the DHHR to pay the fees and expenses incurred by the mother's expert witness and amended its February 27, 2009, order charging such costs to the Public Defender Corporation. Thereafter, the circuit court granted the DHHR's request for a determination pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure[7] to permit this issue to be appealed during the pendency of the remainder of the underlying abuse and neglect proceeding.

From these adverse rulings, the DHHR appeals to this Court. Chevie, through her Guardian ad Litem, also appears before this Court. However, neither Chevie's parents or Chevie's mother's boyfriend nor the West Virginia Public Defender Corporation are parties to the instant appeal.[8]

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[6](...continued)
("[T]he West Virginia Rules of Civil Procedure do not recognize a 'motion for reconsideration.'"). Thus, we repeat our admonition to counsel to refer to a motion for relief from a court's order as a Rule 60(b) motion because the phrase "motion for reconsideration" simply is no longer within the vocabulary of this Court.

[7]West Virginia Rule of Civil Procedure 54(b) provides, in pertinent part:

> [w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[8]The circuit court entered a final dispositional order in the underlying abuse
(continued...)

II.

STANDARD OF REVIEW

In the instant proceeding, the DHHR appeals from the circuit court's July 30, 2009, order charging the DHHR with the costs associated with the mother's expert witness in the underlying abuse and neglect proceeding and from the circuit court's August 24, 2009, order denying the DHHR's motion for relief from the court's July 30, 2009, order.

The sole issue decided by the circuit court in its July 30, 2009, order involves an interpretation of existing statutory and case law to determine which party is responsible for the payment of the mother's expert witness in the underlying abuse and neglect proceeding. "Where the issue on an appeal from the circuit court is clearly a question of

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[8](...continued)
and neglect case on January 17, 2010, whereby Chevie's father was awarded her physical and legal custody and Chevie's mother was granted supervised visitation. The order does not provide, however, whether the parental rights of Chevie's mother were terminated or whether such parental rights remain in force and effect. Having reviewed the record in this case, we are very troubled by the delay between the occurrence of the circuit court's dispositional hearing, held on December 28, 2009, and the court's subsequent entry of its dispositional order on January 17, 2010, nearly one month later and outside the time period within which such orders are required to be filed. *See* W. Va. R. P. Child Abuse & Neglect Proc. 36(a) ("At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provisions of W. Va. Code § 49-6-5. *The court shall enter a disposition order, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing.*" (emphasis added)). *Accord In re B.B.*, 224 W. Va. 647, 655 n.19, 687 S.E.2d 746, 754 n.19 (2009) (per curiam) (same). Accordingly, we remind circuit courts of their duty to be vigilant in adhering to the guidelines governing abuse and neglect proceedings and the entry of orders therein.

law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). *Accord* Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). Therefore, our review of the circuit court's order charging the DHHR with the payment of the mother's expert witness is plenary.

Also on appeal to this Court is the circuit court's August 24, 2009, order denying the DHHR's motion for relief from the court's prior order. As we explained in the preceding section, the phrase "motion for reconsideration" is not a part of this Court's vernacular. Rather, motions brought pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure that request relief from a court's judgment or order should be referred to as such. *See, e.g.*, *Builders' Serv. & Supply Co. v. Dempsey*, 244 W. Va. 80, 83, 680 S.E.2d 95, 98 (2009) (per curiam); *Richardson v. Kennedy*, 197 W. Va. 326, 329, 475 S.E.2d 418, 421 (1996); *Savage v. Booth*, 196 W. Va. 65, 68, 468 S.E.2d 318, 321 (1996). When a court is called upon to decide a Rule 60(b) motion, this Court has found such a ruling to lie within the court's discretion:

> A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R. C. P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.

Syl. pt. 5, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974). Therefore, the circuit court's decision to grant or deny the requested Rule 60(b) motion is within the court's discretion.

We proceed to consider the parties' arguments in light of these standards.

III.

DISCUSSION

On appeal to this Court, the DHHR assigns error to (1) the circuit court's decision to hold it responsible for the payment of the mother's expert witness fees and (2) the circuit court's ruling that such payment be made in accordance with the fee schedule established by the Public Defender Corporation. Although the DHHR's appeal is from both the circuit court's initial payment order and the court's subsequent order denying the DHHR's motion for relief from its first order, both orders must be considered together insofar as the subsequent order sets forth the court's reasoning for its initial decision.

A. Party Responsible for Payment of Expert Witness Costs in Abuse and Neglect Proceeding

In its order of July 30, 2009, the circuit court very succinctly "ORDER[ED] that the West Virginia Department of Health and Human Resources reimburse [Chevie's mother's attorney] the amount of $6,810.63 paid by [the mother's attorney] for services and expenses rendered and incurred by Dr. Mary Carrasco[.]" Through its subsequent, August

24, 2009, order, the circuit court explained that its decision to assess the DHHR with the mother's expert witness costs was based upon West Virginia Trial Court Rules 27.01 and 27.02, as well as W. Va. Code § 49-6-4(a) (2005) (Repl. Vol. 2009). Before this Court, the DHHR contends, instead, that W. Va. Code § 29-21-13a(e) (2008) (Repl. Vol. 2008) and West Virginia Trial Court Rule 35.05(b) dictate that the Public Defender Corporation, not the DHHR, is responsible for the payment of the mother's expert witness. Finally, the minor child's Guardian ad Litem agrees with the circuit court's conclusion that the DHHR is the responsible party but urges, instead, that W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009) is determinative of the issue.

Insofar as the instant controversy requires this Court to review and apply various statutes, we begin our analysis with a brief summary of the rules of statutory construction. When deciding a statutory matter, we first must determine the intent of the Legislature in adopting the statute in question. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Next, we consider the precise wording of the statutory enactment. Plain statutory language must be applied as it is written. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). *Accord* Syl. pt. 2, *Crockett v.*

Andrews, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). However, ambiguous statutory language must be construed before it can be applied. "Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent." Syl. pt. 1, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983). *Accord* Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992) ("A statute that is ambiguous must be construed before it can be applied.").

As a final matter, the ruling of the circuit court and the arguments of the various parties to the case *sub judice* suggest that there exist many statutes and rules that are perceived to apply to the issues before us. Obviously, not all of these authorities are in agreement, or the instant controversy would not exist. Under the rules of statutory construction, where different statutes speak to the same subject matter but conflict with one another, the more specific statute governs. "'The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.' Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984)." Syl. pt. 6, *State ex rel.*

Tucker Cnty. Solid Waste Auth. v. West Virginia Div. of Labor, 222 W. Va. 588, 668 S.E.2d 217 (2008).

Although this Court previously has considered the first issue presented for our resolution, *i.e.*, who is responsible for paying for a parent's expert witness in an abuse and neglect proceeding, this matter essentially remains one of first impression. In our first case involving this question, *Hewitt v. State of West Virginia Department of Health and Human Resources*, 212 W. Va. 698, 575 S.E.2d 308 (2002), the DHHR appealed from an order requiring it to pay an expert witness who had provided services in several juvenile delinquency and abuse and neglect cases. Although W. Va. Code § 49-7-33 was in effect at the time the Court issued its opinion, the statute had been enacted after the facts at issue in that case and thus did not apply thereto. Absent express statutory direction on this point, the Court held, in Syllabus point 2, that

> [i]n recognition of the lack of an express funding obligation provided for expert fees in juvenile delinquency cases and pursuant to our inherent authority to manage the courts of this state, this Court will assume financial responsibility in matters arising under this state's juvenile delinquency laws for the fees properly charged by expert witnesses appointed by the trial courts and subsequently approved for payment.

212 W. Va. 698, 575 S.E.2d 308. With respect to the expert witness fees associated with abuse and neglect proceedings, the Court

> determine[d] that all orders approving and awarding payment for services performed by [the expert witness] in abuse and/or neglect cases that were entered prior to June 7, 2002, the

> effective date of West Virginia Code § 49-7-33 (2002), shall be paid by DHHR at the rate approved by the trial court. Any payment orders pertaining to abuse and/or neglect matters entered following the effective date of West Virginia Code § 49-7-33, shall be paid by DHHR at the rate established by Medicaid and adopted by DHHR for such services.

212 W. Va. at 700, 575 S.E.2d at 310 (footnote omitted).

The Court further commented on the thorny issue that could not be finally resolved in that case and concluded that conflicting statutes governed who, exactly, is responsible for paying for expert witnesses in abuse and neglect proceedings:

> A significant and lingering issue, which cannot be resolved today, arises from the conflicting statutory provisions now in effect that address the award of expert fees in abuse and neglect cases. Notwithstanding the enactment of West Virginia Code § 49-7-33 and its grant of authority to DHHR to set rates for expert witnesses, previously established authority still exists for circuit courts to "provide for the payment of all such expert witnesses" in abuse and neglect proceedings. W. Va. Code § 49-6-4. As a result of this continuing authority in the circuit courts, we do not accept the position of DHHR that it has exclusive authority for the payment of expert fees in abuse and neglect cases under the provisions of W. Va. Code § 49-7-33. Clearly, that provision, when properly invoked, enables the Department to use Medicaid-established rates for the provision of health care services as required under chapter 49, articles five and six, where such rates are available. Critically, however, a circuit court still retains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect matters. *See* W. Va. Code § 49-6-4.

212 W. Va. at 702-03, 575 S.E.2d at 312-13 (footnotes omitted). Following the Court's opinion containing this language, however, the Legislature amended W. Va. Code § 49-6-4 to remove the phrase discussed in *Hewitt*. *Cf.* W. Va. Code § 49-6-4(a) (1984) (Repl. Vol.

2004) (former version of statute, which contains above-referenced language) *with* W. Va. Code § 49-6-4(a) (2005) (Repl. Vol. 2009) (current version of statute, from which referenced language has been removed). Therefore, the central question as to who is responsible for the payment of expert witnesses in abuse and neglect cases remains unresolved following *Hewitt*.

Thereafter, the Court revisited the scope of its mandate in *Hewitt* as it pertained to the payment of expert witnesses in juvenile delinquency proceedings in *State ex rel. Artimez v. Recht*, 216 W. Va. 709, 613 S.E.2d 76 (2005) (per curiam). While reiterating the *Hewitt* language detailing the DHHR's obligation to pay for expert witnesses in the abuse and neglect cases at issue in *Hewitt*, the *Artimez* decision did not further discuss the party responsible for the payment of expert witnesses in abuse and neglect proceedings such as the case *sub judice*. *See Artimez*, 216 W. Va. at 711, 613 S.E.2d at 78 (footnote omitted).

The final case this Court has decided regarding the payment of expert witnesses is limited to expert witnesses providing services in juvenile delinquency proceedings. *See In re Bobby Lee B.*, 218 W. Va. 689, 629 S.E.2d 748 (2006) (per curiam). Insofar as the instant appeal involves abuse and neglect proceedings, and not juvenile delinquency matters, our prior decision in *Bobby Lee B.* is not instructive to our present inquiry. Thus, because we have not yet definitively determined, under existing statutory

law, who must pay for a parent's expert witness in an abuse and neglect proceeding, we will consider the various authorities relied upon by the circuit court and the parties to this appeal.

1. W. Va. Trial Court Rules 27.01 & 27.02 and W. Va. Code § 49-6-4(a) (2005) (Repl. Vol. 2009). In explaining the reasoning for its July 30, 2009, ruling requiring the DHHR to pay for the mother's expert witness fees, the circuit court relied upon W. Va. Trial Court Rules 27.01 and 27.02, as well as W. Va. Code § 49-6-4(a). Trial Court Rule 27.01 provides that, "[u]pon motion by a party or upon its own motion, the court may appoint an expert to perform a medical or psychological evaluation and may require such expert to testify, pursuant to West Virginia Code § 49-6-4." Rule 27.02 further explains that

> [t]he court shall by order establish in advance the reasonable fees and expenses to be paid to an expert. Payment shall be as follows: Upon completion of services by an expert, the court shall, by order, direct the State Department of Health and Human Resources to pay for the expert's evaluation, report writing, consultation, or other preparation; and the court shall, by order, direct payment by the Supreme Court's Administrative Office for the expert's fee and expenses entailed in appearing to testify as a witness.

While these rules specifically pertain to "expert assistance in child abuse or neglect cases," W. Va. Trial Ct. R., ch. 27, these rules do not apply to the case *sub judice* insofar as the circuit court did not specifically choose or appoint the mother's expert witness. Rather, here, the mother approached the circuit court about the possibility of hiring an expert

witness. The circuit court then merely *approved* the mother's request to hire an expert, and then she, herself, proceeded to select and hire her own expert witness. Thus, because these rules govern *appointed* expert witnesses, rather than those hired following court approval, they do not apply to the case *sub judice*.

The circuit court also found basis for its decision in W. Va. Code § 49-6-4(a), which statute is referenced in Trial Court Rule 27.01. In pertinent part, W. Va. Code § 49-6-4(a) states that,

> [a]t any time during proceedings under this article the court may, upon its own motion or upon motion of the child or other parties, order the child or other parties to be examined by a physician, psychologist or psychiatrist, and may require testimony from such expert, subject to cross-examination and the rules of evidence . . . . If the child, parent or custodian is indigent, such witnesses shall be compensated out of the Treasury of the State, upon certificate of the court wherein the case is pending. . . .

As with Trial Court Rule 27.01, however, this statute also pertains to experts who have been appointed by a court because it speaks directly in terms of the court "order[ing]" such examination. In the abuse and neglect proceeding underlying the instant appeal, however, the circuit court did not order any party to be examined by the expert witness requested by Chevie's mother, and, in fact, Chevie's mother was not certain she would definitely call an expert witness when she requested the court's approval to retain one. Rather, Chevie's mother merely sought the circuit court's blessing to hire an expert witness if necessary to rebut the DHHR's evidence of Chevie's abuse and/or neglect. Because the circuit court in

this case only approved, and did not appoint, the mother's expert, W. Va. Code § 49-6-4(a) likewise does not apply to the facts of this case. Therefore, we reject the circuit court's reliance on W. Va. Trial Court Rules 27.01 and 27.02 and W. Va. Code § 49-6-4(a) as authority supporting its decision to require the DHHR to pay for the mother's expert.

2. W. Va. Code § 29-21-13a(e) (2008) (Repl. Vol. 2008) and W. Va. Trial Court Rule 35.05(b). By contrast, the DHHR advocates that the governing authorities dictating payment of the mother's expert witness by the Public Defender Corporation are W. Va. Code § 29-21-13a(e) and W. Va. Trial Court Rule 35.05(b). W. Va. Code § 29-21-13a(e) specifies that,

> [f]or all other eligible proceedings, actual and necessary expenses incurred in providing legal representation, including, but not limited to, expenses for travel . . . *and expert witnesses* . . . shall be reimbursed to a maximum of one thousand five hundred dollars unless the court, for good cause shown, approves reimbursement of a larger sum.

(Emphasis added). By definition, the reference to "[e]ligible proceeding[s]" encompasses "child abuse and neglect proceedings which may result in a termination of parental rights," W. Va. Code § 29-21-2(2) (1996) (Repl. Vol. 2008), such as the underlying abuse and neglect proceeding at issue in this case.

Although this statute is relevant and specifically applies to abuse and neglect proceedings, abuse and neglect proceedings are only one of approximately fourteen different categories of cases that qualify as an "eligible proceeding" under W. Va. Code

§ 29-21-2(2). As such, W. Va. Code § 29-21-13a(e) is a more general statute delineating who is responsible for paying for an indigent parent's expert witness fees in an abuse and neglect proceeding because it establishes the Public Defender Corporation's payment obligation not just for abuse and neglect cases but for all types of proceedings involving an indigent defendant. As a rule, when both a specific and a general statute apply to a given case, the *specific* statute governs. *See* Syl. pt. 6, *State ex rel. Tucker Cnty. Solid Waste Auth. v. West Virginia Div. of Labor*, 222 W. Va. 588, 668 S.E.2d 217 ("'The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.' Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984)."). W. Va. Code § 29-21-13a(e), being a more *general* statute pertaining to several different types of cases, necessarily must yield to the more *specific* statute, W. Va. Code § 49-7-33, whose scope is limited solely to abuse and neglect and juvenile proceedings.

The DHHR also urges that Rule 35.05(b) of the W. Va. Trial Court Rules similarly charges the Public Defender Corporation as the responsible party for the payment of the mother's expert witness expenses. Chapter 35 of the W. Va. Trial Court Rules addresses "public funding for expert assistance." More specifically, W. Va. Trial Court Rule 35.05(b) directs that

> [t]he court shall by order establish and approve in advance the reasonable fees and expenses to be paid to an expert. . . .

. . . .

> (b) Expert Requested by an Indigent Defendant. – Upon completion of services by such expert, the court shall, by order, direct payment by Public Defender Services pursuant to W. Va. Code, Chapter 29 [see §§ 29-21-1 et seq.].

In the same manner as W. Va. Code § 29-21-13a(e), however, Rule 35.05(b), while applicable to abuse and neglect proceedings among other cases, is simply too broad and general when compared with the more specific scope of W. Va. Code § 49-7-33. Therefore, we do not find either W. Va. Code § 29-21-13a(e) or W. Va. Trial Court Rule 35.05(b) to be persuasive authority to relieve the DHHR of its payment obligation in this case.

3. W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009). Lastly, the Guardian ad Litem suggests that W. Va. Code § 49-7-33 definitively establishes the DHHR's responsibility for paying Chevie's mother's expert witness costs as ordered by the circuit court. The full text of W. Va. Code § 49-7-33 provides

> [a]t any time during any proceedings brought pursuant to articles five [§§ 49-5-1 et seq.] [juvenile proceedings] and six [§§ 49-6-1 et seq.] [cases of child neglect or abuse] of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia Department of Health and Human Resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. The West Virginia Department of Health and Human Resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every such psychologist, psychiatrist,

> physician, therapist or other health care professional shall be paid by the West Virginia Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia Department of Health and Human Resources.

We find this statutory language to be plain and capable of but one construction. As such, W. Va. Code § 49-7-33 must be applied as it is written. *See* Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353. Accordingly, we hold that, pursuant to the plain language of W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009), a circuit court "may . . . order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

Having found this statutory language to be plain, we next must consider whether it is determinative of the instant controversy. We find that it is. Unlike the statutes applicable to numerous different types of proceedings discussed in the preceding section, W. Va. Code § 49-7-33 *specifically* pertains only to juvenile and abuse and neglect proceedings. As such, it is a specific statute that expressly applies to abuse and neglect proceedings such as those underlying the instant appeal. Thus, as a more specific statute, this statute is dispositive and permits a circuit court to order the DHHR to pay for a party's expert witness in an abuse and neglect case. *See* Syl. pt. 6, *Tucker Cnty. Solid Waste Auth.*, 222 W. Va. 588, 668 S.E.2d 217.

Finally, we must consider whether the circuit court correctly ordered the DHHR to pay for the expenses associated with Chevie's mother's expert witness. W. Va. Code § 49-7-33 employs the word "may" in describing the circuit court's authority to require the DHHR to pay for professional services. We have construed the word "may" to be permissive and connoting discretion. *See Gebr. Eickhoff Maschienenfabrik und Eisengieberei mbH v. Starcher*, 174 W. Va. 618, 626 n.12, 328 S.E.2d 492, 500 n.12 (1985) ("An elementary principle of statutory construction is that the word 'may' is inherently permissive in nature and connotes discretion." (citations omitted)). Here, the circuit court properly exercised its discretion in ordering the DHHR to pay for Chevie's mother's expert witness costs in the first instance. Moreover, the circuit court did not abuse its discretion in denying the DHHR's motion for relief from the court's July 30th order establishing the DHHR's payment obligation insofar as said order was correct because the circuit court was statutorily authorized to direct the DHHR to pay for the mother's expert witness. Accordingly, to the extent the circuit court ordered the DHHR to pay the expenses associated with Chevie's mother's expert witness in the underlying abuse and neglect proceeding and subsequently upheld its decision, both rulings are affirmed.[9]

[9]Although we affirm the circuit court's rulings based upon different authority than that relied upon by the circuit court in rendering its rulings, such disparity in decisional bases is permitted. *See* Syl. pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

B. Fee Schedule Governing Payment of Expert Witness Costs in Abuse and Neglect Proceeding

With regard to the second issue presented for this Court's resolution, the DHHR contends that if we should find that the DHHR is the party responsible for the payment of the mother's expert witness in this case, then it, and not the Public Defender Corporation, should be permitted to set the fee for such services. We agree with the DHHR that the circuit court erred in requiring the DHHR to pay Chevie's mother's expert witness costs in accordance with the fee schedule adopted by the Public Defender Corporation and approved by the circuit court in its February 27, 2009, order.

W. Va. Code § 49-7-33 specifically describes the manner in which the expert fees for which the DHHR is responsible are to be calculated. In this regard, the statute expressly explains that

> *[t]he West Virginia Department of Health and Human Resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate.* Every such psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the West Virginia Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia Department of Health and Human Resources.

W. Va. Code § 49-7-33 (emphasis added). This language also is plain in its clarification of the method by which such payments are to be calculated. Thus, we hold that when a circuit court orders the West Virginia Department of Health and Human Resources to pay

for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009), the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

Although we approve the circuit court's decisions to charge the DHHR with payment of the mother's expert witness expenses, we disapprove of the court's corresponding requirement that the DHHR pay such expenses in accordance with a fee schedule that is not its own. W. Va. Code § 49-7-33 clearly and explicitly states that the DHHR "shall set the fee schedule for such services." "Shall" is a mandatory, directory term that does not afford discretion in fulfilling its command. *See* Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997) ("'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982)."). Thus, the DHHR possesses the sole authority to determine the fee schedule by which professionals will be paid under W. Va. Code § 49-7-33. This conclusion reiterates our prior observation in *Hewitt* commenting that W. Va. Code § 49-7-33 "expressly grants authority to DHHR to set the rate for psychological evaluations and other types of services provided by a health care professional pursuant to the Medicaid-established rate, provided that such a rate exists." 212 W. Va. at 700 n.1, 575 S.E.2d at 310 n.1 (citations omitted). In spite of the

DHHR's express authority, granted by statute and previously acknowledged by this Court in *Hewitt*, the circuit court nevertheless ignored the statute's directive, both through its initial order directing the DHHR to pay an amount that was calculated in accordance with the Public Defender Corporation's fee schedule and later when it refused the DHHR's request for relief on this ground. Consequently, we are compelled to reverse the circuit court's orders to the extent that they compel the DHHR to pay Chevie's mother's expert witness in accordance with the fee schedule adopted by the Public Defender Corporation. Accordingly, we remand this case to the circuit court for further proceedings to permit the DHHR to establish the fee schedule by which Chevie's mother's expert witness shall be paid in accordance with W. Va. Code § 49-7-33.

IV.

CONCLUSION

For the foregoing reasons, the July 30, 2009, and August 24, 2009, orders of the Circuit Court of Marshall County are hereby affirmed, in part, and reversed, in part, and this case is remanded for further proceedings consistent with this opinion.

Affirmed, in part; Reversed, in part; and Remanded.

194 W. Va. 446, 460 S.E.2d 692

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1995 Term

NOS. 22803 and 22084

IN RE: CHRISTINA L. AND KENNETH J.L.

Appeal from the Circuit Court of Wood County
Honorable George W. Hill, Judge
Civil Action No. 93-J-206

Submitted: May 30, 1995
Filed: July 11, 1995

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JUSTICE CLECKLEY delivered the Opinion of the Court.
JUSTICE BROTHERTON did not participate.
JUDGE FOX sitting by temporary assignment.

SYLLABUS BY THE COURT

1. """W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988).' Syllabus Point 2, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993)." Syllabus Point 1, In re Jonathan Michael D., __ W. Va. __, __ S.E.2d __ (No. 22732 5/18/95).

2. Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).

3. """W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, West Virginia Department of Human Services v.

Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, In re Beth, ___ W. Va. ___, 453 S.E.2d 639 (1994).

4. "Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client." Syllabus Point 5, in part, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

5. When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

6. When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code, 49-6-1 (1992).

Cleckley, Justice:

In this child abuse and neglect case, the Circuit Court of Wood County terminated the parental rights of Bonita L.See footnote 1 to her children, Christina L. and Kenneth J.L., and authorized their adoption. The parental termination was based on evidence that Bonita L.'s live-in boyfriend, James R., sexually abused Christina L. for many years. Furthermore, Bonita L. knew of such abuse and aided James R. in performing some of the acts. Bonita L. and the guardian ad litem for Kenneth J.L. join in this appealSee footnote 2 and cite as error: (1) the circuit court's refusal to allow the mother's counsel and the guardian ad litem for the children the opportunity to submit their proposed dispositional alternatives; and (2) the authorization for the children's adoption since the children's father is not a respondent to the proceedings. Bonita L. raises an additional assignment of error that her parental rights should not be terminated because she had no knowledge the abuse was occurring.See footnote 3 For reasons discussed below, we remand this case to the circuit court for action consistent with this opinion.

I. FACTS AND PROCEDURAL BACKGROUND

Bonita L. and Paul David L. are the natural parents of Christina L., who was born October 9, 1981, and Kenneth J.L., who was born January 12, 1983. Mr. and Mrs. L. divorced shortly after Kenneth's birth, and Bonita L. was awarded custody of the children. Christina and Kenneth have had very little contact with their natural father since the divorce. Bonita L. has lived as husband and wife with her boyfriend, James R., for more than a decade. The children refer to James R. as their father.

The investigation into this matter began after twelve- year-old Christina told a friend at school and a teacher that James R. had sexual contact with her. The evidence shows the sexual abuse began at approximately the time Christina was in the third grade and continued to the time it was reported. She stated James R. touched her breasts, vagina, and anus with his hands and penis. Furthermore, he attempted to penetrate her vagina and anus with his penis. Christina testified the abuse usually occurred in her parents' bedroom in the middle of the night or before school began.

Karol Payne, a child protective services worker with the West Virginia Department of Health and Human Resources (Department), testified at the November 10, 1993, hearing that Christina told her that her mother knew the abuse was occurring because Bonita L. would sometimes hold her arms and tell her to be quiet. Christina testified that Bonita L. would tell her to hold still and not to "squirm." Christina also stated that Bonita L. and James R., on occasion, took Polaroid pictures of these sex acts.

Based on this evidence, the circuit court ordered the removal of Christina and Kenneth from their home. Temporary custody was vested in the Department.

Dr. Joan Phillips, a pediatrician, performed an examination on Christina at the Sexual Assault Clinic of Women and Children's Hospital in Charleston. Dr. Phillips testified at the February 25, 1994, hearing that her findings supported Christina's disclosure of sexual abuse. Upon examination, she noticed a notch in the vagina indicative of a penetration-type forced trauma. Dr. Phillips described the old injury as

"an indentation or V-ed area into the tissue of the hymen. That is significant in that it was deep which would indicate that it had perhaps been a healed tear. It was also at the 8:00 position. We look at the vaginal opening as we would a clock from 12:00 all of the way around. Any notch between the 3:00 and 9:00 position is strongly indicative of trauma or healed trauma."

Dr. Phillips stated a straddle-type injury would not produce this result. Furthermore, it was highly unlikely the injury was caused by masturbation or tampon use.

Bonita L. and James R. vehemently denied any sexual abuse occurred. They speculated that Christina conjured up this story because she was jealous of the attention James R. began paying to his grandson. Furthermore, James R. stated that Christina's allegations were physically impossible because medical problems had prevented him from maintaining an erection for approximately three years. However, no medical evidence was submitted to support his claim.

Kenneth testified he was never sexually abused and no evidence was submitted to show he was abused or exposed to Christina's abuse. He testified he wanted to return to his mother's custody.See footnote 4 Kenneth also testified his mother and other family members did not believe Christina and put pressure on her to rescind the allegations.

By order entered May 23, 1994, the circuit court found by clear and convincing evidence that Christina was sexually abused by James R. and that her mother failed to protect her from the abuse even though she was aware that the abuse occurred. No findings were made in regard to Kenneth. The matter was set for a dispositional hearing.

At the dispositional hearing held May 31, 1994, Cynthia Beck, a psychologist, testified that she had conducted therapy for both Christina and Kenneth on a weekly basis for over a five-month period. Ms. Beck stated she originally diagnosed Christina as having a post-traumatic stress disorder. Christina had made progress in decreasing her anxiety level and was doing well in foster care. She recommended that Christina not return to her mother's custody because James R. was still in the home and Bonita L. never acknowledged the abuse occurred. Ms. Beck testified that it made Christina very angry and frustrated that her mother did not support her.

Ms. Beck diagnosed Kenneth as suffering from depression, although she admitted the depression may have been due to his placement in foster care. She stated that Kenneth wavers back and forth in deciding whether he believes Christina was sexually abused. He wants to believe his parents, but he also has a close bond to Christina and does not want to conclude she is lying. During one therapy session, he remembered two incidents that led him to believe the sexual abuse allegations may have been true. When Kenneth was getting something to eat one night, he remembered seeing James R. going towards Christina's bedroom. Also, he could remember walking into the house on one occasion and encountering James R. running through the house naked. Ms. Beck recommended that Kenneth remain in foster care. She testified that research indicates whenever one child is sexually abused, other children in the home are also at risk of being sexually abused. Furthermore, Kenneth was just beginning to work through the issues of sexual abuse and Ms. Beck was afraid a return to the home would undermine his therapy.

Joan George, a child protective services worker for the Department, testified that Bonita L. never acknowledged that Christina was sexually abused by James R. and was emphatic that she did not assist him. Ms. George testified that, during a visit, Bonita L. told Kenneth, directly in front of Christina, that she did not believe Christina. Ms. George recommended that all parental rights be terminated. She testified that Christina would like to stay in foster care until she reaches the age of eighteen, and then she would visit her mother and not have to see James R. Ms. George stated that due to Bonita L.'s refusal to accept responsibility for what happened to Christina,

she was unable to work with the mother to help solve the family's problems. Ms. George felt that both children should be permanently removed from the home.

By order entered June 21, 1994, the circuit court found no reasonable likelihood that Bonita L. would substantially correct the conditions of abuse in the near future. Accordingly, Bonita L.'s parental rights were terminated to both Christina and Kenneth. The circuit court specifically authorized the Department to consent to the adoption of both children.

Bonita L. and the guardian ad litem for Kenneth join in this appeal. Bonita L. concedes that "any attempt to reunite mother and daughter would be futile" because Christina does not want to return home. Therefore, Bonita L. does not appeal the circuit court's decision in regard to Christina.

II. TERMINATION

A. Christina

We first address Bonita L.'s assertion that only a "scintilla of evidence" supports the circuit court's finding that she was aware James R. was sexually abusing Christina. This assignment of error is without merit. Karol Payne testified that Christina told her Bonita L. was aware of the abuse because she was there and participated in at least some of the acts by holding Christina's arms. Furthermore, Christina testified that her mother told her not to "squirm" and to be quiet when James R. sexually abused her. There was also evidence that Bonita L. took Polaroid pictures of the incidents or was at least aware of the existence of the pictures. Using the standard reiterated in Syllabus Point 1 of In re Jonathan Michael D., __ W. Va. __, __ S.E.2d __ (No. 22732 5/18/95), Bonita L.'s actions constitute child abuse:

> ""W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988).' Syllabus Point 2, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993)."

Furthermore, the circuit court found Bonita L. was aware the abuse was occurring and did nothing to prevent it. This Court accords deference to the findings of the circuit court and will not set aside its findings "unless clearly erroneous[.]" W.Va.R.Civ.P. 52(a). "[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm '[i]f the [circuit] court's account of the evidence is plausible in light of the record viewed in its entirety[.]'" In re Jonathan Michael D., __ W. Va. at __, __ S.E.2d at __ (Slip op. at 12), quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). The circuit court's decision to terminate Bonita L.'s parental rights to Christina is substantially supported by the record. Accordingly, we affirm that portion of the circuit court's order.

B. Kenneth

Although Bonita L. does not appeal the circuit court's decision regarding Christina, the circuit court's finding of Kenneth's abuse stems from her actions in abusing Christina. No evidence was presented that Kenneth was sexually abused by James R. However, the Department alleged he was an abused child under W. Va. Code, 49-1-3(a) (1994), which states, in part:

> "'Abused child' means a child whose health or welfare is harmed or threatened by:
> "(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or
> "(2) Sexual abuse or sexual exploitation[.]" (Emphasis added).

We find that the language of the statute is clear on its face.See footnote 5 The West Virginia Legislature plainly articulated its intention that "an 'abused child' means a child whose health or welfare is harmed or threatened by" the abuse inflicted upon "another child in the home." Under the statute, there need not be a showing by the Department

that each child in the home is directly abused, either sexually or physically, before termination of parental rights is sought.

Accordingly, we hold that where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).

We decline, however, to adopt a blanket rule that parental rights must be terminated to all the children residing in the home based merely on the finding that one child is abused. We do not believe this result was intended under the statute. Under W. Va. Code, 49-1-3(a), the Department must present clear and convincing evidence that the child's "health or welfare is harmed or threatened." Syllabus Point 1 of In re Beth, ___ W. Va. ___, 453 S.E.2d 639 (1994), states:

"'"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990)."

Our review of the record reveals that very little reference is made by Ms. Beck and Ms. George to any potential risk that Kenneth may be harmed or threatened by James R. or Bonita L. Ms. Beck made a vague reference to some unidentified studies that she relied upon indicating that if one child in the home is sexually abused then other children in the home suffer a higher risk of being sexually abused. Ms. George was concerned that Bonita L.'s denial of the abuse charges relating to Christina would somehow affect her ability to protect Kenneth. Apart from this testimony, the Department failed to put on additional evidence directly dealing with Kenneth's well being.See footnote 6

Moreover, the circuit court did not make a specific and independent finding of fact or conclusion of law that Kenneth either was abused or would be at risk of being abused if returned to his mother's custody. More specific findings are required in cases of this nature. Under W. Va. Code, 49-6-2(c) (1992), the circuit court is required to "make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court." See State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983).

The evidence of Christina's abuse is certainly relevant and probative to the issue of Bonita L.'s capacity to protect Kenneth from any abuse should James R. begin abusing Kenneth, as the circuit court apparently feared would happen. Of particular concern to this Court is the possibility that should Kenneth be returned to the home, he may now be all the more reluctant to notify anyone should he be abused. He has experienced the ordeals of this case in which Bonita L. chose not to defend her daughter, but instead chose to defend her boyfriend even in the face of the evidence of sexual abuse. Kenneth may conclude that Bonita L. would likewise not support him should she be confronted with this issue again. In making its ultimate determination as to the disposition of Kenneth, the circuit court should take into consideration these concerns.

Because this issue was not specifically resolved below, we remand this case and direct the Department to conduct a further investigation as to any harm Kenneth may have suffered while residing with Bonita L. and James R. and the risk of being abused or further harmed if he is returned to their home. After hearing this evidence, the circuit court should make specific findings of fact and conclusions of law directly addressing the charges against Bonita L. as they relate to Kenneth. See Kincaid v. Morgan, 188 W. Va. 452, 425 S.E.2d 128 (1992) (this Court will remand case for further development if record has not been adequately developed).

III. DISPOSITIONAL HEARING

Bonita L. and Kenneth's guardian ad litem contend the circuit court wrongfully refused to allow them the opportunity to submit their proposed dispositional plans during the May 31, 1994, dispositional hearing. We agree.

At the close of Ms. George's testimony, the circuit court ruled that the only remedy would be to terminate parental rights. The guardian ad litem interrupted and requested the court to allow him to submit his dispositional plan into the record. The circuit court refused:

"A plan would be irrelevant. Any plan other than termination would be irrelevant so I would not allow you to encumber the record with the plan. The only plan would be where the department puts the custody of the children. So another plan would not only be irrelevant, it would be of no consequence and would encumber the record unnecessarily."

The State concedes the circuit court should have allowed counsel for Bonita L. and the guardian ad litem to present their alternative dispositional plans at the hearing. However, it claims the failure to do so is not reversible error because the circuit court was aware that the guardian ad litem would recommend returning Kenneth to the home because of Kenneth's earlier testimony. We disagree.

There is no dispute the circuit court found the alternative plans irrelevant and prevented the guardian ad litem from submitting his proposal into the record. Two witnesses for the State, Ms. Beck and Ms. George, were the only persons to testify at the dispositional hearing. At the conclusion of their testimony, the circuit court articulated its findings without allowing counsel on either side to argue the appropriateness of their dispositional plans. There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. W. Va. Code, 49-6-5 (1992), states that the circuit court shall give "both the petitioner and respondents an opportunity to be heard" when proceeding to the disposition of the case. The essence of effective representation is an opportunity to make a summation and recommendation before the rendition of judgment in these nonjury proceedings. See Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L.Ed.2d 593 (1975). This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process. In Syllabus Point 5, in part, of In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993), we stated:

"Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client."

In child abuse and neglect cases, the best interests of the child are the paramount concern. In re Jeffrey R.L., supra. Therefore, error of substantial proportion was committed when the guardian ad litem was not provided the opportunity to orally articulate his client's best interests. We cannot state that such constitutional error was harmless. This Court will not speculate as to what the arguments of counsel would have been or as to their potential effect on the circuit court.See footnote 7

Two issues should have been addressed below by the parties. First, the record reflects that Kenneth and Christina have a close bond and wish to keep in contact with one another. At the time of the dispositional hearing, they resided in separate foster homes. The parties should have addressed what steps could be taken to preserve their sibling bond--such as visitation rights with each other. In James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), we stated the Department and the court must make diligent efforts to promote children's continued association with one another. On remand, the circuit court should hear the parties' proposals on this issue.

Second, even though the circuit court decided to terminate Bonita L.'s parental rights, the lower court may still consider whether it is in Kenneth's best interest to have continued visitation with his mother. Concededly, Kenneth does not have a clear right to object to the termination of his mother's parental rights because he has not yet reached the age of fourteen.See footnote 8 However, at the time of the dispositional hearing, Kenneth was approaching eleven years of age. He had earlier stated that he loved his mother and wished to be with her. Kenneth appears to be a bright young man who misses his mother very much and would be devastated at the prospect of never seeing her again. After considering the arguments of the guardian ad litem, the circuit court must determine whether Kenneth is

"of an age of discretion" to object to the termination or to seek continued contact with his mother. See W. Va. Code, 49-6-5.

We find that when parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.See footnote 9

On remand, the circuit court should hear arguments from both sides on this issue if it decides to terminate Bonita L.'s parental rights to Kenneth.

IV. CONSENT TO ADOPT

Bonita L. and Kenneth also argue the circuit court erred in authorizing the adoption of Christina and Kenneth without including their natural father, Paul David L., in the proceedings. We agree. W. Va. Code, 49-6-1 (1992), sets forth specific notice requirements in abuse and neglect cases.See footnote 10

The petition filed by the Department states "the father of the above-named children is Paul David [L.] who resides somewhere in Parkersburg, but whose exact address is currently unknown; he has had no contact with the above-named children for a number of years." Nothing in the record below indicates the Department attempted to locate the father and notify him pursuant to W. Va. Code, 49-6-1. The circuit court's order authorizing the Department to consent to the children's adoption without addressing the natural father's parental rights strips him of any parental rights without affording him due process. See Chrystal R.M. v. Charlie A.L., ___ W. Va. ___, ___ S.E.2d ___ (No. 22507 6/21/95); In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973). See also Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972). Perhaps even more importantly, it leaves the status of the children dangling, and the validity of a future adoption subject to challenge. It seems to be a general practice of the Department not to include allegations of abandonment in petitions for abuse and neglect, thus leaving the children in "No Man's Land" with regard to any resolution in their lives.

As we said in Syllabus Point 2 of James M. v. Maynard, supra, abandonment of a child by a parent constitutes compelling circumstances sufficient to justify the denial of an improvement period. Obviously, it also constitutes grounds for termination of parental rights.

Thus, when the Department seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code, 49-6-1 (1992).

The failure to give reasonable notice is particularly troubling when we consider the fact that the Department believed Paul David L. also resided in Parkersburg and did nothing to notify him. We found such failure to notify reversible error in In re Sutton, 132 W. Va. 875, 880, 53 S.E.2d 839, 842 (1949):

> "Inasmuch as the record discloses that both parents were within the jurisdiction of the court, and that the welfare agency had knowledge of the marriage of the parents and the fact that the father recognized the child as his, we are of opinion that notice should have been given to the parents of the presentation of the petition to the juvenile court seeking the custody of the child on the ground that it was at the time a dependent and neglected child within the meaning of the statute. A parent, in our opinion, cannot be divested of parental rights without notice and opportunity for hearing."

The State argues the natural father can move to protect his rights when and if the Department finds persons to adopt the children. However, we find this argument unpersuasive. It would be ludicrous for this Court to allow this matter to linger while Christina and Kenneth are in foster care. Should they be fortunate enough to form a bond with their foster parents and the foster parents move for adoption, it would be all the more devastating to the children to have to go back into court to litigate whatever rights the natural father may possess. Dangling, unresolved parental

rights also have a chilling effect on potential adoptive parents. We choose to resolve this issue in a timely manner rather than to leave this potential timebomb unresolved. Accordingly, based on the above evidence, we find it was reversible error for the circuit court to authorize the Department to consent to the children's adoption without first giving notice to their natural father and attempting to ascertain his rights and intentions.

V. CONCLUSION

Based on the foregoing, we remand this case with directions to the Department to more fully investigate the abuse charges against Bonita L. as they relate to Kenneth. The circuit court should consider this evidence along with the alternative dispositional plans of the parties and set forth specific findings of fact and conclusions of law in its order. Proper notice of these proceedings must be given to Paul David L. before the Department may be authorized to consent to the adoption of the children.

Affirmed, in part, reversed, in part, and remanded with directions.

Footnote 1 *We follow our past practice in domestic and juvenile cases which involve sensitive facts and do not utilize the last names of the parties. See State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987); W. Va. Dep't of Human Servs. v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985).*

Footnote 2 *Both Bonita L. and the guardian ad litem for Kenneth petitioned for appeal following the circuit court's decision. The appeals were consolidated. While the brief of Bonita L. appears on its face to have been submitted jointly, the guardian ad litem failed to sign the brief and failed to appear before this Court. It is ironic that one assignment of error revolves around the circuit court's refusal to accord the guardian ad litem an independent role in the proceedings when he failed to exercise that role on appeal.*

Footnote 3 *Bonita L. does not appeal the circuit court's decision to terminate her parental rights to Christina.*

Footnote 4 *There was evidence that Kenneth had been moved to two or three different homes while in foster care and was having a difficult time adjusting.*

Footnote 5 *In Donley v. Bracken, 192 W. Va. 383, ___, 452 S.E.2d 699, 703 (1994), we stated:*

"If the statutory language is plain and admits of no more than one meaning, and within the constitutional authority of the law-making body which passed it, the duty of interpretation does not arise, and the rules which are to aid ambiguous language need no discussion. State ex rel. Estes v. Egnor, 191 W. Va. 36, 443 S.E.2d 193 (1994)[.]"

Footnote 6 *We agree with the circuit court that the facts of this case are most egregious. Bonita L. allowed the repeated sexual abuse of her minor daughter and did nothing to stop James R. She was aware such abuse was occurring for years and aided her boyfriend in performing some of the acts. Kenneth was living in the home when Bonita L. and James R. committed these atrocities. However, there still must be sufficient record evidence demonstrating that his "health or welfare is harmed or threatened" by the conditions existing in the home. Evidence as egregious as that in the instant case may support a finding that a parent is so deficient in the basic parental instinct to protect his or her child(ren) that termination of rights to siblings can be justified on that basis alone. However, this is an issue which the circuit court should examine and make specific findings of fact and conclusions of law.*

Footnote 7 *We take this opportunity to state that we are troubled by the fact that the guardian ad litem for Kenneth failed to appear before this Court during the scheduled argument in this case. Clearly, it would have been to Kenneth's advantage had his attorney represented him during oral argument and been available to answer the questions of this Court. In Matter of Scottie D., 185 W. Va. 191, 198, 406 S.E.2d 214, 221 (1991), we stated that guardians ad litem have the duty to exercise the child's appellate rights if an appeal is deemed necessary:*

"It is well established that '[a]fter judgment adverse to his ward, the guardian ad litem has the right to appeal and the duty to do so if it reasonably appears to be to the advantage of the minor[.]' Robinson v. Gatch, 85 Ohio App. 484, 487, 87 N.E.2d 904, 906 (1949). This is based upon the principle that a guardian ad litem has a duty

to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian ad litem were in a normal lawyer-client relationship."
We note that the guardian ad litem appears to have been diligent in protecting his client's interests below. While we are unaware of the reason this particular attorney did not attend the argument, this Court is disturbed by the cavalier attitude taken by some guardians ad litem in failing to appear before this Court to represent their clients and failing to notify the Court of the reason they cannot attend. We again admonish guardians ad litem that it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings. This duty includes appearing before this Court to represent the child during oral arguments. In fact, the guardian ad litem's role to represent the child does not cease until permanent placement of the child is achieved. Syl. pt. 5, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

Footnote 8 *See W. Va. Code, 49-6-5(6) (1992), which states, in part: "Notwithstanding any other provision of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination."*

Footnote 9 *Such post-termination visitation or other continued contact where determined to be in the best interest of the child could be ordered not as a right of the parent, but rather as a right of the child. See Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989), and James M. v. Maynard, supra, enunciating right of the child to continued association with those with whom he or she shares an emotional bond.*

Footnote 10 *W. Va. Code, 49-6-1, states, in part:*

"(b) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice, and notice shall be given to the state department. In cases wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person. If said person signs the certificate, service shall be complete and said certificate shall be filed as proof of said service with the clerk of the circuit court. If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver."

219 W. Va. 678, 639 S.E.2d 770

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33133

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE. CHRISTINA W., SISSY W., AND LISA W.

Appeal from the Circuit Court of Mercer County
Honorable Derek C. Swope, Judge
Juvenile Abuse Neglect Nos. 05-JA-104-S, 05-JA-105-S, 05-JA-106-S
AFFIRMED

Submitted: October 24, 2006
Filed: November 29, 2006

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'"A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship." Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991).' Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994)." Syllabus point 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000).

2. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

3. Because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf

of a client, the rules of professional conduct generally apply to that representation.

4. While a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].

Davis, Chief Justice:

This abuse and neglect case raises the legal question of whether a guardian ad litem owes a duty of confidentiality to his or her infant charge such that, where the infant demands confidentiality with respect to information regarding abuse that the infant discloses to the guardian ad litem, the guardian may be justified in not informing a circuit or family court of the abuse alleged by the infant.

I.

FACTUAL AND PROCEDURAL HISTORY

Testimony presented in this case indicates that on September 17, 2005, a domestic dispute erupted between Linda H. and her boyfriend James B.[1] The dispute allegedly arose from Linda's anger that James had given attention and gifts to Linda's oldest daughter, Christina W., that Linda had desired for herself.[2] During the ensuing altercation, James began to choke Linda. According to Linda, Christina came to her mother's aid by hitting James with a broom while yelling, "let go of my mother or I will tell on you for touching me." Deputy E. P. Parks, of the Mercer County Sheriff's Department, child protective service workers, and Angela Robbins, an in-home service provider assigned to the

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[1]"In this case involving sensitive facts, we adhere to our usual practice adopted in other such cases and refer to the parties by their last initials rather than by their complete surnames." *In re Emily*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000) (citations omitted).

[2]Christina was fifteen years old at this time. She turned sixteen in March 2006.

family, all responded to this incident. Christina W. disclosed to Deputy Parks and Angela Robbins that James B. had been touching her inappropriately. However, Christina later recanted these statements.

Linda was given the option of leaving James in order to maintain custody of her children. Linda declined the offer and her three daughters, Christina W., Sissy W. and Lisa W. were removed from the home.[3] On September 21, 2005, a petition for abuse and neglect was filed based on domestic violence and sexual misconduct by James. A preliminary hearing was held on September 30, 2005, in the Circuit Court of Mercer County. At this hearing, the circuit court found that the children remained at risk due to domestic violence, and indicated that the sexual misconduct allegations required additional investigation.[4] At the time of the preliminary hearing, Christina continued to deny that inappropriate sexual conduct had occurred, and she expressed her desire to visit with her mother and James.[5]

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[3]There are no issues involving Sissy W. and Lisa W. presently before this Court.

[4]According to the State, the parties to this case have indicated that the guardian ad litem appointed for the children, Mary Ellen Griffith, was ordered to investigate the allegations. The State acknowledges, however, that such a directive is not clearly expressed in the circuit court's order.

[5]An amended petition was also filed adding the girls' father, Larry W., and outlining the domestic violence in more detail. A motion to terminate the parental rights of Larry W., based upon his incarceration for sexually assaulting a child who is not a party to the instant action, has been taken under advisement by the circuit court. No issues involving

(continued...)

On October 25, 2005, a multi-disciplinary treatment team (hereinafter "MDT") meeting was held. Among those present at the meeting was Mary Ellen Griffith, who had been appointed guardian ad litem for the children. The MDT agreed to a non-custodial improvement period that would include various services for Linda and James,[6] and would also include weekly daytime unsupervised visits between the three girls and both Linda and James.

Later that same day, Ms. Griffith met with Christina and her sisters at the Paul Miller Shelter, which is where the girls had been placed. During the visit, Ms. Griffith spoke privately with Christina and questioned her about her prior allegations of sexual misconduct. Ms. Griffith states that Christina first questioned her regarding the attorney/client privilege and sought assurances that any information she revealed about sexual misconduct by James would not be shared. Christina then advised Ms. Griffith that James had in fact touched her inappropriately. However, Christina reported that she was "okay" and expressed her desire to go home to her mother. She further stated that she would not testify about James' abusive conduct.[7]

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[5](...continued)
Larry W. are presently before this Court.

[6]The services included in-home parenting instruction for Linda, participation in anger management counseling, a victim support group for Linda and a batterer's intervention program for James.

[7]Ms. Griffith asserts that at the MDT meeting earlier that day she requested a
(continued...)

At an adjudicatory hearing on November 18, 2005, Linda and James stipulated to the allegations of domestic violence contained in the abuse and neglect petition. The children were adjudged neglected. A post-adjudicatory improvement period was granted to Linda and James. The improvement period was agreed to by all parties, including Ms. Griffith. The goal of the improvement period was reunification of all three girls with Linda and James, and it included unsupervised visits with both adults. The court set the matter for review on February 17, 2006.

In January 2006, prior to a scheduled MDT meeting, Ms. Griffith was advised by Stacy Cockerham, a case-worker, that Christina had disclosed to her James' sexual misconduct, and Christina had also revealed the abuse to Nancy Silvazi, a foster-care agency worker.[8] Christina also informed these two women of her prior disclosure of the abuse to her guardian ad litem, Ms. Griffith.[9] Thereafter, the Department of Health and Human Resources (hereinafter "DHHR") petitioned the circuit court to remove Ms. Griffith as guardian ad litem

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[7](...continued)
psychological evaluation for Christina. Accordingly, when she later met with Christina, she encouraged Christina to discuss James' abuse with a counselor. According to Ms. Griffith, as of February 13, 2006, the psychological evaluation had not been completed.

[8]Upon learning of the renewed allegations of sexual misconduct, the Department of Health and Human Resources immediately stopped unsupervised visits with James.

[9]At a subsequent MDT meeting, Linda and James were confronted with Christina's renewed statements of sexual misconduct. Both of them denied the allegations, and Linda stated that she would relinquish her parental rights to all three girls.

due to conflict. Following a hearing on February 17, 2006, the circuit court denied the DHHR's motion to remove Ms. Griffith. The circuit court found that the lawyer/client privilege is applicable to the relationship between a child and his or her guardian ad litem, and denied the DHHR's motion to remove Ms. Griffith as guardian ad litem. The DHHR then filed this appeal seeking reversal of the circuit court's order.[10]

II.

STANDARD OF REVIEW

In this case we are asked to review the circuit court's ruling on the DHHR's motion to remove Ms. Griffith. With respect to the disqualification of a lawyer, we have previously held that

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[10]On August 21, 2006, Ms. Griffith was appointed Family Court Judge for McDowell and Mercer Counties. Obviously, as a result of this appointment, Ms. Griffith may no longer serve as guardian ad litem in this case. Nevertheless, because the legal issue herein raised is capable of repetition, we may address this technically moot issue. *See* Syl. pt. 1, *Israel by Israel v. West Virginia Secondary Schs. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided."); Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984) ("A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.").

> "'[a] circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.' Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991)." Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994).

Syl. pt. 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000). In reviewing the circuit court's ruling on this matter, we are mindful that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). In this case, the circuit court's decision was based upon a legal determination. Therefore, we apply a de novo standard. *See* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.").

III.

DISCUSSION

The narrow legal question we are asked to resolve in this case is whether a

lawyer appointed to serve as guardian ad litem to a child involved in abuse and neglect proceedings owes a duty of confidentiality to the child such that the guardian may not disclose to the presiding court, without the consent of his or her child client, revelations from the child disclosing abuse. To answer this question, we first examine the nature of a lawyer's role in serving as guardian ad litem.

Rule 3(i) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings defines "[g]uardian ad litem" as "the attorney appointed to *represent* the child." (Emphasis added). This definition, stating that the guardian is an "attorney" who is to "represent the child," indicates that the role of guardian ad litem is much the same as that of a lawyer representing a client.[11] *See, e.g.*, Black's Law Dictionary 1303-04 (7th ed. 1999) (defining "representation," in part, as "[t]he act or an instance of standing for or acting on

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[11]Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings similarly refers to a guardian ad litem as the *attorney* for the child[ren]:

> *Continued duties of the child's attorney*. The appointment of a CASA representative shall not in any way abrogate the duties and responsibilities imposed by law on the *attorney for the child[ren]*. The duties and responsibilities of *a child's guardian ad litem* shall continue until such child has a permanent placement, and the guardian ad litem shall not be relieved of his responsibilities until such permanent placement has been achieved.

(second and third emphasis added).

behalf of another, esp. by a lawyer on behalf of a client").[12] The conclusion that a guardian ad litem serves in a capacity very similar to that of a lawyer representing a client is further supported by W. Va. Code § 49-6-2(a) (2006) (Supp. 2006), which provides in relevant part that "[i]n any proceeding under the provisions of this article, the child . . . shall have the right *to be represented by counsel* at every stage of the proceedings . . . . Counsel of the child shall be appointed in the initial order." (Emphasis added). *See also In re Tyler D.*, 213 W. Va. 149, 160, 578 S.E.2d 343, 354 (2003) (commenting that "children [in abuse and neglect cases] are entitled to effective representation through a guardian ad litem"); *In re Christina L.*, 194 W. Va. 446, 453, 460 S.E.2d 692, 699 (1995) ("[T]he circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process."); *In re Scottie D.*, 185 W. Va. 191, 198, 406 S.E.2d 214, 221 (1991) ("[A] guardian *ad litem* has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian *ad litem* were in a normal lawyer-client relationship.").[13]

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[12]*Cf.* Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982) ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.").

[13]We also pointed out in Syllabus point 3 of *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996),

> There is a clear legislative directive that guardians ad litem . . . be given an opportunity to advocate for their clients in

(continued...)

Likewise, many of the duties required by the "GUIDELINES FOR GUARDIANS *AD LITEM* IN ABUSE AND NEGLECT CASES" established by this Court and set out in Appendix A of *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993), are those that would be performed by a lawyer representing a client. For example, Rules 8 through 22 appear under the heading "*Preparation for and Representation at Adjudicatory and Dispositional Hearing*" and require guardians ad litem to perform a wide variety of lawyerly duties. For example, several of the rules require a guardian ad litem to

> 8. Pursue the discovery of evidence, formal and informal.
>
> 9. File timely and appropriate written motions such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.
>
> . . . .
>
> 13. Maintain adequate records of documents filed in the case and of conversations with the client and potential witnesses.
>
> . . . .

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[13](...continued)
child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

> 16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.

190 W. Va. at 41, 435 S.E.2d at 179.

Due to the legal nature of a significant portion of the duties of a guardian ad litem, we believe that, as a general rule, the West Virginia Rules of Professional Conduct, which govern the conduct of lawyers practicing within the State of West Virginia, should apply to the conduct of guardians ad litem.[14] Accordingly, we now hold that, because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation.

We must emphasize, however, that this is merely a general rule. While it forms

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[14]The *In re Jeffrey R.L.* Court commented that the guidelines for guardians ad litem adopted therein

> encompass some of the basic principles found under our *Rules of Professional Conduct*. Specifically, Rule 1.1 requires an attorney to "provide competent representation to a client" which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Furthermore, Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." We believe the guidelines proposed for guardians ad litem essentially reflect these basic rules of practice by which each attorney is bound.

190 W. Va. 24, 39, 435 S.E.2d 162, 177.

a necessary part of our analysis, it does not answer the specific question herein raised. The question we must resolve today is whether a guardian ad litem appointed in an abuse and neglect case owes a duty of confidentiality to the child he or she is representing such that the guardian ad litem is prohibited from disclosing to the presiding court information regarding abuse that the child wishes to remain confidential.

Ms. Griffith claims she was bound to keep her client's confidences by Rule 1.6(a) of the Rules of Professional Conduct,[15] which states in relevant part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." Ms. Griffith urges that this confidentiality in the relationship between a guardian ad litem and an infant furthers the compelling need of the child to have a guardian ad litem with whom he or she can freely communicate. However, we believe that the strict adherence to this rule advocated by Ms. Griffith fails to fully appreciate the complex nature of abuse and neglect proceedings, as well as the multi-faceted duties of guardians ad litem. Indeed, the obligations of a guardian ad litem extend much farther than those anticipated by the typical lawyer/client relationship.

The predominant charge to lawyers representing children involved in abuse and

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[15]Because the parties have briefed this case in the context of the Rules of Professional Conduct, our analysis is based upon those rules. We note, however, that the exception to the confidentiality rule for child abuse and neglect cases established in this opinion applies equally to the attorney/client privilege.

neglect cases is that the best interests of the children is of paramount concern. *In re Amber Leigh J.*, 216 W. Va. 266, 272, 607 S.E.2d 372, 378 (2004) (per curiam) ("Of course, [in abuse and neglect cases] the best interests of the child are paramount." (internal quotations and citation omitted)); Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("[T]he primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."); *In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (same); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."). Thus, guardians ad litem serve a dual role. In addition to serving as an advocate for the child[ren], they must also fulfil their duty to fully inform themselves of the child[ren]'s circumstances and determine and recommend the outcome that best satisfies the child[ren]'s best interests. This Court recently alluded to the dual capacity of a guardian ad litem in the case of *In re Elizabeth A.*, 217 W. Va. 197, 204, 617 S.E.2d 547, 554 (2005) (per curiam), wherein we observed that "[d]uring the proceedings in an abuse and neglect case, a guardian ad litem is charged with the duty to faithfully represent the interests of the child *and* effectively advocate on the child's behalf." (Emphasis added). This dual role was likewise recognized in Syllabus point 5 of *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162:

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W. Va. Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules*

> *for Trial Courts of Record*[16] provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians *Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code*, the *West Virginia Rules for Trial Courts of Record*, and the *West Virginia Rules of Professional Conduct*, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed.

(Footnote added).

Thus, the role of guardian ad litem extends beyond that of an advocate and encompasses also a duty to safeguard the best interests of the child[ren] with whose representation the guardian has been charged. Bearing this in mind, we now consider how

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[16]We pause briefly to note that the Trial Court Rules for Trial Courts of Record have been replaced by the West Virginia Trial Court Rules. Rule 21 of the Trial Court Rules contains guidelines for Guardians Ad Litem; however, Rule 21.01 expressly states that it "does not apply to guardians ad litem appointed in abuse and neglect proceedings." Nevertheless, this Court has continued to follow the principles set out in Syllabus point 5 of *In re Jeffrey R.L.*, including the mandate contained therein that "a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court." *See, e.g.*, *In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005) (per curiam) (reiterating relevant portion of Syllabus point 5 of *In re Jeffrey R.L.* as a Syllabus point); *In re Emily*, 208 W. Va. 325, 339-40, 540 S.E.2d 542, 557 (referring to this Court's "clear and oft-repeated admonitions that . . . guardians are duty-bound to provide guidance to the tribunal charged with determining the subject child(ren)'s ultimate fate" (footnotes omitted)).

the confidentiality provision of Rule 1.6 of the Rules of Professional Conduct impacts upon this role.[17]

Ms. Griffith recognizes that children represented by guardians ad litem are under the disability of age. She contends, however, that the West Virginia Rules of Professional Conduct and existing case law recognize the ability of competent children to direct their legal representation, which includes, by implication, the competent child's assertion of confidentiality.

Rule 1.14 of the West Virginia Rules of Professional Conduct addresses a

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[17]Rule 1.6 of the West Virginia Rules of Professional Conduct states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

lawyer's responsibility to a client who is under a disability, including an age disability, and states in relevant part:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority*, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(Emphasis added). The comment to Rule 1.14 elaborates, in part, that

> The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. *For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody*. . . .

(Emphasis added). Importantly, however, the lawyer's duty under Rule 1.14 to "maintain a normal client-lawyer relationship with the client" extends only "as far as reasonably possible." Furthermore, the recognition in the comment to that rule that "to an increasing extent the law recognizes intermediate degrees of competence" is tempered by the clarification that a child's opinion as to his or her custody is "entitled to *weight* in legal proceedings." (Emphasis added). Thus, while the child's opinions are to be given

consideration where the child has demonstrated an adequate level of competency, there is no requirement that the child's wishes govern. As this Court explained in *In re Lindsey C.*,

> Obviously, those recommendations may or may not be identical to those the child would make to the court, left entirely to his or her own choices. However, in the case of a child, justice is clearly best served by requiring that counsel and the court exercise their respective best judgment in all aspects of the case, and that the court have the benefit of counsel's candid and independent assistance in ascertaining the best interests of that child.

196 W. Va. 395, 409, 473 S.E.2d 110, 124 (1995). Clearly, though, the recognition that a child's opinions are entitled to be weighed in the course of the guardian ad litem's representation in no way minimizes the guardian's ultimate duty to safeguard the child's best interests. *See, e.g., In re Elizabeth A.*, 217 W. Va. 197, 205, 617 S.E.2d 547, 555 (2005) (finding that "[t]he guardian ad litem and DHHR were not given a meaningful opportunity to introduce substantive evidence or obtain additional testing necessary to determine the best interests of the two children whom the guardian ad litem was appointed to serve") (footnote omitted). Where a child's wishes are adverse to the course that serves the child's best interests, they simply cannot be followed. *See In re Lindsey C.*, 196 W. Va. 395, 409, 473 S.E.2d 110, 124 ("As we indicated in *Jeffrey R.L.*, counsel for the child is expected to pursue that central purpose [to ascertain and serve the best interests of the child] even when his or her client, the child, may have a different view of what is in the child's best interests."). Nowhere is this reasoning demonstrated more clearly than in a situation where the child's desired course would expose the child to a high risk of probable harm.

Furthermore, in addition to weighing a child's opinion (such as the desire for confidentiality as issue in this case) against the child's best interests, a guardian ad litem must also balance the child's desire for confidentiality with the guardian's duties to the court. As noted above, a guardian ad litem "*shall* make a full and independent investigation of the facts involved in the proceeding, and *shall* make his or her recommendations known to the court." Syl. pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162.[18] Accordingly, we now hold that while a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].[19]

In the instant case, after Christina had recanted her initial complaint that her mother's boyfriend, James B., had been touching her inappropriately in a sexual manner,

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[18]"'It is well established that the word "shall," in the absence of language . . . showing a contrary intent . . ., should be afforded a mandatory connotation.'" *Retail Designs, Inc. v. West Virginia Div. of Highways*, 213 W. Va. 494, 500, 583 S.E.2d 449, 455 (2003) (quoting Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982)).

[19]We note that a family court or circuit court has the inherent authority to appoint both a lawyer and a guardian ad litem where, in the court's discretion, such appointments are necessary. Additionally, Rule 52 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a Court-Appointed Special Advocate Representative, where such a program is available, "to further the best interests of the child." R. Proc. for Child Abuse & Neglect Proceedings 52(a).

Christina W. revealed to Ms. Griffith that such touching had in fact occurred. Although Christina W. demanded that this information remain confidential, Ms. Griffith's failure to disclose this information to the presiding court resulted in Christina having unsupervised visitation with James B. Until such time as the allegations of sexual abuse could be properly investigated, unsupervised visitation between Christina W. and James B. was most certainly not in Christina's best interest.

In this appeal, DHHR sought to have Ms. Griffith removed as guardian ad litem in this matter. However, the circuit court found that there was no need to remove her because the confidential information, Christina W.'s allegations of sexual abuse, had been brought to the court's attention, and thus, the conflict had been removed. Prior to this opinion, the duties of a lawyer placed in the situation in which Ms. Griffith found herself were not clear. Insofar as this opinion makes clear a lawyer's duties with respect to disclosure of confidential information, and because the court was ultimately made aware of Christine W.'s allegations of abuse, we agree with the circuit court and see no need to remove Ms. Griffith.

IV.

CONCLUSION

While we disagree with the circuit court's conclusion that a guardian ad litem owes an absolute duty of confidentiality to the child[ren] he or she represents in an abuse and neglect proceeding, we find no error in the court's denial of DHHR's motion to remove Ms.

Griffith as guardian ad litem in this matter. Accordingly, the March 1, 2006, order of the Circuit Court of Mercer County is affirmed.

Affirmed.

219 W. Va. 678, 639 S.E.2d 770

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33133

FILED
November 29, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE. CHRISTINA W., SISSY W., AND LISA W.

Appeal from the Circuit Court of Mercer County
Honorable Derek C. Swope, Judge
Juvenile Abuse Neglect Nos. 05-JA-104-S, 05-JA-105-S, 05-JA-106-S
AFFIRMED

Submitted: October 24, 2006
Filed: November 29, 2006

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'"A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship." Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991).' Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994)." Syllabus point 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000).

2. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

3. Because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf

of a client, the rules of professional conduct generally apply to that representation.

4. While a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].

Davis, Chief Justice:

This abuse and neglect case raises the legal question of whether a guardian ad litem owes a duty of confidentiality to his or her infant charge such that, where the infant demands confidentiality with respect to information regarding abuse that the infant discloses to the guardian ad litem, the guardian may be justified in not informing a circuit or family court of the abuse alleged by the infant.

I.

FACTUAL AND PROCEDURAL HISTORY

Testimony presented in this case indicates that on September 17, 2005, a domestic dispute erupted between Linda H. and her boyfriend James B.[1] The dispute allegedly arose from Linda's anger that James had given attention and gifts to Linda's oldest daughter, Christina W., that Linda had desired for herself.[2] During the ensuing altercation, James began to choke Linda. According to Linda, Christina came to her mother's aid by hitting James with a broom while yelling, "let go of my mother or I will tell on you for touching me." Deputy E. P. Parks, of the Mercer County Sheriff's Department, child protective service workers, and Angela Robbins, an in-home service provider assigned to the

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[1]"In this case involving sensitive facts, we adhere to our usual practice adopted in other such cases and refer to the parties by their last initials rather than by their complete surnames." *In re Emily*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000) (citations omitted).

[2]Christina was fifteen years old at this time. She turned sixteen in March 2006.

family, all responded to this incident. Christina W. disclosed to Deputy Parks and Angela Robbins that James B. had been touching her inappropriately. However, Christina later recanted these statements.

Linda was given the option of leaving James in order to maintain custody of her children. Linda declined the offer and her three daughters, Christina W., Sissy W. and Lisa W. were removed from the home.[3] On September 21, 2005, a petition for abuse and neglect was filed based on domestic violence and sexual misconduct by James. A preliminary hearing was held on September 30, 2005, in the Circuit Court of Mercer County. At this hearing, the circuit court found that the children remained at risk due to domestic violence, and indicated that the sexual misconduct allegations required additional investigation.[4] At the time of the preliminary hearing, Christina continued to deny that inappropriate sexual conduct had occurred, and she expressed her desire to visit with her mother and James.[5]

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[3]There are no issues involving Sissy W. and Lisa W. presently before this Court.

[4]According to the State, the parties to this case have indicated that the guardian ad litem appointed for the children, Mary Ellen Griffith, was ordered to investigate the allegations. The State acknowledges, however, that such a directive is not clearly expressed in the circuit court's order.

[5]An amended petition was also filed adding the girls' father, Larry W., and outlining the domestic violence in more detail. A motion to terminate the parental rights of Larry W., based upon his incarceration for sexually assaulting a child who is not a party to the instant action, has been taken under advisement by the circuit court. No issues involving

(continued...)

On October 25, 2005, a multi-disciplinary treatment team (hereinafter "MDT") meeting was held. Among those present at the meeting was Mary Ellen Griffith, who had been appointed guardian ad litem for the children. The MDT agreed to a non-custodial improvement period that would include various services for Linda and James,[6] and would also include weekly daytime unsupervised visits between the three girls and both Linda and James.

Later that same day, Ms. Griffith met with Christina and her sisters at the Paul Miller Shelter, which is where the girls had been placed. During the visit, Ms. Griffith spoke privately with Christina and questioned her about her prior allegations of sexual misconduct. Ms. Griffith states that Christina first questioned her regarding the attorney/client privilege and sought assurances that any information she revealed about sexual misconduct by James would not be shared. Christina then advised Ms. Griffith that James had in fact touched her inappropriately. However, Christina reported that she was "okay" and expressed her desire to go home to her mother. She further stated that she would not testify about James' abusive conduct.[7]

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[5](...continued)
Larry W. are presently before this Court.

[6]The services included in-home parenting instruction for Linda, participation in anger management counseling, a victim support group for Linda and a batterer's intervention program for James.

[7]Ms. Griffith asserts that at the MDT meeting earlier that day she requested a
(continued...)

At an adjudicatory hearing on November 18, 2005, Linda and James stipulated to the allegations of domestic violence contained in the abuse and neglect petition. The children were adjudged neglected. A post-adjudicatory improvement period was granted to Linda and James. The improvement period was agreed to by all parties, including Ms. Griffith. The goal of the improvement period was reunification of all three girls with Linda and James, and it included unsupervised visits with both adults. The court set the matter for review on February 17, 2006.

In January 2006, prior to a scheduled MDT meeting, Ms. Griffith was advised by Stacy Cockerham, a case-worker, that Christina had disclosed to her James' sexual misconduct, and Christina had also revealed the abuse to Nancy Silvazi, a foster-care agency worker.[8] Christina also informed these two women of her prior disclosure of the abuse to her guardian ad litem, Ms. Griffith.[9] Thereafter, the Department of Health and Human Resources (hereinafter "DHHR") petitioned the circuit court to remove Ms. Griffith as guardian ad litem

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[7](...continued)
psychological evaluation for Christina. Accordingly, when she later met with Christina, she encouraged Christina to discuss James' abuse with a counselor. According to Ms. Griffith, as of February 13, 2006, the psychological evaluation had not been completed.

[8]Upon learning of the renewed allegations of sexual misconduct, the Department of Health and Human Resources immediately stopped unsupervised visits with James.

[9]At a subsequent MDT meeting, Linda and James were confronted with Christina's renewed statements of sexual misconduct. Both of them denied the allegations, and Linda stated that she would relinquish her parental rights to all three girls.

due to conflict. Following a hearing on February 17, 2006, the circuit court denied the DHHR's motion to remove Ms. Griffith. The circuit court found that the lawyer/client privilege is applicable to the relationship between a child and his or her guardian ad litem, and denied the DHHR's motion to remove Ms. Griffith as guardian ad litem. The DHHR then filed this appeal seeking reversal of the circuit court's order.[10]

II.

STANDARD OF REVIEW

In this case we are asked to review the circuit court's ruling on the DHHR's motion to remove Ms. Griffith. With respect to the disqualification of a lawyer, we have previously held that

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[10]On August 21, 2006, Ms. Griffith was appointed Family Court Judge for McDowell and Mercer Counties. Obviously, as a result of this appointment, Ms. Griffith may no longer serve as guardian ad litem in this case. Nevertheless, because the legal issue herein raised is capable of repetition, we may address this technically moot issue. *See* Syl. pt. 1, *Israel by Israel v. West Virginia Secondary Schs. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) ("Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided."); Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984) ("A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.").

> "'[a] circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.' Syl. Pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991)." Syllabus point 2, *Musick v. Musick*, 192 W. Va. 527, 453 S.E.2d 361 (1994).

Syl. pt. 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000). In reviewing the circuit court's ruling on this matter, we are mindful that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). In this case, the circuit court's decision was based upon a legal determination. Therefore, we apply a de novo standard. *See* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.").

III.

DISCUSSION

The narrow legal question we are asked to resolve in this case is whether a

lawyer appointed to serve as guardian ad litem to a child involved in abuse and neglect proceedings owes a duty of confidentiality to the child such that the guardian may not disclose to the presiding court, without the consent of his or her child client, revelations from the child disclosing abuse. To answer this question, we first examine the nature of a lawyer's role in serving as guardian ad litem.

Rule 3(i) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings defines "[g]uardian ad litem" as "the attorney appointed to *represent* the child." (Emphasis added). This definition, stating that the guardian is an "attorney" who is to "represent the child," indicates that the role of guardian ad litem is much the same as that of a lawyer representing a client.[11] *See, e.g.*, Black's Law Dictionary 1303-04 (7th ed. 1999) (defining "representation," in part, as "[t]he act or an instance of standing for or acting on

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[11]Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings similarly refers to a guardian ad litem as the *attorney* for the child[ren]:

> *Continued duties of the child's attorney*. The appointment of a CASA representative shall not in any way abrogate the duties and responsibilities imposed by law on the *attorney for the child[ren]*. The duties and responsibilities of *a child's guardian ad litem* shall continue until such child has a permanent placement, and the guardian ad litem shall not be relieved of his responsibilities until such permanent placement has been achieved.

(second and third emphasis added).

behalf of another, esp. by a lawyer on behalf of a client").[12] The conclusion that a guardian ad litem serves in a capacity very similar to that of a lawyer representing a client is further supported by W. Va. Code § 49-6-2(a) (2006) (Supp. 2006), which provides in relevant part that "[i]n any proceeding under the provisions of this article, the child . . . shall have the right *to be represented by counsel* at every stage of the proceedings . . . . Counsel of the child shall be appointed in the initial order." (Emphasis added). *See also In re Tyler D.*, 213 W. Va. 149, 160, 578 S.E.2d 343, 354 (2003) (commenting that "children [in abuse and neglect cases] are entitled to effective representation through a guardian ad litem"); *In re Christina L.*, 194 W. Va. 446, 453, 460 S.E.2d 692, 699 (1995) ("[T]he circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process."); *In re Scottie D.*, 185 W. Va. 191, 198, 406 S.E.2d 214, 221 (1991) ("[A] guardian *ad litem* has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian *ad litem* were in a normal lawyer-client relationship.").[13]

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[12]*Cf.* Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982) ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.").

[13]We also pointed out in Syllabus point 3 of *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996),

> There is a clear legislative directive that guardians ad litem . . . be given an opportunity to advocate for their clients in

(continued...)

Likewise, many of the duties required by the "GUIDELINES FOR GUARDIANS *AD LITEM* IN ABUSE AND NEGLECT CASES" established by this Court and set out in Appendix A of *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993), are those that would be performed by a lawyer representing a client. For example, Rules 8 through 22 appear under the heading "*Preparation for and Representation at Adjudicatory and Dispositional Hearing*" and require guardians ad litem to perform a wide variety of lawyerly duties. For example, several of the rules require a guardian ad litem to

> 8. Pursue the discovery of evidence, formal and informal.
>
> 9. File timely and appropriate written motions such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.
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> . . . .
>
> 13. Maintain adequate records of documents filed in the case and of conversations with the client and potential witnesses.
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> . . . .

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[13](...continued)
child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

> 16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.

190 W. Va. at 41, 435 S.E.2d at 179.

Due to the legal nature of a significant portion of the duties of a guardian ad litem, we believe that, as a general rule, the West Virginia Rules of Professional Conduct, which govern the conduct of lawyers practicing within the State of West Virginia, should apply to the conduct of guardians ad litem.[14] Accordingly, we now hold that, because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation.

We must emphasize, however, that this is merely a general rule. While it forms

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[14]The *In re Jeffrey R.L.* Court commented that the guidelines for guardians ad litem adopted therein

> encompass some of the basic principles found under our *Rules of Professional Conduct*. Specifically, Rule 1.1 requires an attorney to "provide competent representation to a client" which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Furthermore, Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." We believe the guidelines proposed for guardians ad litem essentially reflect these basic rules of practice by which each attorney is bound.

190 W. Va. 24, 39, 435 S.E.2d 162, 177.

a necessary part of our analysis, it does not answer the specific question herein raised. The question we must resolve today is whether a guardian ad litem appointed in an abuse and neglect case owes a duty of confidentiality to the child he or she is representing such that the guardian ad litem is prohibited from disclosing to the presiding court information regarding abuse that the child wishes to remain confidential.

Ms. Griffith claims she was bound to keep her client's confidences by Rule 1.6(a) of the Rules of Professional Conduct,[15] which states in relevant part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." Ms. Griffith urges that this confidentiality in the relationship between a guardian ad litem and an infant furthers the compelling need of the child to have a guardian ad litem with whom he or she can freely communicate. However, we believe that the strict adherence to this rule advocated by Ms. Griffith fails to fully appreciate the complex nature of abuse and neglect proceedings, as well as the multi-faceted duties of guardians ad litem. Indeed, the obligations of a guardian ad litem extend much farther than those anticipated by the typical lawyer/client relationship.

The predominant charge to lawyers representing children involved in abuse and

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[15]Because the parties have briefed this case in the context of the Rules of Professional Conduct, our analysis is based upon those rules. We note, however, that the exception to the confidentiality rule for child abuse and neglect cases established in this opinion applies equally to the attorney/client privilege.

neglect cases is that the best interests of the children is of paramount concern. *In re Amber Leigh J.*, 216 W. Va. 266, 272, 607 S.E.2d 372, 378 (2004) (per curiam) ("Of course, [in abuse and neglect cases] the best interests of the child are paramount." (internal quotations and citation omitted)); Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("[T]he primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."); *In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (same); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."). Thus, guardians ad litem serve a dual role. In addition to serving as an advocate for the child[ren], they must also fulfil their duty to fully inform themselves of the child[ren]'s circumstances and determine and recommend the outcome that best satisfies the child[ren]'s best interests. This Court recently alluded to the dual capacity of a guardian ad litem in the case of *In re Elizabeth A.*, 217 W. Va. 197, 204, 617 S.E.2d 547, 554 (2005) (per curiam), wherein we observed that "[d]uring the proceedings in an abuse and neglect case, a guardian ad litem is charged with the duty to faithfully represent the interests of the child *and* effectively advocate on the child's behalf." (Emphasis added). This dual role was likewise recognized in Syllabus point 5 of *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162:

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W. Va. Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules*

> *for Trial Courts of Record*[16] provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians *Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code*, the *West Virginia Rules for Trial Courts of Record*, and the *West Virginia Rules of Professional Conduct*, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed.

(Footnote added).

Thus, the role of guardian ad litem extends beyond that of an advocate and encompasses also a duty to safeguard the best interests of the child[ren] with whose representation the guardian has been charged. Bearing this in mind, we now consider how

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[16]We pause briefly to note that the Trial Court Rules for Trial Courts of Record have been replaced by the West Virginia Trial Court Rules. Rule 21 of the Trial Court Rules contains guidelines for Guardians Ad Litem; however, Rule 21.01 expressly states that it "does not apply to guardians ad litem appointed in abuse and neglect proceedings." Nevertheless, this Court has continued to follow the principles set out in Syllabus point 5 of *In re Jeffrey R.L.*, including the mandate contained therein that "a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court." *See, e.g.*, *In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005) (per curiam) (reiterating relevant portion of Syllabus point 5 of *In re Jeffrey R.L.* as a Syllabus point); *In re Emily*, 208 W. Va. 325, 339-40, 540 S.E.2d 542, 557 (referring to this Court's "clear and oft-repeated admonitions that . . . guardians are duty-bound to provide guidance to the tribunal charged with determining the subject child(ren)'s ultimate fate" (footnotes omitted)).

the confidentiality provision of Rule 1.6 of the Rules of Professional Conduct impacts upon this role.[17]

Ms. Griffith recognizes that children represented by guardians ad litem are under the disability of age. She contends, however, that the West Virginia Rules of Professional Conduct and existing case law recognize the ability of competent children to direct their legal representation, which includes, by implication, the competent child's assertion of confidentiality.

Rule 1.14 of the West Virginia Rules of Professional Conduct addresses a

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[17]Rule 1.6 of the West Virginia Rules of Professional Conduct states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

lawyer's responsibility to a client who is under a disability, including an age disability, and states in relevant part:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority*, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(Emphasis added). The comment to Rule 1.14 elaborates, in part, that

> The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. *For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody*. . . .

(Emphasis added). Importantly, however, the lawyer's duty under Rule 1.14 to "maintain a normal client-lawyer relationship with the client" extends only "as far as reasonably possible." Furthermore, the recognition in the comment to that rule that "to an increasing extent the law recognizes intermediate degrees of competence" is tempered by the clarification that a child's opinion as to his or her custody is "entitled to *weight* in legal proceedings." (Emphasis added). Thus, while the child's opinions are to be given

consideration where the child has demonstrated an adequate level of competency, there is no requirement that the child's wishes govern. As this Court explained in *In re Lindsey C.*,

> Obviously, those recommendations may or may not be identical to those the child would make to the court, left entirely to his or her own choices. However, in the case of a child, justice is clearly best served by requiring that counsel and the court exercise their respective best judgment in all aspects of the case, and that the court have the benefit of counsel's candid and independent assistance in ascertaining the best interests of that child.

196 W. Va. 395, 409, 473 S.E.2d 110, 124 (1995). Clearly, though, the recognition that a child's opinions are entitled to be weighed in the course of the guardian ad litem's representation in no way minimizes the guardian's ultimate duty to safeguard the child's best interests. *See, e.g., In re Elizabeth A.*, 217 W. Va. 197, 205, 617 S.E.2d 547, 555 (2005) (finding that "[t]he guardian ad litem and DHHR were not given a meaningful opportunity to introduce substantive evidence or obtain additional testing necessary to determine the best interests of the two children whom the guardian ad litem was appointed to serve") (footnote omitted). Where a child's wishes are adverse to the course that serves the child's best interests, they simply cannot be followed. *See In re Lindsey C.*, 196 W. Va. 395, 409, 473 S.E.2d 110, 124 ("As we indicated in *Jeffrey R.L.*, counsel for the child is expected to pursue that central purpose [to ascertain and serve the best interests of the child] even when his or her client, the child, may have a different view of what is in the child's best interests."). Nowhere is this reasoning demonstrated more clearly than in a situation where the child's desired course would expose the child to a high risk of probable harm.

Furthermore, in addition to weighing a child's opinion (such as the desire for confidentiality as issue in this case) against the child's best interests, a guardian ad litem must also balance the child's desire for confidentiality with the guardian's duties to the court. As noted above, a guardian ad litem "*shall* make a full and independent investigation of the facts involved in the proceeding, and *shall* make his or her recommendations known to the court." Syl. pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162.[18] Accordingly, we now hold that while a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].[19]

In the instant case, after Christina had recanted her initial complaint that her mother's boyfriend, James B., had been touching her inappropriately in a sexual manner,

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[18]"'It is well established that the word "shall," in the absence of language . . . showing a contrary intent . . ., should be afforded a mandatory connotation.'" *Retail Designs, Inc. v. West Virginia Div. of Highways*, 213 W. Va. 494, 500, 583 S.E.2d 449, 455 (2003) (quoting Syl. pt. 1, *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982)).

[19]We note that a family court or circuit court has the inherent authority to appoint both a lawyer and a guardian ad litem where, in the court's discretion, such appointments are necessary. Additionally, Rule 52 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a Court-Appointed Special Advocate Representative, where such a program is available, "to further the best interests of the child." R. Proc. for Child Abuse & Neglect Proceedings 52(a).

Christina W. revealed to Ms. Griffith that such touching had in fact occurred. Although Christina W. demanded that this information remain confidential, Ms. Griffith's failure to disclose this information to the presiding court resulted in Christina having unsupervised visitation with James B. Until such time as the allegations of sexual abuse could be properly investigated, unsupervised visitation between Christina W. and James B. was most certainly not in Christina's best interest.

In this appeal, DHHR sought to have Ms. Griffith removed as guardian ad litem in this matter. However, the circuit court found that there was no need to remove her because the confidential information, Christina W.'s allegations of sexual abuse, had been brought to the court's attention, and thus, the conflict had been removed. Prior to this opinion, the duties of a lawyer placed in the situation in which Ms. Griffith found herself were not clear. Insofar as this opinion makes clear a lawyer's duties with respect to disclosure of confidential information, and because the court was ultimately made aware of Christine W.'s allegations of abuse, we agree with the circuit court and see no need to remove Ms. Griffith.

IV.

CONCLUSION

While we disagree with the circuit court's conclusion that a guardian ad litem owes an absolute duty of confidentiality to the child[ren] he or she represents in an abuse and neglect proceeding, we find no error in the court's denial of DHHR's motion to remove Ms.

Griffith as guardian ad litem in this matter. Accordingly, the March 1, 2006, order of the Circuit Court of Mercer County is affirmed.

Affirmed.

194 W. Va. 138, 459 S.E.2d 415

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22507

CHRYSTAL R. M., Plaintiff Below, Appellant

v.

CHARLIE A. L., Defendant Below, Appellee

Submitted: May 3, 1995

Filed: June 21, 1995

SYLLABUS BY THE COURT

1. Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.

2. "Statutes relating to different subjects are not in pari materia. Syllabus point 5, *Commercial Credit Corp. v. Citizens National Bank*, 148 W. Va. 198, 133 S.E.2d 720 (1963)." Syllabus point 1, *Atchinson v. Erwin*, 172 W. Va. 8, 302 S.E.2d 78 (1983).

3. Statements by the natural mother in an adoption agreement that the adoptive father acknowledges paternity, when the adoption agreement is subsequently not consummated, does not constitute an acknowledgement of paternity under W. Va. Code, 48A- 6-6(b) (1990). Therefore, such statements do not bar a proceeding on her part against the actual biological father to establish paternity.

4. "Under W. Va. Code, 48A-6-3 (1992), undisputed blood or tissue test results indicating a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the circuit court should enter judgment accordingly." Syllabus point 5, *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 452 S.E.2d 436 (1994).

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RETIRED JUSTICE MILLER, sitting by temporary assignment, delivered the Opinion of the Court.

JUSTICE BROTHERTON and JUSTICE RECHT did not participate.
JUDGE FOX sitting by temporary assignment.

Miller, Justice:

In this appeal, we are asked to determine whether language by the mother in a written prenatal adoption agreement stating, that the adoptive father is the natural father, should prevail over blood tests that prove a third person, the appellee, Charlie A.L. is the biological father. See footnote 1 By agreement dated January 8, 1990, the appellant, Chrystal R.M., consented to allow Mr. and Mrs. Ruble to adopt her child. In the agreement, the appellant stated that she "hereby acknowledges that Gregory Emmitt Ruble, . . . is the natural father of said child and agrees to place his name on the initial birth certificate and necessary hospital records at the time of her admission for the birth of the child." See footnote 2 The adoption was never consummated.

In June of 1991, the appellant filed suit against the appellee asserting that he was the biological father, and seeking child support, reimbursement of birth expenses, and attorney fees. See footnote 3 The family law master eventually ordered blood tests to determine the paternity issue. They revealed that Mr. Ruble was not the biological father and that there was a 99.94% probability that the appellee, Charles A.L., was the biological father.

The appellee defended against the paternity action by asserting that the signed and notarized adoption agreement between Mr. and Mrs. Ruble and Chrystal R.M., stating that Mr. Ruble was the father, met the requirements of W. Va. Code, 48A-6-6(b) (1990) which states:

A written acknowledgment by both the man and woman that the man is the father of the named child legally establishes the man as the father of the child for all purposes and child support can be established under the provisions of this chapter.

The family law master concluded that this section was designed to establish paternity where the mother and the putative father acknowledged his paternity, but was not meant to cover adoption agreements. On appeal the circuit court reversed because it determined that the language in the adoption agreement met the requirements of W. Va. Code, 48A-6-6(b) (1990). This appeal clearly presents a question of law involving an interpretation of a statute. Accordingly, we apply the de novo standard of review as set out in syllabus point 1, in part, of *Burnside v. Burnside*, ___ W. Va. ___, ___ S.E.2d ___ (No. 22399, March 24, 1995) which states that "questions of law and statutory interpretations are subject to a de novo review." See footnote 4

Initially, the appellant argues that the applicable language in the adoption agreement is void and unenforceable citing *Wyatt v. Wyatt*, 185 W. Va. 472, 475, 408 S.E.2d 51, 54 (1991). There we said that "[t]he duty of a parent to support a child is a basic duty owed by the parent to the child, and a parent cannot waive or contract away the child's right to support." We do not find Wyatt to be applicable simply because the contract for adoption was not consummated. Consequently, the mother neither waived nor contracted away the child's right to support.

We disagree with the legal basis of the circuit court's opinion that under W. Va. Code, 48A-6-6(b) (1990), there had been a formal acknowledgment of paternity. We do not believe that this subsection has some talismanic meaning that requires us to abandon both our logic and common sense. From a purely technical viewpoint, it can be said that the adoption agreement did not carry the "written acknowledgment by both the man and woman" as required by this subsection. Certainly, Mr. Ruble did not admit that he was the natural father because as earlier noted, this statement was made only by the natural mother. See footnote 5

Of more importance, it must be remembered that this was an adoption agreement and it is within this context that we judge its purpose. The purpose of W. Va. Code, 48A-6-6(b) (1990), allowing for acknowledgment of paternity by written agreement, is to enable the biological father to acknowledge this fact without the necessity of going through an expensive and often protracted hearing to establish paternity. This can be seen by reading W. Va. Code, 48A-6-6(a) (1990), which outlines the more cumbersome procedures that must be followed by a putative father seeking to establish paternity. See footnote 6

Moreover, the paternity section, W. Va. Code, 48A-6-1 et seq. (1993) is separate and distinct from the adoption section, W. Va. Code, 48-4-1 et seq. (1985). They serve two entirely different interests, and because of this they are not considered to be in pari materia. We discussed the concept of in pari materia at some length in *Manchin v. Dunfree*, 174 W. Va. 532, 535-36, 327 S.E.2d 710, 713-14 (1984) and observed that it was a rule of statutory construction. We acknowledged the rule meant that "[s]tatutes which relate to the same subject should be read and applied together. . . ." 174 W. Va. at 535, 327 S.E.2d at 713. We went on in *Manchin*, to recognize the corollary to the rule as set out in syllabus point 1 of *Atchinson v. Erwin*, 172 W. Va. 8, 302 S.E.2d 78 (1983) stating that "[s]tatutes relating to different subjects are not in pari materia. [Citations omitted.]" Consequently, we customarily do not consider language in paternity statutes to be applicable to adoption agreements.

Finally, from a public policy standpoint, we do not believe that W. Va. Code, 48A-6-6(b) (1990) can be used to thwart the rights of a natural father. It would be unjust to allow the biological mother to join with another man who is not the

biological father and file an acknowledgment under this section which would bar the rights of the biological father. As evidenced by *Simmons v. Comer*, 190 W. Va. 350, 438 S.E.2d 530 (1993), we have been reluctant to accord a nonbiological father any preferential standing. Simmons dealt with the right of a putative father to claim a parental relationship with a child whose natural mother had represented to him that he was the biological father; she then rejected his attempt to sustain a continuing relationship with the child.

Of more direct importance, however, is the constitutional right accorded to the biological parent not to be deprived of his paternal right without notice and some appropriate due process hearing, as we explained in *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973), relying on, *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); see also *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). But see *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed 91 (1989). Thus, we conclude that statements by the natural mother in an adoption agreement that the adoptive father acknowledges paternity, when the adoption agreement is subsequently not consummated, does not constitute an acknowledgement of paternity under W. Va. Code, 48A-6-6(b). Therefore, such statements do not bar a proceeding on her part against the actual biological father to establish paternity.

In the final analysis, this case was a paternity issue. Blood tests were ordered under W. Va. Code, 48A-6-3 (1992) and, as earlier noted, the appellee was found by a 99.94% probability to be the father and the tests excluded Mr. Ruble. Under W. Va. Code, 48A-6-3(a)(3)(1992), such an undisputed finding, when filed, "legally establish(es) the man as the father of the child for all purposes. . . ." See footnote 7 Recently, in acknowledgement of this section, we stated in syllabus point 5 of *Mildred L.M. v. John O.F.*, supra, note 1:

> Under W. Va. Code, 48A-6-3 (1992), undisputed blood or tissue test results indicating a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the circuit court should enter judgment accordingly.

For the foregoing reasons, we reverse the judgment of the Circuit Court of Wood County and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

Footnote: 1 *In accord with our prior practice, we do not use the last names of the parties in domestic cases that involve sensitive facts. See e.g. Mildred L.M. v.*

John O.F., 192 W. Va. 345, 452 S.E.2d 436 (1994); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987).

Footnote: 2 *The relevant language of the adoption agreement was:*

The party of the second part hereby acknowledges that Gregory Emmitt Ruble, one of the parties of the first part hereto, is the natural father of said child and agrees to place his name on the initial birth certificate and necessary hospital records at the time of her admission for the birth of the child.

Footnote: 3 *The right to recover these items as a part of a paternity action is statutory as we explained in Kathy L.B. v. Patrick J.B., 179 W. Va. 655, 371 S.E.2d 583 (1988).*

Footnote: 4 *The entire text of syllabus point 1 of Burnside v. Burnside, supra, is:*

In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.

As the syllabus in Burnside indicates, the circuit court had concurred with the family law master's findings. However, where a disagreement exists as in this case and the issue is one of law a de novo review is still the correct standard.

Footnote: 5 *For the text, see supra, note 2. The appellant, Chrystal R.M., stated in the adoption agreement that Mr. Ruble was the natural father. However, Mr. Ruble never explicitly claimed he was the father of Chrystal R.M.'s child.*

Footnote: 6 *W. Va. Code, 48A-6-6(a) (1990) states:*

The natural father of a child may file an application to establish paternity in circuit court when he acknowledges that the child is his or when he has married the mother of the child after the child's birth and upon consent of the mother, or if she is deceased or incompetent, or has surrendered custody, upon the consent of the person or agency having custody of the child or of a court having jurisdiction over the child's custody. The application may be filed in the county where the natural father resides, the child resides, or the child was born. The circuit court, if satisfied that the applicant is the natural father and that establishment of the relationship is for the best interest of the child, shall enter the finding of fact and an order upon its docket, and thereafter the child is the child of the applicant, as though born to him in lawful wedlock.

Footnote: 7 *W. Va. Code, 48A-6-3(a)(3) (1992) states:*

Undisputed blood or tissue test results which show a statistical probability of paternity of more than ninety-eight percent shall, when filed with the court, legally establish the man as the father of the child for all purposes and child support may be established pursuant to the provisions of this chapter.

209 W. Va. 102, 543 S.E.2d 659

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

FILED
December 12, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 13, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27915

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner Below, Appellant

v.

WILLIAM AND GAYLE CLARK, INDIVIDUALLY
AND D/B/A MIRACLE MEADOWS SCHOOL,
Respondents Below, Appellees

Appeal from the Circuit Court of Ritchie County
Honorable Robert L. Holland, Jr., Judge
Petition No. 99-JA-3

AFFIRMED

Submitted: October 4, 2000
Filed: December 12, 2000

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

3. "This state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings." Syllabus Point 7, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611, 520 S.E.2d 186 (1999).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Ritchie County entered on January 7, 2000. In that order, the circuit court denied a petition filed by the appellant and petitioner below, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), to compel the appellees and respondents below, William and Gayle Clark, individually, and d/b/a Miracle Meadows School, to produce medical and school records of the students enrolled at Miracle Meadows School in connection with an ongoing investigation concerning allegations of abuse and neglect. The DHHR also requested that the appellees be required to produce the students and staff of Miracle Meadows School for interviews with its investigators. In this appeal, the DHHR contends that pursuant to W. Va. Code § 49-6A-1 to 10 (1977), the circuit court should have ordered the appellees to cooperate with its investigation.

This Court has before it, the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is affirmed.

I.

On April 16, 1999, the DHHR sought ratification, removal, and temporary custody of four students that were in the care and custody of the Miracle Meadows School. The school is a private facility located in Harrison County, West Virginia,[1] and is operated by a private, not-for-profit corporation.[2] Gayle and William Clark are employed by the corporation as director and pastor of the school. Most of the children that attend the school have behavioral problems and are from out of state. Their parents sign temporary custody agreements providing that Miracle Meadows has temporary custody of their children and the right to seek medical attention for them. The agreement further provides that the children will remain at Miracle Meadows for a minimum of one year and that the school will regulate all contact between the students and their parents. Given these circumstances, the DHHR considers the Clarks along with the staff of Miracle Meadows to be the legal custodians of all students enrolled in the school.

The DHHR's petition for custody was filed after two female students of Miracle Meadows, Shannon M.[3] and Sheayan M., reported that they had been sexually abused by a staff member. The girls disclosed the abuse when they were picked up by the state police after running away from the school on April 13, 1999. The girls were returned to the school after it was agreed that the staff member who

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[1]The school has a second location in Ritchie County, West Virginia, where the school's director and pastor reside.

[2]Miracle Meadows School is closely associated with the Seventh Day Adventist Church and is operated under Exemption K of W. Va. Code § 18-8-1 (1995).

[3]We follow our past practice in juvenile and domestic relations cases involving sensitive matters and use initials to identify the children's last names. *In the matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

allegedly abused them would not be permitted back onto the school campus until the DHHR had completed an investigation.

Shortly thereafter, the school contacted the DHHR and reported that the girls had recanted their allegations concerning the sexual abuse. Upon receiving this information, an investigator for the DHHR and a member of the state police returned to the school to question the girls again. At that time, the girls reported that they had been pressured by the school's staff and forced to recant their stories. Both girls indicated that they were afraid to remain at the school. Thus, the DHHR took temporary custody of Shannon M. and Sheayan M.

Upon further investigation, the DHHR determined that two other children at the school had been placed in imminent danger. In particular, the DHHR alleged that Christopher B. had been placed in a five-foot by five-foot secured room and forced to sleep on the floor for a night with a space heater. It was also alleged that Aaron E. had been beaten with a board by the same staff member who allegedly sexually abused Shannon M. and Sheayan M. Both of the boys were removed from the school.

Subsequently, the DHHR filed a petition with the Circuit Court of Ritchie County to compel the appellees to provide the school and medical records of all students enrolled at Miracle Meadows School, and to further produce the students and staff for interviews with the DHHR in connection with its investigation of the allegations of abuse and neglect. An evidentiary hearing on the petition was held on July 29, 1999. After hearing the evidence and considering the memoranda, the circuit court ordered the

appellees to produce the requested records for an in camera inspection by the court. The hearing was then recessed until August 3, 1999, when the parties presented their arguments to the circuit court. At that time, the DHHR also informed the court of new allegations concerning another student, Renee S. After considering the arguments, the court directed the DHHR to pursue the allegations concerning Renee S. in Harrison County. The court further ruled that there was no provision in W.Va. Code § 49-1-1, *et seq.*, authorizing the relief sought by the DHHR. The court stated that to require the appellees to provide the requested information would result in a violation of their constitutional rights against self-incrimination, as the information revealed by the records and interviews could result in criminal prosecution.[4]

II.

We begin our analysis of this case by noting that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). As this Court further explained in Syllabus Point 4 of *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996): "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*."

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[4]It is noted that the circuit court did order the appellees to produce all medical records in their possession relating to Shannon M., Sheayan M., Christopher B., and Aaron E. and to provide a list of the health care providers who may have rendered medical services to these children.

The issue in this case is whether the circuit court erred by refusing to order the appellees to submit the school and medical records of all students attending Miracle Meadows to the DHHR and to further order the appellees to make their students and staff available for interviews. The DHHR contends that it is entitled to this information pursuant to W.Va. Code § 49-6A-9 because it is investigating allegations of abuse and neglect. In response, the appellees argue that the circuit court's order was proper especially in light of the numerous letters written by the parents of the students stating that they did not want their children's records released to the DHHR.

After reviewing the record, we conclude that the DHHR certainly had a duty to investigate the abuse and neglect allegations in this case. However, we do not find that the DHHR was entitled to review the school and medical records of the students who were not the subject of the abuse and neglect petition. Thus, we affirm the decision of the circuit court, but for different reasons.[5]

This Court has previously stated that "[a]s a matter of public policy, the mental health records of children should be treated with particular care to protect the child." *Nelson v. Ferguson*, 184 W.Va. 198, 202, 399 S.E.2d 909, 913 (1990). In *Nelson*, this Court recognized that although medical records do not belong in the same class as highly confidential juvenile records, the same policy concerns

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[5]The circuit court concluded that the appellees did not have to produce the records because it would violate their right against self-incrimination as the information revealed might lead to criminal prosecution. However, we believe that the appellees' constitutional rights were sufficiently protected by W.Va. Code § 49-6-4 (1984), and therefore, decline to uphold the circuit court's ruling on that basis. *See State v. James R. II*, 188 W.Va. 44, 422 S.E.2d 521 (1992).

that keep juvenile records confidential[6] are applicable. *Id.* "Unfortunately, mental disease often carries with it a stigma similar to that associated with a criminal record" and to protect children from this stigma, their records should remain confidential *Id.*

In Syllabus Point 7 of *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611, 520 S.E.2d 186 (1999), this Court declared that: "This state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings." In that case, this Court discussed the need to keep a student's educational records confidential when they are introduced as evidence in court proceedings which are presumptively open to the public. This Court explained that "federal statute and state education regulations and policy generally provide, with limited exceptions, for the confidentiality of students' education records." 205 W.Va. at 620, 520 S.E.2d at 195.

As noted above, the students enrolled at Miracle Meadows are troubled children who apparently have been unable to successfully attend school elsewhere. Miracle Meadows is, in effect, a parochial alternative school. The record in this case contains numerous letters from the parents of these students praising the school and staff for helping their children and expressing disapproval of the DHHR's investigation. For instance, one letter reads:

> We have a concern regarding a hearing called by DHHR to have interviews of staff and students and access to school records. . . . If we felt that [our] daughter was not in a safe environment we would have pulled her out long ago or she would have urged us to take her out. . . . Our desire for you is to . . . deny DHHR access to school records and interviews of the staff and students.

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[6]See W.Va. Code § 49-7-1(1999).

Another parent wrote:

> This fine institution accomplishes exactly what its Name implies. It is a miracle that so many lives of these defiant children, most of who have little respect for any authority, can be turned around, so that they may lead meaningful lives and be contributing, caring citizens of our country. . . . I do not want the State involved, nor having access to my daughter's medical, dental, school transcripts, as they have become the property of Miracle Meadows School.

Yet another parent states:

> We sent our son . . . to Miracle Meadows School to teach him self-management. We are satisfied with the results. . . . We will not grant permission to have his records or any other records in possession by the school be made public.

As these letters illustrate, the parents of these students chose to send their children to Miracle Meadows and it is quite evident that they want their children's right of privacy protected. As we noted in *Garden State Newspapers*, "[t]he right of privacy is a precious right which all Americans fiercely and jealously guard." 205 W.Va. at 619, 520 S.E.2d 194.

Our decisions in *Nelson* and *Garden State Newspapers* indicate that these children's records should in fact be kept confidential in accordance with their parents' wishes. However, we cannot ignore the DHHR's duty to investigate allegations of abuse and neglect. W.Va. Code § 49-6A-1 (1977) provides that: "It is the purpose of this article, through the complete reporting of child abuse and neglect, to protect the best interests of the child, to offer protective services in order to prevent any further harm to the child or any other children living in the home[.]" Given these circumstances, we find that absent probable cause to believe that these children were also abused and neglected, the DHHR does not have

a right to review the children's medical and school records. Nonetheless, we believe that the DHHR does have the right to interview the children.

W.Va. Code § 49-6A-9 sets forth the general duties and powers of the DHHR and specifically directs that an investigation commence upon notification of suspected child abuse and neglect. As part of the investigation, the DHHR is instructed to interview the child or children within fourteen days of the commencement of the investigation. W.Va. Code § 49-6A-9(b)(3) (1994). In this case, the DHHR commenced an investigation after Shannon M. and Sheayan M. reported that they had been sexually abused at the school. As part of that investigation, the DHHR interviewed other children at the school and some members of the school's staff. Through these interviews, the DHHR determined that Christopher B. and Aaron E. had also been placed in imminent danger. Thus, the DHHR filed a petition to remove these two students from school.

The DHHR maintains that after these children were removed from the school, the appellees became less cooperative and as a result some the staff and children were not interviewed. Thus, they requested that the circuit court order the appellees to make the remaining children and staff available for interviews. After reviewing the record, we believe that the DHHR had ample opportunity to investigate the abuse and neglect allegations. The DHHR's investigators were at the school interviewing the students and staff from April 16, 1999 through April 20, 1999. The DHHR conducted further interviews on May 24 and 26, 1999 and on June 1, 2, and 10, 1999. There is every indication that the DHHR conducted a

zealous and thorough investigation. Consequently, we see no basis for allowing the DHHR to conduct further interviews of the students and staff of Miracle Meadows.

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Ritchie County entered on January 7, 2000, is affirmed.

Affirmed.

541 U.S. 36, 124 S.Ct. 1354,
158 L.Ed.2d 177

Supreme Court of the United States
Michael D. CRAWFORD, Petitioner,
v.
WASHINGTON.
No. 02-9410
Argued Nov. 10, 2003.
Decided March 8, 2004.

Chief Judge Rehnquist filed opinion concurring in judgment, in which Justice O'Connor joined.

Syllabus FN*

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,' " a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.,* at 66, 100 S.Ct. 2531. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.,* interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Pp. 1359-1374.

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409. Pp. 1359-1367.

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning.

See, *e.g., Mattox, supra.* Pp. 1367-1369.

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts, supra,* at 66, 100 S.Ct. 2531. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding. Pp. 1369-1370.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Pp. 1370-1371.

(e) *Roberts'* framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp. 1371-1372.

(f) The instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising. Pp. 1372-1374.

147 Wash.2d 424, 54 P.3d 656, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 1374.

Jeffrey L. Fisher, appointed by this Court, Seattle, WA, for petitioner,
Michael R. Dreeben, Washington, DC, for United States as amicus curiae, by special leave of the Court.
Steven C. Sherman, Olympia, WA, for respondent.
Edward G. Holm, Prosecuting Attorney, Thurston County, Washington, John Michael Jones, Senior Deputy Prosecuting Attorney, Counsel of Record, Steven C. Sherman, Senior Deputy Prosecuting Attorney, Olympia, WA, for respondent.
Bruce E. H. Johnson, Jeffrey L. Fisher, Counsel of Record, Scott Carter-Eldred, Davis, Wright, Tremaine, LLP, Seattle, WA, for petitioner.For U.S. Supreme Court briefs, see:2003 WL 21939940 (Pet.Brief)2003 WL 22228001 (Resp.Brief)

Justice SCALIA delivered the opinion of the Court.
Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the

stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:
"Q. Okay. Did you ever see anything in [Lee's] hands?
"A. I think so, but I'm not positive.
"Q. Okay, when you think so, what do you mean by that?
"A. I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different-particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:"Q. Did Kenny do anything to fight back from this assault?
"A. (pausing) I know he reached into his pocket ... or somethin' ... I don't know what.
"Q. After he was stabbed?
"A. He saw Michael coming up. He lifted his hand ... his chest open, he might [have] went to go strike his hand out or something and then (inaudible).
"Q. Okay, you, you gotta speak up.
"A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant).
"Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?
"A. Yeah, after, after the fact, yes.
"Q. Did you see anything in his hands at that point?
"A. (pausing) um um (no)." *Id.,* at 137 (punctuation added).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not

testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev.Code § 5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State v. Burden,* 120 Wash.2d 371, 377, 841 P.2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him." Amdt. 6. According to our description of that right in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.' " *Id.,* at 66, 100 S.Ct. 2531. To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. App. 76-77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim: "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed." App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: " '[W]hen a codefendant's confession is virtually identical [to, *i.e.,* interlocks with,] that of a defendant, it may be deemed reliable.'

" 147 Wash.2d 424, 437, 54 P.3d 656, 663 (2002) (quoting *State v. Rice,* 120 Wash.2d 549, 570, 844 P.2d 416, 427 (1993)). The court explained:

"Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap ....

"[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap....

"[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash.2d, at 438-439, 54 P.3d, at 664 (internal quotation marks omitted). FN1

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S. 914, 123 S.Ct. 2275, 156 L.Ed.2d 129 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas,* 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability-*i.e.,* falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct. 2531. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides v. State,* 3 Miss. 655, 664-665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, Evidence § 1397, p. 104 (2d ed.1923) (hereinafter Wigmore), or something in-between, see *infra,* at 1364. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy v. Iowa,* 487 U.S. 1012, 1015, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial

testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373-374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face." 1 J. Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216-217, 228 (3d ed.1944); *e.g., Raleigh's Case,* 2 How. St. Tr. 1, 15-16, 24 (1603); *Throckmorton's Case,* 1 How. St. Tr. 869, 875-876 (1554); cf. *Lilburn's Case,* 3 How. St. Tr. 1315, 1318-1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.,* c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21-34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra,* at 528-530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ...." 2 How. St. Tr., at 15-16. The judges refused, *id.,* at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.,* at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that " 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.' " 1 Jardine, *supra,* at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E.g.,* 13 Car. 2, c. 1, § 5 (1661); see 1 Hale, *supra,* at 306.

Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case,* 6 How. St. Tr. 769, 770-771 (H.L.1666); 2 Hale, *supra,* at 284; 1 Stephen, *supra,* at 358. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown ch. 46, § 3, pp. 603-604 (T. Leach 6th ed. 1787); 1 Hale, *supra,* at 585, n. *(k);* 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. *Tong's Case,* Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King v. Westbeer,* 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King v. Paine,* 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor ... had lost the benefit of a cross-examination." *Id.,* at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case,* 13 How. St. Tr. 537, 591-592 (H.C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined ...; sir J.F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence ..."); *id.,* at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him .... [O]ur constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings-one speaker even admitting that the evidence would normally be inadmissible. See *id.,* at 603-604 (Williamson); *id.,* at 604-605 (Chancellor of the Exchequer); *id.,* at 607; 3 Wigmore § 1364, at 22-23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.,* § 1364, at 22; cf. *Carmell v. Texas,* 529 U.S. 513, 526-530, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3

id., c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer, supra,* at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case,* 13 How. St. Tr., at 596 (Sloane), with *id.,* at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King v. Eriswell,* 3 T.R. 707, 710, 100 Eng. Rep. 815, 817 (K.B.1790) (Grose, J.) (dicta); *id.,* at 722-723, 100 Eng. Rep., at 823-824 (Kenyon, C.J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute' "), with *id.,* at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King v. Dingler,* 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791); *King v. Woodcock,* 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789); cf. *King v. Radbourne,* 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.,* at 484-492; T. Peake, Evidence 63-64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen v. Beeston,* 29 Eng. L. & Eq. R. 527, 529 (Ct.Crim.App.1854) (Jervis, C. J.). FN2

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte,*" complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed.1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, § 57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub.L. 381, 396-397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds.1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall v. Hancock* (Oct. 1768 - Mar. 1769), in 2 Legal Papers of John Adams 194, 207 (L. Wroth & H. Zobel eds.1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; ... whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told .... [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, ... the *Inquisition.*" 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question .... [W]ritten evidence ... [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra,* at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State v. Webb,* 2 N.C. 103 (Super. L. & Eq. 1794) *(per curiam),* decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Similarly, in *State v. Campbell,* 30 S.C.L. 124, 1844 WL 2558 (App. L. 1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte,* and, therefore, utterly incompetent." *Id.,* at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the

conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn v. Commonwealth,* 26 Va. 701, 708 (1827); *State v. Atkins,* 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam).* Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See *United States v. Macomb,* 26 F.Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *State v. Houser,* 26 Mo. 431, 435-436 (1858); *Kendrick v. State,* 29 Tenn. 479, 485-488 (1850); *Bostick v. State,* 22 Tenn. 344, 345-346 (1842); *Commonwealth v. Richards,* 35 Mass. 434, 437 (1837); *State v. Hill,* 20 S.C.L. 607, 608-610 (App. 1835); *Johnston v. State,* 10 Tenn. 58, 59 (Err. & App. 1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure § 1093, p. 689 (2d ed. 1872); T. Cooley, Constitutional Limitations.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements ntroduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton v. Evans,* 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to

"witnesses" against the accused-in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g., Campbell,* 30 S.C.L. at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra,* at 1360. FN3

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra,* at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The

involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class. FN4

B

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox v. United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country. FN5

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. *Post,* at 1377. Several had become well established by 1791. See 3 Wigmore § 1397, at 101; Brief for United States as *Amicus Curiae* 13, n. 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. FN6 MOST OF THE HEARSAy exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly v. Virginia,* 527 U.S. 116, 134, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule"). FN7

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox v. United States,* 156

U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of ...." *Id.,* at 244, 15 S.Ct. 337.

Our later cases conform to *Mattox's* holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi v. Stubbs,* 408 U.S. 204, 213-216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *California v. Green,* 399 U.S. 149, 165-168, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Pointer v. Texas,* 380 U.S., at 406-408, 85 S.Ct. 1065; cf. *Kirby v. United States,* 174 U.S. 47, 55-61, 19 S.Ct. 574, 43 L.Ed. 890 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber v. Page,* 390 U.S. 719, 722-725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); cf. *Motes v. United States,* 178 U.S. 458, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts v. Russell,* 392 U.S. 293, 294-295, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968) *(per curiam); Bruton v. United States,* 391 U.S. 123, 126-128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Douglas v. Alabama,* 380 U.S. 415, 418-420, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton v. Evans,* 400 U.S., at 87-89, 91 S.Ct. 210 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts,* 448 U.S., at 67-70, 100 S.Ct. 2531, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly v. Virginia, supra,* excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily v. United States,* 483 U.S. 171, 181-184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement. FN8

Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.,* at 545, 106 S.Ct. 2056. Respondent argues that "[t]he logical inference of this statement is that when the discrepancies between the statements

are insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception-previously unknown to this Court's jurisprudence-for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. See *Parker v. Randolph,* 442 U.S. 62, 69-76, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion), abrogated by *Cruz v. New York,* 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. FN9

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e.g., Lilly,* 527 U.S., at 140-143, 119 S.Ct. 1887 (BREYER, J., concurring); *White,* 502 U.S., at 366, 112 S.Ct. 736 (THOMAS J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125-131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law-thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine-thus eliminating the excessive narrowness referred to above.

In *White,* we considered the first proposal and rejected it. 502 U.S., at 352-353, 112 S.Ct. 736. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today,

because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses ... is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States,* 98 U.S. 145, 158-159, 25 L.Ed. 244 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.,* at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id.,* at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e.g., People v. Farrell,* 34 P.3d 401, 406-407 (Colo.2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.,* at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States v. Photogrammetric Data Servs., Inc.,* 259 F.3d 229, 245 (C.A.4 2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin v. Commonwealth,* 40 Va.App. 327, 335-338, 579 S.E.2d 367, 371-372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State v. Bintz,* 2002 WI App. 204, ¶ 13, 257 Wis.2d 177, 187, ¶ 13, 650 N.W.2d 913, 918, ¶ 13. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell, supra,* at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens v. People,* 29 P.3d 305, 316 (Colo.2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly,* 527 U.S., at 137, 119 S.Ct. 1887, that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts,* courts continue routinely to admit them. See *Photogrammetric Data Servs., supra,* at 245-246; *Farrell, supra,* at 406-408; *Stevens, supra,* at 314-318; *Taylor v. Commonwealth,* 63 S.W.3d 151, 166-168 (Ky.2001); *State v. Hawkins,* No. 2001-P-0060, 2002 WL 31895118, ¶ ¶ 34-37, *6 (Ohio App., Dec. 31, 2002); *Bintz, supra,* ¶ ¶ 7-14, 257 Wis.2d, at 183-188, 650 N.W.2d, at 916-918; *People v. Lawrence,* 55 P.3d 155, 160-161 (Colo.App.2001); *State v. Jones,* 171 Or.App. 375, 387-391, 15 P.3d 616, 623-625 (2000); *State v. Marshall,* 136 Ohio App.3d 742, 747-748, 737 N.E.2d 1005, 1009 (2000); *People v. Schutte,* 240 Mich.App. 713, 718-721, 613 N.W.2d 370, 376-377 (2000); *People v. Thomas,* 313 Ill.App.3d 998, 1005-1007, 246 Ill.Dec. 593, 730 N.E.2d 618, 625-626 (2000); cf. *Nowlin, supra,* at 335-338, 579 S.E.2d, at 371-372 (witness confessed to a related crime); *People v. Campbell,* 309 Ill.App.3d 423, 431-432, 242

Ill.Dec. 694, 699, 721 N.E.2d 1225, 1230 (1999) (same). One recent study found that, after *Lilly,* appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases-more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia,* 53 Syracuse L.Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar,* 295 F.3d 1018, 1021-1023 (C.A.9 2002) (plea allocution showing existence of a conspiracy); *United States v. Centracchio,* 265 F.3d 518, 527-530 (C.A.7 2001) (same); *United States v. Dolah,* 245 F.3d 98, 104-105 (C.A.2 2001) (same); *United States v. Petrillo,* 237 F.3d 119, 122-123 (C.A.2 2000) (same); *United States v. Moskowitz,* 215 F.3d 265, 268-269 (C.A.2 2000) (per curiam) (same); *United States v. Gallego,* 191 F.3d 156, 166-168 (C.A.2 1999) (same); *United States v. Papajohn,* 212 F.3d 1112, 1118-1120 (C.A.8 2000) (grand jury testimony); *United States v. Thomas,* 30 Fed.Appx. 277, 279 (C.A.4 2002) (per curiam) (same); *Bintz, supra,* ¶ ¶ 15-22, 257 Wis.2d, at 188- 191, 650 N.W.2d, at 918-920 (prior trial testimony); *State v. McNeill,* 140 N.C.App. 450, 457-460, 537 S.E.2d 518, 523-524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges-the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin, supra,* at 335-338, 579 S.E.2d, at 371-372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g., Gallego, supra,* at 168 (plea allocution); *Papajohn, supra,* at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts ' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-

contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and ... didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is ... neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.,* at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements-that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I could a swore I seen him goin' for somethin' before, right before everything happened .... [B]ut I'm not positive." *Id.,* at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.,* at 137 (puncuation added). Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous-he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials,

and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U.S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring v. Arizona,* 536 U.S. 584, 611-612, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's-great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." FN10 Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499

FN1. The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." 147 Wash.2d, at 432, 54 P.3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

FN2. There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore § 1364, at 23 (requirement "never came to be conceded at all in England"); T. Peake, Evidence 64, n. *(m)* (3d ed. 1808) (not finding the point "expressly decided in any reported case"); *State v. Houser,* 26 Mo. 431, 436 (1858) ("there may be a few cases ... but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State v. Campbell,* 30 S.C.L. 124, 130 (App. L. 1844) (point "has not ... been plainly adjudged, even in the English cases"). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser, supra,* at 436; *Campbell, supra,* at 130; T. Cooley, Constitutional Limitations *318.

FN3. These sources-especially Raleigh's trial-refute THE CHIEF JUSTICE's assertion, *post,* at 1375 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post,* at 1374, n. 1, is belied by the very existence of a general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation-what THE CHIEF JUSTICE calls use of a "proxy," *post,* at 1375-but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

FN4. We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis,* 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of "testimonial" exist, one can

imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

FN5. THE CHIEF JUSTICE claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post,* at 1376, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law. See *supra,* at 1361. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations-explicitly in *King v. Woodcock,* 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789), and *King v. Dingler,* 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791), and by implication in *King v. Radbourne,* 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787).
None of THE CHIEF JUSTICE's citations proves otherwise. *King v. Westbeer,* 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half-century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingler.* Hale's treatise is older still, and far more ambiguous on this point, see 1 M. Hale, Pleas of the Crown 585-586 (1736); some who espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views. See *Fenwick's Case,* 13 How. St. Tr. 537, 602 (H.C. 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is *King v. Eriswell,* 3 T.R. 707, 100 Eng. Rep. 815 (K.B.1790), but even that decision provides no substantial support. *Eriswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. *Id.,* at 707-708, 100 Eng. Rep., at 815-816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible. *Id.,* at 713-714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, Evidence, at 64, n. *(m)* ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, Evidence 487-488, n. *(c)* (1826) ("Buller, J. ... refers to *Radbourne's* case ...; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T. R., at 710, 100 Eng. Rep., at 817 (Grose, J.); *id.,* at 722-723, 100 Eng. Rep., at 823-824 (Kenyon, C. J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous.

See *id.,* at 710, n. *(c),* 100 Eng. Rep., at 817, n. *(c).* Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King v. Ferry Frystone,* 2 East 54, 55, 102 Eng. Rep. 289 (K.B.1801) ("The point ... has been since considered to be so clear against the admissibility of the evidence ... that it was abandoned by the counsel ... without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes.* More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See *supra,* at 13-14; see also *supra,* at 11, n. 2 (coroner statements). The common-law rule had been settled since *Paine* in 1696. See *King v. Paine,* 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B.).

FN6. The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, *e.g., Mattox v. United States,* 156 U.S. 237, 243-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *King v. Reason,* 16 How. St. Tr. 1, 24-38 (K.B.1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at *318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock, supra,* at 501-504, 168 Eng. Rep., at 353-354; *Reason, supra,* at 24-38; Peake, Evidence, at 64; cf. *Radbourne, supra,* at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis.*

FN7. We cannot agree with THE CHIEF JUSTICE that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Post,* at 1377. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse-a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

FN8. One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois,* 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), which involved, *inter alia,* statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.,* at 349-351, 112 S.Ct. 736. It is

questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson v. Trevanion,* Skin. 402, 90 Eng. Rep. 179 (K.B.1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U.S., at 348-349, 112 S.Ct. 736. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given ... that the testimony properly falls within the relevant hearsay exceptions." *Id.,* at 351, n. 4, 112 S.Ct. 736.

FN9. THE CHIEF JUSTICE complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), *Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), and *United States v. Burr,* 25 F.Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). *Post,* at 4-6. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox, supra,* at 242-244, 15 S.Ct. 337; *Kirby, supra,* at 55-61, 19 S.Ct. 574. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr,* we disagree with THE CHIEF JUSTICE's reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroad[s]" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F.Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see *supra,* at 1368, n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green,* 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements " 'cannot be replicated, even if the declarant testifies to the same matters in court.' " *Post,* at 1377 (quoting *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not

bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).)

FN10. We acknowledge THE CHIEF JUSTICE's objection, *post,* at 1378, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. See *supra,* at 1371-1372, and cases cited. The difference is that the *Roberts* test is *inherently,* and therefore *permanently,* unpredictable.

Chief Justice REHNQUIST, with whom Justice O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based. FN1 See, *e.g., King v. Brasier,* 1 Leach 199, 200, 168 Eng. Rep. 202 (K.B.1779); see also J. Langbein, Origins of Adversary Criminal Trial 235-242 (2003); G. Gilbert, Evidence 152 (3d ed. 1769). FN2 TESTIMONIAL STATEments such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled*ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath. FN3 SEE *KING V. woodcock,* 1 Leach 500, 503, 168 eng. rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath). Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. See 1 N. Webster, An American Dictionary of the English Language (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath* " (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at

common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today. FN4

I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States v. Burr,* 25 F.Cas. 187, 193 (No. 14,694) (CC Va. 1807), continuing with our cases in the late 19th century, *Mattox v. United States,* 156 U.S. 237, 243-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby v. United States,* 174 U.S. 47, 54-57, 19 S.Ct. 574, 43 L.Ed. 890 (1899), and through today, *e.g., White v. Illinois,* 502 U.S. 346, 352-353, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante,* at 1363 (citing *Finn v. Commonwealth,* 26 Va. 701, 708 (1827); *State v. Atkins,* 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam)*).

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King v. Eriswell,* 3 T.R. 707, 100 Eng. Rep. 815 (K.B.1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King v. Westbeer,* 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the admission of an *ex parte* affidavit); see also 1 M. Hale, Pleas of the Crown 585-586 (1736) (noting that statements of “accusers and witnesses” which were taken under oath could be admitted into evidence if the declarant was “dead or not able to travel”). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore § 1364, at 26-27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid.; id.,* § 1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. See,

e.g., Eriswell, supra, at 715-719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819-822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. See, *e.g., Woodcock, supra,* at 502-504, 168 Eng. Rep., at 353-354; *King v. Reason,* 16 How. St. Tr. 1, 22-23 (K.B.1722).

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. See n. 1, *supra.* There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr,* 25 F.Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced. See *ibid.*

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.' " *Id.,* at 396, 106 S.Ct. 1121 (quoting *Tennessee v. Street,* 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see *White,* 502 U.S., at 356, 112 S.Ct. 736, statements made in the course of procuring medical services, see *ibid.,* dying declarations, see *Kirby, supra,* at 61, 19 S.Ct. 574, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty

procedure. See *Kentucky v. Stincer,* 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); see also *Maryland v. Craig,* 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"). "[I]n a given instance [cross- examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox,* 156 U.S., at 243, 15 S.Ct. 337; see also *Salinger v. United States,* 272 U.S. 542, 548, 47 S.Ct. 173, 71 L.Ed. 398 (1926). By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, see *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id.,* at 827, 111 S.Ct. 2597. And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial,' " *ante,* at 1374. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.,* is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. See *ante,* at 1367. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to

harmless-error analysis. See *ante,* at 1359, n. 1.

But these are palliatives to what I believe is a mistaken change of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho v. Wright,* 497 U.S. 805, 820-824, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, *ante,* at 1373, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court, *ibid.,*, is required to reverse the judgment here. A citation to *Idaho v. Wright, supra,* would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.

FN1. Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury. See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L.Rev. 499, 534-535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L.Rev. 691, 738-746. In many cases, hearsay alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J. Wigmore, Evidence § 1364, pp. 17, 19-20, 19, n. 33 (J. Chadbourn rev.1974) (hereinafter Wigmore) (noting in the 1600's and early 1700's testimonial and nontestimonial hearsay was permissible to corroborate direct testimony); see also J. Langbein, Origins of Adversary Criminal Trial 238-239 (2003). Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L.Rev. 497, 506 (1990) (describing late 17th-century sentiments); Langbein, Criminal Trial before the Lawyers, 45 U. Chi. L.Rev. 263, 291-293 (1978). In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions.

FN2. Gilbert's noted in 1769:
"Hearsay is no Evidence ... though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under

the Solemnities of an Oath ....”

FN3. Confessions not taken under oath were admissible against a confessor because “ ‘the most obvious Principles of Justice, Policy, and Humanity’ ” prohibited an accused from attesting to his statements. 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791). Still, these unsworn confessions were considered evidence only against the confessor as the Court points out, see *ante,* at 1365, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, ch. 46, § 4, p. 604, n. 3 (T. Leach 6th ed. 1787).

FN4. The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante,* at 1365, says little about the Court's distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontestimonial statements, raise confrontation concerns once admitted into evidence, see, *e.g., Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), and I do not contend otherwise. My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.

208 W. Va. 62, 537 S.E.2d 908

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
July 11, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 12, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27316

DOROTHY CZAJA (now Wright),
Plaintiff Below, Appellant

v.

MARK CZAJA,
Defendant Below, Appellee

Appeal from the Circuit Court of Monroe County
Honorable Robert A. Irons, Judge
Civil Action No. 94-D-23

AFFIRMED IN PART AND REVERSED IN PART

AND

No. 27317

DOROTHY CZAJA (now Wright),
Plaintiff Below, Appellant

v.

MARK CZAJA,
Defendant Below, Appellee

Appeal from the Circuit Court of Monroe County
Honorable Robert A. Irons, Judge
Civil Action No. 94-D-23

AFFIRMED

AND

No. 27318

DOROTHY CZAJA (now Wright),
Plaintiff Below, Appellant

v.

MARK CZAJA,
Defendant Below, Appellee

Appeal from the Circuit Court of Monroe County
Honorable Harry L. Kirkpatrick, III, Judge
Civil Action No. 94-D-23

AFFIRMED IN PART AND REVERSED IN PART

Submitted: June 7, 2000
Filed: July 11, 2000

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JUSTICE SCOTT delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. The provisions of West Virginia Code § 48A-4-17 (1999) are clear in their intent. Failure to comply with the ten-day period for filing exceptions to a recommended order of a family law master, barring a timely filing of and approval of one ten-day extension period, is fatal with regard to preserving those exceptions for appeal.

2. "In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review." Syl. Pt. 1, Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996).

3. "Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil. Syl. Pt. 2, State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981).

4. "Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its

authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thu a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct." Syl. Pt. 1, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

5. "In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate To determine what will constitute an appropriate sanction, the court may consider the seriousness of th conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Syl. Pt. 2, Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996).

6. Before imposing sanctions for filing frivolous pleadings and advancing frivolous arguments, a trial court must give the alleged contemnor notice and an opportunity to be heard on the questions of frivolousness, appropriate sanctions, and, if an award of attorney's fees is to be made, on the necessity and reasonableness of such fees. At the conclusion of such hearing, the trial court must make sufficient findings of fact and conclusions of law to enable the appellate court to conduct a meaningful review.

7. A modification of child custody, without notice and hearing, cannot be ordered to result concurrently with a prospective instance of forbidden conduct.

Scott, Justice:

This consolidated case presents issues surrounding three orders entered by the Circuit Court of Monroe County[1] in connection with Appellant Dorothy Kyle Czaja's (now Wright's) attempt to modify the original grant of unsupervised visitation to Appellee Mark Czaja. In case number 27316

[1]Judge Irons was the presiding judge in this case until Appellant filed a motion seeking his disqualification. This Court appointed Judge Kirkpatrick by order dated April 5, 1999, after Judge Irons voluntarily recused himself in response to the disqualification motion.

Appellant seeks a reversal of an order entered by Judge Irons on March 3, 1999, through which Appellant and her counsel were found to be in contempt of court for failure to obey the lower court's orders concerning visitation. Through case number 27317, Appellant seeks a reversal of an order entered by Judge Irons on February 9, 1999, denying Appellant's exceptions to the November 23, 1998, Recommended Order of the family law master concerning Appellant's motion to restrict Appellee to supervised visitation. In the third case, number 27318, Appellant seeks a reversal of an order entered by Judge Kirkpatrick on June 17, 1999, through which the circuit court found Appellant in contempt for failure to comply with court-ordered visitation; denied Appellant's Rule 59(a) New Trial motion pertaining to the March 3, 1999, ruling of Judge Irons; and denied Appellant's Rule 60(b)(1) and (b) (6) Motions for Relief from Judgment as to the visitation directives set forth in the February 9, 1999, order. After considering the arguments raised in conjunction with the submitted record in this matter, we affirm, in part, and reverse, in part, and remand for further proceedings consistent with this opinion.

I. Factual and Procedural Background

As a limited factual background to this highly-charged and heavily-litigated domestic case, the parties were married on November 25, 1988. During the course of their marriage, two children were born: Julianna, on August 29, 1989, and Mark, on July 25, 1991. Following their separation on August 12, 1993, divorce proceedings were initiated and a final order of divorce was

entered on December 12, 1996.[2] Pursuant to the final order, Appellant was awarded custody of the two minor children and Appellee was granted visitation that comprised alternating weekends and holidays, as well as two separate three-week periods in the summer.

Beginning with the filing of Appellant's petition to modify visitation[3] on April 2, 1997, the issue of Appellee's entitlement to his original grant of unsupervised visitation rights has been the subject of continuous litigation. When the circuit court denied her motion to modify visitation rights,[4] Appellant refused to permit Appellee to exercise his visitation rights scheduled for August 3, 1997, to August 24, 1997. Appellee filed a motion for contempt, and during the course of the September 2, 1997, contempt hearing, Appellant alleged, for the first time,[5] that Appellee had improperly touched his seven-year-old daughter in June of 1997.[6] Based on this allegation, Judge Irons referred the matter to

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[2]On July 29, 1997, this Court refused Appellant's petition for appeal from the final order of divorce. Judge Irons observed in his February 9, 1999, order that many of the same allegations that Appellant asserts in support of her motion to modify visitation were raised previously in her petition for appeal from the final divorce order.

[3]As grounds for the petition to modify, Appellant cited a December 13, 1994, hearing during the divorce proceedings wherein she raised allegations concerning Appellee's personal behavior and his ability to properly care for the parties' children. As an additional ground, Appellant referenced her testimony at that same hearing concerning Appellee's relationship with a fifteen-year-old female student in 1986, while Appellee was employed by the Monroe County school system, and more than two years before the parties' marriage.

[4]The motion was denied by order dated July 9, 1997.

[5]In its September 11, 1997, order, the circuit court states that Appellant did not report this incident to Child Protective Services and did not include this allegation as part of her pleadings.

[6]Appellant alleged that Appellee had fondled Julianna's breast.

Child Protective Services ("CPS") for an investigation[7] and the court directed, by order dated November 6, 1997, that Appellee would have unsupervised daytime visitation pending the outcome of the CPS investigation. On January 20, 1998, CPS submitted a one-paragraph report to Judge Irons, in which caseworker Stephanie Lester states that she "was unable to substantiate abuse to the children by" Appellee. Ms. Lester did, however, recommend supervised visitation; this recommendation was based solely on the "risk of maltreatment" due to Appellee's sexual relationship with a minor student in 1986. See supra note 3.

Following the issuance of the CPS report, Appellant again refused to permit Appellee to exercise his visitation rights with his children in February 1998.[8] By order dated February 11, 1998, Judge Irons referred these visitation issues to Family Law Master Wiley. Following four days of hearings in October 1998, FLM Wiley issued his Recommended Order on November 23, 1998, in which he recommended that Appellant's motion for supervised visitation be denied based on his conclusion that no credible evidence of sexual abuse had been established. He further recommended that Appellee be permitted to have a certain amount of makeup visitation to offset the visitation Appellant had denied him.[9] We observe that during the pendency of the referral to the FLM and the

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[7]See W.Va. Code § 49-6A-1 to -10 (1999).

[8]In a motion to suspend unsupervised visitation, filed January 30, 1998, Appellant stated that she "has respectfully suspended visitation and . . . cannot in consideration of the safety and best interests of her children allow further unsupervised visitation . . . ."

[9]The FLM concluded that Appellee had been denied 69 days of visitation as a result of Appellant's obstructive efforts.

issuance of a decision, Appellee had no visitation with his children.[10] Not until an order was entered o December 21, 1998, directing supervised visitation[11] did Appellee gain the right to see his children following the circuit court's suspension of unsupervised visitation in February 1998.[12]

The circuit court, by order entered February 9, 1999, denied[13] Appellant's exceptions to the FLM's recommendations and directed that Appellee's previous grant of unsupervised visitation should be restored.[14] Notwithstanding the court's order, Appellant refused to deliver the children at the designated place on three successive Friday evenings--February 12, 19, and 26, 1999--which forced Appellee to file another contempt motion.[15] At the March 1, 1999, hearing on Appellee's motion, the

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[10]This Court is both troubled and perplexed that such a lengthy period of time passed --almost eleven months--during which no visitation took place between Appellee and his children. Since Appellant only asked for the cessation of unsupervised visitation through her January 30, 1998, motion, we must question why no efforts were taken on the part of Appellee or the lower court to instigate supervised visitation at a time earlier than December 21, 1998.

[11]The supervised visitation was to take place at the Family Refuge Center in Lewisburg, West Virginia, pending further order of the circuit court.

[12]The lower court's decision to require supervised visitation in December 1998 appears to have been prompted by the lower court's outstanding consideration of Appellant's exceptions to the recommended decision of the FLM and the consequent lack of finality with regard to the FLM decision. The order reflects that Appellant did not object to supervised visitation.

[13]Despite the lower court's considered opinion that the exceptions were waived due to their untimely filing, the circuit court did in fact consider and deny the exceptions in conjunction with its decision that the FLM's Recommended Order should be nonetheless reviewed due to the serious nature of the allegations raised by Appellant.

[14]In this same order, the lower court also approved the makeup visitation specified by the FLM.

[15]The verified petition for contempt was filed with the lower court on February 16, 1999.

lower court found both Appellant and her counsel to be in contempt of court orders concerning visitation and required Appellant's counsel to pay opposing counsel's fees.[16]

On June 14, 1999, Judge Kirkpatrick[17] heard argument in conjunction with Appellant's post-ruling motions, through which she sought a reversal of the March 3, 1999, contempt order and relief from the visitation requirements set forth in the February 9, 1999, order. After considering the evidence presented, the circuit court denied Appellant's Rule 59 and Rule 60 motions and granted Appellee's March 8, 1999, separate motion for contempt for Appellant's failure to comply with the visitation directives set out in multiple orders.[18] As part of its June 17, 1999, order reflecting these rulings, the lower court outlined a mechanism which expressly authorizes the sheriff, following a contemplated court hearing, to take physical custody of the parties' children for the purpose of transporting same to Appellee in the event that Appellant prospectively decides to deny visitation right to Appellee.

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[16]The March 3, 1999, order directs that Appellant's counsel, and not Appellant, is responsible for paying $3,052.50 to Susan Hewman and $3,000 to R. Brandon Johnson. These fees represent those amounts incurred by Appellee during the period of February 9, 1999, through March 1, 1999.

[17]See supra note 1.

[18]Those orders from which Appellee sought findings of contempt were entered respectively on February 9, 1999; February 26, 1999; and March 3, 1999.

It is from these orders of February 9, 1999, March 3, 1999, and June 17, 1999, that Appellant brings this consolidated appeal. Each appeal will be separately discussed in chronological fashion with reference to the entry date of the respective order from which the appeal is taken.

II. Discussion

A. Appeal No. 27317--February 9, 1999, Order

The circuit court's order which is the subject of this appeal concerns the lower court's review of and adoption of the findings and recommendations of FLM Wiley. Appellee argues that Appellant failed to timely file her exceptions to the FLM's Recommended Order and has thereby failed to preserve her exceptions for appeal purposes. We agree.

The statutory provision which governs the filing of exceptions to decisions of family law masters is West Virginia Code § 48A-4-17 (1999). That section provides that: "Failure to timely file the petition [of exceptions to the FLM's recommended order] **shall** constitute a waiver of exceptions, unless the petitioner, prior to the expiration of the ten-day period, moves for and is granted an extensio of time from the circuit court."[19] Id. (emphasis supplied). In its February 9, 1999, order, the circuit court ruled that:

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[19]Rule 22 of the Rules of Practice and Procedure for Family Law provides, in pertinent part, that: "The ten-day period for filing a petition for review under chapter 48A, article 4, section 17 of the Code . . . shall commence on the date on which the parties are served with the notice and recommended order . . . ."

> The recommended decision was served on the Plaintiff by mail on November 23, and the Plaintiff had until December 7, 1998 to file exceptions to this decision. Plaintiff subsequently filed a notice of extension of time to file exceptions, thereby extending the time for the filing of exceptions to December 17, 1998. Plaintiff did not actually file her exceptions until December 28, 1998.

Appellant maintains that the lower court was in error with regard to its ruling that her exceptions were untimely filed. She contends that the original date from which the ten-day period for filing extensions typically would be calculated--November 23, 1998, in this case--was not the proper date. Arguing that the FLM erred in not initially sending a copy of his recommended order to the guardian ad litem, Appellant notes that the FLM's decision was re-served on the parties and the guardian ad litem on December 3, 1998, by notice of that date with an indication that December 17, 1998, was the deadline for filing exceptions. Since Appellant filed and received a ten-day extension fo filing her exceptions, she contends that her pleading was not due to be filed until December 27, ten day after the December 17, 1998, deadline contained in the second notice issued by the FLM. We find several flaws in Appellant's self-serving deadline fashioning.

First and foremost, both of the named parties to this action were served with the notice and recommended order on November 23, 1998. While the original notice was not made a part of the record, there are numerous other pleadings submitted which indicate that the filing date for the

exceptions pursuant to the first notice was December 7, 1998.[20] On the date those exceptions were due--December 7, 1998-- Appellant filed notice of her request for a ten-day extension, as permitted under West Virginia Code § 48A-4-17 and Rule 23 of the Rules of Practice and Procedure for Family Law. In the December 7, 1998, order granting Appellant's ten-day extension, the lower court expressly deleted[21] language which had specified that Appellant had "until December, 27, 1998" to file her exceptions. Given the circuit court's actions in striking the date she supplied for filing exceptions, we reject Appellant's argument that she had until December 27, 1998, to file those exceptions. The circuit court clearly granted Appellant one additional ten-day period to file her exceptions and that period commenced on December 7, 1998, and ended on December 17, 1998.[22]

The oversight on the part of the FLM in sending a copy of his recommended order to the guardian ad litem simply cannot be used offensively by Appellant[23] to expand the statutorily-

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[20]Appellant herself refers to this date as being the "original due date" in her petition for review of and statement of exceptions to the FLM's recommended order, which she filed on December 28, 1998.

[21]Judge Irons penned his initials above the stricken language.

[22]In her attempt to use the Rules of Practice and Procedure for Family Law to her advantage, Appellant has overlooked Rule 23 which sets forth that "[o]nly one ten-day extension may be granted." Appellant sought and obtained that one ten-day extension which began on December 7, 1998.

[23]Appellant's counsel was the party who sought to have the recommended order re-noticed to "cure" the alleged "defect in service." Even this re-noticing appears to be tactically motivated. In her notice seeking an extension of time for the filing of her exceptions, Appellant inserted a footnote stating that: "Notice of Recommended Order originally issued November 23, 1998, and reissued on December 3, 1998, to cure defect in service." Not only do we disagree with Appellant's characterization of the failure to serve the guardian ad litem as a "defect in service," but we question Appellant's designation of the guardian ad litem as a party within the meaning of Rule 21(c) of the Rules of Practice and Procedure for

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provided period for filing her exceptions. Moreover, since both the named parties were timely and properly served with both notice and the recommended decision on November 23, 1998, there is no reason for suggesting that Appellant should be permitted to benefit by a later deadline that should have attached only to the guardian ad litem in the event he would have desired to file exceptions to the recommended decision of the FLM.[24] Upon our review of the record, this Court is left with a palpable sense that Appellant's counsel was trying to "buy" time in any fashion possible for filing Appellant's exceptions.[25]

The provisions of West Virginia Code § 48A-4-17 are clear in their intent. Failure to comply with the ten-day period for filing exceptions to a recommended order of a family law master, barring a timely filing of and approval of one ten-day extension period, is fatal with regard to preservin those exceptions for appeal. See W.Va.R.Prac.&Proc.Fam.Law 23. The record in this case demonstrates that the lower court, in striking Appellant's attempt to further lengthen her exception-filir

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[23](...continued)
Family Law. That rule requires that the recommended order "shall be served on all parties who have appeared or on their attorneys of record." Certainly, the guardian ad litem should be served with a copy of the recommended order, both as a matter of professional courtesy and to permit zealous advocacy where appropriate, but the guardian ad litem's participatory role appears to be more as an advocate rather than as a party. See In re Scottie D., 185 W.Va. 191, 198, 406 S.E.2d 214, 221 (1991).

[24]No exceptions were filed by the guardian ad litem.

[25]Given the great length to which counsel discusses all the deadlines as part of Appellant's exceptions to the Recommended Order, it appears that counsel was acutely aware of and concerned about having missed the deadline for timely filing Appellant's exceptions. Complaining about how difficult it was to get the exceptions filed during the holiday season, Appellant's counsel states that he had to "sacrific[e] his Christmas holiday" in order to complete the exceptions, but then instructs: "This recitation is not intended to elicit sympathy for counsel."

period from the language of the December 7, 1998, order, clearly announced its position that the extension granted was not, as Appellant advocates, until December 27, 1998, but was instead, until December 17, 1998. Since Appellant admits that she did not file her exceptions until December 28, 1998, her exceptions were indisputably filed outside the statutorily-established time frame for preserving those exceptions for appeal. See W.Va. Code § 48A-4-17.

Just as we are unpersuaded that Appellant timely filed her exceptions, we are similarly unconvinced by Appellant's argument that the lower court's consideration of Appellant's exceptions amounted to a waiver of the statutory proscription set forth in West Virginia Code § 48A-4-17. The lower court made clear in its February 9, 1999, order that,

> [a]though the Plaintiff's [Appellant's] exceptions are untimely and are not entitled to any consideration by this Court, because the Plaintiff is seeking supervised visitation, under a theory that the children would [be] at risk, if the Defendant [Appellee] were allowed to have unsupervised visitation, the Court has proceeded to review the exceptions, out of an abundance of precaution, in order to determine if there is any merit to the exceptions.

The lower court could not, simply by virtue of its decision to review Appellant's exceptions "out of an abundance of precaution," have abrogated the statutory language which mandates in nondiscretionary terms that a "[f]ailure to timely file the petition shall constitute a waiver of exceptions." W.Va. Code § 48A-4-17 (emphasis supplied). Judge Irons made clear that his decision to review the exceptions was prompted by concern that the serious nature of the allegations warranted the court's scrutiny notwithstanding Appellant's failure to properly preserve those exceptions for appellate purposes.

In an arguably analogous case, this Court upheld a lower court's review of a FLM's recommended decision where no exceptions had been filed and the parties had thus waived their right to file exceptions. In John D.K. v. Polly A.S.,190 W.Va. 254, 438 S.E.2d 46 (1993), this Court construed the statutory predecessor to West Virginia Code § 48A-4-17,[26] which contained the same mandatory language concerning waiver of exceptions, and determined that the lower court could review the evidence underlying a FLM's order despite the parties' statutory waiver of their right to file exceptions. See 190 W.Va. at 258, 438 S.E.2d at 50. Just as the circuit court felt compelled to engage in a review[27] in John D.K. despite the absence of filed exceptions, Judge Irons similarly conducted his review of Appellant's evidence out of a sense of judicial obligation. In the instant case, the circuit court, like the FLM, found no credible evidence of sexual abuse which would have warranted supervised visitation.[28] The lower court's consideration of the exceptions, and its denial of

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[26]See W.Va. Code § 48A-4-7 (1992).

[27]The court in John D.K. actually went a step further and conducted an evidentiary proceeding. See 190 W.Va. at 257, 438 S.E.2d at 49.

[28]This Court set forth the standard which must be met before supervised visitation is required in syllabus point two of Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992):

> Prior to ordering supervised visitation pursuant to W.Va. Code, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the

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same, does not nullify the statutory waiver which resulted from Appellant's untimely filing of her exceptions. Based on our conclusion that Appellant failed to preserve her exceptions to the FLM's Recommended Order, we do not address the substance of those exceptions. See W.Va. Code § 48A-4-17.

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[28](...continued)

> sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. . . .

Conducting its review under this standard, the circuit court concluded that the FLM was correct in not requiring supervised visitation since there was no credible evidence of any sexual abuse by Appellee to the children. The circuit court states in its February 9, 1999, order:

> There was no direct testimony of sexual abuse by the Defendant [Appellee], directed toward either child, other then [sic] that of the Plaintiff [Appellant]; there was no testimony from the children to the effect the Defendant had abused either child; and there was no expert testimony on this point, even though this Court had previously referred the children and the parties for a psychological evaluation. Other then [sic] the hearsay testimony of the Plaintiff, concerning the allegation of fondling, all other testimony of sexual abuse concerned events predating the separation, in 1994. This is particularly significant, in light of Plaintiff's obligation to show a change of circumstances, in order to modify an existing visitation order.

At the center of this appeal are the rulings made by Judge Irons following a March 1, 1999, hearing[29] on Appellee's contempt motion following Appellant's denial of visitation to Appellee i February 1999. Finding Appellant in contempt for her failure to abide by the provisions of three order setting forth specific visitation directives,[30] the lower court imposed a fine of $50 per day for each of thirteen days[31] of visitation denied to Appellee for a total fine of $650. Appellant raises numerous procedural challenges[32] to the lower court's contempt ruling and argues additionally that the fine imposed converted the civil contempt proceeding into a criminal matter. As we announced in syllabus

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[29]At the outset of our discussion of this appeal we note that only a small portion of the March 1, 1999, hearing transcript was originally filed with this Court. Item No. 48 of the amended designation of the record corresponds to a March 16, 1999, "Notice of Filing of Portion of Transcript of March 1, 1999, Hearing" which includes only pages 21 through 40. In response to this Court's stated concern that a complete transcript had not been included as part of the designated record, Appellee submitted post oral argument a complete transcript of the March 1, 1999, hearing. In fairness to Appellant, there appears to be a discrepancy between the date of the notice listed on the amended designated record--April 10, 1999--and the date of the notice included as part of Item No. 48--March 16, 1999.

[30]See supra note 18.

[31]Those dates of missed visitation include February 12, 13, 14, 26, 27, 28 and seven days of missed makeup visitation.

[32]One such procedural challenge which we reject out-of-hand is her contention that the lower court was without authority to enter the March 3, 1999, contempt order since Appellant's filing of a Motion for New Trial under Rule 59(a) in conjunction with the lower court's February 9, 1999, order, denying her exceptions to the FLM's Recommended Decision, invoked an automatic stay under Rule 62(a) of the West Virginia Rules of Civil Procedure. Appellant reasons that the visitation directives set forth in the February 9, 1999, order could not be enforced vis-a-vis the contempt order based on her filing of the new trial motion. Critically, the order from which Appellant sought a new hearing was a denial of her petition to modify visitation. The circuit court's denial of Appellant's motion to modify impliedly continued the previously-ordered visitation pursuant to the final order of divorce entered in 1996. We simply cannot sanction the offensive use of a procedural mechanism intended to postpone enforcement of a judgment in a manner unintended by the rule--to support Appellant's position that she had no obligation to comply with directives concerning visitation pending a ruling on her Rule 59(a) motion.

point one of Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996), the following standard governs our review of civil contempt cases:

> In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.

Appellant contends that the circuit court lacked jurisdiction to enter a contempt ruling based on her allegation that she was served with a copy of the order to show cause setting a time for the hearing, but not an accompanying petition for contempt. She also asserts a notice problem with regard to the fact that she was not informed that the circuit court would consider evidence as to any visitation denials other than that which was denied on February 12, 1999, or any court orders other than the one entered on February 9, 1999. Like Judge Kirkpatrick, who reviewed these same issues in conjunction with Appellant's post-ruling motions, we agree that the essence of Appellant's procedural challenge to the contempt ruling is notice-based, rather than jurisdictional in nature. In his June 17, 1999, order, Judge Kirkpatrick ruled, when considering Appellant's motion for relief from the March 3, 1999, contempt ruling:

> The undersigned special judge observes that the issue outlined by plaintiff's counsel is actually a **claimed** problem relating to notice. At the present hearing of June 14, 1999, the court learned that plaintiff asserts that she was served only a copy of the Order to Show Cause, with no petition attached. Upon an examination of the court file, the court is of the opinion that the Order to Show Cause alone provided the plaintiff with significant actual knowledge of a contempt matter to be heard on March 1, 1999, so as to be generally informed of the

> proceedings. Combining such factor with the additional fact that plaintiff's counsel of record admitted at the hearing of June 14 that he did receive a copy of the petition, via United States Mail, cured any defect of notice which may have existed in connection with the March 1, 1999 hearing. The transcript of record clearly indicates that neither the plaintiff or [sic] her counsel suffered from surprise in regard to the visitation issues raised at this hearing. (emphasis supplied)

Just as Judge Kirkpatrick was convinced that Appellant was fully-informed of the nature of the contempt proceedings, our review of the record similarly reveals no impediment to enforcement of the contempt ruling arising from any notice-based concerns.[33]

Given the interrelatedness of each of the visitation denials and the core similarity of the legal issue presented by such denials, we would be hard-pressed to find a constitutionally significant notice problem with regard to the court's consideration of each instance where visitation was denied after the entry of the February 9, 1999, order, rather than limiting its ruling to only those missed visitations that were expressly delineated on the petition for contempt.[34] Like Appellant's claims concerning the deadline for filing exceptions to the FLM's order, we find this one to be overly technica

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[33]We reject outright the existence of any subject matter jurisdictional flaw in the contempt ruling. Clearly, the lower court had jurisdiction to consider the entry of a contempt ruling that emanated from a previous order which it had entered. See W.Va. Code § 48-2-22 (1999).

[34]Because the petition for contempt only included the visitation denied on February 12, 1999, Appellant argues that the lower court erred in permitting Appellee to introduce evidence concerning charges other than those originally filed against her. See Doctors Mem'l Hosp., Inc. v. Woodruff, 165 W.Va. 324, 267 S.E.2d 620 (1980). We reject this argument since the charge at issue--visitation denial--was a type of "charge" over which the lower court had continuing jurisdiction and because there is no question that Appellant was "fully and plainly informed" as to the nature of the charge that was being brought against her. Syl. Pt. 2, in part, State ex rel. Hoosier Eng'g Co. v. Thornton, 137 W.Va. 230, 72 S.E.2d 203 (1952).

and aimed solely at avoiding the effects of a deleterious ruling. Appellant's attempt to convince us tha the lower court abused its discretion in entering the contempt ruling by expanding the dates of missed visitation to encompass all those dates between the entry of the February 9, 1999, order and the March 1, 1999, hearing is unavailing. In this Court's opinion, the lower court would have been remiss were it to have limited its contempt ruling to the one date of denied visitation specified in the petition. Moreover, the lower court's arguable expansion of the scope of the contempt proceeding to include those dates where visitation denial occurred subsequent to the filing of the contempt petition was with the circuit court's "plenary power to order and enforce a noncustodial parent's visitation rights with his or her children." Syl. Pt. 2, in part, Carter, 196 W.Va. at 241, 470 S.E.2d at 195.

A circuit court's authority to enter a contempt ruling in a domestic matter is governed by the provisions of West Virginia Code § 48-2-22 (1999). Advocating a construction of the statutory provisions which would defeat the lower court's finding of contempt, Appellant argues that the lower court failed to adhere to the requirement imposed by subsection twenty-two by not first making a finding that she had a method available for purging herself of the contempt. Contrary to her contentions, subsection 22(b) is not written in terms of **requiring** the court to first make a finding regarding the contemnor's ability to purge herself before imposing a contempt sanction. The statute is stated in conditional terms: "[I]f the court further finds the person has the ability to purge himself of contempt, the court shall afford the contemnor a reasonable time and method whereby he may purge himself of contempt." W.Va. Code § 48-2-22(b). Thus, the statute only mandates the identification of a method and reasonable time for purging "**if**" the lower court determines that purging can be

accomplished. Clearly, under the circumstances for which contempt was found in this case--thirteen instances of refused visitation--Appellant could not have been found by the circuit court to be capable of purging herself of those dates where visitation had already been denied.[35]

While citing no law in support of this proposition, Appellant contends that by imposing a fine Judge Irons converted the civil contempt proceeding into a criminal matter.[36] In a recent opinion addressing the use of West Virginia Code § 48-2-22 in connection with enforcement of visitation rights this Court both characterized and affirmed the entry of a contempt ruling, which included a $300 fine, as civil. See Carter, 196 W.Va. at 242-43, 470 S.E.2d at 196-97. Likewise, in State ex rel. Lambert v. Stephens, 200 W.Va. 802, 490 S.E.2d 891 (1997), this Court, in discussing the distinctions between civil and criminal contempt, stated: "Another appropriate sanction in civil contempt cases is a order requiring the contemner to pay a fine as a form of compensation or damages to the party aggrieved by the contemptuous conduct."[37] Id. at

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[35]This Court in State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981), discussed how the absence of an ability for an individual to purge himself of contempt (such as an inability to pay an arrearage) does not convert the matter to a criminal contempt. Id. at 671-72, 276 S.E.2d at 819 n.11. We observed, citing a Florida Supreme Court decision, that an "'ability to comply' could be based on a showing that the contemner [sic] 'previously had the ability to comply but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order' as well as by a showing of present ability." Id. (citing Faircloth v. Faircloth, 339 So.2d 650, 651 (Fla. 1976)).

[36]See W.Va. Code § 61-5-26 (1997) (authorizing fines as a penalty for summary criminal contempt).

[37]Because the March 3, 1999, order directs Appellee to pay her $650 fine to the court, we assume that the lower court did not intend to turn over these funds to Appellee and that therefore, the levied fine was not compensatory in nature. While the non-compensatory nature of the fine might suggest that the

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[37](...continued)
contempt proceeding was criminal, this distinction, upon analysis, is without significance. The quintessence of any argument which seeks to box a contempt ruling as criminal, rather than civil, is the enhanced procedural protections which attach to a criminal contempt proceeding. See Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826-27 (1994) (identifying such protections as including notice of charges, assistance of counsel, right to present a defense, privilege against self-incrimination, right to proof beyond a reasonable doubt, and the right to a jury trial for "serious" criminal contempts involving imprisonment of more than six months, and holding that since "[m]ost contempt sanctions share punitive and coercive characteristics . . . the fundamental question underlying the distinction between civil and criminal contempts is what process is due for the imposition of any particular contempt sanction"). Given the reduced need for "extensive, impartial factfinding" in civil contempt proceedings, these protections are typically viewed as less critical in a civil setting. Id. at 833. Because there was a minimal factfinding role for the lower court to play in this case, as the issue of denied visitation was, for the most part, admitted, any arguable denial of the procedural protections invoked in criminal contempt proceedings is without the necessary prejudicial effect to require reversal. See United States v. United Mine Workers, 330 U.S. 258, 295 (1947).

Both scholars and courts have acknowledged that "the categories, 'civil' and 'criminal' contempt, are unstable in theory and problematic in practice." Bagwell, 512 U.S. at 845 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)) (J., Ginsburg, concurring); see also Earl C. Dudley, Jr., Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts, 79 Va.L.Rev. 1025 (1993). The difficulty intrinsic to any attempt to neatly package contempt rulings into civil or criminal classifications stems from the fact that "[c]ivil contempt proceedings, although primarily remedial, also 'vindicat[e] . . . the court's authority'; and criminal contempt proceedings, although designed 'to vindicate the authority of the law,' may bestow 'some incidental benefit' upon the complainant, because 'such punishment tends to prevent a repetition of the disobedience.'" Bagwell, 512 U.S. at 845 (quoting Gompers, 221 U.S. at 443) (J., Ginsburg, concurring).

Admittedly, West Virginia Code § 48-2-22 does not address the imposition of fines as a sanction for a civil contempt ruling. Such authority for assessing fines in a civil contempt setting arises from the inherent authority of the court to enforce its orders. Bartles, 196 W.Va. at 389, 472 S.E.2d at 835; see also Mackler Prods, Inc. v. Cohen, 146 F.3d 126, 129 (2nd Cir. 1998) (stating that "the power of a court to punish for contempt may be 'inherent'" but noting that penalties are determined by Congress) (citing Ex Parte Robinson, 86 U.S. (19 Wall.)). We recognized in Bartles that "[t]he choice of imposition of sanctions for failing to comply with a court order lies with the trial court, and we will not lightly disturb that decision." 193 W.Va. at 389, 472 S.E.2d at 835. Moreover, in examining the provisions of West Virginia Code § 48-2-22, it is clear that the statute itself contemplates a fusing of criminal and civil contempts as subsection b permits a trial court to "treat a finding of criminal contempt as a civil contempt." W.Va. Code § 48-2-22(b).

We further recognize the arguable impotence that a circuit court has with regard to imposing an
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806, 490 S.E.2d at 895 (citing Syl. Pt. 3, State ex rel. Robinson v. Michael, 166 W.Va. at 660-61, 276 S.E.2d at 813). Thus, we find the law well-settled regarding the assessment of fines as a permissible sanction for civil contempt rulings. See also United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947) (discussing use of fines in civil contempt proceedings for purpose of compensating party or to coerce compliance with court order).

Appellant circuitously reasons that, because the circuit court failed to impose a sanction that included a method for purging the contempt, the civil contempt proceeding necessarily was transformed into a criminal matter. This argument fails because the determination of whether a contempt is civil or criminal is made with reference to the purpose being served by the imposition of th

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[37](...continued)
effective means to both sanction a contumacious party's flagrant violation of court orders regarding indiscrete issues, such as visitation directives, and, at the same time, to compel compliance with those orders. Short of incarceration, the lower court had no other means of coercing Appellant into complying with the court's directives concerning visitation. While this case does not present the opportunity for this Court to reconsider the continued viability of its decision in Hendershot v. Hendershot, 164 W.Va. 190, 263 S.E.2d 90 (1980), with regard to our ruling that jury trials are required whenever a circuit court intends to incarcerate a contemnor, we question whether that ruling comports with the reasoning of the United States Supreme Court decisions which only require jury trials where the criminal contempt can be viewed as "serious" based on the length of the incarceratory period, with "serious" being defined as involving a period of incarceration that minimally spans six months. See Bagwell, 512 U.S. at 827; Taylor v. Hayes, 418 U.S. 488, 495 (1974) (holding that "petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute); Bloom v. State of Illinois, 391 U.S. 194, 207 (1968) (segmenting right to jury trials between those contempts which qualify as petty offenses based on nominal period of incarceration and contempts where sentence renders offense "serious," without specifying bright line rule as to what sentence length necessarily converts offense into "serious" category, and observing that "[p]rosecutions for contempt play a significant role in the proper functioning of our judicial system"). We leave that issue for another day since the lower court did not impose the penalty of incarceration in this case.

sanction rather than the nature of the sanction imposed.[38] Robinson, 166 W.Va. at 670, 276 S.E.2d at 818; accord Stephens, 200 W.Va. at 806, 490 S.E.2d at 895. In syllabus point two of Robinson this Court explained: "Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil."[39] 166 W.Va. at 660, 276 S.E.2d at 813. Since the contempt ruling arose from, and was directed at, compelling compliance with an existing order concerning visitation to be afforded Appellee the purpose of the sanction was clearly consonant with the objectives underlying civil contempt.

While we find no procedural impediment to the imposition of a ruling of summary contempt against Appellant's counsel based on the record before us,[40] we find error with regard to the

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[38]Whereas we previously looked to the penalty imposed (e.g. jail term with opportunity for purging vs. without and determinate vs. indeterminate sentencing) in labeling contempt matters, this Court altered that approach beginning with Robinson and now examines the purpose of the sanction, rather than the sanction itself, to identify the nature of the contempt ruling. Cf. Floyd v. Watson, 163 W.Va. 65, 73-74, 254 S.E.2d 687, 692 (1979) to Robinson, 166.Va. at 670, 276 S.E.2d at 818. Note, however, that this Court has, on more than one occasion, commented on the "indistinct" line which separates civil and criminal contempt proceedings. See Robinson, 166 W.Va. at 662-69, 276 S.E.2d at 814-17.

[39]In contrast, when the sanction is aimed at an "'affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court, the contempt is criminal.'" Stephens, 200 W.Va. at 806, 490 S.E.2d at 895 (quoting Syl. Pt. 4, in part, Robinson, 166 W.Va. at 661, 276 S.E.2d at 813).

[40]The record reveals that the contempt ruling against Appellant's counsel resulted when Appellant, asserting her Fifth Amendment right, refused to answer the trial court's questions despite assurances from the court that no jail term would result from her testimony since this was a civil contempt proceeding and counsel refused to accept the lower court's ruling. Counsel was fined $150 for three initial refusals to "sit down" and then an additional $50 later in the proceeding when counsel kept insisting that he be allowed

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lower court's award of attorney's fees and costs against said counsel. During the March 1, 1999, hearing, Judge Irons decided, sua sponte, to award attorney's fees to Appellee's counsel that were incurred between the entry of the February 9, 1999, order and the March 1, 1999, hearing. As its basis for awarding attorney's fees, the lower court states in the March 3, 1999, order: "[T]he frivolous filings by plaintiff's counsel since the entry of the February 9, 1999 Order herein."[41] Appellant argues, and we agree, that the lower court was required to provide him with notice and an opportunity to be heard on the issue of sanctions being awarded, apparently under Rule 11 of the West Virginia Rules of Civil Procedure, before levying such sanctions against him.

The sole authority cited by the lower court for its entry of an order awarding attorney's fees against Appellant is this Court's decision in Daily Gazette Co. v. Canady, 175 W.Va. 249, 332 S.E.2d 262 (1985). While that decision clearly recognized the authority of a court, both inherent and rule-based, to assess attorney's fees,[42] we nonetheless admonished that "[l]ike other sanctions,

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[40](...continued)
to read the "Code" into the record. While we recognize the need for zealous advocacy on the part of trial counsel, we also appreciate the need for counsel to respect the temporal finality of the lower court's ruling pending appeal. The transcript from the March 1, 1999, hearing demonstrates conduct that is sufficiently disrepectful to the circuit court to warrant a summary contempt finding. See W.Va. Code § 61-5-26; Syl. Pt. 2, State v. Boyd, 166 W.Va. 690, 276 S.E.2d 829 (1981). Further evidence of both direct and indirect disrespectfulness is evidenced by the finding in the March 3, 1999, order that Appellant's counsel "has improperly advised his client . . . to disobey the Orders of this Court and in so doing to display blatant disrespect for this Court and its Orders."

[41]The court further states that Appellant's counsel's "actions have required defendant's attorneys to respond and to schedule hearings and make court appearances in response to said frivolous pleadings."

[42]This Court held in the syllabus of Canady that:

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attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Id. at 251, 332 S.E.2d at 264. In this case, the lower court decided to award attorney's fees and then, without providing Appellant's counsel an opportunity to address either Appellee's entitlement to fees or the reasonableness of the fee award itself, the circuit court approved an order prepared by Appellee's counsel, which directed that $6080.50 in cumulative fees and costs were to be paid by Appellant's counsel within seven days.

In failing to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated. Even a cursory reading of Rule 11, which permits sanctions to be awarded against counsel for pleadings that are either not supported in law or fact or are wrongly filed for harassment, cost-enhancement purposes, or to promote delay, demonstrates that a circuit court must still afford the party, whose conduct has spawned the need to consider sanctions, "notice and a reasonable opportunity to respond." W.Va.R.Civ.P.11(c). We observed in State ex rel. Dodrill v. Egnor, 198 W.Va. 409, 481 S.E.2d 504 (1996), that "ordinarily a party about to be sanctioned is given an opportunity to explain the default or to argue for a lesser penalty." Id. at 414, 481 S.E.2d at 509. The

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> A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law.

175 W.Va. at 250, 332 S.E.2d at 263.

record in this case demonstrates that the lower court merely announced its decision to award attorney's fees and did not permit any argument to be heard on this issue.

In syllabus points one and two of Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996), we addressed the underlying procedural concerns inherent to an award of sanctions:

> Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.
>
> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

In rendering its award of attorney's fees, the lower court failed to heed basic due process principles of notice and opportunity to be heard, as well as the foundational relationship concerns discussed in Bartles.

While we do not question the lower court's authority to subject Appellant's counsel to sanctions in the form of attorney's fees, we cannot approve the summary method by which Judge Irons concluded that attorney's fees were warranted and then permitted Appellee's counsel to submit their fees, without any opportunity for Appellant to challenge the reasonableness of such fees. Before imposing sanctions for filing frivolous pleadings and advancing frivolous arguments, a trial court must give the alleged contemnor notice and an opportunity to be heard on the questions of frivolousness, appropriate sanctions, and, if an award of attorney's fees is to be made, on the necessity and reasonableness of such fees. At the conclusion of such hearing, the trial court must make sufficient findings of fact and conclusions of law to enable the appellate court to conduct a meaningful review. Accordingly, we find that the lower court abused its discretion in imposing the sanction of attorney's fees by not first permitting Appellant's counsel an opportunity to be heard on the issue underlying the trial court's award of sanctions and by not holding a hearing on the reasonableness of the fees. See Bartles, 196 W.Va. at 389-90, 472 S.E.2d at 835-36. On remand, the lower court is directed to conduct a hearing for the purpose of permitting Appellant's counsel an opportunity to respond to the circuit court's position regarding the frivolous pleadings counsel filed between February 9, 1999, and March 1, 1999, and if sanctions in the form of attorney's fees are still deemed appropriate by the lower court, Appellee's counsel should address the reasonableness of the fees submitted and Appellant's counsel should then be provided an opportunity to challenge the submitted fees on the ground of

reasonableness.[43] See Syl. Pt. 4, Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

C. Appeal No. 27318--June 17, 1999, Order

Through this appeal, Appellant asserts error with regard to the lower court's denial of her motions seeking post-ruling relief with regard to the March 3, 1999, contempt ruling and concernin the visitation directives set forth in the February 9, 1999, order. Also challenged is the lower court's finding of contempt against Appellant for violating various orders addressing exercise of Appellee's visitation rights.

As support for her Rule 59(a) motion seeking a new "trial" with regard to the March 3, 1999, contempt ruling, Appellant asserted that she had not been served with the petition for contempt. Dispensing with this "jurisdictional" challenge, the lower court reframed Appellant's concerns as actually involving issues of notice, and concluded that there was no merit to Appellant's averments sin her counsel admitted to receiving the contempt petition.[44] The circuit court found additionally that Appellant was not "surprised" by the visitation issues considered in that proceeding. We find no error with regard to the denial of the Rule 59(a) motion. Judge Kirkpatrick also found no merit to Appellant's Rule 60 (b) (1) and (b) (6) challenges to the February 9, 1999, order adopting the

[43]Appellant claims that the aggregate award of fees is excessive.

[44]Judge Kirkpatrick's June 17, 1999, order, reflects that Judge Irons noted for the record during the March 1, 1999, hearing that the court file contained a return showing that Appellant was "regularly served" with the contempt pleadings.

recommended order of FLM Wiley.[45] For the same reasons we did not address Appellant's assignments of error pertinent to the February 9, 1999, order, we likewise do not address the denial of motions seeking post-ruling relief from this same order.[46]

Although we find no error with regard to Judge Kirkpatrick's entry of a contempt ruling against Appellant for her admitted failure to comply with the visitation directives set forth in multiple orders,[47] the mechanism set in place "designed to restore the relationship between father and children" in the event that Appellant chooses to prospectively deny visitation requires certain modifications. The June 17, 1999, order provides that:

> Although the court does not anticipate that the plaintiff [Appellant] will now continue to prevent visitation; out of an abundance of precaution and in view of past actions, the undersigned does set forth hereafter a mechanism to be utilized upon failure of the plaintiff to follow the visitation directive. . . .
>
> So, in the event of a further instance of denial of unsupervised visitation by the plaintiff, the court will invoke the following procedure as a remedial, not punitive, measure designed to restore the relationship between father and children:
>
> 1. A prompt hearing upon notice will be scheduled in Monroe County before the undersigned to determine whether or not the defendant [Appellee] was enabled to exercise his visitation prescribed herein.
> 2. If it is established that the defendant was further denied his specified visitation by plaintiff, the care, custody and control of these children shall be transferred forthwith from the plaintiff to the defendant.

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[45]Judge Kirkpatrick distilled all of Appellant's challenges to the lower court's adoption of the Recommended Order as emanating from "a strong difference of opinion between the plaintiff and the court" as to the need for supervised visitation.

[46]See Section II.B. discussing statutory waiver of exceptions to FLM Recommended Order.

[47]Those orders were entered on February 9, 24, and 26, 1999.

> 3. The Sheriff of Monroe County will be directed to retrieve and transport these children to the home of the defendant to effect this custody arrangement.
>
> 4. At such hearing, the plaintiff will be determined afforded visitation privileges to be

As justification for its four-pronged method of resolving future instances of visitation denial, the lower court cited this Court's decision in Arbogast v. Arbogast, 174 W.Va. 498, 327 S.E.2d 675 (1984). Judge Kirkpatrick refers to the following passage from that decision:

> The custody change does not appear to have been ordered because of any isolated or technical disregard of the district court's authority, but because Jacquelyn consistently and willfully refused to allow her son any contact with the Arbogast family, denying her son the right to know and share the companionship, affection and society of his father and his parental grandparents. A mother's "very act of preventing . . . children of tender age from seeing and being with their father is an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the mother is unfit to act as custodial parent.

Id. at 505, 327 S.E.2d at 682. By focusing solely on the above-quoted language, the lower court obscures the fact that, in Arbogast, this Court was enforcing a modification of custody that had already been ordered by a Kansas court. Since our actions in that case were governed by the Parental Kidnaping Prevention Act,[48] Arbogast is clearly inapposite. Our decision in that case cannot be read as sanctioning a modification of custody based solely on visitation denial.[49]

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[48]See 28 U.S.C. § 1738A (1994).

[49]Clearly, a West Virginia court could rely upon continued denial of visitation to modify a previous custody ruling assuming adherence to the appropriate procedures. See W.Va. Code § 48-2-15(e).

Since a change in legal custody can only result pursuant to the statutory procedures set forth in West Virginia Code § 48-2-15(e) (1999), which entail the filing of a motion seeking a change i custody and presume a hearing on such motion, the mechanism included in the June 17, 1999, order wrongly suggests circumvention of the statutorily-required method of obtaining a custody modification While the order correctly requires a hearing following notice to the parties on the issue of denied visitation, the order continues by directing, in mandatory terms, that legal custody shall forthwith be transferred from Appellant to Appellee upon proof of denied visitation. A modification of child custody, without notice and hearing, cannot be ordered to result concurrently with a prospective instance of forbidden conduct. Certainly, one parent's continued refusal to permit the non-custodial parent to exercise his/her visitation rights could be considered by the court upon a proper motion for a change in custody. A modification in custody cannot result, however, simply by virtue of a visitation denial. Because any modification must result from a petition, followed by a hearing on the evidence ar can only be ordered following compliance with the standard established for custody modifications,[51] th lower court erred through its prospective directive that would authorize the sheriff to "retrieve and transport" the parties children as a remedial measure intended to "coerce" Appellant into compliance with the visitation directives already in place.[52] Accordingly, item numbers two, three, and four must

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[50]The standard which a circuit court is required to apply in considering motions for modification of custody is a change in circumstances of the parties since the entry of the original decree plus a demonstration that the change of custody would materially promote the welfare of the child[ren]. See Syllabus, Cunningham v. Cunningham, 188 W.Va. 235, 423 S.E.2d 638 (1992).

[51]See supra note 50.

[52]Appellee observes that no visitation violations have occurred since this order was signed.

be omitted from the list of procedures set in place by Judge Kirkpatrick to address future denials of visitation. Upon deletion of these conditions from the June 17, 1999, contempt ruling, the order is properly sustainable, given Appellant's admissions with regard to the visitation denials which are the subject of the contempt ruling.

Based on the foregoing, the February 9, 1999, order of the Circuit Court of Monroe County is hereby affirmed; the March 3, 1999, order of the Circuit Court of Monroe County is reversed as to the award of attorney's fees and remanded for proceedings consistent with this opinion, but otherwise affirmed; and the June 17, 1999, order of the Circuit Court of Monroe County is reversed as to the mechanism designated for transferring physical and legal custody upon a prospective visitation denial and remanded for entry of an order omitting such mechanism, but otherwise affirmed.

Affirmed, in part; Reversed in part; and Remanded With Directions.

235 W. Va. 409, 774 S.E.2d 75

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

FILED
May 22, 2015
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-0403

D.B.
D.B.,
Petitioners

v.

J.R.,
Respondent

Appeal from the Circuit Court of Mingo County
The Honorable John L.Cummings, Judge
Civil Action No. 12-CIG-2

REVERSED AND REMANDED

Submitted: February 25, 2005
Filed: May 22, 2015

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'"The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W. Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989).' Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008)." Syl. Pt. 2, *In re Antonia R.A.*, 228 W. Va. 380, 719 S.E.2d 850 (2011).

2. "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." Syl. Pt. 2, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

2. "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent

to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

3. "When a natural parent transfers temporary custody of . . . [his or her] child to a third person and thereafter seeks to regain custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child." Syl. Pt. 2, in part, *Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996).

Workman, Chief Justice:

This case is before the Court upon the appeal of the Petitioners D.B.[1] (hereinafter "the Petitioner grandfather") and D.B.[2](hereinafter "the Petitioner grandmother") from the February 27, 2014, final order of the Circuit Court of Mingo County, West Virginia, denying their[3] petition for guardianship of their granddaughter, F.R.[4] The Petitioners contend that the circuit court erred: 1) in finding that the Temporary Agreed Order granting the Petitioners temporary custody of the child terminated at the commencement of the guardianship hearing; 2) in ordering transfer of the custody of the child to the Respondent

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[1]Because this case involves a child and sensitive matters, we follow our practice of using initials to refer to the parties. *See* W. Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

[2]The Petitioner grandmother is not the child's biological maternal grandmother. She had been in a long-term relationship with the Petitioner grandfather and married him after he filed a petition for guardianship. While the initial petition was filed by the Petitioner grandfather, it was later amended to also include the Petitioner grandmother. Consequently, we refer to the grandparents collectively as the Petitioners throughout the opinion.

[3]The petition for guardianship did not expressly indicate whether temporary or permanent guardianship was being sought. The initial petition, prior to adding the Petitioner grandmother, simply sought to have the Petitioner grandfather be granted legal guardianship of the infant child.

[4]The child remains in the legal and physical custody of the Petitioners. By order entered March 12, 2014, the final ordered entered February 27, 2014, was stayed pending appeal, and the parties were instructed to follow the Agreed Temporary Order regarding custody and visitation.

father, J.R. (hereinafter also referred to as "the Respondent father"), the child's biological father, without requiring clear and convincing evidence of the Respondent father's fitness as a parent; 3) by ignoring the opinions of the Petitioners' expert witness, Dr. Amelia Santiago, the child's treating physician; and 4) by ignoring the Petitioners' clear and convincing evidence that a change of custody of the child would constitute a significant detriment to the child.[5] Upon review of the parties' briefs[6] and oral arguments, the appendix record and all other matters submitted before this Court, we find that the circuit court erred in failing to apply the standard enunciated by this Court in *Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996). We therefore reverse the circuit court's decision and remand the case for further proceedings consistent with this opinion.

I. FACTS

B.B. and the Respondent father were in a relationship. They had a child, F.R.,

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[5]Despite the assigned errors, the Petitioners' main argument centers upon the circuit court returning the child to the Respondent father's custody without requiring the Respondent father to prove that he was a fit parent. It is this error that we find warrants reversal and remand by this Court.

[6]The summary response filed by the guardian ad litem indicates that "upon information and belief, the [Respondent] father . . . has obtained employment in the northern part of the state and only comes home on the weekends." There were also concerns about the lack of child-proofing in the home, the instability of people living in the home, the number of animals the father has and the fact that the father only has a motorcycle for transportation. He also has made no concrete arrangements for child care and, according to status updates, there is a continued concern about his smoking around his daughter because of her asthma.

who is now three years old. B.B. died in a single vehicle accident on July 12, 2012.

According to the undisputed testimony of the Petitioner grandfather at the guardianship hearing, B.B. and F.R. resided with the Petitioners from the time F.R. was three months old until about a month before B.B.'s death,[7] when she and F.R. moved in with B.B.'s mother.[8]

Following B.B.'s death, the Petitioner grandfather filed a petition for guardianship on July 24, 2012, which the Respondent father answered.[9] On October 1, 2012, the parties entered into an Agreed Temporary Order, wherein they agreed that the Petitioner grandfather was the "Temporary Guardian of the infant," F.R. The Respondent father also agreed to temporary weekend visitation and a guardian ad litem was appointed for the child. The language of the order provides that "the parties had reached a temporary parenting agreement until a Final Evidentiary Hearing could be held by the Court."

---

[7]The circuit court found in its February 27, 2014, order that B.B. and the Respondent father shared custodial responsibility over F.R. until B.B. died; however, the evidence in the appendix record fails to support this finding.

[8]B.B. lived with her mother while she was looking for employment and the Petitioner grandfather stated that during the month, she and F.R. went back and forth between B.B.'s mother's home and his home.

[9]*See supra* note two.

The evidentiary hearing[10] referred to in the Agreed Temporary Order did not occur until over a year later on December 18, 2013.[11] According to Rebecca Marcum with Child Protective Services ("CPS"), who testified at the hearing, as a result of the guardianship petition being filed, CPS received an order from the court[12] "to open up a case and do a family function assessment" on the Respondent father. Ms. Marcum testified that they were able to substantiate domestic violence between the Respondent father and B.B.

The first instance of domestic violence occurred on February 24, 2011, five months before F.R.'s birth. Ms. Marcum testified that the Respondent father admitted that he stopped B.B.'s car and "took her keys and her cell phone and was hitting her and she filed an EPO [or Emergency Protective Order] and stated that she feared for her life and F[.R.]'s life."

About a month later, in March of 2011, there was another domestic violence incident. Ms. Marcum testified that the Respondent father admitted to hitting B.B. after the

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[10]The Honorable John L. Cummings, a senior status judge, was appointed by the West Virginia Supreme Court to hear cases in Mingo County at the time of the evidentiary hearing.

[11]There is no explanation in the record for why the evidentiary hearing referenced in the Agreed Temporary Order did not occur until over a year after the order was entered.

[12]It is unclear from the appendix record why then-Judge Michael Thornsbury ordered CPS to open a case in this matter. It may have been due to the allegation in the petition for guardianship that the Respondent "was arrested for Domestic Battery and Child Neglect creating risk of injury . . . ."

Respondent father became mad when B.B. laughed at him after he accused her of stealing items from him. The Respondent father told Ms. Marcum that he did not know that B.B. was pregnant at the time he hit her.

Ms. Marcum was also prepared to testify regarding an August 31, 2011, incident of domestic violence between the Respondent father and B.B. It was during Ms. Marcum's testimony, however, that the circuit court, sua sponte, questioned the relevancy of the testimony, stating that the court didn't "think it [wa]s relevant to the issue . . . [of] the guardianship between" the Respondent father and the Petitioners. The circuit court questioned "the relevance of what occurred in regard to any form of domestic violence after the death of B[.B.] on . . . July 12, 2012." The circuit court again stated: "If B[.B.] was still alive and if this were a domestic case, this would be very relevant; however, after her death that cause, in effect, ceases with her death. I'm going to sustain the objection as to relevance."

Despite the circuit court instructing the Petitioners' counsel not to go any further into the domestic violence incidents because "they do not count as far as the relevance," the circuit court did allow a proffer of what the testimony would be concerning the August 31, 2011, incident. The Petitioners' counsel then proffered that the evidence would establish that the Respondent father admitted to shooting a BB into a car when B.B.

and the child were inside the car. The circuit court also allowed the Petitioner grandfather to testify about the incident involving the BB gun. The Petitioner grandfather testified that he observed his daughter's car after the incident and took photographs of the car. The Petitioner grandfather also testified that his grandchild was inside the vehicle at the time of the incident. The Respondent father testified and admitted that he told Ms. Marcum that he shot at B.B.'s car. He, however, denied knowing that the child was in car. The Respondent father testified that the child was not in the car at the time he shot the BB gun at the vehicle.

There was also evidence of an incident involving domestic violence that occurred on April 5, 2012.[13] Deputy Barry Moore with the Mingo County Sheriff's Department testified that he investigated an incident in which the Respondent father struck B.B. with a flashlight and then followed her car in a threatening and erratic fashion while F.R., who was then nine months old, was in the car. The Respondent father was charged with domestic battery and child neglect creating a risk of injury. The Respondent father served time for domestic battery, but the child neglect charge was dismissed as part of a plea deal.

In addition to the domestic violence incidents, Ms. Marcum also testified regarding a home visit to the Respondent father's house in which she found the Respondent

[13]There was no objection raised regarding relevancy concerning this event.

father's mother, a caregiver of the child on occasion,[14] under the influence of oxycodone. Ms. Marcum testified that when she went to the Respondent father's mother's job to interview her, his mother also appeared to be under the influence while at work. Drug testing was conducted on the Respondent father's mother and she tested positive for oxycodone. She subsequently quit participating in random drug testing. Additionally, Ms. Marcum testified that the Respondent father's mother's husband was uncooperative and was aggressive at times. He refused to undergo any random drug testing. The Respondent father agreed that neither of these individuals would be appropriate care givers for the child.[15]

Ms. Marcum testified to the following report made as a result of her investigation:

> "There is history of severe domestic violence between J[.R.] and B[.B.] However, B[.B.] is now deceased and J[.R.] is not in another relationship for worker to be able to evaluate him presently. J[.R.] was exposed to domestic violence from an early age. Worker substantiated emotional abuse due to domestic violence in the presence of the child. Worker feels that J[.R.] lacks impulse control and does not think before he acts. J[.R.] has a history of not protecting his child and placing

[14]The Respondent father's mother did not live in the same home with the Respondent father.

[15]There was also testimony that the Respondent father shared his home with an ailing grandmother and a brother, who was affected by a severe traumatic brain injury. During oral argument it was disclosed that the Respondent father's grandmother had passed away. Moreover, Ms. Marcum testified that the ailing brother would not be an appropriate caregiver for the child.

> her in dangerous situations by exposing her to domestic violence when his anger becomes out of control."

Despite this report, Ms. Marcum also testified on cross-examination when asked if the Respondent father was an appropriate caregiver: "He was very compliant. He cooperated, he completed parenting, he completed adult life skills, he completed anger management. We can't say that he's not an appropriate care giver." She further testified that "[h]ypothetically, if a parent cooperates and they complete their services and they show a change, then, yes, we recommend reunification."[16]

Finally, Ms. Marcum testified that she found that the Petitioners were appropriate guardians for F.R. She further testified that the child had bonded with the Petitioner grandmother and calls her "mommy."

The Respondent father testified and admitted to engaging in domestic violence with B.B. and that it continued after F.R.'s birth. The Respondent father also testified that on August 9, 2013, during a scheduled visitation, he was arrested for driving a motorcycle sixty miles an hour in a forty-five mile an hour zone. During this episode, his daughter was in the care and custody of his mother. He testified that he did not know that his mother was taking oxycodone, but also acknowledged that his mother was not a "primary caregiver for

[16]Ms. Marcum testified that she had become Facebook friends with the Respondent father.

my daughter." Further, the Respondent father agreed that his stepfather, grandmother and brother were not appropriate caregivers for the child. The Respondent father acknowledged that F.R. was very close to the Petitioners. He also testified that if he had custody of his daughter he would not eliminate the relationship F.R. had with the Petitioners.

Lastly, there was significant testimony from F.R.'s board certified pediatrician, Amelia J. Santiago, concerning the child's asthma. Dr. Santiago testified that F.R. was diagnosed with asthma on December 19, 2012. The doctor stated that she had seen the child several times before and after the diagnosis. Dr. Santiago stated that the child's asthma could be exacerbated by secondhand smoke from cigarettes. This testimony was relevant because both the Respondent father and his grandmother were cigarette smokers. Dr. Santiago testified that she believed that the child had reoccurring exacerbation of asthma due to exposure to smoke. Specifically, Dr. Santiago testified:

> It has been accepted for quite awhile now that second hand smoke or passive smoking is bad for children because it impairs their ability to fight and move the mucous in their lungs, so we have always for more than twenty years we have recommended that children with their small lung capacity not be exposed to any cigarette smoke . . . . This has been accepted in the medical community . . . .

Dr. Santiago was challenged on cross-examination concerning her lack of "any actual physical, scientific or first hand knowledge that th[e] child was ever exposed to second hand smoke[.]" The doctor acknowledged that she had not witnessed the child being exposed to

secondhand smoke; however, the Petitioners had informed her that the child was being exposed to cigarette smoke during the child's visits with the Respondent father.

Regarding F.R.'s asthma and her doctor's testimony that she should not be around secondhand smoke, the Respondent father admitted to smoking, but said he did so only on the front porch. He said he typically smokes about a half-pack of cigarettes when his daughter is with him. He also testified that on at least one occasion he took the child outside with him when he smoked, stating "[i]t's an open porch. The wind blows thr[ough]."

On February 27, 2014, almost three months after the evidentiary hearing concluded, the circuit court entered its final order denying the petition for guardianship. Specifically, the circuit court, in reaching its decision, found the following standard enunciated in the syllabus of *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960), to be applicable and controlling:

> A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

The circuit court then found that the Agreed Temporary Order, which named the Petitioner grandfather as F.R.'s guardian "dissolved by its own language on December 18, 2013, at the commencement of the First Evidentiary Hearing[]" and that there was "no grant of temporary

custody . . . in place at the time of the Final Evidentiary Hearing." The circuit court again, "[a]pplying *Whiteman*" found that "the [R]espondent [father] has not 'waived such right [to custody of his child], or by agreement or otherwise has transferred, relinquished or surrendered such custody . . . ,' of his child to anyone."

The circuit court further found, regarding the child's asthma, that "Dr. Santiago opined that the asthma was caused and exacerbated by the inhalation of second-hand smoke." The circuit court, however, also found that because the doctor "did not have the foundational knowledge to know what either caused the asthma or exacerbated it[,]"and that because the child also suffered "asthma exacerbation" when in the care of the Petitioners, who did not smoke, these facts "tended to show how attenuated the connection between the second-hand smoke and the asthma exacerbation is."[17] The circuit court also made a specific finding that "the Respondent father, when smoking, does so in an open area where the child could only have minimal exposure."

The circuit court additionally found it had heard testimony from three witnesses

[17]According to the appendix record, Dr. Santiago is a licensed, board certified pediatrician, who practiced in the Mingo County area for more than thirty years. She was certainly qualified to give her medical opinion concerning the child's asthma being aggravated by secondhand smoke. Moreover, contrary to the circuit court's finding that the doctor testified that the child's asthma was caused by secondhand smoking, the record shows that Dr. Santiago never testified to that and, accordingly, this factual finding by the circuit court is erroneous.

about

> three[18] instances of domestic violence between the Respondent father and his former wife.[19] The first incident resulted in an Emergency Protective Order being entered against the Respondent [father] in Wyoming County, West Virginia[,] on February 24, 2011 (Case Number 11-D-49). The next incident resulted in an Emergency Protective Order being entered against the Respondent [father] in Wyoming County, West Virginia[,] on September 3, 2011 (Case Number 11-D-263). The last incident resulted in the Respondent [father] pleading guilty to a Domestic Battery charge in Mingo County, West Virginia[,] with dismissal of the felony child neglect creating a risk of injury (Case Number 12-M-484 and 12-F-151).

(Footnote added). Regarding the foregoing finding, the circuit court, however, failed to include its determination during the evidentiary hearing that it found the evidence irrelevant. As the circuit court ruled during the hearing, "if B[.B.]was still alive and if this were a domestic case, this would be very relevant; however, after her death that cause, in effect, ceases with her death." Notwithstanding its determination that the evidence of domestic violence was irrelevant, the circuit court found that "[h]owever applying the *Whiteman* standard," that "the Respondent [father] is not 'an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty,' despite the three incidents [of domestic violence]."

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[18]Notwithstanding evidence of four instances of domestic violence, the circuit court only referenced and discussed three having determined that the incident involving a BB gun was not relevant.

[19]The circuit court erroneously found that the Respondent father and B.B. had been married. There was no evidence to support this finding.

The circuit court then found that the Petitioners had "failed to prove by clear and convincing evidence" that their appointment as guardians was in the child's best interest. The court also based its decision on its determination that none of the five circumstances listed in West Virginia Code § 44-10-3(f)(1-5) (2014) (providing for appointment and termination of guardian for minor) to establish guardianship had been met and, therefore, the Petitioners failed to meet their burden under the statute and case law.

II. Standard of Review

In syllabus point two of *In re Antonia R.A.*, 228 W. Va. 380, 719 S.E.2d 850 (2011), this Court applied the following standard of review to a case involving a petition for guardianship:

> "'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W. Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989)." Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

Further, "'[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus

point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." *In re Abbigail Faye B.*, 222 W. Va. at 469, 665 S.E.2d at 303, Syl. Pt. 2.

Applying the above-mentioned standards, we examine the issues before us.

III. Discussion of Law

The issue upon which this case turns is whether the circuit court erred in ordering transfer of the custody of the child to the Respondent father, the child's biological father, without requiring clear and convincing evidence of his fitness as a parent. The Petitioners argue that the circuit court incorrectly placed the burden of proof upon the Petitioners to prove that the Respondent father was unfit to parent the child. Instead, the Petitioners assert that because the Respondent father had transferred custody of the child to the Petitioners, the law requires him to prove by clear and convincing evidence that he is a fit parent. *See Overfield*, 199 W. Va. at 29, 483 S.E.2d at 29, Syl. Pt. 2. Further, the Petitioners contend that due to the instances of domestic violence, as well as other evidence introduced during the evidentiary hearing, the Respondent father failed to establish his fitness as a parent by clear and convincing evidence. In contrast, the Respondent father asserts that the circuit court correctly determined that he was a fit parent.

Generally, one seeking the appointment as a guardian for a minor child carries

the burden of proof as set forth in West Virginia Code § 44-10-3:

> (f) The court may appoint a guardian for a minor *if the court finds by clear and convincing evidence that the appointment is in the minor's best interest* and:
> (1) The parents consent;
> (2) The parents' rights have been previously terminated;
> (3) The parents are unwilling or unable to exercise their parental rights;
> (4) The parents have abandoned their rights by a material failure to exercise them for a period of more than six months; or
> (5) There are extraordinary circumstances that would, in all reasonable likelihood, result in serious detriment to the child if the petition is denied.
>
> (g) Whether or not one or more of the conditions of subsection (f) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists or that a period of transition into the custody of a parent is needed so long as the appointment is in the best interest of the minor. . . .
>
> . . . .
>
> (j) For a petition to revoke or terminate a guardianship filed by a parent, the burden of proof is on the moving party to show by a preponderance of the evidence that there has been a material change of circumstances and that a revocation or termination is in the child's best interest.

Id. (emphasis added).

In *Whiteman*, a biological father filed a petition for habeas corpus in the circuit court to regain custody of his three-and-one-half year old daughter from the child's maternal

uncle and his wife.[20] 145 W. Va. at 686, 116 S.E.2d at 692. The child's mother, who was married to the father, suffered from a mental disability. The mother and father were from West Virginia, but were residing in Seattle, Washington. The child's mother disappeared and was subsequently found dead. During the interval between the mother's disappearance and the discovery of her body some twenty days later, the father communicated with members of their family in West Virginia concerning his wife's absence and his situation of caring for four young children. His wife's brother, the children's uncle, went to Seattle to assist the father with bringing the children to West Virginia. Each child was placed with members of the father's family on a temporary basis. The youngest was placed with the maternal uncle. *Id*. at 687, 116 S.E.2d at 692. There was no written agreement between the parties transferring custody of the child from the father to the uncle. Instead, it was understood by both the father and the uncle that the placement of the youngest child with the uncle was of a temporary nature, not to exceed six months after the father's remarriage,[21] but could end sooner if the father wanted custody back. *Id*. at 687-88, 116 S.E.2d at 693. When the father sought to regain custody of his child, the uncle refused. The uncle believed that it was in the child's best interest to remain with him and his wife permanently. *Id*. at 689-90, 116 S.E.2d at 694.

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[20]The couple had four children, but only the youngest was the subject of the habeas petition.

[21]The father did remarry within a short period of time after the mother's death. 145 W. Va. at 688, 116 S.E.2d at 693.

Despite finding that both the father and the uncle were suitable persons to have care and custody of the child, the circuit court refused to award custody of the child to the child's father, because the father had failed to prove that "a change of custody from the defendants [the uncle and his wife] to the petitioner [the father] would promote the welfare of the child." *Id*. at 686, 112 S.E.2d at 692.

On appeal, this Court reversed the circuit court's decision and ordered that the custody of the child be returned to the father. *Id*. at 696, 116 S.E.2d at 697. The Court found that the father

> has never, by agreement or otherwise, transferred, relinquished or surrendered the custody of his child to the defendants but instead has in effect merely permitted them to have the temporary possession of the child subject to the right of the petitioner [the father] to terminate such possession at any time or, in any event, at the expiration of six months after the petitioner should remarry.

Id. at 695, 116 S.E.2d at 697. Thus, the father had "the natural right to the custody" of his child as there were no allegations that he was an unfit person and he had not transferred custody of the child to the uncle. 145 W. Va. at 685, 116 S.E.2d at 691-92, Syllabus.

Years later in *Overfield*, this Court was presented with a biological mother suing her parents to regain custody of her two children. 199 W. Va. at 31, 483 S.E.2d at 31. The mother, by affidavit, granted custody of the children to their maternal grandparents, after

the mother had suffered a traumatic injury. The mother maintained that she had only given her parents temporary custody of the children, while the grandparents argued that the intention was to permanently transfer custody of the two children to them. *Id.*

Seven days after the affidavit was executed by the parties, the grandparents filed an action seeking an order granting them permanent custody of the children. The circuit court entered the requested order granting the grandparents permanent custody. *Id.* at 32, 483 S.E.2d at 32.

Over a year later, when the mother's health had improved, she filed a petition to regain custody of her children. The circuit court denied the petition, finding that because the mother had transferred permanent custody of the children to the grandparents it was incumbent upon her to show that a return of custody would be in the children's best interests. The circuit court found that the mother failed to meet her burden. *Id.*

On appeal, this Court reversed the lower court's decision and remanded the case for further proceedings. Relevant to the instant matter, the Court held in syllabus point two of *Overfield* that when either temporary or permanent custody is transferred by a parent to a third party, the burden of proof to regain custody of the child is on the parent as follows:

> When a natural parent transfers temporary custody of their child to a third person and thereafter seeks to regain

> custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child.

Id. at 30, 483 S.E.2d at 30, Syl. Pt. 2, in part.

In the instant case, the Agreed Temporary Order named the Petitioner grandfather "Temporary Guardian" of F.R. and allowed the Respondent father to have "temporary weekend visitation" with the child "until a Final Evidentiary Hearing could be held by the Court." The circuit court found that the temporary order "dissolved by its own language on December 18, 2013, at the commencement of the Final Evidentiary Hearing." The circuit court then found that the standard set forth in *Whitefield* was the applicable standard to be used in the case and "the *Overfield v. Collins* standard . . . [was] inapplicable in the case at bar because no grant of temporary custody was in place at the time of the Final Evidentiary Hearing." Consequently, the circuit court placed the burden of proof upon the Petitioners to establish by clear and convincing evidence that the Respondent father was an unfit parent. The court, based upon its assessment of the evidence, found that the Petitioners failed to satisfy their burden.

In examining the instant matter, we find that the circuit court erred in its

application of *Whiteman*, rather than *Overfield*, to reach its decision. Essentially, the circuit court ignored the transfer of custody of the minor child from the Respondent father to the Petitioners, which is unequivocally evinced in the Agreed Temporary Order entered into between the parties. Consequently, the facts do not support the circuit court's finding that no temporary transfer of custody was in place at the time of the final evidentiary hearing. Moreover, it is simply illogical and ill-advised for the circuit court to have found that the temporary order "dissolved by its own language on December 18, 2013, at the commencement of the Final Evidentiary Hearing." To make such a determination effectively meant that the child went without any guardian in place from December 18, 2013, until the final order was entered on February 27, 2014. Moreover, the purpose of having a final evidentiary hearing was to determine whether the Petitioners should be made the permanent guardians of the child or whether the temporary guardianship should be terminated. That determination could not be made until the hearing was complete and the circuit court entered an order. "A court of record speaks only through its orders. . . ." *State ex rel. Erlewine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973). Thus, the circuit court's imposition of the wrong burden of proof necessarily was predicated upon an erroneous ruling that no temporary transfer of custody had occurred.

Consequently, pursuant to the law enunciated by the Court in *Overfield*, because there was a temporary transfer of custody, the Respondent father carried the burden

of proving by clear and convincing evidence that he was a fit parent. 199 W. Va. at 30, 483 S.E.2d at 30, Syl. Pt. 2. After that burden was met, then the burden of proof would shift to the Petitioners "to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child." *Id*. Because the circuit court's decision in this case was based upon a misapplication of the burden of proof, which stemmed from the court's incorrect finding that a temporary transfer of custody did not occur in this case, we must reverse the decision in this case and remand for further proceedings.

We also find that the circuit court erred in determining that incidents of domestic violence between the Respondent father and the child's deceased mother were not relevant to its determination of the Respondent father's parental fitness. We have consistently found that evidence of domestic violence is relevant to the determination of whether a parent is fit. *See* Syl. Pt. 1, *Henry v. Johnson*, 192 W. Va. 82, 86, 450 S.E.2d 779, 783 (1994) (holding that "[c]hildren are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law [judge] should take domestic violence into account when making an award of temporary custody[,]" based upon a recognition that "[i]t is clear that where domestic violence is present it should be considered

when determining parental fitness."); *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 714, 356 S.E.2d 464, 468 (1987) ("We have recognized that spousal abuse is a factor to be considered in determining parental fitness for child custody."); *Collins v. Collins*, 171 W. Va. 126, 127, 297 S.E.2d 901, 902 (1982) (upholding trial court's decision to grant permanent custody of child to paternal grandparents based, in part, on the trial court's finding that the child's mother had "demonstrated [a] tendency to be violent as evidenced by her willingness to threaten with and to actually shoot a deadly weapon at human beings when she was upset, but not in any way threatened.").

In *Nancy Viola R.*, a maternal aunt sought custody of her nephew after her nephew's father was indicted for first degree murder of the child's mother. Throughout the marriage of the child's parents, the mother had been a victim of repeated acts of violence and abuse by her husband. Prior to the mother's death, she and the child had been separated from the father for four months. 177 W. Va. at 712, 356 S.E.2d at 466. After the mother's death, the child resided with his maternal aunt. During the custody proceeding, the trial court found the father of the child to be fit and that the father, as a fit parent, could designate the child's guardian. The father designated the child's paternal uncle. *Id*. at 711-12, 356 S.E.2d at 465-66. The father thereafter plead guilty to first degree murder of his wife. The maternal aunt sought reconsideration of the order granting guardianship to the child's paternal uncle. *Id.* at 712, 356 S.E.2d at 466. When the trial court denied the maternal aunt's motion, she

appealed.

The issue before the Court on appeal in *Nancy Viola R.* was whether the father was a fit parent. *Id*. In resolving that issue, we noted that the father's abuse of his wife was "an important consideration" in the case and similarly "[o]ther courts also regard spousal abuse as an important consideration in child custody cases." *Id*. at 714, 356 S.E.2d at 468 (citing *In re Marriage of Cline*, 433 N.E.2d 51, 54 (Ind.Ct.App.1982); *In re Marriage of Ballinger*, 222 N.W.2d 738, 739 (Iowa 1974); *Hosey v. Myers*, 240 So.2d 252, 253 (Miss.1970); *Schiele v. Sager*, 571 P.2d 1142, 1146 (Mont. 1977)). We followed the reasoning of the Supreme Court of Iowa in *In re Marriage of Snyder*, 241 N.W.2d 733 (Iowa 1976), that "assaults of a spouse reveal violent tendencies which may render a parent unfit for custody of his or her child." 177 W. Va. at 714, 356 S.E.2d at 468. We further noted from the *Snyder* case that even though there was no evidence that the father had ever abused his child, "the father's 'meanness, aggressiveness, and tendency to[ward] violence expose[d] [the child] to more danger'" than any of the mother's transgressions. *Id*. at 714, 356 S.E.2d at 468 (quoting, in part, *Snyder*, 241 N.W.2d at 474). We then found, in *Nancy Viola R.*, that the circuit court erred in finding that the father was a fit parent based not only on the father's first degree murder conviction of the child's mother, but also on "other acts of violence toward . . . [the mother] and threats of violence to the child . . . ."[22] *Id*. at 716, 356 S.E.2d

[22]The child was committed to the "permanent guardianship of the West Virginia (continued...)

at 470; *see generally Guardianship of Simpson*, 79 Cal.Rptr.2d 389, 404 (Cal. Ct. App. 1998) ("Domestic violence is always a serious concern, and any propensity to it is highly relevant as regards children's welfare.").

In the instant case, the burden was on the father to show by clear and convincing evidence that he was a fit parent. *Overfield*, 199 W. Va. at 30, 483 S.E.2d at 30, Syl. Pt. 2, in part. As previously stated, we have been unwavering in emphasizing the importance that evidence of domestic violence plays in determinations of whether a parent is fit. *See Nancy Viola R*, 177 W. Va. at 714, 356 S.E.2d at 468. Whether the individual who was the victim of domestic violence is deceased is not the focus of the inquiry, rather the focus is on the individual who demonstrated the violent tendencies in the first instance.

Because the circuit court applied the holding in *Whiteman*, rather than *Overfield*, and because the circuit court found the evidence of domestic violence not relevant at the evidentiary hearing that was conducted, we find it is necessary to remand this case. Upon remand, the trial court should consider the petition for guardianship under the applicable law set forth in *Overfield*. Further, the evidence of domestic violence is relevant to the determination of whether the Respondent father is a fit parent.

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[22](...continued)
Department of Human Services" with temporary custody given to Nancy R. 177 W. Va. at 716, 356 S.E.2d at 470.

IV. Conclusion

Based upon the foregoing, the decision of the circuit court is reversed and this case is remanded for further consideration consistent with this opinion.

Reversed and remanded.

230 W. Va. 254, 737 S.E.2d 282

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2012 Term

No. 12-0141

FILED
November 21, 2012
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: D.P.

Appeal from the Circuit Court of Hancock County
The Honorable Ronald E. Wilson, Judge
Civil Action No. 11-JA-31

AFFIRMED

Submitted: September 25, 2012
Filed: November 21, 2012

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Per Curiam:

In this appeal from the Circuit Court of Hancock County, the Department of Health and Human Resources appeals a circuit court's order dismissing a petition alleging a father had abused and neglected his daughter. After vesting legal custody of the child with the child's grandmother – a disposition the Department supported – the circuit court determined that further hearings on the petition would be "idiotic" and not in the best interests of the child. The Department asserts that the circuit court was still required to formally determine whether abuse or neglect occurred before the petition could be dismissed.

We find no error in the record, and affirm the circuit court's order.

I.

This case involves D.P.,[1] a child born in January 1995. For most of her life D.P. has lived in the care and custody of her grandmother in Pennsylvania. Her mother died of an apparent drug overdose. Her father, respondent J.W., allegedly threatened the grandmother that if she ever sought formal, legal custody of the child, he would assert his custodial rights and take the child away from her. The grandmother stated she did not have the money necessary to file for legal custody.

[1] Because of the sensitive nature of the facts alleged in this case, we use the initials of the affected parties. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990) ("Consistent with our practice in cases involving sensitive matters, we use the victim's initials.")

During the summer of 2011, when she was 16 years old, D.P. had an emotional break-up with a boyfriend. She suffered serious mental health issues, and her grandmother took her to an emergency room. A doctor determined she was not a danger to herself and cleared her for discharge, but suggested that she spend a few nights away from her grandmother with an aunt as a "cooling-off" or respite period.

D.P. went to her aunt's home in Pennsylvania, but was not allowed to take her pets with her. D.P. refused to stay at her aunt's without her pets and, in desperation, called her father J.W. in West Virginia to come and get her. On August 2, 2011, J.W. went to Pennsylvania and drove D.P. and her pets back to his West Virginia home.

On August 7th – after "residing" with her father for a total of five days – D.P. was taken into emergency protective custody by the Department of Health and Human Resources. The Department thereafter filed a petition to find that D.P. was abused and/or neglected by J.W. The petition alleged that J.W. furnished alcohol to D.P. in his home; that J.W. had been arrested for driving under the influence with D.P. in the car, and that the officer had simultaneously cited D.P. for underage consumption; and that D.P. had awoken after drinking to find a naked man on her bedroom floor and a hickey on her neck from this man. The petition also alleged that D.P.'s father had told other teenagers they could do whatever they wanted to D.P. in exchange for marijuana. D.P. later tested positive for the drugs marijuana and klonopin.[2]

[2] Klonopin is a benzodiazepine that helps control seizures and panic attacks. A police officer found an empty prescription bottle for klonopin in J.W.'s house. The prescription, written for J.W.'s girlfriend, had been filled on July 27, 2011. The girlfriend was incarcerated, and the prescription had supposedly been filled so she would

A multi-disciplinary team meeting was convened on August 26, 2011. The meeting included D.P.'s guardian *ad litem*, the Department's caseworker, the caseworker's supervisor, J.W.'s counsel, and D.P.'s grandmother, aunt, and uncle. D.P.'s father, J.W., was not present because he had been extradited to Pennsylvania to face charges there. The multi-disciplinary team unanimously agreed that the child should be promptly returned home with her grandmother. The team determined that the most expeditious way to return the child was to have the grandmother, by separate petition, file for legal guardianship of the child. The team also unanimously agreed to recommend to the circuit court that the abuse and neglect petition should be dismissed.

Subsequently, on September 28, 2011, the circuit court – after finding it was in the child's best interest – formally appointed D.P.'s grandmother as her legal guardian.

The child's guardian *ad litem* moved to dismiss the abuse and neglect petition, because at the multi-disciplinary team meeting, it had been agreed by all parties – including the Department – that the petition could interfere with the grandmother's legal guardianship under the Interstate Compact on the Placement of Children. *See*, *W.Va. Code* § 49-2A-1 *et seq.* The Department, however, changed its position and objected to the dismissal, ostensibly because J.W. *might*, in the future, attempt to reassert his rights to custody of D.P. The Department therefore wanted to proceed with a full adjudication of the petition.

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have her medication when she was released. J.W. could not explain why there were no pills in the bottle.

After several hearings, the circuit court dismissed the abuse and neglect petition in an order dated January 13, 2012. The circuit court noted that the child had lived in West Virginia for less than a week before the petition was filed, and that her only other contact with her father had been "trivial." "[E]xcept for his brief and deplorable contact with his daughter when the negligent acts occurred, [J.W.] never played any meaningful role in his daughter's life." The circuit court also noted that D.P. had mental health issues that might be exacerbated if she were required to testify, and noted that she was nearing the age of majority (she will turn 18 in January 2013).

Based on these facts, the circuit court determined that J.W. "didn't have a snowball's chance in hell of ever regaining custody" of his daughter, D.P., and that "it was idiotic to subject [D.P.] to a worthless Adjudicatory Hearing where she would have to testify about what had happened to her." The circuit court acknowledged the diligence of the Department's case workers, but went on to note that the Department's argument in this case was nothing more than a "Department policy." In light of the facts, the circuit court found the Department's argument was "absurd," and found the local caseworkers were merely "compelled . . . to parrot the position of the Department." The circuit court concluded that "blind adherence" to a generic policy to pursue every petition to a full adjudication was not in D.P.'s best interests.

The Department now appeals the January 13, 2012, dismissal order.

II.

We apply the following multi-faceted standard of review:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

When a circuit court examines an abuse and neglect petition, *W.Va. Code* § 49-6-5(1) [2011] requires the court to "give precedence to dispositions in the following sequence: (1) Dismiss the petition." Still, when a petition alleging abuse and/or neglect has been filed, the circuit court must hold hearings to determine whether the child has been abused or neglected. *See* Syllabus Point 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983). It is axiomatic that, in any contest involving the care and custody of a minor, "the welfare of the child is the polar star by which the discretion of the court will be guided." Syllabus Point 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948). *See also* Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary

goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.")

In the instant case, the circuit court afforded the parties several hearings, and the initial position of *all* of the parties was that the petition should be dismissed. It was only after the child had been placed with her grandmother as legal custodian (a disposition agreed to by the Department) that the Department changed its position and asserted that further hearings were necessary. The circuit court provided the Department with a "meaningful opportunity to be heard," as required by *W.Va. Code* § 49-6-2(c) [2006]. At no time did the Department justify how the child's health, welfare or best interests would be promoted by further adjudication on the petition.[3]

We believe that the circuit court was within its right when it found that the Department had asserted procedure over substance. After carefully reviewing the record, it is clear that the circuit court did not err in its finding that full adjudication of the petition was not in the best interests of D.P.

III.

The circuit court's January 13, 2012, order is affirmed.

Affirmed.

[3] For a contrary example, *see In re: T.W.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 11-1628, Nov. 14, 2012), where the Department raised grievous allegations of abuse and neglect against a father of four children. The father voluntarily consented to termination of parental rights to two children, on condition that the circuit court not conduct hearings. The circuit court granted the voluntary termination. This Court reversed, finding that the potential existed for future visitation between the parent and the two children to whom parental rights were not terminated. In *T.W.*, the Department demonstrated that it was in the best interests of all four children for the circuit court to conduct full hearings.

211 W. Va. 79, 562 S.E.2d 147

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

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OF WEST VIRGINIA

No. 29965

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February 22, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: DANIEL D. AND SAMANTHA D.

Appeal from the Circuit Court of Marion County
The Honorable Fred L. Fox, II, Judge
Juvenile Case No. 99JA59

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 9, 2002
Filed: February 22, 2002

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. "Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability." Syl. Pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996).

3. West Virginia Code § 49-7-1 (2000) (Repl. Vol. 2001) provides no meaningful protection of confidentiality or privilege for statements made by an accused in an abuse and neglect proceeding and is, in fact, designed to facilitate the dissemination of information to those charged with the public duty of prosecuting those who may be or are accused of criminal conduct.

4. """'A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part;

it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W.Va. [312], 305 S.E.2d 268 (1983).' Syl. Pt. 3, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985)." Syl. Pt. 1, *State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992).

5. ""'In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).' Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984)." Syl. Pt. 2, *State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992).

6. "No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W.Va.Code § 49-6-4(a) (1992)." Syl. Pt. 3, *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992).

7. West Virginia Code § 49-6-4 (1984) (Repl. Vol. 2001) was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

8. If a trial court, in the course of an abuse and neglect proceeding, requires by its order that an accused submit to an examination by a person proposed by any party as an expert who is neither a *physician, psychologist or psychiatrist*, such an examination is conducted under warrant of law and is, accordingly, subject to the prohibitions of West Virginia Code § 57-2-3 (1965) (Repl. Vol. 1997). To the extent that our holding in *State ex rel. Wright v. Stucky*, 205 W. Va. 171, 517 S.E.2d 36 (1999), conflicts with our holding here regarding the protections afforded by West Virginia Code § 57-2-3, *Stucky* is hereby modified to exclude from its holding court-ordered examinations in abuse and neglect proceedings.

9. In an abuse and neglect proceeding, an accused required by court order to undergo an examination by an expert who is neither a physician, psychologist, or psychiatrist is entitled to have the trial court's determinations regarding the protections afforded by West Virginia Code § 57-2-3 (1965) (Repl. Vol. 1997) set forth in a protective order for future reference.

10. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

11. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

Albright, Justice:

This is an appeal by Daniel D.[1] (hereinafter "Appellant") from an order of the Circuit Court of Marion County terminating his parental rights to two children, Daniel D., Jr., and Samantha D. The Appellant contends that the lower court erred in terminating his parental rights and by violating his due process rights. Having thoroughly reviewed the briefs, record, and arguments of counsel, we reverse the termination of the Appellant's parental rights and remand with directions to permit the Appellant to participate in one additional improvement period designed to facilitate therapeutic evaluation and treatment, if desired by the Appellant, and to consider what post-termination visitation, if any, is appropriate in the event that termination of parental rights is imposed.

I. Facts and Procedural History

On October 24, 1999, the maternal grandmother of Daniel D., then age two, and Samantha D., then age four, contacted the West Virginia Child Abuse Hotline, reporting that Samantha D. had informed her that the Appellant, Samantha's father, had put his penis in her mouth several times. The allegations were investigated by the West Virginia Department of

[1]Consistent with our practice in cases involving sensitive facts, we identify the parties by initial only. *See In re Jeffrey R.L.*, 190 W. Va. 24, 26 n.1, 435 S.E.2d 162, 164 n. 1 (1993).

Health and Human Resources (hereinafter "DHHR")[2] and a petition for abuse and neglect was filed on December 30, 1999.[3]

A preliminary hearing was conducted before the lower court on January 18, 2000. Samantha testified regarding the abuse, explaining the details of the sexual actions and reciting explicit descriptions of her father's actions. Psychologist Terry Laurita testified that she had evaluated Samantha and had confirmed that she had been sexually abused by her father. Ms. Laurita also testified concerning the inappropriate sexual knowledge Samantha possessed for her age. On February 23, 2000, the lower court conducted an adjudicatory hearing at which the Appellant continued to exercise his right to remain silent. Ms. Laurita opined that the Appellant would be incapable of providing the children with the support they needed if no admission of the abuse was made. She further opined that any contact between the Appellant and Samantha would send an unhealthy message to the child. At the conclusion of the adjudicatory hearing, the lower court found that the Appellant had sexually abused Samantha, denied visitation to the Appellant, granted him a three-month improvement period, and suggested a psychological evaluation and assessment of his parenting skills.

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[2]Rebekah Bledsoe, a representative of the DHHR, and Doris James, a Marion County Sheriff's Department Detective, investigated the report and concluded that there was sufficient evidence to substantiate the report of sexual abuse and justify the filing of an abuse and neglect petition against the Appellant.

[3]The petition also alleged alcohol and substance abuse by the Appellant.

During the improvement period, the Appellant underwent psychological evaluations by licensed psychologist Ronald D. Pearse. The Appellant denied the allegations of sexual abuse during these evaluations. Subsequent to the April 2000 testing,[4] the evaluator recommended that the Appellant have no unsupervised visitation with the children and concluded as follows:

> Mr. [D.] continues to deny the sexual abuse charges. However, records indicate an evaluation was completed of his daughter indicating a fairly clear-cut case of sexual abuse. Keeping the safety of his children in mind, it is not recommended that Mr. [D.] have any unsupervised visits. He is not a good candidate for treatment at this time due to his inability to admit to any sexual molestation that occurred.

On May 31, 2000, the lower court granted the Appellant a ninety-day extension of his improvement period and denied his request for visitation. On June 13, 2000, the Appellant was indicted for first degree sexual assault; sexual abuse by a parent, guardian, or custodian; and incest. Due to the pending criminal charges, the Appellant continued to exercise his right to remain silent during further meetings associated with the abuse and neglect proceedings. On August 28, 2000, the lower court denied the Appellant's request for an

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[4]Some of the tests were deemed invalid due to a finding that the Appellant "was attempting to present himself in a favorable light" and "was not being open and honest during the evaluation." The testing also revealed that the Appellant's "defensiveness scores were significantly elevated. This indicates that he may have been attempting to minimize his problem. His answers indicated that he likely has emotional problems and/or a behavioral disorder."

additional ninety-day improvement period and denied his request for visitation with the children.

The lower court conducted a dispositional hearing on November 28, 2000, at which Ms. Laurita testified that Samantha had consistently identified the Appellant as her abuser. Ms. Laurita further testified that it was essential that the Appellant participate in therapy and that in order to obtain treatment as a sexual offender, it was imperative that the Appellant admit to the abuse and request treatment. Despite the fact that the court had provided the Appellant with improvement periods, he had not admitted the abuse and had not begun treatment or counseling. Ms. Melissa Pickens of DHHR testified that despite the offer of reasonable services to the Appellant, he had not availed himself of such services and had made no attempt to seek treatment. Ms. Pickens explained that due to the Appellant's denial that abuse had occurred, the DHHR did not know of any services which could be provided to assist the Appellant or reunify the family. Ms. Pickens further opined that the Appellant had not utilized his improvement periods and that reunification was not in the best interests of the children.

The lower court terminated the Appellant's parental rights to Samantha and Daniel by orders dated February 5, 2001. The lower court order reiterated the prior evidence, testimony, and evaluations and concluded that there was no reasonable likelihood that the conditions of abuse could be substantially corrected in the near future. The court noted that

"[c]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . ."[5] The court further recognized that it was compelled to review the degree to which the Appellant had attempted to attain goals in the improvement period and whether sufficient improvement had been made. The court explained that "[i]n the difficult balance which must be fashioned between the rights of the parent and the welfare of the child," the child's rights prevail.

The Appellant appeals the determination of the lower court, maintaining that his due process rights were violated by the lower court's reliance upon his denial of the abuse and unwillingness to undergo treatment as a basis for the termination of parental rights.

II. Standard of Review

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[5]The lower court cited *In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993), for this proposition. Syllabus point one of *Lacey* provides:

> "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 1, *Interest of Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).

This case raises issues of constitutional rights and statutory interpretation. This Court indicated in *Phillip Leon M. v. Greenbrier County Board of Education*, 199 W. Va. 400, 484 S.E.2d 909 (1996), that "[b]ecause interpretations of the West Virginia Constitution, along with interpretations of statutes and rules, are primarily questions of law, we apply a *de novo* review." *Id*. at 404, 484 S.E.2d at 913. In syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), we also explained: "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."

III. The Hobson's Choice[6]

The Appellant raises an issue concerning the classic dilemma confronted by the individual encountering charges in both civil and criminal contexts. He exercised his Fifth Amendment right to silence in the underlying abuse and neglect proceedings in order to protect himself from incrimination in the pending criminal case. Based in substantial part upon his silence and the absence of treatment potential for an individual maintaining silence, the Appellant's parental rights were terminated.

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[6]The standard Hobson's Choice refers to a choice without an alternative. Reference to a "Hobson's Choice" is said to have originated with a Thomas Hobson, a livery stable owner in Cambridge, England, who purportedly required every customer to take either the horse closest to the door or none at all.

This scenario has been recurrently addressed, and definitive themes have emerged in the methods by which courts have resolved the Fifth Amendment allegations of individuals facing parallel issues in civil and criminal contexts. The Minnesota Court of Appeals addressed this dilemma in *In re S.A.V.*, 392 N.W.2d 260 (Minn. Ct. App. 1986), wherein a trial court had ordered the allegedly abusive parents to attend parenting classes and psychological counseling. The father contended on appeal that the order requiring his admission in psychological evaluation violated his privilege against self-incrimination. The Minnesota court rejected his argument based upon the fact that the termination of parental rights was not a sanction for refusal to testify and that the termination was "simply the necessary result of failure to rectify parental deficiencies." *Id*. at 264.

The Minnesota Supreme Court addressed a similar issue in *In re J.W.*, 415 N.W.2d 879 (Minn. 1987), in which the trial court had ordered psychological therapy to include an explanation of the death of the child in question. The prosecutor had indicated that refusal to cooperate would result in the filing of a termination petition. On appeal, the Minnesota court found that while the trial court could not directly require the parents to incriminate themselves in therapy, the state could require therapy generally. If the therapy was thereafter deemed to be ineffective, termination could proceed. "These consequences lie outside the protective ambit of the Fifth Amendment." *Id.* at 883. The court explained:

> What the parents would like to claim, although of course they cannot, is that their responsibility for the death of a child and the inferences arising therefrom is privileged and may not be considered in determining their suitability as parents. But to state

> this proposition is to refute it. Not only does the proposition ignore the fact that the evidence of responsibility has already been received but it ignores the best interests of the children.

Id. at 884. The court reasoned: "In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a 'threat' nor a 'penalty' imposed by the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent." *Id*; *see also In re J.G.W.*, 433 N.W.2d 885 (Minn. 1989).

Similarly, in *New Jersey Division of Youth and Family Services v. S.S.*, 645 A.2d 1213 (N.J. 1994), the reviewing court held that requiring a mother to rebut prima facie evidence of abuse did not violate her Fifth Amendment privilege against self-incrimination. The New Jersey court relied upon *In re S.*, 322 N.Y.S.2d 170 (Fam.Ct. 1971), in which the following reasoning was utilized:

> There is no mandatory requirement that they take the stand and testify. That would be unconstitutional. The constraint upon respondent to give testimony arises here simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution. . . .
>
> It may be a difficult decision for the respondents and their attorneys. [But] it is a question of procedure and legal options for the defense, not one of the constitutionality of incrimination. . . .

Id. at 1217 (*quoting In re S.*, 322 N.Y.S.2d at 177-78).

The Nebraska court grappled with this issue of refusal to speak in an abuse and neglect proceeding based upon fear of incrimination in *In re Clifford M.*, 577 N.W.2d 547 (Neb. 1998). The Nebraska court held, in this issue of first impression for that court, that parental rights could not be terminated based solely upon the refusal to waive the right against self-incrimination. In so holding, the court noted that a review of other states' authority indicated:

> that there is a very fine, although very important, distinction between terminating parental rights based specifically upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent's failure to acknowledge past wrongdoing inhibits meaningful therapy. The latter is constitutionally permissible; the former is not.

Id. at 554.

In examining possible accommodations for this testimonial dilemma, scholars have opined that the potential for continuing the abuse and neglect action until after the conclusion of the criminal case is not palatable for the obvious reason that prompt disposition of child abuse/neglect proceedings is essential.[7] *See generally* Jessica Wilen Berg, Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for*

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[7]In *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), however, the Fifth Circuit found that a continuance of the civil case until after the accused's criminal responsibility was determined would be an appropriate resolution. *Id*. at 1089.

Court-Ordered Therapy Programs, 79 Cornell L. Rev. 700 (1994); William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. 473 (1990). This jurisdiction has definitively spoken to that issue, as manifested in Rule 5 of the Rules of Procedure for Child Abuse and Neglect, wherein it is provided that "[u]nder no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings."

Commentators have observed that providing use immunity is the most practical and efficient method of protecting the privilege against self-incrimination while simultaneously advancing the best interests of the child by granting an inducement for full cooperation and disclosure during the child abuse and neglect proceedings. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. at 521-22.[8]

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[8]A question has also been raised regarding whether a parent can be impeached during the criminal action with statements made during the abuse and neglect action. "[T]o the extent that use immunity is granted for statements made in court-ordered therapy in order to facilitate family reunification, the precedents indicate that such statements could not later be used to impeach the parents." 24 Ga. L. Rev. at 522; *see also New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (holding that testimony given under use immunity is "the essence of coerced testimony" and cannot be used for impeachment purposes). In 1972, the United States Supreme Court decided *Kastigar v. United States*, 406 U.S. 441 (1972), concluding that immunity against use and derivative use of incriminatory testimony was sufficient to protect the Fifth Amendment privilege. *Id*. at 453. The Supreme Court also explained that the granted protection is not dependent upon the good faith of a prosecutor because, subsequent to witness

(continued...)

In *In re Jessica B.*, 254 Cal. Rptr. 883 (1989), a case in which the trial court had refused family reunification because the father had not acknowledged his wrongdoing, the appellate court found that use immunity would preserve the father's privilege against self-incrimination. The California court held as follows:

> The California Constitution requires that a person proceeding simultaneously in the criminal courts for child abuse and the juvenile court regarding a dependency of the abused minor should not only be granted use immunity for his or her testimony at dependency proceedings that constitutes an admission to the acts at issue in the criminal case against him or her but also for such statements made during court-ordered therapy. Under the circumstances of this case, such an immunity is essential to the constitutional privilege against self-incrimination and facilitates the goal of protecting the best interest of the minor and achieving the reunification of the family at the earliest possible date.

Id. at 893-94.

Similarly, in *In re Eduardo A.*, 261 Cal. Rptr. 68 (1989), procedural protections were afforded to individuals caught in this labyrinth. In that case, the California court addressed the patient-psychotherapist privilege and found that the legislature had intended to abrogate the privilege only in the context of examinations ordered by the court as an initial investigative tool, but did not intend to abrogate the privilege in the context of

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[8](...continued)
disclosure that he or she testified under a grant of immunity, the prosecution has the burden to show that the evidence being used came from legitimate sources, "wholly independent of the compelled testimony." *Id*. at 460.

psychotherapeutic treatment. *Id*. at 71. "It would be unreasonable to expect a patient to freely participate in such treatment if he knew that what he said and what the therapist learned from what he said could all be revealed in court." *Id*. at 70.

Protective or limiting orders may also be utilized in conjunction with the grant of use immunity. In *State v. Decker*, 842 P.2d 500 (Wash. Ct. App. 1992), for instance, the court addressed the a tribunal's inherent authority to issue protective orders and affirmed the use of a protective order entered regarding a predisposition psychological evaluation. *Id*. at 503.

IV. West Virginia's Statutory Guidance

A. Language of the Statutes

In attempting to reconcile the competing interests involved in the case sub judice, we are assisted, to some extent, by the substance of West Virginia Code § 49-6-4(a) (1984) (Repl. Vol. 2001), West Virginia Code § 57-2-3 (1965) (Repl. Vol. 1997), and West Virginia Code § 49-7-1 (2000) (Repl. Vol. 2001). While the Appellant acknowledges the existence of certain protections contained in these statutes, he contends that such protections are inadequate to permit the full exercise of his Fifth Amendment right against self-incrimination and the vigorous defense of his parental rights.

West Virginia Code § 49-6-4(a) addresses medical and mental examinations in the child abuse and neglect proceeding and provides as follows:

> (a) At any time during proceedings under this article the court may, upon its own motion or upon motion of the child or other parties, order the child or other parties to be examined by a **physician, psychologist or psychiatrist**, and may require testimony from such expert, subject to cross-examination and the rules of evidence: Provided, That the court shall not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination, nor shall the court hold such party in contempt for refusing to submit to an examination. The physician, psychologist or psychiatrist shall be allowed to testify as to the conclusions reached from hospital, medical, psychological or laboratory records provided the same are produced at the hearing. The court by order shall provide for the payment of all such expert witnesses. If the child, parent or custodian is indigent, such witnesses shall be compensated out of the treasury of the State, upon certificate of the court wherein the case is pending. **No evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person.**

W. Va. Code § 49-6-4(a) (emphasis supplied). West Virginia Code § 57-2-3 provides additional protection, as follows: "In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." Finally, West Virginia Code § 49-7-1 provides generally for confidentiality of records concerning a child which may be accumulated by DHHR.[9]

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[9]Section 49-7-1 provides in that records "concerning a child or juvenile which are maintained by the division of juvenile services, the department of health and human resources, a child agency or facility, court or law-enforcement agency shall be kept (continued...)

B. This Court's Prior Consideration of Pertinent Statutes

This Court addressed the statutory protections in *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), as they affect the issue of utilization of evidence in the civil and criminal contexts against the interests of a parent also accused of a crime related to the alleged abuse and neglect of children. This Court explained:

> Such a parent or guardian may be invoking his/her right to remain silent pursuant to the Fifth Amendment because that individual also may be facing criminal charges arising out of the abuse and neglect of the child. The rights of the criminally accused are sufficiently protected, however, by the following statutory provisions: 1) West Virginia Code § 49-6-4(a) (1995) which allows medical and mental examinations of the child or other parties involved in an abuse and neglect proceeding provides that "[n]o evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person; 2) West Virginia Code § 49-7-1 (1995) provides that "[a]ll records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released . . . [;]" and 3) West Virginia Code § 57-2-3 (1966) provides that "[i]n a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."

Id. at 497-98, n.22, 475 S.E.2d at 873-74, n.22.

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[9](...continued)
confidential and shall not be released or disclosed to anyone, including any federal or state agency." The statute contains numerous exceptions.

In *Wright*, a case involving the death of child, this Court reviewed the authorities supporting "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 498, 475 S.E.2d at 874, *quoting Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).[10] In light of that review of authorities, this Court held as follows in syllabus point two of *Wright:*

> Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

Id. at 492, 475 S.E.2d at 868.

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[10]This Court explained as follows in *Wright*:

> There is no basis in law for requiring that a court be disallowed from considering a parent's or guardian's choice to remain silent as evidence of civil culpability. Moreover, the invocation of silence by a parent or guardian in an abuse and neglect proceeding goes to the heart of the treatability question which is essential in these cases, as the nature of the proceedings is remedial and not punitive. Thus, in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

197 W. Va. at 497-98, 475 S.E.2d at 873-74 (footnotes omitted).

C. Application of the Statutes to the Appellant's Case

We are satisfied that this rule allowing a trial court to consider one's silence as affirmative evidence of culpability, as set forth in *Wright*, is soundly supported by the authorities and is consistent with the policy of this State which encourages prompt hearing of abuse and neglect cases and a paramount concern for the best interests of the children involved in such proceedings. We are also satisfied that the rule does not offend the protections against self-incrimination afforded by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article III, Section 5 of our State Constitution. As applied to the issue of culpability, the rule simply confronts the accused parent with a choice: Assert the privilege against self-incrimination with the risk that silence will be considered in the civil proceeding as evidence of culpability, or waive the privilege and offer such evidence as the accused may alone possess to refute the charge of abuse and neglect.

The Appellant argues, however, that this Court was in error when it concluded in *Wright* that the statutory protections cited in *Wright* are sufficient to permit Appellant's full and proper exercise of the right against self incrimination guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article III, Section 5 of our State Constitution. The Appellant contends that the statutes relied upon in *Wright* do not protect him in all of the circumstances which might arise if he undertook a vigorous effort to maintain his parental rights and prevent their termination in the abuse and neglect proceedings. The Appellant maintains that participation in interviews with DHHR workers, participation in multi-disciplinary team meetings and submission to treatment, as contrasted

with mere diagnostic examinations, by medical or other professional personnel are not within the scope of the protections afforded by the statutes relied upon in *Wright*. The Appellant further argues that none of the statutes protects him against the use of evidence gathered in the abuse and neglect proceedings to impeach any testimony offered against him in a subsequent criminal proceeding involving his alleged abuse and neglect of the children.

To address the Appellant's claims, we will discuss each relevant statute. West Virginia Code § 49-7-1, as quoted in pertinent part above, is a statute providing generally for the confidentiality of records of the Department of Health and Human Resources accumulated in abuse and neglect cases. The statute is replete with exceptions, including exceptions directing release of the information to "law-enforcement agencies and prosecuting attorneys, . . . [a] grand jury, circuit court or family law master. . . ." We find that West Virginia Code § 49-7-1 provides no meaningful protection of confidentiality or privilege for statements made by an accused in an abuse and neglect proceeding and is, in fact, designed to facilitate the dissemination of information to those charged with the public duty of prosecuting those who may be or are accused of criminal conduct.

The remaining statutes at issue appear to provide some substantive protection to those involved in abuse and neglect cases who may also be charged with crime related to the alleged abuse and neglect. The Appellee argues that these protective statutes provide adequate opportunity for a parent accused of abuse and neglect and also accused of a crime arising from

any such alleged abuse and neglect to exercise rights against self-incrimination in the criminal proceeding. The Appellee further argues that the protections adequately balance the paramount interest of the State in the protection of children with the right of the Appellant against self-incrimination. The Appellee contends that those protective statutes therefore do not unconstitutionally deprive the Appellant of those rights. Finally, the Appellee argues that if the lower court is reversed "[t]he entire system for resolving abuse cases would be destroyed."

We do not shrink from a close examination of the Appellant's claims because of this warning of dire results. We share the view of the lower court that the issues raised by the Appellant present a very difficult situation. The trial court addressed the complexity of this issue on at least three separate occasions, as evidenced by the record of the proceedings below. During the February 23, 2000, adjudicatory hearing, the lower court astutely observed as follows:

> I think we - - in cases of this nature and specifically in this case, we put the father between the proverbial rock and a hard place in the sense that we tell him to go for clinical diagnosis, but he knows going in that anything he says which may incriminate him may be used against him at a later time.
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> And so if he does - - faces the prospect of criminal charges, if he does exercise his right not to make a statement, which - - which is a constitutional right, then that can be used against him to say, "Well, no improvement period. We're going to terminate your custodial rights." I think in this case inasmuch as the child has never been removed from her mother and is being placed with her mother and will remain there. That there's - -

> there's no harm to be done by granting the father an improvement period just for the simple - - I don't think this Court or any Court has any way of getting him out of the situation he's in now, and that is choosing between losing his child or making admissions which my subject him to criminal penalties. . . . I'm hesitant about totally terminating his parental rights because counsel properly advised him that if the - - these matters could be used against him, and he exercised his Fifth Amendment Rights.

During a May 31, 2000, hearing at the termination of one of the improvement periods, this issue was again raised, and the lower court stated:

> I think he's in that place that we refer to between a rock and a hard place, and that is if he - - the only way he can see the children is to admit it - - admit the sexual abuse. And if he admits the sexual abuse, he's looking at criminal charges - - an admission in criminal charges.

During the November 28, 2000, dispositional hearing, the lower court explained:

> The Court is - - again recognizes the situation the father's in. He's not been tried yet and obviously would not be to his best interest in the criminal proceeding to - - to admit the acting in this proceeding.

If the protective statutes are narrowly read and applied, it appears to this Court that they do, in fact, provide little comfort to an accused abuser who desires (1) not to waive his right against self-incrimination, and (2) make a bona fide effort to fully participate in the process established for resolving abuse and neglect cases, including remedial examination and treatment. While the Appellee asserts in its brief that "it can be argued that" the protections of West Virginia Code § 57-2-3 could apply to Multi-Disciplinary Team proceedings, the

Appellee did not so concede, and the Appellant, at the lower court level, had every reason to fear that the Appellee would not so concede in his upcoming criminal prosecution.[11]

We recognize that if the statutes are construed to provide protections only for statements made in diagnostic examinations by a physician, psychiatrist or psychologist and to legal examinations had under oath, then the protections they offer may be seen as illusory. We likewise recognize that those statutes cannot, under any circumstances, operate to protect a criminal defendant's statements in an abuse and neglect proceeding from subsequent use in a criminal proceeding in any and all circumstances. Nevertheless, the statutes appear to

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[11]Similarly, the Appellant fears that statements made in the abuse and neglect process may be used to impeach his testimony in a subsequent criminal proceeding; the Appellee proves that fear legitimate by arguing to this Court that *State v. Williams*, 171 W. Va. 556, 301 S.E.2d 187 (1983), requires the admission of prior statements proffered to impeach Appellant's testimony. However, we do not perceive that the possibility of using Appellant's prior statements in an abuse and neglect proceeding to impeach his testimony in a later criminal trial unduly interferes with a bona fide effort by one so accused to participate vigorously in an abuse and neglect proceeding. It may be presumed that one electing to testify in one's criminal trial intends to testify truthfully, thereby minimizing the need to use prior statements to impeach that testimony. Secondly, we do not read *Williams* as overruling *State v. Price*, 113 W. Va. 326, 167 S.E. 862 (1933). In *Price*, this Court expressly disapproved the use of evidence given in a preliminary hearing to impeach testimony given in the ultimate trial of the case. *Id*. at 330, 167 S.E. at 864. Finally, we perceive that, in light of the express provisions of West Virginia Code § 49-6-4(a) and West Virginia Code § 57-2-3, a criminal defendant electing to exercise the privilege against self-incrimination in the criminal trial may be adequately protected from having *necessary prior statements* in the abuse and neglect proceeding utilized in the criminal trial.

provide substantial protections in this regard if carefully observed and liberally construed to achieve the remedial purposes for which it appears they were enacted.

D. Liberal Construction

With specific reference to West Virginia Code § 49-6-4(a), that statute provides that no evidence acquired as a result a parent or other person having custody of a child being *examined* by a *physician, psychologist or psychiatrist* under court order may be used against such person in any subsequent criminal proceedings against such person and that the court shall not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination. That statute is supplemented by West Virginia Code § 57-2-3, preventing the use of evidence acquired upon a "legal examination," in subsequent court proceedings other than a prosecution for perjury or false swearing.

In the case sub judice, in a slight variation on this proposition, the lower court took evidence from a psychologist to the effect that there was no hope of correcting the conditions of abuse because the Appellant, in the exercise of his privilege against self-incrimination, failed to admit the abuse during a psychological examination and argued that the statutes did not adequately protect him. We believe that the Appellant's argument has merit if the statutes are narrowly construed, but that the remedial purposes of the statutes require a broader construction.

Our abuse and neglect statutes contemplate reasonable and timely efforts being made during the course of the abuse and neglect proceedings to achieve a correction of the conditions creating the abuse or neglect. Moreover, there is little doubt that the Appellant's silence regarding the conditions of abuse – in essence, his failure to take part in the examination ordered by the lower court at least to the extent of discussing those conditions with the examining psychologist – contributed materially to the trial court's decision here to terminate parental rights.

As we contrast the design of our abuse and neglect statutes to provide reasonable and timely efforts to correct conditions creating abuse and neglect with the dilemma created by the Appellant's silence, we are guided by the holding of this Court in syllabus point one of *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992):

> "'"A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).' Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W.Va. [312], 305 S.E.2d 268 (1983)." Syl. Pt. 3, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985).

In syllabus point two of *White*, this Court continued:

> "'In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.' Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).

In discussing the protections afforded to the accused individual in *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992), this Court referenced West Virginia Code § 49-6-4 and explained as follows in syllabus point three: "No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W.Va.Code § 49-6-4(a) (1992)."

Our review of the statutes, corresponding case law of this state, and authority from other jurisdictions compels our conclusion that West Virginia Code § 49-6-4 was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings. Accordingly, we conclude that West Virginia Code § 49-6-4 applies to disclosures in any *court-ordered* examination of an accused who is a respondent in an abuse and neglect proceeding, whether such disclosures occur in the course of diagnosis or

treatment.[12] If a trial court, in the course of an abuse and neglect proceeding, requires by its order that an accused submit to an examination by a person proposed by any party as an expert who is neither a *physician, psychologist, or psychiatrist*, such an examination is conducted under warrant of law[13] and is, accordingly, subject to the prohibitions of West Virginia Code § 57-2-3.[14] We further hold that, in an abuse and neglect proceeding, an accused required by court order to undergo an examination by an expert who is neither a physician, psychologist, or psychiatrist is entitled to have the trial court's determinations regarding the protections afforded by West Virginia Code § 57-2-3 set forth in a protective order for future reference. We are mindful of this Court's holding in *State ex rel. Wright v. Stucky*, 205 W.Va. 171, 517 S.E.2d 36 (1999), that neither West Virginia Code § 57-2-3 nor a protective order under Rule 26(c) of the West Virginia rules of Civil Procedure provide use immunity to *require* a person to answer questions in civil discovery over a claim of the privilege against self-incrimination,

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[12]*See, e.g., Hutchison v. City of Huntington*, 198 W. Va. 139, 150, 479 S.E.2d 649, 660 (1996) ("The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.") (citation and internal quotation marks omitted); syl. pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925) (holding that it is "the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity").

[13]*See State v. Legg*, 59 W. Va. 315, 53 S.E. 545 (1906), for discussion of examination under warrant of law.

[14]*See* Fisher, *The Psychotherapeutic Professions And The Law Of Privileged Communications*, 10 Wayne Law Review 609 (1964). Fisher proposes that the general psychotherapeutic privilege should apply "where one (or more) is seeking help in the solution of a mental problem caused by psychological and/or environmental pressures from another whose training and status are such as to warrant other persons confiding in him for the purpose of such help." *Id*. at 617.

remarking in the body of the opinion that the subject statute protects only statements made in court. To the extent that *Stucky* conflicts with our holding here regarding the protections afforded by West Virginia Code § 57-2-3, *Stucky* is hereby modified to exclude from its holding court-ordered examinations in abuse and neglect proceedings.[15]

The remedial interpretations adopted by this Court serve a twofold purpose: first, they provide significant protection of the Fifth Amendment rights of the accused; and second, they advance the significant goal of ascertaining truth and appropriate protection of children's rights in abuse and neglect proceedings by removing a potential stumbling block to full and complete disclosure, investigation, and treatment of perpetrators. As this Court has consistently recognized, the primary goal in all abuse and neglect cases must be the health and welfare of the children. *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Any operation of the statute which provides less than such constructive, comprehensive protection would be incongruous with the underlying intent of both the statute itself and the goal of abuse and neglect proceedings.

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[15]We perceive that examinations by a court-sanctioned expert, whether for diagnosis, therapy or other treatment, are such an integral part of West Virginia's detailed plan for the consideration of abuse and neglect cases and their ultimate impact on family relationships that such examinations, held as they are "under warrant of law" must be treated as "legal examinations," enabling but not requiring an accused parent to fully participate in rehabilitative efforts. Evidence obtained in such examinations may be used in the abuse and neglect proceeding; however, use in a subsequent criminal proceeding, other than for perjury or false swearing, would be excluded under such a protective order.

We emphasize here that these protective statutes apply only to court-ordered examinations. Obviously, there is no basis to extend those protections to investigations prior to the filing of an abuse and neglect proceeding, other contacts with DHHR personnel, or statements made in MDT meetings where numerous persons may be present. In those situations, a parent is left to his or her own judgment whether to speak or remain silent on all or any issue that may arise.

E. Necessity for Remand

The Appellant chose to remain silent in the abuse and neglect proceeding based upon what this Court considers a legitimate concern regarding the clarity and scope of the protective statutes. Based upon the Appellant's decision to remain silent, he was unable to utilize his improvement periods for their intended benefit, as "an opportunity to remedy the existing problems." *West Virginia Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990). As this Court explained in syllabus point six of *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991),

> At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

When the Appellant did not attempt to utilize his improvement period for its intended benefit, the lower court concluded that the Appellant had not demonstrated improvement and found that termination was justified.

We conclude that the Appellant did not utilize his improvement periods and chose to remain silent based upon legitimate legal questions of constitutional dimension. These questions addressed the perceived illusory effect of the statutes discussed herein, questions this Court has now answered for the first time. As we have noted, the trial court shared the Appellant's concerns, but until this Court addressed those concerns the Appellant had no remedy, and the trial court was understandably equally constrained.

Our discussion herein should permit the Appellant to pursue his case more aggressively on remand and permit him to seek full evaluation and treatment, if he desires to prevent termination of his parental rights. On remand, the Appellant should be provided with one additional improvement period. If the Appellant chooses to remain silent, whether based upon the Fifth Amendment or otherwise, then the termination order should stand, based upon the reasoning of the lower court. By this opinion, we have clarified the breadth of the legislative provision and have emphasized that a limiting order could be crafted to identify protected conversations, admissions, evaluations, and treatment to protect the Appellant from the fear that anything expressed in conjunction with the abuse and neglect proceeding will be

utilized in the criminal proceeding.[16] Our conclusions herein shall have only prospective application in other cases wherein an order of termination has not been entered.

On remand, the lower court should assess the Appellant's progress at the cessation of this additional improvement period and proceed accordingly, within the discretion of the lower court. The lower court correctly determined that the abuse and neglect could not be remedied without the cooperation and treatment of the Appellant. However, our review of the record compels our conclusion that the Appellant withheld such cooperation and submission to treatment based upon a legitimate concern. That concern having been resolved herein, to the extent possible, the Appellant should be entitled to demonstrate whether he possesses the desire and ability to fully cooperate in a meaningful improvement period.

In so ruling, this Court does not wish to express any preference or opinion regarding the ultimate determination of the lower court on the issue of termination of the Appellant's parental rights or the degree to which the Appellant may be permitted supervised visitation or post-termination visitation.

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[16]We also emphasize that a prosecutor handling both the abuse and neglect case and the criminal charges against the same individual must be discreet and judicious in the use of information inculpating the individual, to assure that information gleaned in the abuse and neglect context is not improperly utilized in the criminal prosecution. In *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992), this Court explained that a prosecutor did not represent conflicting interests by representing the state in a civil abuse and neglect proceeding and subsequently in criminal proceedings against same person. *Id*. at 46, 422 S.E.2d at 523.

We are also cognizant of the need for final resolution in the lives of these young children. Were these children being placed for adoption or lingering in foster care, we would be less disposed toward extending the additional improvement period to the Appellant. Where the children are securely with their mother, however, we see no impediment to permitting the Appellant the opportunity to participate in a meaningful improvement period, if he so chooses.

If termination is the ultimate result, the possibility of post-termination visitation must also be addressed by the lower court. We directed as follows in syllabus point five of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995):

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Reversed and Remanded with Directions.

No. 29965 - In Re: Daniel D. and Samantha D.

FILED
March 15, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, dissenting:

Daniel D., father of the unfortunate children involved in this case, contends that he was denied due process when the circuit court terminated his parental rights. Daniel D. has argued that he did not have adequate protection against self-incrimination in order to fully participate in the improvement periods extended to him by the circuit court. The majority opinion agreed with Daniel D. and reversed the circuit court's termination orders. Because the majority opinion has not properly applied existing precedent, and, in reaching its ultimate resolution of this case, has utterly and inexcusably failed to consider the best interests of the two innocent children involved, I am compelled to dissent.

Our Prior Holding in *State v. James R.* Should Have Controlled this Case

The record clearly shows that the evidence established without a doubt that Daniel D. repeatedly sexually abused his four year old daughter.[1] However, the majority opinion has determined that Daniel D. needs yet another opportunity to demonstrate that he has

[1]The majority opinion did not disturb the circuit court's determination that Daniel D. engaged in sexual activity with his daughter. In other words, even the majority opinion has agreed that Daniel D. sexually abused his daughter.

changed and will never again sexually assault his children. This determination is wrong.

The circuit court initially awarded Daniel D. a three month improvement period. During this improvement period, Daniel D. absolutely refused to participate in any activity that would assist in proving he was on the road to recovery. Nevertheless, the circuit court was patient with Daniel D. In fact, the circuit court gave Daniel D. a second three month improvement period. However, Daniel D. once again refused to cooperate in rehabilitation efforts. Faced with unrefutable evidence that Daniel D. had engaged in sexual activities with his adolescent daughter, and further faced with the fact that Daniel D. refused to cooperate with efforts toward rehabilitation, the circuit court fulfilled its obligation under the law to protect the innocent children by terminating Daniel D.'s parental rights. The majority opinion, by reversing the termination orders, has rewarded Daniel D. for refusing efforts of rehabilitation, and has failed to protect the interests of the D. children.[2]

The majority opinion attempts to justify its decision by erroneously asserting

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[2]Even when addressing parents' rights in child abuse and neglect cases, the best interests of the child(ren) must be given priority. *See In re Emily*, 208 W. Va. 325, 336, 540 S.E.2d 542, 553 (2000) ("A parent's rights are necessarily limited in this respect because the pre-eminent concern in abuse and neglect proceedings is the best interest of the child subject thereto."); Syl. pt. 3, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999) ("'Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).' Syllabus point 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children." (citation omitted)).

that our law is unclear as to whether Daniel D. would have incriminated himself by participating in an improvement period. To this end, the majority opinion crafted the illusion that a new and novel issue was raised in this case. That is, the majority opinion asserted that our law is unclear as to whether a parent in a child abuse and neglect proceeding could meaningfully participate in an improvement period without having such participation used against the parent in a subsequent criminal prosecution. This issue is neither new nor novel. In fact, the exact issue was squarely addressed by the Court in *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992).

James R. involved a father who was charged, in a civil child abuse and neglect proceeding, with sexually abusing his three children and forcing his wife to engage in sex with their oldest son. The circuit court found that sexual abuse had occurred, but granted the father an improvement period. After the improvement period, criminal charges were brought against the father based upon his sexual abuse of the children. The father motioned the circuit court to disqualify the prosecutor from the criminal proceeding because the prosecutor had taken part in the civil child abuse and neglect proceeding. The circuit court granted the motion. The State appealed the order of disqualification.

This Court held in *James R.* that the circuit court erroneously disqualified the prosecutor. We explained "a prosecutor does not represent conflicting interests by representing the State first in a civil abuse and neglect proceeding and then in subsequent

criminal proceedings against the same person." *James R.*, 188 W. Va. at 47, 422 S.E.2d at 524. The reasoning in *James R.* was based upon the fact that the prosecutor could not use evidence against the father that had been obtained during the course of the father's cooperation with the requirements of the improvement period. *James R.* made this point abundantly clear in syllabus point 3 of the opinion:

> No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W. Va. Code § 49-6-4(a) (1992).

James R. controlled the disposition of this case. The father in the instant matter alleged that he did not cooperate with the mental health evaluators during the improvement period, because he believed that his cooperation would have been used against him in a criminal proceeding. The contention was baseless. *James R.* made clear that the father in the instant case could cooperate with authorities during the improvement period, and none of that evidence could be used in any subsequent criminal proceedings. The majority opinion has engaged in a long-winded dissertation to come to the exact same conclusion that was reached in *James R.*[3] The majority opinion considered its holding unprecedented, which enabled it to

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[3]For example, compare syllabus point 7 of the majority opinion with syllabus point 3 of *James R.*, which is quoted above. Syllabus point 7 of the majority opinion states:

> West Virginia Code § 49-6-4 (1984) (Repl. Vol. 2000) was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through

(continued...)

conclude that Daniel D. was unaware he could participate in the improvement period without the threat of incriminating himself. In light of the existing precedent of *James R.*, the majority opinion's conclusion in this regard is clearly flawed.[4]

In the final analysis, this case presented a simple issue that this Court previously resolved in *James R.* The majority opinion elected to ignore *James R.* by holding that our law was unclear as to the consequences of cooperating with professional authorities during an improvement period. As a result of the majority decision, the lives and mental stability of two innocent children must continue to be held in limbo. Such an outcome is certainly not in these children's best interest. *See* Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d

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[3](...continued)

> court-ordered psychological examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

This construction of W. Va. Code § 49-6-4 constitutes no new law and is nothing more than an unnecessary restatement of syllabus point 3 of *James R.*

[4]The majority opinion was also disingenuous with its creation of syllabus points 8 and 9. Those syllabus points were intended to hold that when a parent consults with non-medical professionals during an improvement period, the parent's cooperation cannot be used against him or her. Such a holding has no basis in this case. Daniel D. *refused* to cooperate with the mental health evaluators. The trial court's decision in this case was not based upon the failure to cooperate with anyone else. Thus, the majority opinion should never have addressed a matter that had no application to the facts presented. Similarly, because the Court was not asked in this case to address the question of post-termination visitation, the topic should not have been raised. I am appalled that the majority opinion, nevertheless, seems to suggest that such visitation may be appropriate where a father has sexually abused his child and then unequivocally refused any treatment.

365 (1991) ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. . . ."). Meanwhile, Daniel D. gets to decide for the third time whether or not he is prepared to take responsibility for conduct he was unequivocally found to have committed during the abuse and neglect proceedings. In deciding to allow Daniel D. a third improvement period, the majority opinion has clearly failed in its duty to consider the best interests of the children whose well being is at stake. "'The goal of an improvement period is to facilitate the reunification of families *whenever that reunification is in the best interests of the children involved*.'" *In re Emily*, 208 W. Va. 325, 334, 540 S.E.2d 542, 551 (2000) (emphasis added) (quoting *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 258, 470 S.E.2d 205, 212 (1996)).

For the reasons stated, I dissent from the majority decision. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

195 W. Va. 530, 466 S.E.2d 189

Supreme Court Of Appeals Of West Virginia

IN RE: DANIELLE T.

No. 23076
Submitted: November 28, 1995
Filed: December 12, 1995

SYLLABUS BY THE COURT

1. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, In re: R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

2. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

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Per Curiam:
This case is before this Court upon an appeal from the final order of the Circuit Court of Barbour County, West Virginia, entered on May 23, 1995. The case concerns the alleged abuse and neglect of Danielle T., an infant. See footnote 1 The appellant, the West Virginia Department of Health and Human Resources (hereinafter Department), contends that the circuit court committed error in not terminating the parental rights of the appellees, Johnny Ray T. and Peggy Sue T. The final order, which directed the appellant to return Danielle to the appellees, was stayed by this Court pending the outcome of this appeal. For the reasons expressed below, we reverse the final order and terminate the parental rights of the appellees to Danielle.

I

The facts in this case are distressing. The appellees are the natural parents of Danielle, who was born in May 1990. The appellees, Danielle and the appellees' three other children, Brandy, born in 1984, Ashley, born in 1985, and Dustin, born in 1992, resided in the same household. On February 6, 1994, the appellees brought Danielle, age three, to Davis Memorial Hospital in Elkins, West Virginia. The appellees indicated to hospital authorities that Danielle had been sick for a few days and was unresponsive. Upon an initial medical examination at Davis Memorial Hospital, Danielle was immediately flown to Ruby Memorial Hospital in Morgantown, West Virginia, for more comprehensive treatment.

At Ruby Memorial Hospital, Danielle, emaciated and in shock, was found to have the following medical conditions: (1) pneumonia, (2) scratches and scars on her back, (3) bruises about the head, (4) four missing teeth, (5) missing patches of hair, (6) a cut on one ear, (7) burns upon the inside of both arms, (8) severe dehydration and (9) severe malnutrition. The record indicates that Danielle's state of malnutrition was particularly egregious because it had caused brain damage in addition to its manifestation in the form of visible sores around Danielle's mouth.

The medical evidence indicated that the sores around the mouth were caused by a vitamin deficiency. At the time of her admission to Ruby Memorial Hospital, Danielle was also recovering from surgery conducted in 1993 with regard to a dislocated hip.

On February 17, 1994, the appellant Department, with the assistance of the Barbour County Prosecuting Attorney, filed a petition in circuit court seeking immediate custody of Danielle. The appellant alleged that Danielle was an abused and neglected child. W. Va. Code, 49-1-3 [1994]; W. Va. Code, 49-6-1 [1992], et seq. Moreover, the appellant requested that the appellees' other children undergo a medical examination.

Upon receipt of the petition, and finding the existence of imminent danger to Danielle and the absence of a reasonable alternative to removal from the appellees' home, the circuit court ordered that temporary custody of Danielle be given to the appellant. W. Va. Code, 49-6-3(a) [1992]. Pursuant to that order, the circuit court appointed a guardian ad litem to represent Danielle and also appointed counsel to represent the appellees. The appellant has since placed Danielle in foster care. Furthermore, although the appellees' other children, Brandy, Ashley and Dustin, as well as Danielle, were named as parties in the appellant's petition, the circuit court ultimately dismissed those three children from this litigation.

Several evidentiary hearings were conducted by the circuit court upon the question of the alleged abuse and neglect of Danielle. At the end of each hearing, the circuit court continued the out-of-home placement of Danielle. The final hearing in the case was conducted on May 17, 1995, and the final order was entered on May 23, 1995.

As set forth in the final order, the circuit court found that Danielle's condition in February 1994 could have been fatal and that the appellees should have sought medical and professional assistance for Danielle sooner than they did. However, the circuit court further found that the appellees did not physically abuse Danielle and did not intentionally neglect her, although, in the words of the circuit court, the appellees were guilty of "passive neglect." The circuit court ordered that custody of Danielle be returned to the appellees, subject to a twelve-month improvement period and supervision by the appellant Department. As reflected in the final order, both the appellant and the guardian ad litem for Danielle objected to the ruling of the circuit court.

In this appeal, the appellant Department, emphasizing the severity of Danielle's injuries, contends that Danielle suffered extensive abuse and neglect and that the parental rights of the appellees should have been terminated by the circuit court. The appellees, on the other hand, contend that Danielle's injuries resulted from causes other than abuse and neglect and that, in any event, the appellant failed to establish compelling circumstances for the denial of an improvement period.

II

Chapter 49 of the West Virginia Code is entitled "Child Welfare," and W. Va. Code, 49-1-3 [1994], therein defines "abused child" as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home [.]" In addition, W. Va. Code, 49-1-3 [1994], defines a "neglected child" as a child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing,

shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian [.]"

Article 6 of chapter 49 is entitled "Procedure in Cases of Child Neglect or Abuse" and provides various remedies for the protection of children, including, in certain circumstances, the termination of parental rights. Specifically, pursuant to W. Va. Code, 49- 6-5(a)(6) [1992], a circuit court may:

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency.

Moreover, W. Va. Code, 49-6-5(b) [1992], provides:

> As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
>
> . . . .
>
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally . . . and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child [.]

The above provisions of W. Va. Code, 49-6-5 [1992], are substantially the same as in the 1977 version of that statute, which this Court cited in In re: R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980). In syllabus point 2 of In re: R.J.M. we held:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children,

> W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

Syl. pt. 1, In re Brianna Elizabeth M., 192 W. Va. 363, 452 S.E.2d 454 (1994); syl. pt. 1, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993); syl. pt. 4, In the matter of Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989); syl. pt. 4, State v. C.N.S., 173 W. Va. 651, 319 S.E.2d 775 (1984). See also, Mary J. Cavins, Annotation, Physical Abuse of Child by Parent as Ground for Termination of Parent's Right to Child, 53 A.L.R.3d 605 (1973).

In In re: R.J.M., this Court upheld a circuit court's termination of parental rights, without an improvement period, where the parents had permitted the child, under three years old, to come very close to starvation. The child's starvation was averted by the intervention of outside authorities. The parents also declined to cooperate with medical experts and social workers concerning the child's welfare. In In re: R.J.M., this Court stated that starvation is a particularly insidious type of child abuse and that children under three years of age, compared to older children, have a far greater susceptibility to illness. 164 W. Va. at 500-501, 266 S.E.2d at 117.

The In re: R.J.M. case was subsequently cited by this Court in In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993). In In re: Jeffrey R.L., a guardian ad litem asserted that the circuit court erred in failing to terminate the parental rights of an infant, where the infant had suffered numerous bone fractures, and physicians had diagnosed the infant as suffering from battered child syndrome. Noting that the mother's explanations for the infant's injuries were inconsistent with the medical evidence See footnote 2 and that neither the mother nor the father was cooperative with regard to identifying the perpetrator of the injuries, this Court, in In re: Jeffrey R.L., agreed with the guardian ad litem and held that there was clear and convincing evidence in the record warranting the termination of parental rights. 190 W. Va. at 35, 435 S.E.2d at 173. As we stated in syllabus point 3 of In re: Jeffrey R.L.:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

In the case before this Court, the testimony focused upon the burn injuries to the inside of Danielle's arms and to her malnutrition, although as described above, Danielle suffered several other injuries. According to the appellees, Danielle received the burns from a defective vaporizer which had been sitting by her bed. That explanation was disputed, however, by Doctor Angela Rosaf who examined Danielle at Ruby Memorial Hospital in February 1994. Doctor Rosaf indicated that, even if Danielle had been inquisitive toward the vaporizer, she could not have sustained burns located upon the inside of both arms, especially, as here, in the absence of corresponding burns upon the chest.

With regard to the malnutrition, the appellees stated that Danielle had always been a fussy eater and that just prior to her hospitalization in February 1994 Danielle had taken in even less food and fluids because of her flu-like symptoms. Again, however, the appellees were contradicted by medical testimony. Doctor Monica Gingold, a neurologist at Ruby Memorial Hospital, testified that a CAT scan examination revealed that Danielle had suffered brain damage of a type consistent with malnutrition and that some of the effects of the brain damage were permanent. See footnote 3 Moreover, Doctor Rosaf testified that Danielle's malnutrition had occurred over a period of months and had caused the sores present upon Danielle's mouth. Furthermore, Doctor Rosaf indicated that Danielle did not have an eating disorder. See footnote 4

In addition to the explanations of Danielle's injuries, the appellees submitted to the circuit court the report of Allan L. LaVoie, a psychologist, who indicated that Danielle's mother, Peggy Sue T., had no inclinations toward child abuse or neglect. The appellees also submitted the testimony of John M. Marstiller, a psychologist, who found that Danielle's father, Johnny Ray T. was not likely to abuse or neglect children. In addition, the appellees submitted the testimony of Barbour County Deputy Sheriff Richard R. Gordon, who investigated the appellees' home in May 1994 and testified that he did not believe that the appellees had abused Danielle. It should be noted, however, that Allan L. LaVoie, though under subpoena, did not appear before the circuit court to testify. Moreover, John M. Marstiller indicated that Johnny Ray T. had "somewhat inappropriate expectations regarding children's developmental capabilities." Furthermore, Deputy Gordon testified that, although he did not believe that Danielle had been abused, he did believe that she had been neglected by the appellees.

This Court is not unmindful that the parental rights of the appellees with regard to Danielle are entitled to significant consideration. Syl. pt. 1, In re: Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973). However, this case falls squarely within the principles of In re: R.J.M. and In re: Jeffrey R.L., supra. As in In re: R.J.M., the appellees in this case permitted Danielle to come very close to starvation. Importantly, and consistent with In re: R.J.M., the circuit court in this case

expressly stated that the intervention of the appellant Department in February 1994 "was necessary to alleviate the malnutrition and medical problems suffered by [Danielle] which might otherwise have been fatal." Moreover, in In re: Jeffrey R.L., this Court indicated that there was no reasonable likelihood that the conditions of abuse could be substantially corrected because the perpetrator had not been identified, and the parents had taken no action to identify the abuser. That is also the case here. In this case, the appellees sought to explain Danielle's burn and malnutrition conditions with testimony inconsistent with the medical evidence. The photographs alone of Danielle's injuries, submitted as a part of the record before this Court, render the appellees' testimony rather unconvincing. Danielle's other injuries, such as the scratches, scars, bruises, missing teeth and the cut upon her ear, were addressed only tangentially by the appellees. Neither of the appellees acknowledged that any abuse or neglect of Danielle took place.

Accordingly, this Court is of the opinion that the record contains clear and convincing evidence of extensive physical abuse and neglect of Danielle and that there is no reasonable likelihood that the conditions can be substantially corrected. Syl. pt. 3, In re: Jeffrey R.L., supra. The fact that the circuit court found Danielle's injuries to be nearly fatal and that the record indicates that Danielle's conditions have substantially improved in out-of- home placement, a fortiori, support those conclusions. Upon all of the above, this Court is of the opinion that the circuit court committed error in granting the improvement period, and the parental rights of the appellees to Danielle are hereby terminated. This case is remanded to the circuit court for the development of a plan concerning Danielle's prospective care and permanent placement. W. Va. Code, 49-6-5 [1992]. The appointment of the guardian ad litem upon Danielle's behalf shall continue until a permanent placement is made. In re: Jeffrey R.L., supra, 190 W. Va. at 35, 435 S.E.2d at 173.

We have on a number of occasions and in varying contexts recognized a child's right to continued association with significant figures in his or her life. In re Christina L., ___ W. Va. ___, 460 S.E.2d 692 (1995); James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991); Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989).

As we recognized in syllabus point 5 of In re Christina L.:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must

> indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Similarly, we have recognized that where there is a termination of parental rights, all efforts should be made to preserve the child's rights to a continued relationship with her only other immediate family blood relatives, her siblings. See footnote 5

Upon remand, the circuit court should review all of the evidence on these issues in the context of a permanency plan, including the monitoring of the siblings as hereinafter required, to determine the extent to which such continued parental or sibling association is in the child's best interests.

In view of the above, this Court is also concerned about the health, safety and welfare of the appellees' remaining children, Brandy, Ashley and Dustin. Upon remand, therefore, the appellant Department is directed to monitor the progress of Brandy, Ashley and Dustin in order to make sure that those children are not the subject of abuse or neglect. Syl. pt. 2, In re: Christina L., __ W. Va. ___, 460 S.E.2d 692 (1995).See footnote 6

The final order of the Circuit Court of Barbour County, entered on May 23, 1995, is reversed, and this case is remanded to that court for proceedings consistent with this opinion.

Reversed and remanded.

Footnote: 1 We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P., 182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote: 2 In Jeffrey R.L., this Court emphasized the inconsistency between the mother's explanations of the infant's injuries and the medical evidence:

X-rays revealed that Jeffrey R.L. suffered fifteen fractures to his skull, clavicle, ribs, arms and legs. It is
undisputed that Jeffrey R.L. suffered these extensive injuries as a result of physical abuse, and the physicians diagnosed him as suffering from battered child syndrome.

Yet, his mother, Gail L., gave several possible explanations for the injuries to Jeffrey R.L. She stated that he could have suffered these injuries while he was rolling around in his crib. However, the crib was found by the social worker to be

well-padded. Gail L. also stated that his injuries could be the result of a genetic bone disease from which her grandfather suffered. Yet, after several tests were performed at West Virginia University Hospital, there was no indication that Jeffrey R.L. suffered from any bone disease. Furthermore, Gail L. offered the explanation that Jeffrey R.L. suffered his injuries during birth, despite the fact that the evidence in the record reveals Gail L. experienced a normal vaginal delivery. None of the evidence in the record supports any of Gail L.'s explanations of Jeffrey R.L.'s injuries.

190 W. Va. at 34, 435 S.E.2d at 172. See also In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985), emphasizing in a termination of parental rights case that the parents' explanations for the injuries to the child were inconsistent with the medical evidence.

Footnote: 3 Dr. Gingold testified as follows:

Q. Now, could you tell us what tests were performed?

A. Well, that night they were limited because she was so critically ill, but there was a CAT scan done within hours of her arrival that showed pronounced atrophy of the brain, but also showed lesions in the brain stem.

Q. Doctor, is atrophy of the brain caused -- among other things, due to malnutrition?

A. Definitely.

Q. Did the atrophy of the brain that you observed appear consistent with a history of malnutrition?

A. Chronic malnutrition.

. . . .

Q. One final question. Do you believe that she will be able to fully recover from the condition that she presented herself with in February; or that she will continue to suffer permanent deficits?

A. She will have permanent deficits definitely.

Footnote: 4 Doctor Rosaf testified as follows:

Q. Did you take a history from the parents as to her intake of fluids and nutrition in the preceding period?

A. Yes, I did. They said the child's intake had been down for a few days prior to admission -- that she had a
respiratory infection. But prior to that she had the usual amount of three meals a day and vitamin supplement protein milk shake -- one can a day.

Q. Based on your examination and findings did you find that history to be consistent with what you observed?

A. No, it was not. The amount of protein -- she was receiving was very little protein for several months, and the riboflavin deficiency -- the sores around her mouth indicates she was not receiving vitamins or riboflavin.

. . . .

Q. Could you characterize this condition that you observed?

A. Culture cure.

Q. And is there a classical scenario where you observe this?

A. You see this typically in third world countries where children because of poverty do not receive protein as a food source.

. . . .

Q. No possibility of some type of eating disorder?

A. No.

Footnote: 5 As we said in Maynard:

Trends both in social work and the law relating to child placement indicate an increased awareness of children's rights to such continued association with siblings and other meaningful figures. See generally, Hegar, Legal and Social Work Approaches to Sibling Separation in Foster Care, 67 Child Welfare 113 (1988); Reddick, Juv. Just., Nov. 1974, 31-2. The increased professional emphasis in social work on the sibling relationship is consistent with the broadening focus of the literature about separation. Hegar, supra, 67 Child Welfare at 113. The growing legal emphasis on the best interests of the child as the primary criterion

for child placement decisions facilitates efforts to preserve stable relationships for children. Hegar, supra., Soc. Serv. Rev., Sept., 1983, at 429; see also Note, Visitation Beyond the
Traditional Limitations, 60 Ind. L.J. 191 (1984).

185 W. Va. at 658, 408 S.E.2d at 410.

Footnote: 6 Syllabus point 2 of In re: Christina L., supra, states:

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).

175 W. Va. 137, 331 S.E.2d 868

Supreme Court of Appeals of West Virginia

In the Interest of DARLA B., An Infant Under the Age of 18 Years.

No. 16669

Submitted April 24, 1985.

Decided June 12, 1985.

SYLLABUS BY THE COURT

1. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syl. pt. 1, In Re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980).

2. The decision of a circuit court terminating the rights of parents to their child pursuant to W.Va.Code, 49-6-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life- threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found "compelling circumstances" for the termination of parental rights.

3. The granting of an improvement period, pursuant to W.Va.Code, 49-6-2(b) [1980] and W.Va.Code, 49-6-5(c) [1977], unless otherwise provided by the laws of this State, is not an alternative disposition where a finding is made pursuant to W.Va.Code, 49-6-5(a)(6) [1977] that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future," and, pursuant to W.Va.Code, 49-6-2(b) [1980], "compelling circumstances" justify a denial thereof.

S. Douglas Adkins, Williamson, for Mr. and Mrs. Brewer.

Pamela Lynn Dalton, Williamson, for Darla Brewer.

Robert G. Clarke, Asst. Atty. Gen., Charleston, for Dept. of Human Services.

Jane Moran, Williamson, for intervenor Custodial Caretakers.

McHUGH, Justice:

In this action, the appellants, Dwayne and Tuesday B., appeal from the final order of the Circuit Court of Mingo County, West Virginia, which held that the appellants' daughter, Darla B., was an abused child, and terminated the parental rights of the appellants. The infant was committed to the permanent guardianship of the West Virginia Department of Human Services. This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. Counsel for the respondent and the intervenor, who represented the infant's present custodial caretaker and filed a brief in her behalf, appeared for argument, while counsel for appellants did not.

The appellants, Dwayne and Tuesday B., are the natural parents of Darla B. The infant child, while approximately five weeks old, was hospitalized, suffering from a skull fracture, a brain contusion, fractures of the leg, arm and collarbone, and swellings over the infant's mouth and eye. Medical testing showed that these injuries took place within 48 hours of hospitalization. Additional evidence of a separate, partially healed brain contusion was discovered, which was determined to have been inflicted approximately one week before Darla's other injuries.

As a result of a petition filed by the Department of Human Services, the circuit court entered an order finding Darla B. an abused child, terminating the parental rights of Tuesday and Dwayne B. This finding was based upon medical evidence that injuries of the type suffered by Darla could not have occurred in the fashion in which the appellants testified. Furthermore, the circuit court found that there was no reasonable likelihood that the conditions of abuse could be substantially corrected in the near future.

The issue before this Court thus concerns whether the court below correctly terminated the parental rights of the appellants, and correctly denied the application of the appellants for an improvement period.

The appellants assert several errors in the decision below. First, they suggest the circuit court erred in failing to grant them an improvement period as provided by statute. The appellants suggest that the rights of the infant's parents were not given adequate deference, and that at least one improvement period should be granted before termination.

The appellant parents also maintain that it was error for the trial court to deny the improvement period, inasmuch as statutory language requires granting a less restrictive alternative remedy where such a remedy is present. The appellants suggest that termination of parental rights was not the only remedy, but was the most severe. They assert that the court was required to grant the improvement period, since it would be less restrictive than termination of parental rights.

For reasons stated below, we hold that the action of the circuit court was proper.

West Virginia statutes and case law stress the protection of the parent and child relationship. This Court, in In Re Willis, 157 W.Va. 225, at 237, 207 S.E.2d 129, at 136 (1973), stated that "no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person." [citations omitted]. However, the discussion was followed with the following limiting language:

> Nevertheless, this Court, early in the history of this State, recognized that the right of the natural parent to the custody of his child is not absolute; it is limited and qualified by the fitness of the parent to honor the trust of the guardianship and custody of the child.
>
> 157 W.Va. at 237, 238, 207 S.E.2d at 137.

In the case now before us, the injuries inflicted upon the child were of such magnitude that termination of the parental rights as a result of abuse was the only reasonable conclusion that the trial judge could reach. The testimony of the parents conflicts with all of the medical evidence as to the manner in which the life-threatening injuries occurred. See footnote 1

As indicated above, the appellants contend that the trial court erred in denying an improvement period. W.Va.Code, 49-6-2(b) [1980] provides for the granting of an improvement period, during which the parents may attempt to rectify the conditions upon which the determination of abuse or neglect was based. However, the statute sets forth an occasion when an improvement period may not be granted.

> (b) ... [T]he parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow such an improvement period unless it finds compelling circumstances to justify a denial thereof.... (emphasis added)

The court below found that "compelling circumstances" existed which would merit the denial of the improvement period and described the circumstances as follows:

> This is the most serious, substantial aggravated abuse on the most helpless kind of person that I have ever heard and I find those to be compelling circumstances. The very life of this child is in jeopardy and there exists substantial and real and immediate danger to the physical well being of the child and, in fact, there is a threat to the life of this child.

> [Transcript of Mingo County Circuit Court hearing of Novem ber 29 and 30, 1983, page 68.]

In a recent case, In Re R.J.M., 164 W.Va. 496, 500-501, 266 S.E.2d 114, 117 (1980), the Court stated that an improvement period should be denied based on "compelling circumstances" where parents "routinely flogged their child to within an inch of her life."

The abuse in the case now before us is similar to that discussed in In Re R.J.M. in that Darla B., during the initial five weeks of her existence with her parents, was abused on two separate occasions and both times gravely injured. The trial court properly found "compelling circumstances" to deny an improvement period.

Secondly, the appellants argue that by refusing to grant an improvement period the court did not utilize the least restrictive available remedy, as is required by W.Va.Code, 49-6-5 [1977]. See footnote 2 That statute specifies that, "[t]he court shall give precedence to dispositions in the following sequence ...," thereafter listing remedies which range from dismissing the abuse petition, to terminating parental rights.

The trial court did not err in deciding that there was no less restrictive alternative than termination of parental rights which alternative would protect the infant's well-being. Termination of parental rights is the only appropriate remedy in this case. W.Va.Code, 49-6-5(a)(6) [1977], states, in part:

> (6) Upon a finding that there is no re asonable likelihood that the conditions or neglect or abuse can be substantia lly corrected in th e near future, and when necessary for the we lfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state departm ent or a licensed child welfare agency. (emphasis added).

Importantly, this section defines the phrase, "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected" to include any instance where the parent or parents have repeatedly or seriously physically abused the child. Upon such a finding, W.Va.Code, 49-6-5 [1977], requires termination of parental rights. See footnote 3

We believe termination of parental rights to be the mandated conclusion in this case, in light of the life-threatening conditions Darla B. suffered. We note that the age of Darla B., at the time she sustained the injuries in question was 38 days. The age of children in circumstances similar to those of Darla B. was taken into account by this Court in In Re. R.J.M., supra, where in syllabus point 1 we held:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

The decision of a circuit court terminating the rights of parents to their child pursuant to W.Va.Code, 49-6-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life- threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found "compelling circumstances" for the termination of parental rights.

Further, we note that the granting of an improvement period, pursuant to W.Va.Code, 49-6-2(b) [1980] and W.Va.Code, 49-6-5(c) [1977], unless otherwise provided by the laws of this State, is not an alternative disposition where a finding is made pursuant to W.Va.Code, 49-6-5(a)(6) [1977] that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future," and, pursuant to W.Va.Code, 49-6-2(b) [1980], "compelling circumstances" justify a denial thereof.

The father asserts that he should not have his rights terminated because he was not a direct participant in the acts giving rise to the petition. However, in light of the circumstances of this case, termination of the rights of both parents is the proper result. We note that appellant Dwayne B. supports the testimony of his wife entirely, even though the explanation is inconsistent with the medical evidence. Further, he testified that he was in attendance when the first injury to Darla B. occurred, which involved the child's right frontal lobe. Importantly, the explanation given for this injury by both appellants is inconsistent with the medical evidence. Aside from his direct support of his wife's version of the reasons for the infant's injuries, it is ludicrous for him to assert that he should be held blameless for his nonaction in protecting his child.

Upon all of the above, the final order of the Circuit Court of Mingo County is affirmed.

Affirmed.

Footnote: 1 *Tuesday B. testified that Darla was accidentally injured during an episode in which Tuesday believed her daughter had stopped breathing. Mrs. B. claimed that after a fit of crying, Darla was placed in a crib and became suddenly silent. Mrs. B. leaned over the crib, determined that Darla was not breathing, grasped Darla's body under Darla's arms and shook her.*

Then, according to Mrs. B., she turned Darla onto her stomach and struck her sharply on the back several times. The medical evidence suggested that this action might explain the fractured collarbone, but could not result in the injuries Darla suffered to the skull, arm and leg. Notedly, appellant Dwayne B., although not present at the time of the injury, supports his wife's explanation.

Furthermore, both appellants testified that the earlier injury suffered by the infant resulted from Darla being accidentally struck on the left side of her skull upon a gun rack while being carried by her mother. Both appellants claimed to be in attendance at the time of this injury, and were certain that the described accident involved the left side of Darla's skull. However, the medical evidence revealed that the injury could not have occurred in this manner, since the injury was to the right portion of her skull, rather than the left.

Footnote: 2 *W.Va.Code, 49-6-5, was amended subsequent to the filing of the petition seeking termination of the parental rights. The amendment, however, is not relevant to the circumstances of this action.*

Footnote: 3 *The appellants cite another trial court error which merits little discussion. They assert that the initial abuse petition filed in the circuit court in this case was defective, according to W.Va.Code, 49-6-1(a) [1977]. This statute states, in part: "The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought." The petition involving Darla B. contained an error which made reference to the allegations of specific conduct in Section 4c of the petition rather than Section 4a, the appropriate reference. Nevertheless, the petition filed with the court gave clear warning to the appellants that (1) Darla B. was a suspected victim of abuse, (2) that she was in her parents' custody at the time of the injury, (3) that the explanation given by the parents was not credible, and (4) that the Department of Human Services was seeking temporary custody of Darla, which might later result in the termination of parental rights.*

This Court discussed the sufficiency of neglect petitions in State ex rel. Moore v. Munchmeyer, 156 W.Va. 820, 823-24, 197 S.E.2d 648, 651 (1973), stating that:

Each petition must be evaluated individually. If the allegations of fact in a child neglect petition are sufficiently specific to inform the custodian of the infants of the basis upon which the petition is brought, and thus afford a reasonable opportunity to prepare a

rebuttal, the child neglect petition is legally sufficient. The appellants in the case before us were not hindered or prejudiced in any manner in the preparation of their case.

231 W. Va. 25, 743 S.E.2d 333

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

FILED
May 17, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 12-0994 and 12-1014

IN RE: DARRIEN B. AND ANDREW B.

Appeal from the Circuit Court of Raleigh County
Honorable John A. Hutchison
Civil Action Nos. 10-JA-125-H and 10-JA-126-H

VACATED AND REMANDED WITH DIRECTIONS

Submitted: April 10, 2013
Filed: May 17, 2013

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The opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "'Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.' Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001)." Syl. Pt. 5, *In re T.W.*, __ W.Va. __, 737 S.E.2d 69 (2012).

Per Curiam:

This case is before this Court on the consolidated appeals of the petitioners, Hannah W. and George B.,[1] from the Circuit Court of Raleigh County's July 31, 2012, order terminating their parental rights[2] to their twin boys, Darrien B. and Andrew B. Based upon the record, the parties' briefs, and the arguments presented, the order of the circuit court is vacated and this case is remanded to the circuit court for further proceedings consistent with this opinion.

I. Factual and Procedural Background

On November 2, 2010, Hannah W. ("the mother") took her twenty-three-month-old son Darrien B.[3] to the emergency room at Raleigh General Hospital where she reported that Darrien had been running in the living room of her home when he tripped and fell over a pair of shoes. The mother further reported that the child cried inconsolably after he fell and would not put any weight on his right leg. Darrien was diagnosed with a spiral fracture of his right femur. Because spiral fractures in children are suspicious for abuse, the hospital contacted Child Protective Services ("CPS") of the respondent, the West Virginia

[1]We follow our traditional practice in child abuse and neglect matters, as well as other cases involving sensitive facts, by abbreviating the last names of the parties. *See, e.g., In re Jessica G.*, 226 W.Va. 17, 697 S.E.2d 53 (2010).

[2]Each petitioner has filed a separate appeal from the same underlying order of termination, and this Court has consolidated the appeals for consideration and opinion.

[3]Darrien B. and Andrew B. were born on November 18, 2008.

Department of Health and Human Resources ("the Department"). Hospital records reflect that the emergency room physician informed CPS worker Donna Dickens that a spiral fracture "is very difficult to have with a simple fall from [a] standing position, but he could not make a statement being 100% sure that that is not how the injury occurred." Darrien was transferred to the Charleston Area Medical Center ("CAMC"). The records from CAMC's Emergency Department indicate that "[a]lthough this is very suspicious fracture, we cannot rule in or out the probability of abuse. At this point, we would leave this decision up to Child Protective Services to make and have them be involved with this case."

On the date of Darrien's injury, CPS worker Dickens went to the parents' home to secure custody of Darrien's brother, Andrew B. Ms. Dickens observed that the home was "disheveled" with trash throughout the living room and kitchen. She noted that the kitchen counters were covered with dirty dishes, some with food still left on them, and that there was a "horrible stench" in the apartment. At this same time, George B. ("the father") informed Ms. Dickens that he had voluntarily relinquished his parental rights to a biological daughter from a different relationship because the child wanted to live with her maternal grandparents. Ms. Dickens's subsequent investigation revealed that the father relinquished his parental

rights to his daughter only after CPS instituted an abuse and neglect proceeding arising out of substantiated allegations that the father had sexually abused the child.[4]

On November 4, 2010, the Department filed a verified Petition to Institute Child Abuse and Neglect Proceedings against both parents in the Circuit Court of Raleigh County. The Department alleged that both Darrien and Andrew were abused and/or neglected as defined in West Virginia Code § 49-1-3 *et seq*. (2009 & Supp. 2012) and § 49-6-1 *et seq*. (2009 & Supp. 2012); that "the circumstances in the home where the children live places them in imminent danger[;]" and that "there are no reasonable and effective alternatives to removing the children from the home." The Department also alleged that the father had voluntarily relinquished his parental rights to his daughter, as discussed above.[5] The circuit court entered an order that same day ordering that the petition be filed, transferring custody of the children to the Department, appointing legal counsel for each

[4]The record does not indicate whether criminal charges were ever filed against the father in this regard. The record does reflect that this child was adopted and the case was closed by CPS.

[5]Although the Department mentioned the father's prior voluntary relinquishment in its petition, it did not seek a termination of the father's parental rights to Darrien and Andrew on that basis.

parent, and appointing a guardian *ad litem*[6] to represent the children. The parents waived their preliminary hearing and the case proceeded to adjudication.[7]

An adjudicatory hearing[8] was held before the circuit court during which the emergency room physicians from both hospitals testified to their suspicions of abuse in relation to the spiral fracture suffered by Darrien. However, neither physician could testify to precisely how this particular injury occurred. The parents' medical expert testified and expressed his opinion that there was a "very, very low chance that there was a child abuse type of injury to the right femur fracture." The parents, CPS worker Dickens, an emergency room nurse from Raleigh General Hospital, and a social services specialist from CAMC also testified at this hearing.

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[6]Stacey Fragile, Esq., was appointed as the guardian *ad litem* and appeared for all of the hearings until the last hearing held before the circuit court on June 28, 2012, during which Colleen Brown-Bailey, Esq., appeared as the children's guardian *ad litem*.

[7]In an order entered December 21, 2010, the circuit court directed that both parents undergo a psychological evaluation. The evaluating psychologist issued his reports in which he recommended individual and family counseling; parenting, life skills, and anger management classes; substance abuse counseling and monitoring, including random drug screens; and a monitoring period. The psychologist did not recommend the independent return of the children to the parents or unsupervised visitation with them at that time.

[8]The adjudicatory hearing began on February 2, 2011. It resumed and concluded on February 22, 2011.

On March 16, 2011, the circuit court entered an order based on the evidence presented at the adjudicatory hearing and found, in part, as follows:

> 2. The . . . parents in their testimony have failed to provide a consistent and reasonable explanation of how the injury occurred. There is clear evidence that . . . the parents have given divergent and contradictory descriptions of the events leading to the injury of their child.
>
> 3. There is clear and convincing evidence that the home where the children have resided is maintained in an unsatisfactory and unhealthy manner.
>
> 4. The [Department] has proven by clear and convincing evidence that the injury to the child in this case arose from conditions existing in the home that were directly responsible for the abuse and neglect.
>
> 5. There is no evidence that the injury to the child was the result of intentional conduct of the . . . parents, but the injury was the result of abuse and neglect as defined by West Virginia Code § 49-1-3 et. seq., and § 49-6-1 et. seq.
>
> 6. The infant child, Darrien [B.], is abused and neglected pursuant to West Virginia Code § 49-1-3 et. seq., and § 49-6-1 et. seq., and therefore the infant child Andrew [B.] is also in danger.
>
> 7. The infant children, Darrien [B.] and Andrew [B.], were abused and neglected based on the condition of the home pursuant to West Virginia Code § 49-1-3 et. seq., and § 49-6-1 et. seq.

On June 14, 2011, the circuit court entered an order granting both parents a six-month post-adjudicatory improvement period. Thereafter, the circuit court held review

hearings to assess how the parents were doing in their improvement period. In the circuit court's order entered on November 23, 2011, following one of those review hearings, the court stated that the parents were "having problems keeping their home in a safe and sanitary condition for the children and the home now has roaches due to the unsanitary condition . . . ." In this same order, the circuit court granted the parents an extension of their improvement periods with the added requirement that both parents submit to random drug and alcohol screens.

The circuit court was updated on the status of the parents in a Revised Court Summary dated January 27, 2012, filed in the circuit court. In this Summary, CPS worker Traci Hairston reported that the random drug screens for both parents had been negative and that the Department had made frequent and random visits to the home finding it to be "somewhat clean" at times and "filthy and filled with clutter" at other times.[9] Ms. Hairston further reported in her Summary that although the parents had made progress, they had shown that "they are not capable of providing a stable home environment for their children[;]" that the Department had "made every effort to provide [them] with all possible assistance[;]" and that the parents have been "granted two extensions to their Improvement

[9]This Revised Court Summary also reflects that in-home services provider Kim Jesse informed Ms. Hairston that the parents were about to be evicted from their apartment because their gas had been shut off, which was a breach of their lease, and that the parents could be evicted for their rental delinquency, as well.

Period and have continually failed to change all the safety issues in the home."[10] Ms. Hairston concluded by stating that the Department recommends that "the court move to Disposition and the termination" of the parental rights of both parents.

On February 2, 2012, a review hearing was held before the circuit court during which it was reported that while the parents had made some progress, they had not successfully completed their case plans. At that time, both parents moved for a dispositional improvement period. Soon thereafter, CPS worker Hairston filed a Court Summary in the circuit court dated February 7, 2012. In this Summary, Ms. Hairston reported that the parents had continued to test negative on their drug screens, that the visits between the parents and the children were going well, and that the home had been kept "relatively clean." She further reported, however, that the Department had received a letter from the apartment manager who advised that the parents are constantly behind in their rent; that they have a roach infestation in their apartment; and that they have been noncompliant with their lease. Ms. Hairston concluded that although "the Department was prepared to reunify Andrew and Darrien with their parents it has now become difficult due to the housing issues . . . ."

[10]Ms. Hairston also reported in this Summary that when she visited the home in early December 2011, the mother advised that she did not know how she and the father would support themselves when the children came home because they could not afford to take care of themselves; that the father spent an entire paycheck on a trip to Tennessee; and that they recently purchased a gaming system. This Summary also reflects that Ms. Hairston told the mother that she and the father would not be reunified with the children if they did not keep the home clean and "start making better decisions."

Thereafter, the case moved forward and, on March 9, 2012, the disposition hearing was held before the circuit court. During this hearing, the in-home services provider, Kelli Cook, testified[11] to her belief that the parents had successfully completed their improvement period. She also testified that the gas service had been restored to the apartment; that the home had been clean since January 2012; that both parents had been employed for the last four or five months; and that the roach infestation had been resolved. Ms. Cook further testified that the prior month, the Department had begun weekly overnight in-home visits between the children and the parents and that those visits were going well. Ms. Cook testified that while she would not recommend returning the children to the home immediately, she would say that a transition period of three months for reunification of the children with the parents "if everything stayed clean and all the utilities caught up . . . ."

Following the disposition hearing, the circuit court entered an order on March 23, 2012, directing the Department to continue to provide services and to continue with the visitation between the parents and the children until the court issued its decision on disposition. The circuit court also scheduled "[a]n Improvement Period Review or Motion to Terminate and Court's Decision" hearing for June 28, 2012. On June 27, 2012, the day prior to this hearing, CPS worker Hairston filed a Court Summary in which she reported that

[11]It appears from the record that Kelli Cook replaced Kim Jesse as the in-home services provider around September 2011.

> [t]he Department has grave concerns that the behaviors in the home have not significantly changed as throughout the lifetime of this case George and Hannah have minimally complied in the aspect of they have not missed parenting or adult life skill sessions, but they have not learned how to maintain appropriate housing or safety for the children.
>
> • • •
>
> At this time the Department has reservations about the children being reunified with their parents do [sic] to the consistency of unchanged behaviors throughout this case.[12]

Ms. Hairston concluded her Summary with the Department's final recommendation that the children remain in the legal and physical custody of the Department. Significantly, the Department did not recommend the termination of parental rights in this Summary.

On the following day, June 28, 2012, the previously scheduled hearing was held before the circuit court during which the Department's counsel represented that the Department was seeking the termination of the parental rights of both parents. The guardian *ad litem* expressed her agreement with the Department's position. At the conclusion of this hearing, the circuit court stated:

> This is one of the cases that . . . keeps me up at night. It's very, very clear that the law of the State of West Virginia is . . . that a parent has the constitutional right to raise their own children. Having said that, this Court . . . has found that the children have been abused.

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[12]Ms. Hairston also reported that following the March 9, 2012, disposition hearing, the parents had a bed bug infestation in the home, which had since been resolved.

Now . . . with the Department directly providing services or contracting and having those services provided otherwise, the question is . . . have the parents assimilated the training that they received and have they, in fact, gotten rid of or resolved the issues which created the conditions of abuse and/or neglect as they existed at the time of the filing of the petition. And I have great concerns regarding whether or not these parents have, in fact, fully assimilated . . . the training and recognized the issues that they have . . . in terms of raising these two children.

• • •

The acts and the conduct that created the problem here relate to the injury of Darrien . . . The nature of the broken bone raised all kinds of red flags with the Department and with the doctors at the hospital.

• • •

And, further . . . George [B.] has had prior involvement with Child Protective Services. . . . He relinquished his rights to [another] child . . . after allegations of sexual abuse were substantiated in a preliminary investigation . . . .

• • •

The Court finds that, based upon its involvement in this case, that . . . the parents have failed to adequately improve the conditions that resulted in the abuse and neglect, that they have been unable to or unwilling to adequately change the conditions which resulted in the abuse and neglect despite the fact that the Court has, with the assistance of the Department, attempted to provide additional training, treatment and programs which would have eliminated that.

The Court finds that the history in this case has been that the . . . parents have done the minimum to . . . try to keep the case going and that there's no real evidence that . . . they have - either of them - assimilated the training and accepted the

> training and made . . . the changes necessary to alleviate the conditions.
>
> Therefore, it's the judgement [sic] of the Court that the parental rights of both George [B.] and Hannah [W.] are terminated as to Darrien [B.] and Andrew [B.].

At that point during the hearing, the mother's counsel advised the circuit court, as follows:

> In discussions prior to this hearing . . . with Ms. Hairston, it was not her intention to recommend termination of parental rights to this Court. That isn't what her court summary says.[13] The Court didn't follow the recommendation of the Department.
>
> Moreover, we have the home services worker [Kelli Cook] here today, Your Honor. If - - and perhaps I didn't understand where the Court was in the posture, but if I need to call Kell[i], who is here today, or Ms. Hairston, I want to put their recommendations to this Court on the record. I believe that my client has a right to that.

(Footnote added). The circuit court refused to permit either Ms. Hairston or Ms. Cook to testify stating, "[T]his is a review hearing and a ruling hearing. It was not set up for an evidentiary hearing, so we don't have time."

On July 31, 2012, the circuit court entered an order memorializing its ruling made during the June 28, 2012, hearing and terminating the parents' parental rights to Darrien B. and Andrew B. on the basis that the parents had "failed to change the conditions

[13]Counsel is referring to Ms. Hairston's Court Summary filed with the circuit court the previous day.

which gave rise to this case and failed to assimilate the therapy and training offered by the Department to successfully complete their improvement periods . . . [.]" The circuit court ordered that the visitation between the children and the parents be maintained and that services by the Department continue pending the parents' appeal to this Court.

II. Standard of Review

We are asked to review a circuit court's order entered upon a petition for termination of parental rights. Our standard of review in this regard is well established:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

III. Discussion

In the present appeal, the mother asserts that the circuit court erred during the June 28, 2012, hearing by refusing to allow her counsel to call CPS worker Traci Hairston and in-home services provider Kelli Cook to the witness stand. The mother asserts that both Hairston and Cook were present and were prepared to testify that the children should be reunified with their parents.

We begin our analysis of this issue with our basic tenet that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). The record reflects that even with the extensions to the post-adjudicatory improvement period granted to each parent, as well as the services provided by the Department, the parents could not consistently maintain their apartment in a clean and sanitary manner for the children, keep current on their rent and utilities, and maintain steady employment.

Notwithstanding the parents' inability to fulfill the terms of their improvement period, the termination of parental rights remains the most "drastic remedy" that can be imposed in a case of abuse and neglect. *See* Syl. Pt. 5, in part, *In re Nelson B.*, 225 W.Va. 680, 695 S.E.2d 910 (2010) ("'Termination of parental rights, the most drastic remedy under

the statutory provision covering the disposition of neglected children . . . [.]' Syl. pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).''). Consequently,

> "[w]here it appears from the record that the process established by the rules of Procedure of Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or *frustrated*, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Syl. Pt. 5, *In re T.W.*, __ W.Va. __, 737 S.E.2d 69 (2012) (Emphasis added).

Rule 36(a) of the Rules of Procedure for Child Abuse and Neglect provides, as follows:

> *Findings of fact and conclusions of law; time frame*. — At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provision of W.Va. Code § 49-6-5. The court shall enter a disposition order, *including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing*.

(Emphasis added). Here, the disposition hearing was held on March 9, 2012. On March 23, 2012, the circuit court entered an Order Following Disposition Hearing on Both Parents that simply continued the case on status quo. The circuit court did not set forth findings of fact and conclusions of law in this order. *See Id.* Instead, the circuit court scheduled a hearing

for June 28, 2012, for "Improvement Period Review or Motion to Terminate and Court's Decision."

During the June 28 hearing, the mother's counsel advised the circuit court that he had spoken with CPS worker Hairston, who allegedly advised him that the Department would *not* be seeking a termination of parental rights that day. Counsel's representation was arguably consistent with Ms. Hairston's Court Summary filed with the circuit court the prior day in which the Department did *not* seek a termination of parental rights. Accordingly, the circuit court should have permitted the mother's counsel to call Ms. Hairston to the witness stand for the limited purpose of exploring the Department's position with regard to termination. Indeed, given the length of time that had passed since the disposition hearing (almost four months), it was particularly important to have taken the testimony of the in-home services provider who had presumably continued to provide services to the parents per the circuit court's March 23, 2012, order.

Under the facts and circumstances herein, this Court concludes that the disposition in this case was frustrated when the circuit court refused to allow counsel to call Ms. Hairston and Ms. Cook to the witness stand during the June 28, 2012, hearing. Accordingly, we remand this case for the purpose of holding an evidentiary hearing to allow the parents' counsel to call Ms. Hairston and Ms. Cook as witnesses to explore the

Department's position with respect to the termination of the parental rights to Darrien and Andrew.[14]

Another matter to be addressed on remand is the father's prior voluntary relinquishment of parental rights to his biological daughter, as discussed above. "The revocation of a parent's parental rights, whether by *voluntary relinquishment* or by involuntary termination, *is a very serious matter*." *In re Cesar L.*, 221 W.Va. 249, 257, 654 S.E.2d 373, 381 (2007) (emphasis added); *see also In re James G.*, 211 W.Va. 339, 346, 566 S.E.2d 226, 233 (2002) ("Nothing prevents the Department from conducting an investigation if it believes that a parent who has *voluntarily terminated* parental rights with respect to one child might be mistreating another child . . . ." (Emphasis added).). Further, West Virginia § 49-6-5(a)(7) provides, in relevant part, that "[f]or purposes of the court's consideration of the disposition custody of a child . . . the department is *not* required to make reasonable efforts to preserve the family if the court determines: (A) The parent has subjected . . .

[14]We note that the circuit court's July 31, 2012, order terminating the parents' parental rights does not cover the requisite statutory factors under West Virginia Code § 49-6-5(a)(6), although the findings it made during the June 28, 2012, were arguably sufficient. *See In re Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41 (1999) (upholding termination of parental rights where transcript of dispositional hearing, rather than order of termination, satisfied Court that lower court had made findings required by West Virginia Code § 49–6–5(a)(6)). Nonetheless, on remand, the order entered by the circuit court should comply with this statute.

another child of the parent . . . to aggravated circumstances which include . . . *sexual abuse*[.]" *Id.* (Emphasis added). Moreover, as this Court has stated on many occasions,

> [t]he guiding principle in any child abuse or neglect proceeding is to do what is best for the child: "First and foremost in a contest involving the custody of a child is the consideration of that child's welfare. It has been held repeatedly by this Court that the welfare of the child is the polar star by which the discretion of the court will be guided."

In re: Kyiah P., 213 W.Va. 424, 429, 582 S.E.2d 871, 876 (2003) (internal citations omitted).

Here, while the Department's petition to institute these proceedings alleged, in part, that the father had voluntarily relinquished his parental rights to a biological daughter after allegations of sexual abuse were substantiated, and while the circuit court acknowledged this prior relinquishment on the record at the conclusion of the June 28, 2012, hearing,[15] we conclude that these prior substantiated allegations of sexual abuse must be more fully explored and addressed on remand. This would include, but is not necessarily limited to, whether there was an adjudication in this earlier child abuse proceeding against the father and whether these substantiated allegations of sexual abuse constitute a separate

[15]The circuit court stated that the father "has had prior involvement with Child Protective Services" and had "relinquished his rights to [another] child . . . after allegations of sexual abuse were substantiated in a preliminary investigation[.]"

and/or additional basis for the termination of the father's parental rights to Darrien B. and Andrew B.

Accordingly, this Court vacates the circuit court's July 31, 2012, order and remands this case to the circuit court for a full evidentiary hearing to explore the Department's position concerning the termination of the petitioners' parental rights to Darrien B. and Andrew B. and to further address the substantiated allegations of sexual abuse involving the father and his biological daughter to whom he voluntarily relinquished his parental rights.[16]

IV. Conclusion

Based upon this Court's thorough review of this matter and for the foregoing reasons, the order of the Circuit Court of Raleigh County terminating the parental rights of the parents with regard to Darrien B. and Andrew B. is hereby vacated and this case is remanded to the circuit court for an expedited evidentiary hearing consistent with this

[16]We find that the other assignments of error asserted by the parents in the case *sub judice*, including, but not limited to, the father's argument that the circuit court erred in denying him a dispositional improvement period and in failing to place adequate weight on the recommendations of the Department and the in-home services provider, need not be addressed as they have either been rendered moot by this Court's opinion herein and/or will necessarily be considered anew by the circuit court on remand. *See Cole v. Fairchild*, 198 W.Va.736, 752 n. 22, 482 S.E.2d 913, 929 n. 22 (1996) ("The parties raise a number of other alleged errors in their briefs . . . We carefully have reviewed each alleged error and find they . . . are rendered moot by our above decision . . . .").

opinion. To facilitate the commencement of the proceedings on remand, the Clerk is directed to issue the mandate of the Court contemporaneously with the issuance of this opinion.

Vacated and Remanded with Directions.

192 W. Va. 663, 453 S.E.2d 646

Supreme Court Of Appeals Of West Virginia

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES EX REL.
BRENDA WRIGHT, SOCIAL SERVICE WORKER Petitioner
v.
DAVID L., JILL L., CHELSEA L., ASHLEY L., AND JOSHUA L.,
Respondents

No. 22311
Submitted: September 20, 1994
Filed: December 15, 1994

SYLLABUS BY THE COURT

1. "One spouse's interception of telephone communications by the other is a violation of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq., which by its terms renders them inadmissible." Syllabus Point 15, Marano v. Holland, 179 W. Va. 156, 366 S.E.2d 117 (1988).

2. "'Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.' Syllabus Point 1, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968)." Syllabus Point 1 of State v. Boatright, 184 W. Va. 27, 399 S.E.2d 57 (1990).

3. Any recordings of conversations made in violation of W. Va. Code, 62-1D-3(a)(1) (1987), and 18 U.S.C. § 2511(1)(a) (1988) are inadmissible under W. Va. Code, 62-1D-6 (1987), and 18 U.S.C. § 2515 (1968).

4. A parent has no right on behalf of his or her children to give consent under W. Va. Code, 62-1D-3(c)(2) (1987), or 18 U.S.C. § 2511(2)(d) (1988) to have the children's conversations with the other parent recorded while the children are in the other parent's house.

5. "In domestic cases involving allegations of abuse and neglect, a circuit court or family law master may order that a home study be performed to investigate the allegations under Rule 34(b) of the Rules of Practice and Procedure for Family Law." Syllabus Point 5, John D.K. v. Polly A.S., 190 W. Va. 254, 438 S.E.2d 46 (1993).

Margaret Phipps Brown, Assistant Prosecuting Attorney for Cabell County, Huntington, West Virginia, Attorney for the Petitioner

James B. Lees, Jr., Hunt, Lees, Farrell & Kessler, Charleston, West Virginia, Attorney for the Respondent David L.

William D. Levine, J. William St Clair, St Clair & Levine, Huntington, West Virginia, Attorney for the Respondent Jill L.

Cleckley, Justice:

This case involves two certified questions relating to the Wiretapping and Electronic Surveillance Act, W. Va. Code, 62-1D-1, et seq., and its federal counterpart in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq. The certified questions involve whether a husband, who no longer lives with his wife, but who suspects his wife of abusing their children, may use a third person with access to the wife's house to place a voice-activated tape recorder in the wife's house to record conversations between his wife and their children. We hold such conduct violates W. Va. Code, 62-1D-3(a)(1) (1987), and 18 U.S.C. § 2511(1)(a) (1988). Therefore, the audiotapes are inadmissible under W. Va. Code, 62-1D-6 (1987), and 18 U.S.C. § 2515 (1968).

I.
FACTS

Jill L. See footnote 1 filed for a divorce from David L. in October, 1993, and she was given temporary custody of their twin daughters, Ashley L. and Chelsea L., ages 6, and their son, Joshua L., age 5. Jill L. continued to reside in the marital home, and David L. moved. After the couple separated, but prior to their divorce, David L. asserts he became concerned that the children were being abused by Jill L., so he asked his mother, the children's paternal grandmother, to place a voice-activated tape recorder in the children's bedroom to record conversations between Jill L. and the children. The paternal grandmother had access to the home because she babysat the children. Through his mother, David L. retrieved a series of tape-recorded conversations. Jill L. was unaware the recordings were being made.

After listening to these conversations, David L. gave the tapes to his lawyer See footnote 2who approached the Cabell County Prosecuting Attorney's Office. A therapist for Family Services, Inc., and a child protective service worker for the Department of Health and Human Resources (DHHR) listened to at least some of the tapes. Thereafter, on April 29, 1994, the DHHR filed a petition in the Circuit Court of Cabell County, and, by an order dated the same day, the DHHR, inter alia, was granted temporary legal and physical custody of the children. The order also authorized the DHHR to place physical custody of the children with David L.

A hearing on the petition was held on May 2, 1994. At the hearing, the child protective service worker testified she spoke with the children for about twenty minutes. She said the children indicated to her that Jill L. screams excessively at

them and made a comment to the effect "she would kill them." One of the girls said she hides in the basement or behind a chair and covers her ears when her mother screams. In addition, all the children indicated Jill L. sometimes uses a belt, and Joshua L. indicated he suffered a bruise on his buttocks from a belt at least once. The child protective service worker stated she saw no signs of physical abuse on the children at the time she met with them, and she said they did not appear to be malnourished.

The child protective service worker also spoke with David L. and the children's paternal grandmother. See footnote 3 It was reported to her that Jill L.'s screams could be overheard by neighbors and Jill L. did not keep adequate food in the house. She attempted unsuccessfully to contact Jill L. After the child protective service worker testified, the circuit court judge stated the hearing could continue, but he wanted to speak personally with the children the next day. The hearing then concluded, and no one else testified.

According to the brief on behalf of the DHHR, after the circuit court judge interviewed the children, but before the hearing resumed, the judge, Jill L., and her lawyer learned of the audiotapes. Jill L. and her lawyer, David L. and his lawyer, and the guardian ad litem for the children listened to the tapes. Afterwards, Jill L. agreed to maintain the custody arrangement as per the temporary order dated April 29, 1994. The circuit court judge apparently did not listen to the tapes and ordered them sealed.

On May 16, 1994, Jill L. filed a motion to vacate the order dated April 29, 1994, and award her custody of the children. In support of her motion, Jill L. asserted the DHHR failed to show by admissible evidence that she abused her children. The circuit court heard arguments on the admissibility of the audiotapes, and, by order dated May 26, 1994, the circuit court certified the following two questions to this Court:

> "1. Does W. Va. Code 62-1D-3(a)(1) and i ts federal equi valent, 18 U.S.C. 2511, apply to a cust ody dispute where a father, upon suspicion of abusive behavior t oward his children, pr ocures a third party with access to the marital hom e to place a self-activating tape recorder in the children 's bedr oom for the purpose of recording conversations and i nteractions between the wif e/mother and children?
>
> "2. Are tape recordings which are the product of such interceptions admissible as evidence in a hearin g to determine both temporary and permanent physical and legal custody?"

The circuit court ruled the tape recordings violated W. Va. Code, 62-1D-3(a)(1), and were inadmissible under W. Va. Code, 62-1D-6. See footnote 4 This Court reviews questions of statutory interpretation de novo. See Mildred L.M. v. John O.F., ___ W.Va. ___, ___ S.E.2d ___ (No. 22037 12/8/94).

II.
DISCUSSION

As the circuit court indicates in its first certified question, this case specifically is controlled by W. Va. Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511 (1988). W. Va. Code, 62-1D-3(a)(1), provides: "(a) Except as otherwise specifically provided in this article, it is unlawful for any person to: (1) Intentionally intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication[.]" The federal version of the statute set forth in 18 U.S.C. § 2511(1)(a) is substantially similar. See footnote 5 If communications are intercepted in violation of the provisions of W. Va. Code, 62-1D-3(a)(1), or 18 U.S.C. 2511(1)(a), such communications are inadmissible as evidence under W. Va. Code, 62-1D-6, and 18 U.S.C. § 2515. See footnote 6

West Virginia's Wiretapping and Electronic Surveillance Act was adopted in 1987. Since its adoption, we have not addressed the issue of whether the Act prohibits the type of audiotaping at issue in this case. We did, however, address the parallel federal version of the Act in Marano v. Holland, 179 W. Va. 156, 366 S.E.2d 117 (1988), where we stated in Syllabus Point 15:

> "One spouse 's interce ption of te lephone communications by the other is a violation of the Om nibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq., which by its terms renders them inadmissible."

David L. argues the facts of the present case are significantly different from the facts in Marano and the facts of the cases cited by Marano. Therefore, David L. asserts that Syllabus Point 15 of Marano should not apply to this case. Although we generally agree with David L. that the facts of the present case are different from the others, we find the holding in Marano and the holdings of several other federal courts are sufficiently analogous to conclude David L.'s conduct, via his mother, is prohibited under W. Va. Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511(1)(a).

In Marano, a criminal defendant argued he was denied effective assistance of counsel, in part, by his lawyer's failure to seek the admission of certain audiotapes. The defendant surreptitiously audiotaped his wife's telephone conversations which revealed his wife was engaged in several extramarital relationships. Upon listening

to some of the audiotapes, the defendant learned his wife was sexually involved with a close friend and business partner. The defendant then killed the man.

Upon review of the habeas corpus relief granted to the defendant by the Circuit Court of Ohio County, we disagreed with the circuit court's finding "that the failure to introduce the tapes 'seriously jeopardized' the defendant's case, in that they would have buttressed his insanity defense and provided a basis for a backup defense of diminished capacity." 179 W. Va. at 172, 366 S.E.2d at 133. (Footnote omitted). We found a majority of jurisdictions held such audiotapes violated 18 U.S.C. § 2510, et seq. Therefore, such audiotapes were inadmissible under 18 U.S.C. § 2515. 179 W. Va. at 172, 366 S.E.2d at 133. As support, we cited United States v. Jones, 542 F.2d 661 (6th Cir. 1976); United States v. Rizzo, 583 F.2d 907 (7th Cir. 1978), cert. denied, 440 U.S. 908, 99 S. Ct. 1216, 59 L.Ed.2d 456 (1979); Heyman v. Heyman, 548 F. Supp. 1041 (N.D. Ill. 1982); and Gill v. Willer, 482 F. Supp. 776 (W.D.N.Y. 1980).

We recognize that these cases are factually different from the case at bar. The courts in Jones, 542 F.2d at 667, Heyman, 548 F. Supp. at 1045, and Gill, 482 F. Supp. at 778, however, all found the language of 18 U.S.C. § 2511(1)(a) is clear and unambiguous and prohibits all interceptions of wire communications unless otherwise explicitly permitted. See footnote 7 Consequently, these three cases declined to follow the decision in Simpson v. Simpson, 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897, 95 S. Ct. 176, 42 L.Ed.2d 141 (1974). See footnote 8

In Simpson, after reviewing and finding the legislative history inconclusive, the Fifth Circuit ruled that 18 U.S.C. § 2510, et seq., did not apply to wiretapping a marital home's telephone and recording a spouse's conversations. Finding 18 U.S.C. § 2511(1)(a) was clear and unambiguous, the courts in Jones, Heyman, and Gill stated the Fifth Circuit violated the canon of not resorting to legislative history unless a statute is unclear or ambiguous. 542 F.2d at 667; 548 F. Supp. at 1045; 482 F. Supp. at 778. Citing United States v. Oregon, 366 U.S. 643, 648, 81 S. Ct. 1278, 1281, 6 L.Ed.2d 575, 579 (1961).

We agree with Jones, Heyman, and Gill that an analysis of legislative history is not necessary where a statute is clear and unambiguous. As we stated in Syllabus Point 1 of State v. Boatright, 184 W. Va. 27, 399 S.E.2d 57 (1990):

> "'Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unam biguous will be applied and not construed.' Syllabus Poi nt 1, State v. Elder , 152 W. Va. 571, 165 S.E.2d 108 (1968)."

We further said in Boatright, "[o]ne canon of statutory construction is to follow the statute's plain, unambiguous language. 'When the statute is unambiguous on its face, there is no real need to consider its legislative history.'" 184 W. Va. 29, 399 S.E.2d at 59. (Citations omitted).

Nevertheless, in response to the examination of the legislative history the Fifth Circuit did in Simpson, supra, the Sixth Circuit in Jones, supra, conducted its own analysis. The Sixth Circuit explained that even upon a "review of the legislative history . . . , testimony at congressional hearings, and debates on the floor of Congress," it was led to the inescapable "conclusion that 18 U.S.C. § 2511(1)(a) establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation." 542 F.2d at 669. (Footnote omitted). See also United States v. Giordano, 416 U.S. 505, 514, 94 S. Ct. 1820, 1826, 40 L.Ed.2d 341, 353 (1974) (where the Supreme Court said "[t]he purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act[.]" (Footnote omitted)).

The Sixth Circuit also distinguished the facts of its case from the Simpson case. In Simpson, the wiretapping occurred while the couple was still married and living in the same house. However, in Jones, the wiretapping occurred while the husband and wife were separated and living apart from each other. Thus, the Sixth Circuit concluded, "[u]nder these circumstances, we do not find applicable the implied interspousal exception to the wiretap statute recognized in Simpson." 542 F.2d at 673. Similarly, other courts, including our Fourth Circuit, generally have held there is no interspousal exception to 18 U.S.C. § 2510, et seq. See Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984); Platt v. Platt, 951 F.2d 159 (8th Cir. 1989); Kempf v. Kempf, 868 F.2d 970 (8th Cir. 1989); Thompson v. Dulaney, 970 F.2d 744 (10th Cir. 1992); Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991), cert. denied, U.S. , 112 S. Ct. 1514, 117 L.Ed.2d 651 (1992); Ex parte O'Daniel, 515 So.2d 1250 (Ala. 1987); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976); Pulawski v. Blais, 506 A.2d 76 (R.I. 1986). But see Anonymous v. Anonymous, 558 F.2d 677 (2nd Cir. 1977); Janecka v. Franklin, 684 F. Supp. 24 (S.D.N.Y. 1987), aff'd, 843 F.2d 110 (2nd Cir. 1988).

Applying the language of 18 U.S.C. § 2510, et seq., to the facts of the case at bar, we find there is no indication that Congress intended to create an exception for a husband, living apart from his wife, to procure a third person surreptitiously to tape record conversations between his wife and their children in the wife's house. We find it is insignificant that this case does not involve the interception of wire communications, i.e., telephone lines, in that 18 U.S.C. § 2511(1)(a) specifically applies to "any wire, oral, or electronic communication[.]" (Emphasis added).

Similarly, we find W. Va. Code, 62-1D-3(a)(1), is clear and unambiguous and it, too, prohibits this type of conduct. Therefore, any recordings of conversations made in violation of W. Va. Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511(1)(a) are inadmissible under W. Va. Code, 62-1D-6, and 18 U.S.C. § 2515.

The DHHR contends Jill L.'s conversations with her children do not fall within the parameters of 18 U.S.C. § 2511(1)(a), and W. Va. Code, 62-1D-3(a)(1), because she had no reasonable expectation her conversations were private. As support, the DHHR states that "neighbors have reported hearing [Jill L.'s] emotional outbursts toward her children, even when [Jill L.] and the children are inside their home. In fact, on one occasion, a neighbor outside in his yard using a power tool reported that he heard [Jill L.'s] screams over the noise of the tool." Thus, the DHHR argues Jill L.'s conversations are not "oral communications" as defined by 18 U.S.C. § 2510(2) (1986), and W. Va. Code, 62-1D-2(h) (1987).

Both statutes, 18 U.S.C. § 2510(2), and W. Va. Code, 62-1D-2(h), define oral communication as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." We find the DHHR's argument to be without merit. First, none of the neighbors testified at the hearing on May 2, 1994. In fact, at that point, it only had been reported to the DHHR that the neighbors overheard Jill L.'s screams, and the child protective service worker testified she had not actually spoken to any of them. As a result, even if we assume the neighbors did overhear Jill L.'s screaming, we do not know what the neighbors overheard or when they overheard it. Moreover, it virtually would be impossible to determine if the episodes the neighbors overheard are the exact same episodes recorded on the audiotapes.

Second, even if the neighbor's overheard various conversations Jill L. had with her children while Jill L. and the children were within their house, it did not give David L. carte blanche authority to procure a third person to hide a voice-activated tape recorder in the children's bedroom to record all conversations between Jill L. and the children. Certainly, Jill L.'s reasonable expectation of privacy would preclude such a serious intrusion.

The DHHR next argues that regardless of the policy reasons to protect Jill L.'s right to privacy, her right must be determined to be subordinate and, thus, succumb to the best interests of the children. We agree with the DHHR that the best interests of the children are of preeminent concern in child custody cases and to this Court. See Judith R. v. Hey, 185 W. Va. 117, 120, 405 S.E.2d 447, 450 (1990); Honaker v. Burnside, 182 W. Va. 448, 450-51, 388 S.E.2d 322, 324 (1989). However, under the facts of this case, it is not necessary for this Court to

choose between Jill L.'s right to privacy and the best interests of the children. If the DHHR is correct in stating the neighbors have overheard Jill L.'s "emotional outbursts," then the audiotapes are not necessary to establish this claim. If they wish, the DHHR or David L. can call the neighbors to testify at the custody hearing. In addition, direct information given by the children or other types of admissible evidence, i.e., reports with regard to psychological examinations, may all be considered by the circuit court to determine the best interests of the children.

As a final argument, David L. asserts the tape recordings were not unlawfully obtained under W. Va. Code, 62-1D-3(c)(2) (1987), because he informed the children he would be recording in their bedroom at some unspecified time. David L. argues that he, as the children's father, had authority to give their consent under W. Va. Code, 62-1D-3(c)(2), which provides, in relevant part: "It is lawful . . . for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception[.]" Substantially similar language also is contained in 18 U.S.C. § 2511(2)(d). See footnote 9 David L. cites no law in support of his position.

The closest case we can find to support David L.'s contention is Thompson v. Dulaney, 838 F. Supp. 1535 (D. Utah 1993). In Thompson, Denise Dulaney and James Thompson were living apart from one another and in the process of getting a divorce when Ms. Dulaney tape recorded certain telephone conversations between Mr. Thompson and their children, ages three and five. During the custody hearings, Ms. Dulaney introduced transcripts of several conversations. The state court found both parents were fit, but awarded custody to Ms. Dulaney. Subsequently, Mr. Thompson filed suit alleging, in part, Ms. Dulaney's actions violated 18 U.S.C. § 2510, et seq.

Ms. Dulaney said she recorded the conversations because Mr. Thompson was interfering with her and the children's relationship. One of the defenses Ms. Dulaney raised to Mr. Thompson's suit was that under 18 U.S.C. § 2511(2)(d), she had "the parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent[.]" See footnote 10 838 F. Supp. 1544. Ms. Dulaney cited a litany of Utah law which grants to her the right to make various decisions for her children. In this respect, the court stated "Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child." 838 F. Supp. at 1544. In addition, the court said it was "a close and difficult question," and carefully limited its holding to the particular facts before it. 838 F. Supp. at 1544. The court then went on to hold

> "as long as the guardi an has a good faith basis that is objectively reasonable for believi ng that it is ne cessary to consent on be half of

> her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children." 838 F. Supp. at 1544.

We do not disagree with the reasoning in Thompson; however, we determine the facts of the present case are different from the facts in Thompson in two significant respects. First, the children were physically residing with Ms. Dulaney at the time the conversations were recorded. Second, the conversations were recorded from a telephone in the house where Ms. Dulaney and the children resided.

On the other hand, in the present case, first, Jill L., not David L., was awarded temporary custody of the children during the divorce proceedings. Second, the recordings occurred in Jill L.'s house, not David L.'s house, and he had absolutely no dominion or control over Jill L.'s house where he procured his mother's assistance to hide the tape recorder. Thus, under the specific facts of the case before us, we hold a parent has no right on behalf of his or her children to give consent under W. Va. Code, 62-1D-3(c)(2), or 18 U.S.C. § 2511(2)(d), to have the children's conversations with the other parent recorded while the children are in the other parent's house. Therefore, David L. is not protected by the consent language in W. Va. Code, 62-1D-3(c)(2), or 18 U.S.C. § 2511(2)(d). See footnote 11

Finally, we mention we are very much concerned that the best interests of these children are protected in the custody hearings. With regard to this concern, we direct the circuit court to order the DHHR to conduct home studies of both parents See footnote 12 if such studies are not already complete and satisfactory. As we state in Syllabus Point 5 of John D.K. v. Polly A.S., 190 W. Va. 254, 438 S.E.2d 46 (1993):

"In domestic cases involving allegations of abuse and neglect, a circuit court or family law master may order that a home study be performed to investigate the allegations under Rule 34(b) of the Rules of Practice and Procedure for Family Law."

The circuit court must examine closely the evidence on the fitness of both parents to determine whether Jill L. or David L. should be awarded permanent custody of their children. We further order both the circuit court and the DHHR to expedite this matter so the custody issue is resolved. See John D.K., supra; In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

III.

CONCLUSION

For the foregoing reasons, we hold the recordings violated W. Va. Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511(1)(a), and may not be admitted into evidence in the custody proceedings under W. Va. Code, 62-1D-6, or 18 U.S.C. § 2515. We, therefore, agree with the circuit court's conclusions with regard to the certified questions. See footnote 13

The certified questions having been answered, this case is dismissed from the docket. See footnote 14

Answered and dismissed.

Footnote: 1 As is our practice in cases involving sensitive facts, we do not use the last names to avoid stigmatizing the parties. See, e.g., State v. Derr, W. Va. , S.E.2d (No. 22101 11/18/94); State ex rel. Div. of Human Serv. by Mary C.M. v. Benjamin P.B., 183 W. Va. 220, 395 S.E.2d 220 (1990).

Footnote: 2 David L. is represented by a different lawyer on appeal.

Footnote: 3 In addition, she spoke with the therapist from Family Services, Inc., who apparently talked to the children, but did not appear herself in court to testify. She also talked to the girls' kindergarten teacher who could not give her any specific information.

Footnote: 4 By order dated June 22, 1994, this Court stayed all proceedings in the circuit court while we reviewed the certified questions. Subsequently, by order dated June 30, 1994, we clarified the stay to permit the DHHR to proceed with actions necessary to meet the best interests and needs of the children.
In its brief, the DHHR reports the children continue to have problems with Jill L. during visitations. These problemsinclude "spankings and hittings, sometimes resulting inbruises, and emotional tirades directed toward them." The DHHR states the circuit court now has "entered an order more specifically setting out the terms of the supervision during visitation and abating all physical discipline of the children by either parent until further order of the Court."

Footnote: 5 18 U.S.C. § 2511(1)(a) states:
"(1) Except as otherwise specifically provided in this chapter any person who--
"(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
* * *
shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)."

Footnote: 6W. Va. Code, 62-1D-6, states:
"Evidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received in evidence only in grand jury proceedings and criminal proceedings in magistrate court and circuit court: Provided, That evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding."
Likewise, 18 U.S.C. § 2515 provides:
"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Footnote: 7 One of the exceptions under 18 U.S.C. § 2510, et seq., is set forth in 18 U.S.C. § 2516 (1988), which authorizes the interception of wire, oral, or electronic communications in certain situations. 18 U.S.C. § 2516(2) provides: "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses." (Emphasis added).
Therefore, under 18 U.S.C. § 2516(2), a prosecuting attorney may request a circuit court to enter an order permitting the interception of communications in certain situations.
In West Virginia, certainly child abuse and neglect are considered crimes that are "dangerous to life [and] limb . . . and [are] punishable by imprisonment for more than one year." 18 U.S.C. § 2516(2). See W. Va. Code, 61-8D-1, et seq. However, our legislature did not include child abuse and neglect in the statute authorizing interceptions of communications. W. Va. Code, 62-1D-8 (1987), permits an order

authorizing interceptions of communications where there is "reasonable cause to believe the interception would provide evidence of the commission of" certain enumerated crimes. Among the crimes listed are those generally involving kidnapping and abduction; escape or aiding an escape by an inmate; "dealing, transferring or trafficking in any controlled substance or substances"; or aiding or abetting or conspiring to commit any of these offenses. We leave it to the sound discretion of the legislature if it chooses to amend W. Va. Code, 62-1D-8, to include such serious crimes as child abuse and neglect.

Upon its consideration of this issue, the legislature similarly should contemplate establishing a procedure whereby a parent could, under the authority of W. Va. Code, 62-1D-3(c)(2), be permitted to request an ex parte hearing before a circuit court for the purposes of obtaining the circuit court's permission on behalf of the child to tape record conversations when there is a reasonable basis for believing that child abuse is occurring or is about to occur. Just as a circuit court often is authorized to make or approve other decisions on behalf of minors and others under disability, so, too, should the circuit court have the authority, upon findings of fact tending to demonstrate the likelihood that child abuse is occurring, to consent to such recordings on behalf of the minor. See, e.g., W. Va. Code, 16-2F-4 (1984) (setting forth right of minor to petition circuit court for waiver of parental notification necessary for abortion); see also W. Va. Code, 44A-1-1 to -7 (circuit courts have appointment, modification, and termination powers as to guardians and conservators for protected persons); W. Va. Code, 56-4-10 (1923) (noting the duty of the circuit court to see that estate of infant or insane is both represented and protected); W.Va.R.Civ.P. 17(c) (guardian may sue on behalf of infant or incompetent).

Certainly, it would open a Pandora's Box of possible abuse to permit one parent to have open season on the interception of conversations of his or her former spouse in the name of child protection without any real safeguard in place for determining whether there was a legitimate and reasonable basis for such interception. However, in a truly legitimate case, a neutral judicial officer should have the authority to hear evidence to determine whether such interception is warranted and to limit the parameters of such interception in the least obtrusive manner possible, while still accomplishing its legitimate purpose.

Footnote: 8 In the other case cited by Marano, supra, United States v. Rizzo, supra, the Seventh Circuit factually distinguished the case before it from Simpson, supra, and said it "need not choose between the interpretations given the statute in Simpson and in Jones[, supra]." 583 F.2d at 909.

Footnote: 9 18 U.S.C. § 2511(2)(d) provides, in part:

"It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a

party to the communication or where one of the parties to the communication has given prior consent to such interception[.]"

Footnote: 10 The court found because of the children's ages, three and five, the children "clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent." 838 F. Supp. at 1543.

Footnote: 11 We draw a distinction between the present situation and a situation in which a guardian, who lives with the children and who has a duty to protect the welfare of the children, gives consent on behalf of the children to intercept telephone conversations within the house where the guardian and the children reside.

Footnote: 12 Jill L. alleges in her brief that David L. "has a history of alcohol abuse and . . . [has] physically terrorized [her] both during their marriage and after their separation."

Footnote: 13 We specifically do not address the propriety of any civil or criminal action that may be brought as the result of these recordings.

Footnote: 14 We question whether this case was an appropriate case for certified questions. Cf. Bass v. Coltelli, W. Va. , S.E.2d (No. 22304 12/12/94).
No. 22311 - West Virginia Department of Health and Human Resources ex rel. Brenda Wright, Social Service Worker v. David L., Jill L., Chelsea L., Ashley L., and Joshua L.

Neely, J., concurring:

This case is like a single log floating upstream that neither notes nor considers the rush of other logs in downriver traffic. Although I agree that this log-- case -- is properly headed, I pause to consider the downriver traffic.

The majority holds, and I agree, that audiotapes surreptitiously recorded by one spouse in the house of the other estranged spouse are inadmissible under W. Va. Code 62-1D-3(a)(1) [1987]; however, the majority fails to see or consider the conflict between W. Va. Rules of Evid. and W. Va. Code 62-1D-3(a) [1987]. See footnote 1

First, under the Rules of Evid. these audiotapes are admissible. Rule 402 states that "[a]ll relevant evidence is admissible." Relevant evidence is defined by Rule

401 to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, the audiotapes are of Jill L.'s conversations with her children. These conversations show facts that are "of consequence to the determination of" the question of Jill L.'s alleged abuse of her children. Thus under Rule 402 the audiotapes are admissible.

Second, by using the reasoning of Gilman v. Choi, 185 W. Va. 177, 406 S.E.2d 200 (1990)(refusing to recognize the conflict between W. Va. Code 55-7B-7 [1986] and Rule 702, W. Va. Rules of Evid.) and Teter v. Old Colony Co., 190 W. Va. 711, 441 S.E.2d 728 (1994) (W. Va. Rules of Evid., Rule 702 prevails over W. Va. Code 37-14-3(a)'s license or certification requirement for real estate appraisers), the Court could have used the Rules to invalidate the specific statute. Indeed in this case the reasoning of Gilman and Teter requires the Court to ignore the legislature's prohibition against wiretapping-- a mere section of the Code -- to cite to this Court's rule-making authority as set forth in Syllabus Points 1 and 2 of Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988) See footnote 2 and to admit the audiotapes.

Today's opinion ignores the conflict between "procedural" and "substantive" mechanisms and circuit courts are left without guidance concerning when to follow a restrictive statute or the more liberal W. Va. Rules of Evid. As stated in my dissent in Gilman 185 at 190, 406 S.E.2d at 213, this Court should not use court-promulgated rules "to foreclose the use of tools such as modifications of the law of evidence traditionally thought to be available to legislatures." See Reed v. Phillips, ___ W. Va. ___, ____, ____ S.E.2d ___, ____ (No. 22196 Filed December 8, 1994)(Neely, J. dissenting)(judicial branch should not use "precious reasoning. . .[to] confound . . .[a] legitimate political compromise").

I concur in the direction of this log but pause to wonder at what the majority does not see or discuss.

Footnote: 1 I recognize that this case can also be decided exclusively under 18 U.S.C. § 2511 and the U.S. Constitution Supremacy Clause. But the majority didn't decide that way, thus allowing me to have my usual fun with result-oriented principle manipulation.

Footnote: 2 Syl. pts. 1 and 2 of Bennett, supra provide:
1. Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law.

2. "Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.Pt. 1, Stern Brothers, Inc. v. McClure, 160 W.Va. 567, 236 S.E.2d 222 (1977).

182 W. Va. 57, 385 S.E.2d 912

Supreme Court of Appeals of West Virginia

DAVID M.

v.

MARGARET M.

No. 19020.

Oct. 19, 1989.

SYLLABUS BY THE COURT

1. "The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused: however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syllabus Point 2, Funkhouser v. Funkhouser, 158 W.Va. 964, 216 S.E.2d 570 (1975).

2. "With reference to the custody of very young children, the law presumes that it is in the best interest of such children to be placed in the custody of their primary caretaker, if he or she is fit." Syllabus point 2, Garska v. McCoy, 167 W.Va. 59, 278 S.E.2d 357 (1981).

3. The "primary caretaker" is the parent who has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

4. In West Virginia we intend that generally the question of which parent, if either, is the primary caretaker of minor children in a divorce proceeding is proven with lay testimony from the parties themselves and from teachers, relatives and neighbors. In most cases, the question of which parent does the lion's share of the chores can be answered satisfactorily and quickly. Once the primary caretaker has been identified, the only question is whether that parent is a "fit parent." In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents such as might require expert witnesses, but only with whether the primary caretaker achieves a passing grade on an objective test.

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

6. In exceptional cases when the trial judge is unsure about the wisdom of awarding the children to the primary caretaker, he or she may ask children of appropriate age and discretion for their preference and accord that preference whatever weight he or she deems appropriate. Such an interview, because of the problems in asking children about their parental preference, should not, however, be routine and neither party may demand such an interview as a matter of right.

7. "Acts of sexual misconduct by a [primary caretaker], albeit wrongs against an innocent spouse, may not be considered as evidence going to the fitness of the [caretaker] for child custody unless [his or] her conduct is so aggravated, given contemporary moral standards, that reasonable men would find that [his or] her immorality, per se, warranted a finding of unfitness because of the deleterious effect upon the child of being raised by a [primary caretaker] with such a defective character." Syllabus Point 4, J.B. v. A.B., 161 W.Va. 332, 242 S.E.2d 248 (1978) as modified by Garska v. McCoy, 167 W.Va. 59, 70, 278 S.E.2d 357, 363 (1981).

8. We do not authorize court-ordered joint custody over the objections of a primary caretaker parent although parents may agree to such an arrangement.

9. "A cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to cooperate in reaching shared decisions in matters affecting the child's welfare." Syllabus Point 5, Lowe v. Lowe, 179 W.Va. 536, 372[370] S.E.2d 730[731] (1988).

Patrick E. McFarland, Eugene T. Hague, Jr., Redmond, McFarland & Hague, Parkersburg, for appellant, Margaret M.

Philip E. D'Orazio, Parkersburg, for appellee, David M.

NEELY, Justice:

Margaret M. appeals from a divorce order entered by the Circuit Court of Wood County that awarded David M. custody of their son, Timothy, age six. See footnote 1 Mrs. M. contends that the Circuit Court erred in adopting the findings of the family law master which held that although Mrs. M. was the primary caretaker of the child, she was not a fit

and suitable person to have permanent care and custody of the child. We agree with Mrs. M. and reverse the trial court's ruling.

The parties were married on 4 August 1979 and lived together in Wood County until 7 September 1988. Mr. M. filed a complaint alleging cruel and inhuman treatment or, in the alternative, adultery and seeking custody of their son, then age five. In her answer, Mrs. M. denied the allegations, filed a counterclaim alleging irreconcilable differences and sought custody of their son. Mr. M., in his reply to the counterclaim, admitted that irreconcilable differences existed between the parties.

The case was referred to a family law master and by agreement of the parties the case was bifurcated with only the divorce and the custody issues to be heard, reserving all other issues for further proceedings. After a hearing on the matter, the family law master found: (1) irreconcilable differences existed between the parties; (2) Mrs. M. was the primary caretaker; (3) Mrs. M. had committed adultery on two occasions over two years; and (4) Mrs. M. was not a fit and suitable person to have custody of the child. The Circuit Court adopted the findings and conclusions of the family law master, granted the parties a divorce, and awarded Mr. M. custody of their child, subject to reasonable visitation rights.

In the present case, although the primary caretaker parent rule as described in Garska v. McCoy, 167 W.Va. 59, 278 S.E.2d 357 (1981), appears to have been followed, the primary caretaker was denied custody through a broad interpretation of the fitness requirement. See footnote 2 We have noted that our very narrow exception to the primary caretaker rule has of late developed a voracious appetite which, if left unchecked, will allow it to eat the rule. We write today to reaffirm and clarify the benefits of the primary caretaker parent rule to assist the family law masters and the circuit courts in reaching the best interests of the child by applying the primary caretaker parent presumption and its limited requirement of fitness. When properly applied, the primary caretaker parent presumption reduces sharp practices in custody negotiation, prevents fathers and mothers from being penalized on account of their gender, and avoids custody battles that are so unwieldy and intrusive that they make the lives of a divorcing couple and their children even more miserable than they otherwise would be.

I

In the nineteenth century, and in the early part of this century, the law gave fathers custody of their children after divorce, particularly when mothers were held at fault in breaking up the marriage. See footnote 3 That rule was a logical extension of the inferior legal status of women, the husband's property right in his family's labor, and the husband's absolute obligation to support his children. See footnote 4 Even a hundred years ago, however, this rule made little sense in light of human emotions and society's expectation that children would be raised by women. Consequently, it was abolished in

this century. By 1950, it was almost always the rule that a mother was the preferred custodian of young children if she was a fit parent. See footnote 5

But the behavior that different courts characterized as evidencing "fitness" differed dramatically. In application, the rule of maternal preference allowed judges substantial leeway to take a mother's fault into consideration in the award of custody. It was frequently the case, therefore, that sexual "promiscuity" (a term that tends to mean different things when applied to women than to men, with women getting the short end of the double standard) on the part of the woman would cause a court to declare her "unfit." See footnote 6

Currently, all parental rights in child custody matters are subordinate to the interests of the innocent child. The pole star in child custody cases is the welfare of the child. We have repeatedly acknowledged that the child's welfare is the paramount and controlling factor in all custody matters. J.B. v. A.B., supra note 5, 161 W.Va. at 335-36, 242 S.E.2d at 251; Funkhouser, supra note 5, 158 W.Va. at 969, 216 S.E.2d at 573; Boos v. Boos, 93 W.Va. 727, 117 S.E. 616 (1923); Dawson v. Dawson, 57 W.Va. 520, 50 S.E. 613 (1905).

In J.B. v. A.B., we examined our custody presumption in favor of mothers in light of our concern for the welfare of the child and found:

> The welfare of the child seems to requi re that if at all possible we avoid subjecting children to the trauma of being wrenched away from their mothers, upon whom they have natu rally both em otional and physical dependency.
>
> Id. 161 W.Va. at 338-39, 242 S.E.2d at 253 (emphasis in original).

Today, the presumption in favor of mothers is rapidly eroding because the maternal preference presumption discriminates against fathers on the basis of sex. In the 1980 amendment to W.Va.Code, 48-2-15, the legislature provided in relevant part:

> ... There shall be no legal presumption th at, as between the natural parents, either the father or the m other should be awarded custody of said children but the court shall m ake an award of cu stody solely for the best interest of the children based upon the merits of each case. See footnote 7

Although in Garska, supra, 167 W.Va. at 70, 278 S.E.2d at 363, we abolished the gender-based presumption, we reaffirmed our holding in J.B. v. A.B., "except that wherever the words 'mother,' 'maternal,' or 'maternal preference' [were] used" some variation of the term "primary caretaker parent" should be substituted.

In jurisdictions that retain some type of maternal preference in awarding custody of very young children, the maternal preference has become largely a tie breaker. The emerging rule is that all custody disputes be decided on their individual merits, with the parent whom the judge considers the most competent receiving custody. See footnote 8 At first glance, this emerging rule seems to make sense, since some fathers are excellent parents and some mothers are child abusers. See footnote 9 Unfortunately, however, this individualized, sex-neutral approach poses serious problems because the welfare of the child is often lost by the distorted incentives created by the divorce settlement process.

Substantial research has confirmed that young children, as a result of intimate interaction, form a unique bond with their primary caretaker. This unique attachment to a primary caretaker is an essential cornerstone of a child's sense of security and healthy emotional development. See footnote 10

At the earliest stage, [the attachment to a primary caretaker] is critical to the child's learning to place trust in others and to have confidence in her own capacities. Later, it plays a central role in the child's capacity to establish emotional bonds with other persons. The sense of trust in others and in self that the attachment provides may also affect the child's development of intellectual and social skills. The growing child passes through many developmental stages, each requiring her to acquire critical skills and capacities.... The original bond of the child with the primary caretaker is believed to have an important continuing effect on the child's ability to pass through each stage with success. See footnote 11

Thus, the young child's welfare can be best served by preserving the child's relationship with the primary caretaker parent. Without a presumption in favor of the primary caretaker parent, the process--or even the prospect--of sorting out custody problems in court affects those problems, usually for the worse.

The unpredictability of courts in divorce matters offers many opportunities for a parent (generally the father) to minimize support payments and gain leverage in settlement negotiations. The most effective, and hence the most generally used, tactic is to threaten a custody fight. The effectiveness of the threat increases in direct proportion to the other parent's unwillingness to give up custody. Because women, much more than men, are preeminently interested in custody, seemingly gender-neutral custody rules actually serve to expose women to extortionate bargaining at the hands of their husbands.

A sizable body of research has confirmed that mothers are much more likely than fathers to feel close to their children. In 1977, Sharon Araji of Washington State University published a study entitled "Husbands' and Wives' Attitude-Behavior Congruence on Family Roles." See footnote 12 In that study, she asked her subjects their opinion on the

proper division of family labor and then asked how such work was in fact divided in their households. More than two-thirds stated that child-care labor should be equally divided. When asked about actual performance, however, those same people overwhelmingly responded that it was the woman in their household who bore the brunt of child-care duties. Shared responsibility for child care would seem more a cosmopolitan pretension than a reality in most settings.

Another study done at the University of Nevada that same year See footnote 13 found that the division of labor within households is resistant to change. Furthermore, the responsibility for child care was among the duties least often shared. To the extent that husbands participated in child care at all, they were more likely to be involved in playing, baby-sitting and disciplining rather than in such day-to-day tasks as feeding, changing and bathing. The Nevada study is also significant in that it examined cohabiting couples as well as married ones. One might expect that those cohabiting would show more progressive attitudes in the division of domestic responsibilities, but the study found that such couples nonetheless hewed closely to the sexual stereotypes of the world in which they grew up.

Such was also the case with couples in which the women were highly career- oriented. See footnote 14 Even among such couples, it was found, both spouses generally assumed that the woman would be the one primarily responsible for child care. A crucial finding was that the decision to take primary responsibility for the children was frequently a voluntary one for women, who saw parenting as a fundamental element of a successful female life.

Still, just because most women strongly desire custody and most men do not doesn't mean that such is the case in every instance. Fathers who want to retain the companionship of their children and who believe that they would be better single parents than their wives expect the judicial system to operate on the basis of more refined principles than simple statistically-based discrimination. See footnote 15

Fathers are now demanding that courts award custody based on an individualized inquiry into their specific situations. This appears reasonable on its face. But when we understand the costs of such an inquiry, and appreciate as well just how much sinister bargaining is carried out in the shadow of such an unpredictable, case-specific system, we must think again. And, as part IV, infra, will demonstrate, our conclusions in this regard are now shared by a growing number of states.

II

The individualized approach might be ideal if it were costless and if courts actually considered the relative merits of the parents in each case. In fact, however, the individualized approach is intrusive, time-consuming and inherently distortive in its

effect. And, because the vast majority of divorces are settled without ever reaching court, See footnote 16 very few custody arrangements receive even the dubious benefit of a judicial determination that they are in the "best interests of the child."

Under the individualized approach to the "best interests of the child" standard, custody, when contested, goes to the parent who the court believes will do a better job of child rearing. This standard is a substitute for the maternal preference rule or its gender-neutral successor, the primary caretaker parent rule. It operates as well in those states retaining a weak maternal preference, with that preference being only a tie breaker. In order to assign custody, the court must explore the dark recesses of psychological theory to determine which parent will, in the long run, do a better job.

However, this undertaking inevitably leads to the hiring of expert witnesses--psychologists, psychiatrists, social workers and sociologists. See footnote 17 These experts are paid by the parties to demonstrate that one or the other (coincidentally, always the client) is the superior parent in light of his or her personality, experience and aptitude for parenting. The experts will advance the theory that whatever positive aspects of personality their client possesses are preeminently important to successful single-parent child-raising. See footnote 18

Expert witnesses are, after all, very much like lawyers: They are paid to take a set of facts from which different inferences may be drawn and to characterize those facts so that a particular conclusion follows. There are indeed cases in which a mother or father may appear competent on the surface, only to be exposed after perfunctory inquiry as a child abuser. Under truly careful inquiry, such discoveries might be made more often. Such careful inquiry, however, is almost impossible in the real world because it requires experts who combine competence and integrity in a way that is seldom found, at least in courtrooms. The side with the stronger case can afford to hire only competent experts with profound integrity; the side with the weaker case, on the other hand, wants impressively glib experts who are utterly devoid of principles. When both parents are good parents, the battle of the experts can result only in gibberish.

No issue is more subject to personal bias than a decision about which parent is "better." Should children be placed with an "open, empathetic" father or with a "stern but value-supporting" mother? The decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver.

Even when the judge, like most judges, has an intuitive grasp of the difference between good testimony and bunkum, the process is itself destructive. Judges in states that have a "best interests of the child" standard or a weak maternal presumption must allow days

of testimony from a parade of highly paid experts before finally rendering a decision. In most cases, the judge ends up deciding that the mother is closer to the children and awards custody accordingly. Yet the hearings, as generally irrelevant as they are to the outcome, are bad in and of themselves because the very process of preparing experts to testify increases the hardship for all concerned. See Garska, supra, 167 W.Va. at 65, 278 S.E.2d at 361.

In order for a psychiatrist or psychologist to testify in court about so- called personality integration or similar psychological phenomena, the expert must interview parents and children, conduct tests and perhaps observe the litigants in a family setting. This very exercise can undermine the mental health of the children as well as the emotional stability of the parents. Id. When an elaborate custody battle is anticipated, the experts will create painful situations in their efforts to substantiate the testimony they have been paid to give. In much the same way that an artillery battery can "liberate the hell out of" a peaceful hamlet, experts can create emotional imbalances in the very children they are trying to "protect." See footnote 19

In the child custody context, children fall into one of three groups, depending on their age. Children under six years of age are called "children of tender years": They are the most dependent on their parents, but they usually cannot articulate an intelligent opinion about their custody. Children between six and fourteen are also dependent on their parents, but they can usually articulate a preference regarding custody arrangements and explain their reasons. See footnote 20 By the age of fourteen a child takes on many of the qualities of an adult; in most cases, unless geography interferes, a child over fourteen will decide for himself or herself the parent with whom he or she wants to live, regardless of what a court says. See footnote 21

Children over the age of six might seem to be the best available experts on the subject of how the parents and children get along. Usually, however, children do not want what is best for them; they want what is pleasant. See footnote 22 If children are permitted to influence decisions about custody simply by stating a preference, the parents are placed in the position of being competitive bidders in a counterfeit currency. For the children, the results are seldom positive. See footnote 23

That is because the litigation process is not neutral, but has its own peculiar and dangerous side effects. Unlike other litigation that sorts out rights and obligations based on facts frozen in time, custody decisions are predictions of what is best for the child--predictions based on facts constantly changing in part as a result of the litigation process. See footnote 24 If the divorce drags through the trial and appellate courts for two years, the lawsuit itself may wound or destroy the very children whose welfare is supposed to be at its center. In addition, money that would have been available to ease

the transition from joint household to separate households is diverted instead to lawyers, court fees and expert witnesses.

Once a custody battle is contemplated, the relationship between parents and children usually changes for the worse. The overriding need to prepare for court will dominate the lives of both parents and if the children are to be polled--either directly through court testimony or indirectly through the probing of experts--each parent is probably going to attempt to poison the other's well.

The degree to which children suffer during divorce is a widely discussed subject. See footnote 25 The slowly grinding machinery of the courts inevitably exacerbates the emotional stresses that result from the simple fact of divorce. Among the damaging effects of custody litigation are uncertainty, painful psychological probing (e.g., "Who do you love more, Mommy or Daddy?"), and competitive parental bribery. The magnitude of these effects is a direct function of the time it takes to conclude the proceedings.

Damage in these matters is magnified by the different meaning time has for children as opposed to adults. Events that transpired in childhood can be remembered in meticulous detail, while similar events, for an adult, are largely a blur. When a person is forty, a year represents one-fortieth of his or her life; for someone who is five, a year represents one-fifth. Divorce is by its very nature traumatic not only in terms of the mother's and father's separation but also in terms of new male and female companions for each entering the scene. If the children have no idea with whom they will live or under what terms or even where, the consequent uncertainty is likely to undermine their ability to function. Their relations with other children may suffer, their ties to the community may be threatened, and the stress they are under can cause academic failure. See footnote 26

The harms of courtroom custody battles happen only in a relatively small minority of divorces because the vast majority of divorce cases are settled out of court. See footnote 27 However, the possibility of a courtroom custody battle also causes problems in out-of-court settlement negotiations.

Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory review. The result is that parties (usually husbands) are free to use whatever leverage is available to obtain a favorable settlement. In practice this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties discussed above, as a means of intimidating wives into accepting less child support, alimony or distribution of marital property than is sufficient to allow the mother to live and raise the children appropriately as a single parent. See footnote 28 To some extent the uncertainty in the amount of child support payments is limited by the application of the guidelines required by W.Va.Code, 48A-2-8

[1986]. See footnote 29 The guidelines for child support awards are set forth in 6 W.Va.Code of State Rules 78-16-1 to 78-16-20 (effective May 2, 1988). See footnote 30 Because women are usually unwilling to accept even a minor risk of losing custody, however, such techniques, despite the guidelines, are generally successful because the guidelines establish minima and do not apply to alimony or property distribution.

Under any purportedly gender-neutral system, women on statistical average come out of divorce settlements with the worst of all possible results: They get the children, but insufficient money with which to support them. They are forced to scrape along to support their families at inadequate standards of living, and the children are forced to grow up poor, or at least poorer than they should be. Yet the negotiation dynamic is seldom discussed, despite its importance in promoting the growth of a rapidly-expanding class of poor people, the female-headed household.

An important reason that little attention has been given to the effect of in- court rules on out-of-court bargaining is that views on divorce are informed more by wishful thinking than by the facts of life. Many people (especially men) begin with a political conviction that women ought to be equal to men economically, from which they leap to the insupportable conclusion that women are equal to men economically. It then follows that women can support children as well as men can and that whoever wants the children can pay for them.

In the real world, however, women are much poorer than men, and this pattern is highly resistant to change. See footnote 31 The cost of child care itself is a major economic burden placed on single mothers. Single mothers, who start with unequal earning power, also provide child care--care that involves great amounts of time that could be spent earning money. See footnote 32 But the unfairness only begins there, as so many women are forced to accept lower child support and alimony payments in order to be sure of getting the children (and the accompanying economic burden) at all.

The everyday occurrence of children being traded for money should be sufficient in and of itself to prompt a reevaluation of a system that turns custody awards into bargaining chips. The fact that such trading also has contributed to the impoverishment of women makes the need for change still more urgent. What is needed is a standard for custody awards that assures the welfare of the child without encouraging such pernicious bargaining, but which also does not discriminate by gender.

III

Most of the problems of child custody litigation can be avoided by not litigating the issue in the first place. It is here that the wisdom of the old maternal preference, or its gender-neutral alternative, the "primary caretaker parent presumption," becomes

apparent. The primary caretaker presumption severely limits opportunities for using child custody litigation as a bargaining chip.

West Virginia law does not permit a maternal preference. But we do accord an explicit and almost absolute preference to the "primary caretaker parent" of young children, Garska, supra, 167 W.Va. at 68, 278 S.E.2d at 362. We have defined the "primary caretaker" as the parent who:

> ... has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of m eals; (2) bathing, gr ooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses o r, for exam ple, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educa ting, i.e. religious, cultural, social, etc.; and, (10) teaching elementa ry skills, i.e., reading, writing and arithmetic.
>
> Id. 167 W.Va. at 69-70, 278 S.E.2d at 363.

This list of criteria usually, but not necessarily, spells "mother." That fact reflects social reality; the rule itself is neutral on its face and in its application. When women pursue lucrative and successful careers while their husbands take care of the children, those husbands receive the benefit of the presumption as strongly as do traditional mothers. Furthermore, where both parents share child-rearing responsibilities equally, our courts hold hearings to determine which parent would be the better single parent. See footnote 33 This latter situation is rare, but is evidence of the actual gender-neutrality of the primary caretaker presumption.

Our rule inevitably involves some injustice to fathers who, as a group, are usually not primary caretakers. There are instances when the primary caretaker will not be the better custodian in the long run. Yet there is no guarantee that the courts will be able to know, in advance and based on the deliberately distorted evidence that characterizes courtroom custody proceedings, when such is the case. And, notwithstanding its theoretical imperfections, the primary caretaker parent presumption acknowledges that exhaustive hearings on relative degrees of parenting ability rarely disclose any but the most gross variations in skill and suitability. Permitting such hearings inevitably has distortive effect on the parties' behavior, and is likely to lead to potentially disastrous emotional trauma for all concerned if the case goes to court.

Any rule concerning custody matters will be gender-biased, in effect if not in form. An allegedly gender-neutral rule that permits exhaustive inquiry into relative degrees of paternal fitness is inevitably going to favor men in most instances. This bias follows from the observed pattern that in consensual divorces where there is no fight over money--either because there isn't any or because there is enough to go around--women overwhelmingly receive custody through the willing acquiescence of their husbands. Experience teaches that if there is any chance that the average mother will lose her children at divorce, she will either stay married under oppressive conditions or trade away valuable economic rights to ensure that she will be given custody.

In West Virginia we intend that generally the question of which parent, if either, is the primary caretaker of minor children in a divorce proceeding is to be proven with lay testimony from the parties themselves and from teachers, relatives and neighbors. In most cases, the question of which parent does the lion's share of the chores can be answered satisfactorily and quickly. Once the primary caretaker has been identified, the only question is whether that parent is a "fit parent." In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents such as might require expert witnesses, but only with whether the primary caretaker achieves a passing grade on an objective test. That issue does not require experts.

To be a fit parent, a person must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child. In this last regard, restrained normal sexual behavior does not make a parent unfit. The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior. Whether a primary caretaker parent meets these criteria can be determined through nonexpert testimony, and the criteria themselves are sufficiently specific that they discourage frivolous disputation. See footnote 34

Furthermore, since J.B. v. A.B., supra note 5, we have divided children into the three age groups. See footnote 35 With regard to children of tender years, the primary caretaker presumption operates absolutely if the primary caretaker is a fit parent. However, with those children able to formulate an intelligent opinion about their custody, our rule becomes more flexible. In exceptional cases when the trial judge is unsure about the wisdom of awarding the children to the primary caretaker, he or she may ask the children for their preference and accord that preference whatever weight he or she deems appropriate. Such an interview, because of the problems in asking children about their parental preference, should not, however, be routine and neither party may demand such an interview as a matter of right. When the children's testimony is necessary, the trial

judge should seek to minimize the damage by talking to the children on record but outside their parents' presence. Thus, the "experts" who can rebut the primary caretaker presumption are principally the children, although in extraordinary circumstances a judge may seek or allow expert testimony. The judge is not, however, required to hear the testimony of the children, and will usually not do so, particularly if he or she suspects bribery or undue influence. Nonetheless, by allowing the children to be acceptable experts in our courts, an escape valve is provided in unusually hard cases.

Finally, once a child reaches the age of fourteen, the child is permitted to name his or her guardian if both parents are fit. See footnote 36 Often, as might be expected, this means that the parent who makes the child's life more comfortable will get custody; however, there is little alternative because children over fourteen who are living where they do not want to live will become unhappy and ungovernable anyway. In all three cases, the parent who receives custody is primarily responsible for making decisions concerning the child and for providing the child's permanent home. The other parent, however, is usually accorded liberal visitation rights, including the right to have the child during holidays, part of the summer, and some weekends.

Although the primary caretaker parent presumption may appear cut-and-dried and insufficiently sensitive to the needs of individual children, it serves the welfare of the child by achieving stability of care in the child's life, reducing the uncertainty of custody decisions, limiting the invasiveness of the custody determination process and reducing the expense of domestic litigation. Because litigation per se can be the cause of serious emotional damage to children (and to adults), we consider the primary caretaker parent presumption to be in the best interests of children. Even more important, children cannot be used as pawns in fights that are actually about money because a lawyer can tell a primary caretaker parent that, if fit, that parent has absolutely no chance of losing custody of very young children. The result is that questions of alimony, property distribution, and child support are settled on their own merits.

IV

When we adopted the primary caretaker presumption in Garska, only one other jurisdiction relied upon a determination of primary caretaker in reaching custody decisions. Garska, supra, 167 W.Va. at 69, n. 10, 278 S.E.2d at 357, n. 10, citing Matter of Marriage of Derby, 31 Or.App. 803, 571 P.2d 562 (1977), modified on other grounds, 31 Or.App. 1333, 572 P.2d 1080 (1977). Since then the Supreme Court of Minnesota, citing Garska, adopted a primary caretaker parent presumption for custody of young children. Pikula v. Pikula, 374 N.W.2d 705 (Minn.1985). Justice Wahl in Pikula, id. at 711, reasoned that the primary caretaker presumption secured the best interests of the child by protecting the psychological bonding. Justice Wahl also noted that the "uncertainty of other indicia of a child's best interest ... and the pressing need for coherent decision making on the trial court level and for effective appellate review" required the

primary caretaker presumption. Id. at 713. Sefkow v. Sefkow, 427 N.W.2d 203 (Minn.1988), reaffirmed Pikula. In order to preserve the presumption in favor of the primary caretaker, a strong showing of parental unfitness was required to grant custody to the other parent. Tanghe v. Tanghe, 400 N.W.2d 389 (Minn.App.1987).

North Dakota recently considered the primary caretaker presumption but determined that none of the statutory factors should be dispositive. Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D.1986). In her dissent, Justice Levine, citing Garska, argued in favor of the primary caretaker preference because the child's best interest was to remain in the primary caretaker's custody and the "benefits of the primary caretaker rule far outweigh any baggage." Id. at 625. See footnote 37

Both Ohio and Pennsylvania cited our primary caretaker presumption. In re Maxwell, 8 Ohio App.3d 302, 456 N.E.2d 1218 (1982), required strong consideration be given to the factor of primary caretaker to assure the continuation of the care. Thompson v. Thompson, 31 Ohio App.3d 254, 511 N.E.2d 412 (1987), noted that consideration was given to primary caregiver even though the term was not used. Com. ex rel. Jordan v. Jordan, 302 Pa.Super. 421, 448 A.2d 1113, 1115 (1982), held that "the role of primary caretaker, without regard to the sex of the parent, is a substantial factor which the trial judge must weigh in adjudicating a custody matter where the child is of tender years." Jordan then noted the Garska factors for identifying the primary parent. Id.

Cases in other jurisdictions that have recognized the relationship between the primary caretaker parent and the child but have refused to grant that factor a presumption or preference include: Burchard v. Garay, 42 Cal.3d 531, 541, 229 Cal.Rptr. 800, 806-07, 724 P.2d 486, 492-93 (1986) (stressing "the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds," awarded custody of the 2 year old child to the primary caretaker); Agudo v. Agudo, 411 So.2d 249 (Fla.App.1982) (awarding custody of a seventeen-month-old to the primary caretaker based on expert testimony concerning the importance of the psychological bond); Crum v. Crum, 122 A.D.2d 771, 505 N.Y.S.2d 656 (1986) (holding that although a finding of primary caretaker should be considered that factor alone was not determinative of custody); Pusey v. Pusey, 728 P.2d 117 (Utah 1986), later proceeding 750 P.2d 599 (1988) (recognizing primary caretaker as an important factor for determination of child custody).

The following also have recognized the role of the primary caretaker as relevant to custody: Smith v. Smith, 294 S.C. 194, 363 S.E.2d 404, 406 (App.1987) (upholding custody award to the primary caretaker who had custody of the children since the separation; "latter factor alone supports the trial court's decision"); Gordon v. Gordon, 577 P.2d 1271 (Okl.1978), cert. denied 439 U.S. 863, 99 S.Ct. 185, 58 L.Ed.2d 172 (reversing custody award to the father when the mother was shown to be the primary

caretaker); Burleigh v. Burleigh, 200 Mont. 1, 650 P.2d 753 (1982) (affirmed custody of two minor children with the mother based on evidence that she was the primary person involved in their care, education and rearing); Leach v. Leach, 660 S.W.2d 761 (Mo.App.1983) (upholding custody award to the primary caretaker father although contrary to the tender years presumption); Marlatt v. Marlatt, 427 So.2d 1285 (La.App.1983) (awarded custody to the father who was the primary "nurturing parent"). See footnote 38

Other courts have implicitly considered the role of primary caretaker and have awarded custody to the nurturing parent, or the parent who was responsible for the child. See In re Marriage of Leopando, 106 Ill.App.3d 444, 62 Ill.Dec. 340, 435 N.E.2d 1312, aff'd 96 Ill.2d 114, 70 Ill.Dec. 263, 449 N.E.2d 137 (1983); Anderson v. Anderson, 121 Ariz. 405, 590 P.2d 944 (App.1979); Nale v. Nale, 409 So.2d 1299 (La.App.1982) (superceded by a presumption in favor of joint custody according to Lake v. Robertson, 452 So.2d 376 (La.App.1984)). See footnote 39

Many jurisdictions have turned to joint custody to solve divorce- related custody problems. See footnote 40 Under joint custody, divorced parents have equal time with the children and equal say in decisions about their schooling, religious training and lifestyle. See footnote 41 Joint custody, however, does not solve the problem of extortion in the settlement process because many mothers find shared custody as unacceptable as complete loss of custody. See footnote 42

Joint custody works well when both parents live in the same neighborhood or at least in the same city, and so long as they can cooperate on child-rearing matters. Divorcing couples on their own often agreed to joint custody in the past, long before court-ordered joint custody became a public issue. When joint custody is by agreement, the same cooperative spirit that animated the underlying agreement will usually allow the parents to rear a child with no more antagonism than is experienced in most married households.

Voluntary joint custody, however, must be distinguished from court-ordered joint custody. A court can order that custody be shared, but it cannot order that the parents stop bickering, stop disparaging one another, or accommodate one another in child-care decisions as married persons would. And if parents do not live close to one another, joint custody can place an intolerable strain on a child's social and academic life if one parent is not willing to allow the other to supply a more-or-less permanent home. See footnote 43

Furthermore, parents must constantly give permission for one thing or another. Who decides whether the child can have a driver's license at age sixteen? Who decides when the child can date, under what conditions, and with whom? When the parents violently disagree--and particularly when they disagree because there are continuing fights left

over from the marriage--the child is likely to be left hopelessly confused as the parents are played off one against the other. We do not authorize court-ordered joint custody today over the objection of a primary caretaker parent, although parents may agree to such an arrangement. As we said in Syllabus point 4 of Lowe v. Lowe, 179 W.Va. 536, 370 S.E.2d 731 (1988):

> A cardinal criterion for an award of jo int custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare.

V

In the present case, the record established that Mrs. M. was the primary caretaker parent of the child. Mrs. M. (1) bathed, groomed and dressed the child, (2) purchased, cleaned and cared for his clothes, (3) organized and purchased his food, (4) secured medical attention, when needed, (5) missed work to nurse the child, and (6) put the child to bed, attended to him in the middle of the night and awakened him in the morning. We note that the father assisted in some of the cooking, and both parents were responsible for disciplining, educating and teaching general manners and elementary skills.

In Syllabus Point 4, J.B. v. A.B., 161 W.Va. 332, 242 S.E.2d 248 (1978), as modified by Garska, supra, 167 W.Va. at 70, 278 S.E.2d at 363, we discussed the relationship between a parent's adultery and parental fitness.

> Acts of sexual m isconduct by a [prim ary caretaker], albeit wrongs against an innocent spouse, m ay not be considered as evidence going to the fitness of the [caretaker] for child custody unless [his or] her conduct is so aggravated, given contem porary m oral standards, that reasonable m en would find that [his or] her immora lity, per se, warranted a finding of unfitness because of the deleterious e ffect upon the child of being raised by a [primary caretaker] with such a defective character.

Although the record contains evidence of three acts marital misconduct, two of which were adultery, there is no evidence that Mrs. M.'s marital misconduct was known to the child or damaged the child. We have repeatedly held that a "circuit court may not base a finding of parental unfitness solely on the ground that the parent is guilty of sexual misconduct." Bickler, supra note 2, 176 W.Va. at 409, 344 S.E.2d at 632. Mrs. M. testified that two of the instances occurred about midnight when the child was asleep and the third occurred after the child and his stepbrother left to visit a neighbor and was concluded before the children returned home. Although evidence of marital misconduct, this restrained normal sexual behavior does not make Mrs. M. an unfit parent.

The circuit court was clearly wrong in its position that the three instances of sexual misconduct, occurring over two years, warranted a finding of unfitness, without evidence establishing that the child was harmed or that the conduct per se was so outrageous, given contemporary moral standards, as to call into question her fitness as a parent. J.B. v. A.B., supra note 5, 161 W.Va. at 345, 242 S.E.2d at 256. The absence of such evidence requires reversal.

Accordingly, for the reasons set forth above, the judgment of the Circuit Court of Wood County with respect to the granting of a divorce is affirmed, but with respect to the award of custody is reversed and this case is remanded with directions to enter an order consistent with this opinion.

Affirmed in part; Reversed in part; and Remanded with directions.

Footnote: 1 *Mr. M. has two other children from a previous marriage, Matthew and Jason, who live with their mother.*

Footnote: 2 *For other cases in which the lower court erroneously applied a broad interpretation of the fitness requirement see Isaacs v. Isaacs, 178 W.Va. 272, 358 S.E.2d 833, 835 (1987) (Custody should not be determined on apparent sexual misconduct.); M.S.P. v. P.E.P., 178 W.Va. 183, 358 S.E.2d 442 (1987) (A lower court should not award joint custody of the children with primary residence with the non-caretaker parent because of the "moral atmosphere" of the home of the caretaker parent.); Bickler v. Bickler, W.Va. 407, 344 S.E.2d 630, 632 (1986) ("[A] circuit court may not base a finding of parental unfitness solely on the ground that a parent is guilty of sexual misconduct."); Stacy v. Stacy, 176 W.Va. 247, 332 S.E.2d 260 (1985) (Adultery, without a deleterious effect on the children is insufficient evidence of parental unfitness.); Rowsey v. Rowsey, 174 W.Va. 692, 329 S.E.2d 57 (1985) (The speculative harm of a mother's friendship with another woman who was a lesbian does not require a change of custody.); Mormanis v. Mormanis, 170 W.Va. 717, 296 S.E.2d 680 (1982) ("[M]arijuana ... smoked in a car in which the [mother] was at one point present [without evidence] that the child was in the car at the time" is insufficient evidence of parental unfitness.).*

Footnote: 3 *J. Westman, Child Advocacy 273 (1979); Derdeyn, "Child Custody Contests in Historical Perspective," 133 Am.J. Psychiatry 1369, 1370 (1978). For documentation of the paternal preference and the emergence of the maternal preference in some states during the nineteenth century, see Foster & Freed, "Child Custody," 39 N.Y.U.L.Rev. 423, 425 (1964); Schiller, "Child Custody: Evolution of Current Criteria," 26 De Paul L.Rev. 241, 242-44 (1977); Comment, 12 Cum.L.Rev. 513, 515-17 (1982).*

Footnote: 4 *Derdeyn, supra note 3, at 1370; Schiller, supra note 3, at 242; Foster & Freed, supra note 3, at 423-25; Norman v. Norman, 88 W.Va. 640, 107 S.E. 407 (1921)*

(modifying the "general rule" that the father is the natural custodian of his minor children).

Footnote: 5 J. Westman, supra note 3, at 273; Foster & Freed, supra note 3, at 425. Syllabus Point 1, J.B. v. A.B., 161 W.Va. 332, 242 S.E.2d 248 (1978) (" 'With reference to the custody of very young children, the law favors the mother if she is a fit person, other things being equal.' Syl. pt. 1, Funkhouser v. Funkhouser, [158] W.Va. [964], 216 S.E.2d 570 (1975)"); Syllabus Point 2, Settle v. Settle, 117 W.Va. 476, 185 S.E. 859 (1936); Beaumont v. Beaumont, 106 W.Va. 622, 146 S.E. 618 (1929).

Footnote: 6 Settle, supra note 5, 117 W.Va. at 476, 185 S.E. at 859 (A mother's primary right to the custody of her children may be lost if her marital conduct has been questioned.). See Finnegan v. Finnegan, 134 W.Va. 94, 58 S.E.2d 594 (1950) (Custody of children should be awarded to the innocent spouse.).

Footnote: 7 W.Va.Code, 48-2-15(b)(1) [1986] provides in pertinent part:
The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances.

Footnote: 8 See Freed & Walker, "Family Law in the Fifty States: An Overview," 22 Fam.L.Q. 367 (1989). See, e.g., Ariz.Rev.Stat.Ann. § 25-332 (1986); Cal.Civ.Code § 4608 (West 1983 & Supp.1987); Fla.Stat.Ann. § 61.13 (West 1984); Ind.Code Ann. § 31-1-11.5-21 (Burns 1986); Ky.Rev.Stat.Ann. § 403.270 (Bobbs-Merrill 1984); Md.Fam. Law Code Ann. § 5-203 (1984 & Supp.1986); Mich.Stat.Ann. § 25.312(3) [M.C.L. § 722.23] (Callahan 1984); Mo.Ann.Stat. § 452.375 (Vernon 1986); N.J.Stat.Ann. § 9:2-4 (West 1976); Tenn.Code Ann. § 36-6-101 (1986); Tex.Fam.Code Ann. § 14.07 (Vernon 1986); Wis.Stat.Ann. § 767.24 (West 1981).

Footnote: 9 Despite popular perceptions to the effect that child abusers are predominantly male, women are just as likely to be abusers as are men. See D. Gil, Violence Against Children 117 (1970). See also Schwartz, Book Review, 2 Yale L. & Pol'y Rev. 179, 183-84 (1983).

Footnote: 10 See J. Goldstein, A. Freud and A. Solnit, Before the Best Interests of the Child 31-35 (1979); Wexler, "Rethinking the Modification Child Custody Decrees," 94 Yale L.J. 757, 799 (1985); Leonard & Provence, "The Development of Parent-Child Relationships and the Psychological Parent," 53 Conn. B.J. 320, 326 (1979).

Footnote: 11 Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce," 83 Mich.L.Rev. 477, 530 (1984). Professor Chambers also notes that these observations present the strongest case for a presumption of custody of young children

with the primary caretaker parent. However, Professor Chambers believes that the substantial emotional bonds a child forms with secondary caretakers are undervalued.

Footnote: 12 39 J.Marr. & Fam. 309 (1977).

Footnote: 13 Stafford, Backman & diBona, "The Division of Labor Among Cohabiting and Married Couples," 39 J.Marr. & Fam. 43 (1977). Cf. Kotkin, "Sex Roles Among Married and Unmarried Couples," 9 Sex Roles 975 (1983) (study finding conventional allocation of household tasks and male career precedence among married and cohabiting couples planning to marry but more egalitarian attitudes among cohabiting couples not planning to marry); Doerfler & Krammer, "Workaholism, Sex and Sex Role Stereotyping Among Female Professionals," 14 Sex Roles 551, 559 (1986) (quoting an unpublished study of university faculty that found married working faculty women with children worked an average of 108.3 hours per week).

Footnote: 14 Heckman, Bryson & Bryson, "Problems of Professional Couples: A Content Analysis," 39 J.Marr. & Fam. 323, 327-29 (1977). See also Project, "Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict," 34 Stan.L.Rev. 1263 (1982) (The study shows that women law students expected to spend considerably more time than male students in performing child care tasks and their job considerations were also influenced.); Baber & Monaghan, "College Women's Career and Motherhood Expectations: New Options, Old Dilemmas," 19 Sex Roles 189, 201 (1988) (The study found that college educated women even in traditionally male dominated fields, expect to have primary responsibility for young children.); A 1987 New York Times Poll showed that women "are still the primary care-givers." N.Y.T., February 24, 1988 at 1, col 1.

Footnote: 15 Chambers, supra note 11, at 561.

Footnote: 16 Over 90 percent of divorces are uncontested. This means that the granting of the divorce is pro forma and routine, with all of the important decisions made out of court--usually in law office negotiations. In the case of middle-class and rich clients, failure to contest usually means a settlement has been reached. N.Y. Law Journal, July 11, 1984, at 1, col. 1.

Footnote: 17 See Bolocofsky, "Use and Abuse of Mental Health Experts in Child Custody Determinations," 7 Behav.Sci. & L. 197 (1989) (indicating an overreliance by mental health professionals on questionable sources of data and the inadequacies of clinical judgment in child custody evaluations).

Footnote: 18 See Ziskin & Faust, "Psychiatric and Psychological Evidence in Child Custody Cases," 25 Trial 44 (August 1989) for a discussion on the use of scientific and professional research to dispute the expertise of mental health professionals and to question the validity of their evaluations.

Footnote: 19 S. Goldstein & A. Solnit, Divorce and Your Child 64 (1984). See also Chambers, supra note 11, at 569. "Litigation imposes heavy emotional and financial costs on families. Unlike most other forms of litigation the parties to this dispute generally continue to deal with each other after it is over: The 'loser' is entitled to visitation over a long period of years."

Footnote: 20 In J.B. v. A.B., supra note 5, 161 W.Va. at 340, 242 S.E.2d at 253, we stated: "The concept of 'tender years' is somewhat elastic; obviously an infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not.... Between the two extremes are children who are more or less capable of expressing a preference concerning their custody."

Footnote: 21 "... [A]n adolescent fourteen years of age or older ... has an absolute right under W.Va.Code, 44-10-4 [1923] to nominate his own guardian." J.B. v. A.B., supra note 5, 161 W.Va. at 340, 242 S.E.2d at 253; Shimp v. Shimp, 179 W.Va. 215, 366 S.E.2d 663 (1988); Ga.Code Ann., 19-9-1(a) (Supp.1988) (child fourteen or older may choose parent unless parent is unfit); Ohio Rev.Code Ann. 3109.04 (Baldwin 1983) (child twelve years or older may choose parent unless court finds parent unfit).

Footnote: 22 Scott, Reppucci & Aber, "Children's Preference in Adjudicated Custody Decisions," 22 Ga.L.Rev. 1035, 1055 (1988) (A child's preference may be influenced by "transitory anger at the 'guilty' parent" or the entertainment by a "week-end" parent.).

Footnote: 23 Mnookin & Kornhauser, "Bargaining in the Shadow of the Law," 88 Yale L.J. 950 (1979).

Footnote: 24 The sheer complexity of custody decisions means that the measurement process itself changes the thing that is measured. Lack of neutrality in measuring things is a recurring problem in many areas of human endeavor. In physics the problem is known as the Heisenberg uncertainty principle--which refers to Werner Heisenberg's discovery that it is impossible to measure both the speed and the location of an electron simultaneously because the measuring devices themselves affect the speed and location being measured. Heisenberg, "Uber den anschaulichen inhalt der quantentheoretische Kinematik und Mechanik," 43 Z.Phys. 172 (1927); see also A. Zee, Fearful Symmetry: The Search for Beauty in Modern Physics 140 (1986). A similar principle applies to divorce cases--measuring family problems usually makes these problems worse.

Footnote: 25 See, e.g., J. Despert, Children of Divorce 91-150 (1962); J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 37- 39 (rev. ed. 1979); S. Goldstein, supra note 19, at 8; J. Westman, supra note 3, at 273-75, 287; Wallerstein, "The Child in the Divorcing Family," in The Rights of Children 99, 99-108 (J. Henning

ed. 1982); Kirshner, "Child Custody Determination," in The Rights of Children 117, 125-26 (J. Henning ed. 1982).

Footnote: 26 J. Despert, supra note 25, at 116-50; J. Goldstein, A. Freud & A. Solnit, supra note 25, at 37-39. See also sources cited at note 25, supra. Cf. Okpaku, "Psychology: Impediment or Aid in Child Custody Cases?" 29 Rutgers L.J. 1117, 1140-41 (1976) (lack of conclusive empirical research in the area of children's reaction to custodial discontinuity); Dembitz, "Beyond AnyDiscipline's Competence" (Book Review), 83 Yale L.J. 1304, 1309-11 (1974) (continuity of the custodial arrangement not always of supreme importance) (reviewing J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973)).

Footnote: 27 See note 16, supra.

Footnote: 28 See Garska, supra in text, 167 W.Va. at 66-68, 278 S.E.2d at 360-62, for a discussion of the Solomon Syndrome--the phenomenon that "the parent who is most attached to the child will be willing to accept an inferior bargain."

Footnote: 29 Each state is required by federal law to establish guidelines for child support amounts, effective 1 October 1987. 42 U.S.C. 667 (Supp. IV 1986). See also 45 C.F.R. 302.56 (1988).

Footnote: 30 See Holley v. Holley, 181 W.Va. 396, 382 S.E.2d 590 (1989) (requiring the amount of child support to be in accordance with the established state guidelines, unless written, specific reasons for not following the guidelines are provided). See also Kathy L.B. v. Patrick J.B., 179 W.Va. 655, 371 S.E.2d 583 (1988) (holding a father liable for support from the date of his child's birth).

Footnote: 31 "[Single] [w]omen maintaining families are far more likely to be unemployed than husbands or wives, their average (median) family income is less than half that of married couples, and they are five times as likely to be in poverty." Bureau of Labor Statistics, U.S. Dep't of Labor, Women at Work: A Chartbook 26 (1983). This gap seems to be widening. U.S. Commission on Civil Rights, Disadvantaged Women and Their Children: A Growing Crisis 6 (1983) (hereinafter cited as "Disadvantaged Women"). See also Bureau of Labor Statistics, U.S. Dep't of Labor, Women & Work (August 1987) (noting that ninety percent of persons on welfare are women and children); N.Y.T., February 26, 1988 at 1, col. 1, reporting a study by the Congressional Budget Office that found although median adjusted family income overall rose twenty percent from 1970 to 1986, family income for single mothers with children rose only two percent.

Footnote: 32 Of economically active women ages 25-34 with no spouse present, those without children worked an average of 1,966 hours annually, while those with children worked from 1,171 hours (for those with four or five children) to 1,775 hours (for those with one child). Smith, "Estimating Annual Hours of Labor Force Activity," 106 Monthly Lab. Rev. 13, 19 (Feb. 1983).
This hardship is compounded in several ways. First, in order to work full-time, working mothers must obtain child care, which (unless relatives or friends are available regularly) is always expensive and often prohibitively so. Disadvantaged Women, supra note 31, at 12-13, 63. Second, in general "[w]omen are segregated in a few occupations that pay low wages and have little promotion potential." Id. at 63. And third, there is evidence that the pressures of raising a family alone and beating back poverty are major sources of emotional stress. Id. at 52. Note also that women acting as single parents "are also in the category of persons who are least likely to receive preventive health care or adequate care during illness." Id. Men, on the other hand, largely avoid the economic pitfalls afflicting divorced women. Id. at 12. For more on the psychological strains suffered by working women, see J. Westman, supra note 3, at 105, and Johnson & Johnson, "Attitudes Toward Parenting in Dual Career Families," 134 Am.J. Psychiatry 391 (1977).

Footnote: 33 Garska, supra in text; T.C.B. v. H.A.B., 173 W.Va. 410, 317 S.E.2d 174 (1984) (upholding a finding of joint primary caretakers and an award of custody to the father).

Footnote: 34 Garska, supra in text, 167 W.Va. at 70, 278 S.E.2d at 361.

Footnote: 35 See part II, supra.

Footnote: 36 See note 21, supra.

Footnote: 37 See O'Kelly, "Blessing The Tie That Binds: Preference for the Primary Caretaker as Custodian," 63 N.D.L.Rev. 481 (1987), for a thoughtful argument in favor of North Dakota's adopting a preference for custody remaining with the primary caretaker parent. Professor O'Kelly concluded that although the results in several noted North Dakota child custody cases would have remained unchanged under a primary caretaker preference, the opinion rationales would change and the private ordering in other cases by negotiation and mediation would be different. See also Von Bank v. Von Bank, 443 N.W.2d 618 (N.D.1989), noting Professor O'Kelly's article but declining to give presumptive weight to the primary caretaker.

Footnote: 38 J. Atkinson, Modern Child Custody Practice 239 (1986), reports that in 1982 and 1983 appellate courts of at least 20 states favored custody for primary caretakers. See Annotation, "Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child," 41 A.L.R.4th 1129 (1985 & Supp.1989).

Footnote: 39 See Annotation, supra note 38, at 1138-41.

Footnote: 40 *Over half the states have adopted legislation dealing with joint custody awards within the last several years. See Scott & Derdyn, "Rethinking Joint Custody," 45 Ohio St.L.J. 455, 456 n. 5 (1984). Some laws require court approval of voluntary joint custody arrangement, absent unusual circumstances. Others authorize courts to enter joint custody orders over the objections of either or both parties. Some could be read as creating a legislative presumption for joint custody even over the objections of either or both parties. Id. at 457 n. 9, 471 n. 73.*

Footnote: 41 *Actually, in many cases one parent will provide the permanent residence of the child while other aspects of child-raising are shared evenly. Generally, the parent with whom the child is staying at the time will make day-to-day decisions (e.g., permission for school outings), with major decisions being shared between the two. See generally Folberg & Graham, "Joint Custody of Children Following Divorce," 12 U.C.D.L.Rev. 523 (1979) (thoroughly documented discussion of joint custody plans, including history and prevailing attitudes).*

Footnote: 42 *See Chambers, supra note 11, at 567.*

Footnote: 43 *See text accompanying note 25, supra.*

547 U.S. 813, 126 S. Ct. 2266

Supreme Court of the United States

Adrian Martell DAVIS, Petitioner,

v.

WASHINGTON.

Hershel Hammon, Petitioner,

v.

Indiana.

Nos. 05-5224, 05-5705.

Argued March 20, 2006.

Decided June 19, 2006.

Holdings: After granting certiorari, the United States Supreme Court, Justice Scalia, held that:

victim's statements in response to 911 operator's interrogation were not testimonial, and therefore, were not subject to Confrontation Clause, and

domestic battery victim's written statements in affidavit given to police officer were testimonial, and therefore, were subject to Confrontation Clause.

Affirmed in part, reversed in part and remanded.

Justice Thomas filed separate opinion concurring in the judgment in part and dissenting in part.

In No. 05-5224, a 911 operator ascertained from Michelle McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Court of Appeals affirmed, as did the State Supreme Court, which concluded that, *inter alia*, the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

In No. 05-5705, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for, *inter alia*, domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Court of Appeals affirmed in relevant part. The State Supreme Court also affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt.

Held:

1. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177. These cases require the Court to determine which police "interrogations" produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Pp. 2273 - 2274.

2. McCottry's statements identifying Davis as her assailant were not testimonial. Pp. 2274 - 2278.

(a) This case requires the Court to decide whether the Confrontation Clause applies only to testimonial hearsay, and, if so, whether the 911 recording qualifies. *Crawford* suggested the answer to the first question, noting that "the Confrontation Clause ... applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' " Only "testimonial statements" cause a declarant to be a witness. The Court is unaware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not involve testimony as thus defined. Well into the 20th century, this Court's jurisprudence was carefully applied only in the testimonial context, and its later cases never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases involving testimonial hearsay. Pp. 2274 - 2276.

(b) The question in *Davis*, therefore, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements. In contrast to *Crawford*, where the interrogation took place at a police station and was directed solely at establishing a past crime, a 911 call is ordinarily designed primarily to describe current circumstances requiring police assistance. The difference is apparent here. McCottry was speaking of events as they were actually happening, while Crawford's interrogation took place hours after the events occurred. Moreover, McCottry was facing an ongoing emergency. Further, the statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what had happened in the past. Finally, the difference in the level of formality is striking. Crawford calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying. Pp. 2276 - 2278.

3. Amy Hammon's statements were testimonial. They were not much different from those in *Crawford*. It is clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the investigation was to investigate a possible crime. While the formal features of Crawford's interrogation strengthened her statements' testimonial aspect, such features were not essential to the point. In both cases, the declarants were separated from the defendants, the statements recounted how potentially criminal past events began and progressed, and the interrogation took place some time after the events were over. For the same reasons the comparison to *Crawford* is compelling, the comparison to *Davis* is unpersuasive. The statements in *Davis* were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. Pp. 2278 - 2279.

4. The Indiana courts may determine on remand whether a claim of forfeiture by wrongdoing-under which one who obtains a witness's absence by wrongdoing forfeits the constitutional right to confrontation-is properly raised in *Hammon*, and, if so, whether it is meritorious. Absent such a finding, the Sixth Amendment operates to exclude Amy Hammon's affidavit. Pp. 2279 - 2280.

No. 05-5224, 154 Wash.2d 291, 111 P.3d 844, affirmed; No. 05-5705, 829 N.E.2d 444, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

Michael R. Dreeben, for United States as amicus curiae, by special leave of the Court, supporting the respondent.

Irving L. Gornstein, for the United States as amicus curiae, by special leave of the Court, supporting the respondent.

Nancy Collins, Washington Appellate Project, Seattle, WA, Jeffrey L. Fisher, Counsel of Record, Lissa Wolfendale, Shook Davis Wright Tremaine LLP, Seattle, WA, Counsel for Petitioner.
Norm Maleng, King County Prosecuting Attorney, James M. Whisman, Counsel of Record, Senior Deputy Prosecuting Attorney, Deborah A. Dwyer, Senior Deputy Prosecuting Attorney, Lee D. Yates, Senior Deputy Prosecuting Attorney, Seattle, Washington, Counsel for Respondent.

Richard D. Friedman, Counsel of Record, Ann Arbor, Michigan, Kimberly A. Jackson, Jensen & Associates, Indianapolis, Indiana, Brief of Petitioner Hershel Hammon.

General IGC South, Indianapolis, IN, Steve Carter, Attorney General, Thomas M. Fisher, Counsel of Record, Solicitor General, Nicole M. Schuster, Julie A. Hoffman, Deputy Attorneys General, Counsel for Respondent.

Justice SCALIA delivered the opinion of the Court.
These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

I

A

The relevant statements in *Davis v. Washington*, No. 05-5224, were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:
"911 Operator: Hello.
"Complainant: Hello.
"911 Operator: What's going on?
"Complainant: He's here jumpin' on me again.
"911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
"Complainant: I'm in a house.
"911 Operator: Are there any weapons?
"Complainant: No. He's usin' his fists.
"911 Operator: Okay. Has he been drinking?
"Complainant: No.
"911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
"Complainant: I'm on the line.
"911 Operator: Listen to me carefully. Do you know his last name?
"Complainant: It's Davis.
"911 Operator: Davis? Okay, what's his first name?
"Complainant: Adrian
"911 Operator: What is it?
"Complainant: Adrian.
"911 Operator: Adrian?
"Complainant: Yeah.
"911 Operator: Okay. What's his middle initial?
"Complainant: Martell. He's runnin' now." App. in No. 05-5224, pp. 8-9.

As the conversation continued, the operator learned that Davis had "just r [un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. *Id.*, at 9-10. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." *Id.*, at 10. She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. *Id.*, at 11-12. McCottry described the context of the assault, *id.*, at 12, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you." *Id.*, at 12-13.

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence." 154 Wash.2d 291, 296, 111 P.3d 844, 847 (2005) (en banc).

The State charged Davis with felony violation of a domestic no-contact order. "The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries." *Ibid.* McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him. The Washington Court of Appeals affirmed, 116 Wash.App. 81, 64 P.3d 661 (2003). The Supreme Court of Washington, with one dissenting justice, also affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis was not testimonial, and that if other portions of the conversation were testimonial, admitting them was harmless beyond a reasonable doubt. 154 Wash.2d, at 305, 111 P.3d, at 851. We granted certiorari. 546 U.S. ----, 126 S.Ct. 552, 163 L.Ed.2d 459 (2005).

B

In *Hammon v. Indiana*, No. 05-5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. 829 N.E.2d 444, 446 (Ind.2005). They found Amy alone on the front porch, appearing " 'somewhat frightened,' " but she told them that " 'nothing was the matter,' " *id.*, at 446, 447. She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the ... partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit." App. in No. 05-5705, p. 16.

Hershel, meanwhile, was in the kitchen. He told the police "that he and his wife had 'been in an argument' but 'everything was fine now' and the argument 'never became physical.' " 829 N.E.2d, at 447. By this point Amy had come back inside. One of the officers remained with Hershel; the other went to the living room to talk with Amy, and "again asked

[her] what had occurred." *Ibid.;* App. in No. 05-5705, at 17, 32. Hershel made several attempts to participate in Amy's conversation with the police, see *id.*, at 32, but was rebuffed. The officer later testified that Hershel "became angry when I insisted that [he] stay separated from Mrs. Hammon so that we can investigate what had happened." *Id.*, at 34. After hearing Amy's account, the officer "had her fill out and sign a battery affidavit." *Id.*, at 18. Amy handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.*, at 2.

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. See *id.*, at 11, 12, 13, 17, 19, 20, 21. At one point, after hearing the prosecutor defend the affidavit because it was made "under oath," defense counsel said, "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it. Makes me mad." *Id.*, at 19. Nonetheless, the trial court admitted the affidavit as a "present sense impression," *id.*, at 20, and Amy's statements as "excited utterances" that "are expressly permitted in these kinds of cases even if the declarant is not available to testify." *Id.*, at 40. The officer thus testified that Amy "informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became ... physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.
.....
"She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe." *Id.*, at 17-18.

The trial judge found Hershel guilty on both charges, *id.*, at 40, and the Indiana Court of Appeals affirmed in relevant part, 809 N.E.2d 945 (2004). The Indiana Supreme Court also affirmed, concluding that Amy's statement was admissible for state-law purposes as an excited utterance, 829 N.E.2d, at 449; that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings," where "the motivations of the questioner and declarant are the central concerns," *id.*, at 456, 457; and that Amy's oral statement was not "testimonial" under these standards, *id.*, at 458. It also concluded that, although the affidavit was testimonial and thus wrongly admitted, it was harmless beyond a reasonable doubt, largely because the trial was to the bench. *Id.*, at 458-459. We granted certiorari. 546 U.S. ----, 126 S.Ct. 552, 163 L.Ed.2d 459 (2005).

II

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See *id.*, at 51, 124 S.Ct. 1354. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Our opinion in *Crawford* set forth "[v]arious formulations" of the core class of " 'testimonial' " statements, *ibid.*, but found it unnecessary to endorse any of them, because "some statements qualify under any definition," *id.*, at 52, 124 S.Ct. 1354. Among those, we said, were "[s]tatements taken by police officers in the course of interrogations," *ibid.;* see also *id.*, at 53, 124 S.Ct. 1354. The questioning that generated the deponent's statement in *Crawford*-which was made and recorded while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself-"qualifies under any conceivable definition" of an " 'interrogation,' " 541 U.S., at 53, n. 4, 124 S.Ct. 1354. We therefore did not define that term, except to say that "[w]e use [it] ... in its colloquial, rather than any technical legal, sense," and that "one can imagine various definitions ..., and we need not select among them in this case." *Ibid.* The character of the statements in the present cases is not as clear, and these cases require us to determine more precisely which police interrogations produce testimony.

Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[FN1]

III

A

In *Crawford*, it sufficed for resolution of the case before us to determine that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.*, at 53, 124 S.Ct. 1354. Moreover, as we have just described, the facts of that case spared us the need to define what we meant by "interrogations." The *Davis* case today does not permit us this luxury of indecision. The inquiries of a police operator in the course of a 911 call [FN2] are an interrogation in one sense, but not in a sense that "qualifies under any conceivable definition." We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.

The answer to the first question was suggested in *Crawford*, even if not explicitly held:
"The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S., at 51, 124 S.Ct. 1354.

A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.

We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.[FN3] Well into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context. See, *e.g.*, *Reynolds v. United States*, 98 U.S. 145, 158, 25 L.Ed. 244 (1879) (testimony at prior trial was subject to the Confrontation Clause, but petitioner had forfeited that right by procuring witness's absence); *Mattox v. United States*, 156 U.S. 237, 240-244, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witnesses admitted because subject to cross-examination); *Kirby v. United States*, 174 U.S. 47, 55-56, 19 S.Ct. 574, 43 L.Ed. 890 (1899) (guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen); *Motes v. United States*, 178 U.S. 458, 467, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (written deposition subject to cross-examination was not admissible because witness was available); *Dowdell v. United States*, 221 U.S. 325, 330-331, 31 S.Ct. 590, 55 L.Ed. 753 (1911) (facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or innocence and hence were not statements of "witnesses" under the Confrontation Clause).

Even our later cases, conforming to the reasoning of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980),[FN4] never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, see *Crawford*, 541 U.S., at 57-59, 124 S.Ct. 1354 (citing cases), with one arguable exception, see *id.*, at 58, n. 8, 124 S.Ct. 1354 (discussing *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)). Where our cases did dispense with those requirements-even under the *Roberts* approach-the statements at issue were clearly nontestimonial. See, *e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 181-184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) (statements made unwittingly to a Government informant); *Dutton v. Evans*, 400 U.S. 74, 87-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (plurality opinion) (statements from one prisoner to another).

Most of the American cases applying the Confrontation Clause or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort-sworn testimony in prior judicial proceedings or formal depositions under oath-which invites the argument that the scope of the Clause is limited to that very formal category.

But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions, see *Crawford, supra,* at 52, and n. 3, 124 S.Ct. 1354. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case-English or early American, state or federal-can be cited, that is it.

The question before us in *Davis,* then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford, supra,* at 53, 124 S.Ct. 1354, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford,* " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S., at 51, 124 S.Ct. 1354. (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. See, *e.g., United States v. Stewart,* 433 F.3d 273, 288 (C.A.2 2006) (false statements made to federal investigators violate 18 U.S.C. § 1001); *State v. Reed,* 2005 WI 53, ¶ 30, 280 Wis.2d 68, 695 N.W.2d 315, 323 (state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov [e]" some past fact, but to describe current circumstances requiring police assistance.

The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis,* McCottry was speaking about events *as they were actually happening,* rather than "describ [ing] past events," *Lilly v. Virginia,* 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. See, *e.g., Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness;* she was not *testifying.* What she said was not "a weaker substitute for live testimony" at trial, *United States v. Inadi,* 475 U.S. 387, 394, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), like Lord Cobham's statements in *Raleigh's Case,* 2 How. St. Tr. 1 (1603), or Jane Dingler's *ex parte* statements against her husband in *King v. Dingler,* 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in *Crawford.* In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier,* 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.,* at 200, 168 Eng. Rep., at 202. The case would be

helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E.2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U.S., at 53, n. 4, 124 S.Ct. 1354. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

B

Determining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*. It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged, App. in No. 05-5705, at 25, 32, 34. There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything, *id.*, at 25. When the officers first arrived, Amy told them that things were fine, *id.*, at 14, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer *should* have done.

It is true that the *Crawford* interrogation was more formal. It followed a *Miranda* warning, was tape-recorded, and took place at the station house, see 541 U.S., at 53, n. 4, 124 S.Ct. 1354. While these features certainly strengthened the statements' testimonial aspect-made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events-none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]." App. in No. 05-5705, at 34. What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations, 541 U.S., at 52, 124 S.Ct. 1354, is shared by Amy's statement here. Both declarants were actively separated from the defendant-officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.[FN5]

Both Indiana and the United States as *amicus curiae* argue that this case should be resolved much like *Davis*. For the reasons we find the comparison to *Crawford* compelling, we find the comparison to *Davis* unpersuasive. The statements in *Davis* were taken when McCottry was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry's present-tense statements showed immediacy; Amy's narrative of past events

was delivered at some remove in time from the danger she described. And after Amy answered the officer's questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously." App. in No. 05-5705, at 18.

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, see 829 N.E.2d, at 453, 457, we do not hold the opposite-that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel*, 542 U.S., at 186, 124 S.Ct. 2451. Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements. But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. Cf. *Crawford, supra,* at 52, n. 3, 124 S.Ct. 1354.[FN6]

IV

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases-domestic violence-requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. Cf. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (suppressing evidence from an illegal search). But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, see, *e.g., United States v. Scott*, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, see, *e.g., Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." *Id.*, at 545, 830 N.E.2d, at 174. The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford,* in overruling *Roberts,* did not destroy the ability of courts to protect the integrity of their proceedings.

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

* * *

We affirm the judgment of the Supreme Court of Washington in No. 05-5224. We reverse the judgment of the Supreme Court of Indiana in No. 05-5705, and remand the case to that Court for proceedings not inconsistent with this opinion.

It is so ordered.

FN1. Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations-which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the

evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

FN2. If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

FN3. See, *e.g., State v. Webb*, 2 N.C. 103, 103-104, 1794 WL 98 (Super. L. & Eq. 1794) *(per curiam)* (excluding deposition taken in absence of the accused); *State v. Atkins*, 1 Tenn. 229, 1807 WL 107 (Super. L. & Eq. 1807) *(per curiam)* (excluding prior testimony of deceased witness); *Johnston v. State*, 10 Tenn. 58, 59, 1821 WL 401 (Err. & App. 1821) (admitting written deposition of deceased deponent, because defendant had the opportunity to cross-examine); *Finn v. Commonwealth*, 26 Va. 701, 707-708, 1827 WL 1081 (1827) (excluding prior testimony of a witness still alive, though outside the jurisdiction); *State v. Hill*, 20 S.C.L. 607, 1835 WL 1416 (App.1835) (excluding deposition of deceased victim taken in absence of the accused); *Commonwealth v. Richards*, 35 Mass. 434, 436-439, 1836 WL 2491 (1837) (excluding preliminary examination testimony of deceased witness because the witness's precise words were not available); *Bostick v. State*, 22 Tenn. 344, 1842 WL 1948 (1842) (admitting deposition of deceased where defendant declined opportunity to cross-examine); *People v. Newman*, 5 Hill 295, 1843 WL 4534 (N.Y.Sup.Ct.1843) *(per curiam)* (excluding prior trial testimony of witness who was still alive); *State v. Campbell*, 30 S.C.L. 124, 125, 1844 WL 2558 (App.L.1844) (excluding deposition taken in absence of the accused); *State v. Valentine*, 29 N.C. 225, 1847 WL 1081 (1847) *(per curiam)* (admitting preliminary examination testimony of decedent where defendant had opportunity to cross-examine); *Kendrick v. State*, 29 Tenn. 479, 491, 1850 WL 2014 (1850) (admitting testimony of deceased witness at defendant's prior trial); *State v. Houser*, 26 Mo. 431, 439-441, 1858 WL 5832 (1858) (excluding deposition of deponent who was still alive).

FN4. "*Roberts* condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' " *Crawford*, 541 U.S., at 60, 124 S.Ct. 1354 (quoting *Roberts*, 448 U.S., at 66, 100 S.Ct. 2531). We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.

FN5. The dissent criticizes our test for being "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," *post*, at 2285 (opinion of THOMAS, J.). As to the former: We have acknowledged that our holding is not an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation," *supra*, at 2273, but rather a resolution of the cases before us and those like them. For *those* cases, the test is objective and quite "workable." The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description "workable"-unless one thinks that the distinction between "formal" and "informal" statements, see *post*, at 2282 - 2283, qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process," *post*, at 2283, and cautioning that the Clause would stop the State from "us [ing] out-of-court statements as a means of circumventing the literal right of confrontation," *post*, at 2283. It is hard to see this as much more "predictable," *ibid.*, than the rule we adopt for the narrow situations we address. (Indeed, under the

dissent's approach it is eminently arguable that the dissent should agree, rather than disagree, with our disposition in *Hammon v. Indiana*, No. 05-5705.)

As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality, see *post*, at 2281 - 2282: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers, see L. Friedman, Crime and Punishment in American History 67-68 (1993)-who perform investigative and testimonial functions once performed by examining Marian magistrates, see J. Langbein, The Origins of Adversary Criminal Trial 41 (2003). It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction. Cf. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

FN6. Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

Justice THOMAS, concurring in the judgment in part and dissenting in part.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we abandoned the general reliability inquiry we had long employed to judge the admissibility of hearsay evidence under the Confrontation Clause, describing that inquiry as "*inherently*, and therefore *permanently*, unpredictable." *Id.*, at 68, n. 10, 124 S.Ct. 1354 (emphasis in original). Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations. *Ante*, at 2273. Besides being difficult for courts to apply, this test characterizes as "testimonial," and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause. Because neither of the cases before the Court today would implicate the Confrontation Clause under an appropriately targeted standard, I concur only in the judgment in *Davis v. Washington*, No. 05-5224, and dissent from the Court's resolution of *Hammon v. Indiana*, No. 05-5705.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. Const., Amdt. 6. We have recognized that the operative phrase in the Clause, "witnesses against him," could be interpreted narrowly, to reach only those witnesses who actually testify at trial, or more broadly, to reach many or all of those whose out-of-court statements are offered at trial. *Crawford*, *supra*, at 42-43, 124 S.Ct. 1354; *White v. Illinois*, 502 U.S. 346, 359-363, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). Because the narrowest interpretation of the Clause would conflict with both the history giving rise to the adoption of the Clause and this Court's precedent, we have rejected such a reading. See *Crawford*, *supra*, at 50-51, 124 S.Ct. 1354; *White*, *supra*, at 360, 112 S.Ct. 736 (opinion of THOMAS, J.).

Rejection of the narrowest view of the Clause does not, however, require the broadest application of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, *supra*, at 43, 50, 124 S.Ct. 1354; *White*, *supra*, at 361-362, 112 S.Ct. 736 (opinion of THOMAS, J.); *Mattox v. United States*, 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409 (1895). "The predominant purpose of the [Marian committal] statute was to institute *systematic* questioning of the accused and the witnesses." J. Langbein, Prosecuting Crime in the Renaissance 23 (1974) (emphasis added). The statute required an oral examination of the suspect and the accusers, transcription within two days of the examinations, and physical transmission to the judges hearing the case. *Id.*, at 10, 23, 15 S.Ct. 337. These examinations came to be used as evidence in some cases, in lieu of a personal appearance by the witness. *Crawford*, *supra*, at 43-44, 124 S.Ct. 1354; 9 W. Holdsworth, A History of English Law 223-229 (1926). Many statements that would be inadmissible as a matter of hearsay law bear little resemblance to these evidentiary practices, which the Framers proposed the Confrontation Clause to prevent. See, *e.g.*, *Crawford*, *supra*, at 51, 124 S.Ct. 1354 (contrasting "[a]n off-hand, overheard remark" with the abuses targeted by the Confrontation Clause). Accordingly, it is unlikely that the Framers intended the word "witness" to be read so broadly as to include such statements. Cf. *Dutton v. Evans*, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result) (rejecting the "assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule").

In *Crawford* we recognized that this history could be squared with the language of the Clause, giving rise to a workable, and more accurate, interpretation of the Clause. " '[W]itnesses,' " we said, are those who " 'bear testimony.' " 541 U.S., at 51, 124 S.Ct. 1354 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). And " '[t]estimony' " is " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Ibid.* (quoting Webster, *supra*). Admittedly, we did not set forth a detailed framework for addressing whether a statement is "testimonial" and thus subject to the Confrontation Clause. But the plain terms of the "testimony" definition we endorsed necessarily require some degree of solemnity before a statement can be deemed "testimonial."

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *White*, *supra*, at 365, 112 S.Ct. 736 (opinion of THOMAS, J.). Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," *Crawford*, *supra*, at 52, 124 S.Ct. 1354, to the examinations of the accused and accusers under the Marian statutes.[FN1] See generally Langbein, *supra*, at 21-34.

Although the Court concedes that the early American cases invoking the right to confrontation or the Confrontation Clause itself all "clearly involve[d] testimony" as defined in *Crawford*, *ante*, at 2274, it fails to acknowledge that all of the cases it cites fall within the narrower category of formalized testimonial materials I have proposed. See *ante*, at 2274, n. 3.[FN2] Interactions between the police and an accused (or witnesses) resemble Marian proceedings-and these early cases-only when the interactions are somehow rendered "formal." In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). 541 U.S., at 38, 124 S.Ct. 1354. *Miranda* warnings, by their terms, inform a prospective defendant that " 'anything he says can be used against him in a court of law.' " *Dickerson v. United States*, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting *Miranda*, *supra*, at 479, 86 S.Ct. 1602). This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.[FN3]

The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances. *Ante*, at 2274 - 2276. Instead, the sole basis for the Court's conclusion is its apprehension that the Confrontation Clause will "readily be evaded" if it is only applicable to formalized testimonial materials. *Ante*, at 2276. But the Court's proposed solution to the risk of evasion is needlessly overinclusive. Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process. Cf. *ibid.* That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation, see *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In such a case, the Confrontation Clause could fairly be applied to exclude the hearsay statements offered by the prosecution, preventing evasion without simultaneously excluding evidence offered by the prosecution in good faith.

The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law. Cf. *Crawford*, *supra*, at 68, n. 10, 124 S.Ct. 1354 (criticizing unpredictability of the pre-*Crawford* test); *White*, 502 U.S., at 364-365, 112 S.Ct. 736 (THOMAS, J., concurring in part and concurring in judgment) (limiting the Confrontation Clause to the discrete category of materials historically abused would "greatly simplify" application of the Clause). In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. See *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) ("Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives-their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect"). Assigning one of these two "largely unverifiable motives," *ibid.*, primacy requires constructing a hierarchy of purpose that will rarely be present-and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.

The Court's repeated invocation of the word "objectiv[e]" to describe its test, see *ante*, at 2273, 2276 - 2277, 2278, however, suggests that the Court may not mean to reference purpose at all, but instead to inquire into the function served by the interrogation. Certainly such a test would avoid the pitfalls that have led us repeatedly to reject tests dependent on the subjective intentions of police officers.[FN4] It would do so, however, at the cost of being even more disconnected from the prosecutorial abuses targeted by the Confrontation Clause. Additionally, it would shift the ability to control

whether a violation occurred from the police and prosecutor to the judge, whose determination as to the "primary purpose" of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation.

B

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue.[FN5] Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations; the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality. Finally, there is no suggestion that the prosecution attempted to offer the women's hearsay evidence at trial in order to evade confrontation. See 829 N.E.2d 444, 447 (Ind.2005) (prosecution subpoenaed Amy Hammon to testify, but she was not present); 154 Wash.2d 291, 296, 111 P.3d 844, 847 (2005) (en banc) (State was unable to locate Michelle McCottry at the time of trial). Accordingly, the statements at issue in both cases are nontestimonial and admissible under the Confrontation Clause.

The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent. When combined with the Court's holding that the evidence against Davis is perfectly admissible, however, the Court's *Hammon* holding also reveals the difficulty of applying the Court's requirement that courts investigate the "primary purpose[s]" of the investigation. The Court draws a line between the two cases based on its explanation that *Hammon* involves "no emergency in progress," but instead, mere questioning as "part of an investigation into possibly criminal past conduct," *ante*, at 2269 - 2270, and its explanation that *Davis* involves questioning for the "primary purpose" of "enabl[ing] police assistance to meet an ongoing emergency," *ante*, at 2277. But the fact that the officer in *Hammon* was investigating Mr. Hammon's past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, *ante*, at 2278, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as "past conduct" back into an "ongoing emergency." *Ante*, at 2277, 2278.[FN6] Nor does the mere fact that McCottry needed emergency aid shed light on whether the "primary purpose" of gathering, for example, the name of her assailant was to protect the police, to protect the victim, or to gather information for prosecution. In both of the cases before the Court, like many similar cases, pronouncement of the "primary" motive behind the interrogation calls for nothing more than a guess by courts.

II

Because the standard adopted by the Court today is neither workable nor a targeted attempt to reach the abuses forbidden by the Clause, I concur only in the judgment in *Davis v. Washington*, No. 05-5224, and respectfully dissent from the Court's resolution of *Hammon v. Indiana*, No. 05-5705.

FN1. Like the Court, I presume the acts of the 911 operator to be the acts of the police. *Ante*, at 2274, n. 2. Accordingly, I refer to both the operator in *Davis* and the officer in *Hammon*, and their counterparts in similar cases, collectively as "the police."

FN2. Our more recent cases, too, nearly all hold excludable under the Confrontation Clause materials that are plainly highly formal. See *White v. Illinois*, 502 U.S. 346, 365, n. 2, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment). The only exceptions involve confessions of codefendants to police, and those confessions appear to have either been formal due to their occurrence in custody or to have been formalized into signed documents. See *Douglas v. Alabama*, 380 U.S. 415, 416, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (signed confession); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (signed confession taken after accomplice's arrest, see Brief for Petitioner in *Brookhart v. Janis*, O.T.1965, No. 657, pp. 10-11); *Bruton v. United States*, 391 U.S. 123, 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (custodial interrogation); *Roberts v. Russell*, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968)

(per curiam) (custodial interrogation following a warning that the co-defendant's statement could be used against her at trial, see Brief in Opposition, O.T.1967, No. 920, pp. 5-6).

FN3. The possibility that an oral declaration of past fact to a police officer, if false, could result in legal consequences to the speaker, see *ante*, at 2275 - 2276, may render honesty in casual conversations with police officers important. It does not, however, render those conversations solemn or formal in the ordinary meanings of those terms.

FN4. See *New York v. Quarles*, 467 U.S. 649, 655-656, and n. 6, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (subjective motivation of officer not relevant in considering whether the public safety exception to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is applicable); *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (subjective intent of police officer to obtain incriminatory statement not relevant to whether an interrogation has occurred); *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (refusing to evaluate Fourth Amendment reasonableness in light of the officers' actual motivations).

FN5. Although the police questioning in *Hammon* was ultimately reduced to an affidavit, all agree that the affidavit is inadmissible *per se* under our definition of the term "testimonial." Brief for Respondent in No. 05-5705, p. 46; Brief for United States as *Amicus Curiae* in No. 05-5705, p. 14.

FN6. Some of the factors on which the Court relies to determine that the police questioning in *Hammon* was testimonial apply equally in *Davis*. For example, while Hammon was "actively separated from the [victim]" and thereby "prevented ... from participating in the interrogation," Davis was apart from McCottry while she was questioned by the 911 operator and thus unable to participate in the questioning. *Ante*, at 2271, 2278. Similarly, "the events described [by McCottry] were over" by the time she recounted them to the 911 operator. *Ibid.* See 154 Wash.2d 291, 295-296, 111 P.3d 844, 846-847 (2005) (en banc).

185 W. Va. 512, 408 S.E.2d 91

Supreme Court of Appeals of West Virginia

STATE of West Virginia, Plaintiff Below, Appellant,

v.

Karen Sue DeBERRY, Defendant Below, Appellee.

No. 19990

Submitted May 14, 1991

Decided July 25, 1991

SYLLABUS BY THE COURT

1. In order to obtain a conviction under W.Va.Code, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by W.Va.Code, 61- 8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W.Va.Code, 61-8D-4(b) [1988].

2. "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1, State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974).

3. The term "neglect," as defined by W.Va.Code, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10. Therefore, W.Va.Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10, because such statute's use of the term "neglect" gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.

Edmund J. Matko, David A. Jones, Harrison County Prosecutor's Office, Clarksburg, Joanna I. Tabit, Deputy Atty. Gen., Appellate Div., Charleston, for the plaintiff below, appellant.

James M. Pool, Clarksburg, for the defendant below, appellee.

McHUGH, Justice:

This case is before the Court upon the appeal of the State of West Virginia. The appellee is Karen Sue DeBerry, the defendant below (hereinafter "defendant").

I

This appeal arises from the dismissal of an indictment in the Circuit Court of Harrison County. Because there was no trial, the record is very brief, with little factual development. The State's allegations, however, are as follows: In May, 1989, the defendant went to a party at her neighbor's house and took her twelve-year-old daughter, Valerie, with her. The defendant knew that alcohol would be served at this party.

At the party, the defendant encouraged her daughter to drink alcohol and to play "drinking games" with adults who were at the party. Valerie consumed alcohol until she lost consciousness.

The defendant apparently arranged for someone else to carry Valerie home and put her in bed, while she (the defendant) engaged in sexual intercourse with another guest at the party.

The next morning, the defendant found Valerie dead in her bedroom. The medical examiner determined that the cause of death was "acute ethanol intoxication" resulting from vast consumption of alcohol.

The defendant was charged in a three-count indictment. The first count charged the defendant and a William Thomas Reaser with first degree murder (by administering poison). See footnote 1 The second count charged the defendant with causing serious bodily injury to her child by felonious neglect, pursuant to W.Va.Code, 61-8D-4(b) [1988]. The third count of the indictment charged Reaser with aiding and abetting the defendant's violation of W.Va.Code, 61-8D-4(b) [1988]. See footnote 2

The second count of the indictment is at issue in this case, specifically, the constitutionality of W.Va.Code, 61-8D4(b) [1988], which makes it a felony for a parent, guardian, or custodian to neglect a child, and by such neglect, cause the child serious bodily injury. We must necessarily address the constitutionality of W.Va.Code, 61-8D-1(6) [1988] as well, which sets forth the definition of "neglect," as that term is used in W.Va.Code, 61-8D-4(b) [1988].

On February 13, 1990, the defendant moved to dismiss the indictment on the grounds that W.Va.Code, 61-8D-4(b) [1988] is unconstitutionally vague. The circuit court agreed, and, on November 28, 1990, an order was entered dismissing the indictment. See footnote 3

II

W.Va.Code, 61-8D-4 [1988] provides, in pertinent part:

> (b) If any parent, guardian or custodian shall neglect a child and by such neglect cause said child serious bodily injury, as such te rm is defined in section one, article eight-b of this ch apter, then such parent, guardian or custodian shall be guilty of a felony, and, upon conviction thereof, shall be fined not m ore than three thousa nd dollars and im prisoned in the penitentiary not less than one nor more than ten years, or both such fine and imprisonment.
>
> (emphasis supplied)

" 'Neglect' " is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." W.Va.Code, 61-8D-1(6) [1988] (emphasis supplied). See footnote 4

In dismissing the indictment, the circuit court held that the definition of the word "neglect," as that term is set forth in W.Va.Code, 61-8D-1(6) [1988] is unconstitutionally void for vagueness, in violation of principles of due process. See footnote 5 Thus, the circuit court agreed with the defendant's contention that the use of that term in W.Va.Code, 61-8D-4(b) [1988] is so indefinite and uncertain that it does not inform the accused as to the act or acts necessary to constitute the offense charged with such certainty that the defendant would be able to determine whether or not she had violated the law at the time the alleged offense occurred. We do not agree with the circuit court's judgment in this case, and, accordingly, we reverse the circuit court's order.

III

In arguing before the lower court that W.Va.Code, 61-8D-4(b) [1988] and W.Va.Code, 61-8D-1(6) [1988] are unconstitutionally vague, the defendant attacked the alleged ambiguity of the terms "unreasonable failure," and "minimum degree of care," as those terms are used in the definition of "neglect." W.Va.Code, 61-8D-1(6) [1988]. The State, on the other hand, asserts that W.Va.Code, 61-8D-4(b) [1988] establishes a standard of ordinary negligence.

In support of its contention, the State points to the definition of the term "unreasonable," which means, inter alia, unwise, senseless, or not rational. Black's Law Dictionary 1379 (5th ed. 1979). The State further looks to the use of the term "minimum degree of care," as that term is used in the statutory definition of "neglect." W.Va.Code, 61-8D-1(6) [1988]. "Minimum," the State points out, is the least quantity that is possible or assignable in a particular case. Black's Law Dictionary 898 (5th ed. 1979).

The defendant contends that the State wrongfully equates neglect with negligent, arguing that in a statutory crime, the element of intent may only be dispensed with where the legislature has clearly expressed so in the statute. This Court has held: "The legislative purpose to dispense with the element of intent in a statutory crime must be clearly expressed." Syl., State v. Great Atlantic & Pacific Tea Co. of America, 111 W.Va. 148, 161 S.E. 5 (1931).

The statute at issue in this case does not require intent because it sets forth a standard of neglect. Although we do not use the words neglect and negligence interchangeably, a comparison to criminal negligence is illustrative of our conclusion that intent is not required to obtain a conviction under W.Va.Code, 61-8D-4(b) [1988]. "There can be no attempt to commit a crime the gravamen of which is negligent conduct. By definition, the actor must intend to commit the target crime. His intent to commit a negligent act would be a contradiction in terms." IV C. Torcia, Wharton's Criminal Law § 741, at 569 (14th ed. 1981) (emphasis supplied).

We agree with the State's contention that W.Va.Code, 61-8D-4(b) [1988] and W.Va.Code, 61-8D-1(6) [1988] are not ambiguous. Clearly, the legislature intended to impose a standard of neglect, as opposed to requiring intent, by enacting W.Va.Code, 61-8D-4(b) [1988]. Because this statute involves neglect in a criminal context, again we view the law of criminal negligence as instructive.

> There can be no intent to com mit an unlawful act when the underlying conduct constitutes culpable negligence. Criminal negligence occurs in those instances in which neither specif ic nor general criminal intent is present but there exists such disregard of the interest of others that the offender's conduct am ounts to a gross devi ation below the standard of care expected to be m aintained by a reasonably careful person under like circumstances. Criminal negligence is of a higher degree than is required for civil liability and requires signifi cantly more than ordinary tort negligence.

22 C.J.S. Criminal Law § 38, at 44 (1989) (emphasis supplied) (footnotes omitted). See Eslava v. State, 473 So.2d 1143, 1147 (Ala.Crim.App.),cert. denied, 473 So.2d 1143 (Ala.1985). See footnote 6

Similarly, other states, in their criminal child abuse statutes, include the term "negligence" therein. For example, in State v. Lucero, 87 N.M. 242, 531 P.2d 1215, cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975), the court held that a criminal child abuse statute does not require proof of criminal intent. Rather, as the court pointed out, "[t]he Legislature has the authority to make a negligent act a crime as well as an

intentional one." 87 N.M. at 245, 531 P.2d at 1218. See footnote 7 See also People v. Hoehl, 193 Colo. 557, 568 P.2d 484 (1977); see generally, annotation, Validity and Construction of Penal Statute Prohibiting Child Abuse, 1 A.L.R.4th 38, § 12[b] (1980 & Supp.1990).

Accordingly, in order to obtain a conviction under W.Va.Code, 61-8D- 4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by W.Va.Code, 61-8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W.Va.Code, 61-8D-4(b) [1988].

IV

As for the State's contention that the terms used in W.Va.Code, 61- 8D-4(b) [1988] and W.Va.Code, 61-8D-1(6) [1988] are not unconstitutionally vague, we turn to well established constitutional principles.

In State v. Flinn, 158 W.Va. 111, 208 S.E.2d 538 (1974), this Court set forth the requirements for a criminal statute to pass constitutional muster, where that statute is challenged upon grounds of vagueness. In syllabus point 1 thereto, we held: "A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." We have recognized that this "vagueness standard is well settled[.]" State v. Less, 170 W.Va. 259, 263, 294 S.E.2d 62, 66 (1981). See syl. pt. 2, Less; syl. pt. 1, State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981); State ex rel. Whitman v. Fox, 160 W.Va. 633, 638-39, 236 S.E.2d 565, 569 (1977); State ex rel. Cogar v. Kidd, 160 W.Va. 371, 376-77, 234 S.E.2d 899, 902 (1977); Anderson v. George, 160 W.Va. 76, 84, 233 S.E.2d 407, 411 (1977) (Miller, J., concurring); State v. Grinstead, 157 W.Va. 1001, 1009, 206 S.E.2d 912, 918 (1974).

This Court is of the opinion that neither W.Va.Code, 61-8D-4(b) [1988], nor W.Va.Code, 61-8D-1(6) [1988] are unconstitutionally vague.

In reaching this conclusion, we look to see whether the criminal statute at issue notifies a potential offender that he or she may be in violation thereof. Although

> [t]here is no satisfactory form ula to deci de if a statute is so vague as to violate the due process clauses of the State and Fede ral Constitutions[,] [t]he basic requirements are that such a statute m ust be couched in such language so as to notify a potential o ffender of a crim inal provision as to

> what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

Syl. pt. 1, State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970).

As pointed out previously herein, the term "unreasonable" means unwise, senseless, or not rational. Black's Law Dictionary 1379 (5th ed. 1979). See also Beerman v. City of Kettering, 14 Ohio Misc. 149, 154, 237 N.E.2d 644, 648 (1965). The statute's use of this term is clear. Furthermore, the "minimum degree of care" is a term which requires little explanation in ascertaining proscribed conduct under the statute at issue.

The definition of "neglect" is comprised of these terms and set forth in W.Va.Code, 61-8D-1(6) [1988]. The term "neglect," in turn, is used in W.Va.Code, 61-8D-4(b) [1988], which makes it a crime to neglect a child where such neglect results in a serious injury.

Clearly, the term "neglect," as that term is used in W.Va.Code, 61-8D-4(b) [1988], and defined in W.Va.Code, 61-8D-1(6) [1988], "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227 (1972). See syl. pt. 1, State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970).

Consistent with the foregoing, we hold that the term "neglect," as defined by W.Va.Code, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10. Therefore, W.Va.Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10, because such statute's use of the term "neglect" gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.

Accordingly, the judgment of the Circuit Court of Harrison County is reversed. See footnote 8

Reversed.

Footnote: 1 See W.Va.Code, 61-2-1, as amended.

Footnote: 2 See W.Va.Code, 61-11-6 [1931].

Footnote: 3 *The hearing on the motion to dismiss was held on November 1, 1990. On November 2, 1990, the State moved to dismiss the first count of the indictment. The defendant opposed the State's motion. The record before this Court does not indicate why the State desired dismissal of the indictment's first count, nor why the defendant would oppose such a motion. However, during the oral argument of this case, counsel for the defendant asserted that the defendant objected to the motion to dismiss because the defendant was prepared to prove that she did not commit murder. In so asserting, counsel for the defendant, during oral argument, stated that the defendant's daughter was murdered, but not by the defendant. Counsel also asserted that the autopsy revealed semen in the victim's vagina, a blood alcohol content of .17%, and that the examining pathologist was not even certified. In any event, the dismissal of the first degree murder count of the indictment has no bearing on the issue that confronts us in this case, specifically, the constitutionality of W.Va.Code, 61-8D-4(b) [1988] and W.Va.Code, 61-8D-1(6) [1988].*

Footnote: 4 *W.Va.Code, 61-8D-4(b) [1988] also refers to the term "serious bodily injury," as that term is defined by W.Va.Code, 61-8B-1(10) [1986], which provides: " 'Serious bodily injury' means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ."*
W.Va.Code, 61-8D-4(a) [1988] is essentially the same as subsection (b), except subsection (a) deals with only "bodily injury," and not "serious bodily injury." The penalties under subsection (a) are less severe as well.
Subsection (c) of W.Va.Code, 61-8D-4 [1988] prohibits application of that section where the neglect is "due primarily to a lack of financial means on the part of" the parent. Subsection (d) prohibits application to a parent who, due to conflicting tenets and practices of religion, "fails or refuses, or allows another person to fail or refuse, to supply a child under the care, custody or control of such parent, guardian or custodian with necessary medical care[.]"

Footnote: 5 *Due process principles are contained in section 1 of the fourteenth amendment to the United States Constitution, which provides, in part, "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law[,]" and article III, section 10 of the West Virginia Constitution, which similarly provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."*

Footnote: 6 *We note that W.Va.Code, 61-8D-4(b) [1988] does not establish a standard of negligence, such as "reckless disregard," which is contained in this state's vehicular negligent homicide statute, W.Va.Code, 17C-5- 1 [1979]. In State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979), we recognized that that statute requires more than ordinary negligence. Id., syl. pt. 2.*

If W.Va.Code, 61-8D-4(b) [1988] expressed another specific standard of negligence as its standard of criminal liability, then we would be bound to apply that standard. For example, in a similar context, "[w]here a statute adopts degrees of negligence as a basis for fixing criminal responsibility, the court must give effect to them, even though they are not recognized in civil cases." 22 C.J.S. Criminal Law § 38, at 45 (1989). Our decision is limited to holding that W.Va.Code, 61-8D-4(b) [1988] requires neglect, which, as defined in W.Va.Code, 61-8D-1(6) [1988], is, fundamentally, of a higher degree than ordinary negligence.

The State maintains that even under a more stringent standard, the defendant's conduct in this case is violative of such a standard. As stated in note 3, supra, our decision in this case does not specifically address the defendant's alleged conduct. Rather, we limit ourselves to deciding the constitutionality of W.Va.Code, 61-8D-4(b) [1988] and W.Va.Code, 61-8D-1(6) [1988].

Footnote: 7 The defendant maintains that the State's reliance upon Lucero is misplaced because in that case, the court was faced with a statute in which the legislature had expressly eliminated the intent requirement by including the term "negligently" in the statute. Lucero is not dispositive of the case now before us. It is, however, persuasive. As stated previously herein, we believe that W.Va.Code, 61-8D-4(b) [1988] does not require intent. The defendant also claims that Lucero is distinguishable from this case because in Lucero, the court addressed a child abuse statute, whereas here, we are reviewing a child neglect statute. We believe that this distinction is inapposite for purposes of our decision in this case. While it is true that abuse refers more to the commission of an act and neglect refers to the omission of an act, the terms "child abuse" and "child neglect" are intertwined in several contexts. See, for example, W.Va.Code, 49-1-3 [1990], which sets forth definitions relating to child abuse and neglect in a civil context. See also State v. Eagle Hawk, 411 N.W.2d 120, 123-24 (S.D.1987) (agreeing with State's reasoning that, at some point, parental neglect may become abuse of child).

Footnote: 8 Our decision in this case is limited to reversing the judgment of the circuit court only with respect to the issue of the constitutionality of the statutes at issue in this case. Our decision does not address the question of the defendant's guilt or innocence, but merely allows the State to reindict the defendant under the applicable statute. See supra note 3.

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

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

FILED
December 1, 2004
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31710

IN RE: DEJAH ROSE P.

(Now DEJAH ROSE F.)

Appeal from the Circuit Court of Harrison County
Honorable Fred Fox, II, Judge
Case No. 02-JA-3-1

AFFIRMED

Submitted: September 8, 2004
Filed: December 1, 2004

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER, deeming himself disqualified, did not participate in the consideration or decision of this case.

SYLLABUS BY THE COURT

1. "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care." Syl. pt. 5, *In Re: Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

2. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

3. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, *In Re: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Per Curiam:

This case is before this Court upon the appeal of Julie F. from the July 24, 2003, order of the Circuit Court of Harrison County, West Virginia, terminating her parental rights to her infant daughter, Dejah Rose P., now known as Dejah Rose F.[1] The Circuit Court concluded that appellant Julie F.'s long-term addiction to drugs and past failures in responding to treatment have resulted in the identification of Dejah Rose as a neglected or abused child as defined by law in this State. Dejah Rose has been in the custody of the West Virginia Department of Health and Human Resources since April 2002 and has resided in the same foster home since that time.

Specifically, the Circuit Court found that, in view of the appellant's failure to fully comply with the terms of her post-adjudicatory improvement period, and because the time required for the appellant's recovery from addiction is uncertain under her current treatment program, there is no reasonable likelihood that the conditions of neglect or abuse

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[1] This Court follows its past practice in sensitive cases and shall refer to the last names of certain individuals by initials only. *Department of Health and Human Resources ex rel. Mills v. Billy Lee C.*, 199 W.Va. 541, 543 n. 1, 485 S.E.2d 710, 712 n. 1 (1997); *In re: Danielle T.*, 195 W.Va. 530, 531 n. 1, 466 S.E.2d 189, 190 n. 1 (1995).

It should be noted that, after paternity testing indicated that an individual by the name of Robert P. is not the biological father of Dejah Rose P., the Circuit Court directed that the child would be known as Dejah Rose F, consistent with the last name of her mother, appellant Julie F.

can be substantially corrected in the near future. As a result, the Circuit Court held that the welfare of Dejah Rose required the termination of the appellant's parental rights. Nor did the Circuit Court grant the appellant any post-termination visitation with Dejah Rose.

Appellant Julie F., conceding that immediate reunification with her daughter is unwarranted, contends that the Circuit Court committed error in not granting her an alternative to termination. Acknowledging her drug addiction and emphasizing that she is currently enrolled in a treatment program on a voluntary basis, the appellant asserts that the Circuit Court should have allowed her a gradual reunification with Dejah Rose under the supervision of the Circuit Court and the Department of Health and Human Resources while the appellant continues with her treatment. On the other hand, the brief of the Department of Health and Human Resources filed in this Court in support of the order terminating the appellant's parental rights was joined by the guardian ad litem appointed by the Circuit Court for the child.

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. Upon a careful review of this sad and distressing case, this Court concludes that the Circuit Court acted within its discretion in making the difficult decision to terminate the appellant's parental rights to Dejah Rose. The Circuit Court's decision was based upon extensive findings of fact. In that context, this Court notes the observation made in *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642

(1997), that the "intangibles" in abuse and neglect cases justify the deferential approach this Court takes regarding Circuit Court findings. 200 W.Va. at 562, 490 S.E.2d at 649.

Accordingly, the July 24, 2003, order of the Circuit Court of Harrison County is affirmed.

I.
FACTUAL AND PROCEDURAL BACKGROUND

For a number of years, the appellant, Julie F., has been an abuser of drugs, such as OxyContin and Xanax. As indicated by the Department of Health and Human Resources, the appellant was incarcerated, prior to the birth of her child, on bad check charges in connection with her drug habit and had failed to respond to treatment for her addiction on two prior occasions.

In March 2002, the appellant was living in Clarksburg, West Virginia, with Robert P. who also has a history of drug abuse. On March 16, 2002, Dejah Rose was born. At that time, the hospital staff noticed drug related "track marks" on the appellant's arms and feet. As later determined, the appellant had not consistently pursued prenatal care and had

abused drugs during her pregnancy.[2] After her release from the hospital with her baby, the appellant continued to abuse drugs. Dejah Rose is the appellant's only child.

In April 2002, the Department of Health and Human Resources obtained emergency custody of Dejah Rose and, soon after, placed her in a foster home where she has remained throughout these proceedings. In addition, the Department filed a petition in the Circuit Court of Harrison County alleging that Dejah Rose was a neglected or abused child[3] and asking the Circuit Court to terminate the appellant's parental rights.[4] Thereafter, the

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[2] The record indicates that at birth the child, Dejah Rose, exhibited symptoms indicative of drug addiction.

[3] Pursuant to *W.Va. Code*, 49-1-3 (1999), the phrase *child abuse or neglect* (or *child abuse and neglect*) is defined as "physical injury, mental or emotional injury . . . or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child."

Specifically, an *abused child* is defined in that section to include a child whose health or welfare is harmed or threatened by a parent, guardian or custodian "who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home [.]"

A *neglected child* is defined in that section to include a child whose physical or mental health is harmed or threatened by a failure of the child's parent, guardian or custodian "to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian [.]"

[4] The petition filed by the Department alleged that the biological father of Dejah Rose is unknown.

(continued...)

Circuit Court appointed a guardian ad litem for the child and a separate Court-Appointed Special Advocate to further the child's best interests.[5]

On April 29, 2002, the Circuit Court conducted a preliminary hearing and ruled that Dejah Rose should remain in the custody of the Department of Health and Human Resources and should continue to reside in the foster home. *W.Va. Code*, 49-6-3 (1998). The appellant, however, was granted supervised visitation with her daughter. Thereafter, the appellant signed a stipulated adjudication pursuant to Rule 26 of this Court's Rules of Procedure for Child Abuse and Neglect Proceedings[6] in which she acknowledged that, as a

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[4](...continued)
A paternity test conducted in May 2002 indicated that Robert P. is not the biological father of the child. Thereafter, a test conducted in February 2003 indicated that an individual by the name of Darryl H. is the biological father of Dejah Rose. Darryl H. later acknowledged the child as his own, and the Circuit Court determined Darryl H. to be a neglectful parent. In fact, the record indicates that Darryl H. is the biological father of several other children and that he has not provided them with financial or emotional support. The Department recommends that the parental rights of Darryl H. to Dejah Rose be terminated. This appeal, however, is limited to a consideration of the parental rights of the appellant, Julie F.

[5] Rule 52 of this Court's Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a Court-Appointed Special Advocate (CASA) who has the authority in abuse and neglect cases to independently review the record and advocate the best interests of the child.

[6] Rule 26 of the Rules of Procedure for Child Abuse and Neglect Proceedings states, in part, that any stipulated or uncontested adjudication shall include the following information: "(1) Agreed upon facts supporting court involvement regarding the respondent's(s') problems, conduct or condition; and (2) A statement of respondent's(s') (continued...)

result of her drug addiction, Dejah Rose was a neglected or abused child under the laws of this State. In that regard, the appellant admitted that she used illicit drugs during the last trimester of her pregnancy and that she had jeopardized the health of her baby by not regularly attending prenatal care. On the other hand, the appellant indicated in the adjudicated stipulation that she left the Clarksburg area and was receiving treatment for her addiction at a half-way house known as the Mid-Ohio Valley Fellowship Home in Parkersburg, West Virginia.

An adjudicatory hearing was conducted in the case on July 16, 2002. *W.Va. Code*, 49-6-2 (1996). The Circuit Court directed that custody of Dejah Rose continue with the Department and that she remain in the foster home. However, in addition to permitting further visitation with her daughter, the Circuit Court granted the appellant, Julie F., a six-month post-adjudicatory improvement period, conditioned, as set forth in the family case plan filed by the Department, upon the appellant's continued participation in the program at the Mid-Ohio Valley Fellowship Home.

In September 2002, the Department of Health and Human Resources filed a motion to revoke the improvement period because, in August 2002, the appellant tested

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[6](...continued)
problems or deficiencies to be addressed at the final disposition."

positive for opiates and had been expelled from the Fellowship Home. A secondary ground for the motion was the allegation that the appellant had been involved in a relationship with a male resident against the rules of the Home. The Circuit Court conducted an evidentiary hearing upon the motion and ruled that, although the allegations of the Department were true, the appellant would be granted a three-month extension of the post-adjudicatory improvement period. *See, W.Va. Code*, 49-6-12(g) (1996), permitting such extensions. The Court's ruling was based upon the fact that, since her expulsion from the Mid-Ohio Valley Fellowship Home, the appellant returned to Clarksburg and voluntarily enrolled in a methadone treatment program at the Clarksburg Treatment Center.

On April 15, 2003, the Circuit Court conducted a disposition hearing. *W.Va. Code*, 49-6-5 (2002); Rule 35(b), West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. At that time, Dejah Rose was approximately 13 months old and had been in the same foster home since April 2002. Following the hearing, the Circuit Court entered the order of July 24, 2003, terminating the appellant's parental rights. The order was prepared by the guardian ad litem for the child.

In terminating the appellant's parental rights, the Circuit Court noted that the appellant failed to respond to treatment for her drug addiction on prior occasions and had violated the terms of the post-adjudicatory improvement period as discussed above. Moreover, the Circuit Court emphasized that, based upon the evidence, the appellant would

be unable to complete her current methadone treatment program in the near future and that, in fact, it is unknown how much more time would be required. As the Circuit Court concluded: "[T]here is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future, and it is necessary for the welfare of the infant child to terminate the parental rights of [Julie F.]"

II.
DISCUSSION

This Court has long recognized the principle that parental rights are not absolute when in conflict with the health and welfare of the child. Syllabus point 5 of *In Re: Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973), holds: "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care." Syl. pt. 3, *In Re: Carolyn Jean*, 181 W.Va. 383, 382 S.E.2d 577 (1989); syl. pt. 1, *State v. C.N.S.*, 173 W.Va. 651, 319 S.E.2d 775 (1984). Moreover, as this Court said in syllabus point 3 of *In Re: Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996): "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 4, *In Re: Frances J.A.S.*, 213 W.Va. 636, 584 S.E.2d 492 (2003).

Specifically, a circuit court has the authority under *W.Va. Code*, 49-6-5(a)(6) (2002), to terminate parental rights when necessary for the welfare of the child, upon a finding "that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future [.]" Pursuant to that statute, the circuit court shall, in such cases, consider: "(A) The child's need for continuity of care and caretakers; (B) the amount of time required for the child to be integrated into a stable and permanent home environment; and (C) other factors as the court considers necessary and proper." Moreover, *W.Va. Code*, 49-6-5(b) (2002), provides in relevant part:

> As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning [.]

Finally, *W.Va. Code*, 49-6-5(b) (2002), sets forth several less restrictive alternatives to the termination of parental rights. Those alternatives include, for example,

permitting the child to remain with the parents but under the supervision of the Department of Health and Human Resources. However, in certain circumstances those alternatives are not feasible. Syllabus point 2 of *In Re: R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980), holds: "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected."[7] Syl. pt. 2, *In Re: Erica C.*, 214 W.Va. 375, 589 S.E.2d 517 (2003); syl. pt. 2, *DHHR ex rel. Mills v. Billy Lee C.*, 199 W.Va. 541, 485 S.E.2d 710 (1997).

In the case now to be determined, the Circuit Court concluded that "there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future, and it is necessary for the welfare of the infant child to terminate the parental rights of [Julie F.]" In reviewing that conclusion, this Court is guided by the standard of review set forth in syllabus point 1 of *In Re: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and

[7] *W.Va. Code*, 49-6-5 (1977), has been amended several times since 1977. Those amendments, however, do not affect the holding expressed in syllabus point 2 of *In Re: R.J.M.*

> shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In Re: Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003); syl. pt. 1, *In Re: Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41 (1999); syl. pt. 4, *In Re: Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997).

The appellant, Julie F., emphasizes that, since the removal of her child by the Department of Health and Human Resources in April 2002, she has obtained new housing and employment, completed classes in parenting skills and voluntarily enrolled in the methadone treatment program at the Clarksburg Treatment Center. Moreover, the appellant states that she has stayed away from Robert P., who also has a history of drug abuse. Thus, the appellant contends that she is entitled to a gradual reunification with Dejah Rose under the supervision of the Circuit Court and the Department.

On the other hand, the record contains substantial evidence, largely undisputed, justifying the Circuit Court's concern for the welfare of the child and warranting the termination of the appellant's parental rights.

In terms of drug abuse or drug addiction, *W.Va. Code*, 49-6-5 (2003), contemplates an inquiry into the parent's past conduct as well as the parent's prognosis. As discussed above, the statute authorizes a circuit court to determine: (1) whether the parent has demonstrated an inadequate capacity to solve the problems of neglect or abuse on his or her own or with help, and (2) whether the parent has habitually abused drugs or is addicted to drugs. Here, it is undisputed that the appellant abused drugs for a number of years and jeopardized the health of Dejah Rose by abusing drugs during her pregnancy and by not regularly attending prenatal care. After her release from the hospital with her baby, the appellant continued to abuse drugs. Counting her expulsion from the Mid-Ohio Valley Fellowship Home, during the improvement period, after testing positive for opiates, the appellant has failed to respond to treatment for her addiction three times.

The appellant enrolled in the methadone treatment program at the Clarksburg Treatment Center in November 2002. While this Court is not unmindful of the appellant's efforts to remain drug free, *W.Va. Code*, 49-6-5 (2002), further provides that, in terminating parental rights, a circuit court shall consider: (A) the child's need for "continuity of care and caretakers" and (B) "the amount of time required for the child to be integrated into a stable and permanent home environment." Here, Dejah Rose has resided in the same foster home since April 2002. As the Circuit Court found, the time required for the appellant's recovery from addiction at the Clarksburg Treatment Center is uncertain. The testimony given at the April 15, 2003, disposition hearing concerning the Treatment Center revealed that, due to the

individualized nature of the program, a patient could remain in treatment from six months to beyond one year. Moreover, such a period would not necessarily include the time required for other needed services, such as outpatient counseling. During the disposition hearing, David Jeffrey, a psychologist, testified that parenting would be difficult while involved in a methadone treatment program.

In the parental termination case of *In Re: Emily B.*, 208 W.Va. 325, 540 S.E.2d 542 (2000), the Circuit Court of Mercer County granted the mother an improvement period scheduled to commence upon the mother's successful completion of a substance abuse treatment program. This Court reversed, suggesting, in part, that the indefinite nature of such an improvement period contradicts the intent of the West Virginia Legislature to expedite abuse and neglect proceedings in order to safeguard the welfare of children. 208 W.Va. at 337, 540 S.E.2d at 554.[8]

This Court observed in *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996), that a child deserves "resolution and permanency" in his or her life and deserves the right to rely on his or her caretakers "to be there to provide the basic nurturance

[8] The *In Re: Emily B.* opinion indicates that the Circuit Court's implementation of the mother's improvement period was problematic because, by the very terms of the Court's ruling, the delay was indefinite. Moreover, this Court observed that, under the circumstances of the case, basing the commencement of the improvement period upon the mother's successful completion of a substance abuse treatment program was speculative. 208 W.Va. at 337, 540 S.E.2d at 554.

of life." 196 W.Va. at 260, 470 S.E.2d at 214. In this case, the ruling of the Circuit Court to terminate the appellant's parental rights to Dejah Rose was based upon extensive findings of fact and a correct application of the law. Consequently, this Court is of the opinion that the ruling of the Circuit Court terminating the appellant's parental rights, as well as the Circuit Court's decision at the disposition stage not to employ less restrictive alternatives[9], should not be disturbed.

III.
CONCLUSION

Upon all of the above, the July 24, 2003, order of the Circuit Court of Harrison County, West Virginia, terminating the appellant's parental rights is affirmed.

Affirmed.

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[9] As stated above, the Circuit Court did not grant the appellant, Julie F., any post-termination visitation with Dejah Rose, although it had the authority to do so. Syl. pt. 5, *In Re: Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Upon a review of the record, this Court affirms the denial of post-termination visitation. In that regard, this Court notes the representations of counsel during oral argument before this Court to the effect that, at some point after the July 24, 2003, order of the Circuit Court, the appellant may have temporarily left the State of West Virginia, and has, in any event, been somewhat out of contact with those concerned in this appeal.

187 W. Va. 212, 417 S.E.2d 903

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA, Plaintiff Below, Appellee,

v.

DENZIL DELANEY, Defendant Below, Appellant

No. 19837

Submitted: March 10, 1992

Filed: April 16, 1992

SYLLABUS BY THE COURT

1. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interest, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syllabus point 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

2. "A statement is not hearsay if the statement is offered against a party and is his own statement, in either his individual or a representative capacity." Syllabus point 1, Heydinger v. Adkins, ___ W.Va. ___, 360 S.E.2d 240 (1987).

3. In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

Joanna I. Tabit, Deputy Attorney General, Charleston, West Virginia, Attorney for the Appellee

Mark G. Sargent, Spencer, WV, Attorney for the Appellant

Brotherton, Justice:

The appellant, Denzil Delaney, appeals from the verdict of the Circuit Court of Calhoun County, which found the appellant guilty on six counts of sexual assault. The appellant was sentenced to thirty-to-fifty years in the State penitentiary, fined $10,000, and ordered to pay restitution for medical and counseling expenses incurred by the victims.

Denzil Delaney was married to Joyce Nicholas. He lived with his wife and their daughter, Patty, on a farm in Orma, Calhoun County, West Virginia. Also living with Denzil and Joyce Delaney were Joyce's parents and Joyce's two young sisters, Emma and Missy Nicholas.

The first of the alleged sexual assaults which form the basis of this case occurred in January, 1983, when the appellant assaulted seven-year-old Emma Nicholas after feeding the hogs. Later that summer, he again allegedly assaulted Emma while she was sleeping in her parents' bed. Next, in the summer of 1984, the appellant took Emma outside early one morning and again sexually assaulted her. He then gave her a handful of change and told her not to tell anyone.

In June, 1985, the appellant allegedly assaulted Emma's eight-year-old sister, Missy, while she was in her bedroom. Again, the appellant gave her a handful of change and told her not to tell anyone what he had done.

On July 21, 1985, Emma, Missy, and Patty Delaney, the appellant's daughter, told the appellant's wife, Joyce, that Denzil had been making them pull their clothes down. The appellant denied the allegation and accused the girls of lying. In July, 1988, Patty claimed that the appellant sexually assaulted her. A second sexual assault happened later that month. After both occasions, he gave her money and told her not to tell anyone.

After hearing that the appellant had molested Patty, Missy and Emma again decided to tell someone what had happened. Missy constructed a diary, in which she wrote, on July 18, 19, and 20, 1988, what had happened to her, Emma, and Patty. She also drew sketches of the appellant, portraying him as the devil. Missy placed the diary on the kitchen table on July 19, 1988, hoping that her mother, Missouri Nicholas, would read it. Her mother did not see it. Missy then copied one of the pages from the diary onto a separate piece of paper and gave it to a friend to give to her mother. Word got back to Missy's older sister, Robin McCumbers, who told the appellant's wife what the girls had said. The appellant's wife, Joyce, then ordered the appellant to pack his clothes and leave. He moved to his mother's home in Pennsylvania.

On July 21, 1988, Joyce Delaney and Missouri Nicholas took the three girls to the State Police headquarters in Grantsville, where all three girls gave statements to Trooper Garrett. On July 22, 1988, they were examined by Dr. Kathryn Grant. Based upon the statements given, Trooper Garrett investigated the appellant and filed criminal complaints against him in Calhoun County Magistrate Court. The appellant waived extradition, returned to West Virginia, and was incarcerated in the Calhoun County jail.

While incarcerated, the appellant made several phone calls to Joyce, by then his ex-wife, and his ex-father-in-law, Denver Nicholas. Denver Nicholas visited the appellant at the jail at the appellant's request. At that time, the appellant allegedly confessed to sexually assaulting the three girls and indicated that, although he wanted to plead guilty, he was not permitted to do so because he was not represented by counsel at that time. During the next visit, Denver Nicholas reported that the appellant asked him to have the girls recant their statements, but Denver refused. When the appellant called his ex-wife, Joyce, she spoke with the appellant while her sister, Robin, listened on the extension. At that time, the appellant confessed that he had sexually assaulted the girls, but stated that he wanted the girls to lie because he didn't want to go to jail for it.

Trial began in the Circuit Court of Calhoun County on July 11, 1989. Denver Nicholas, Robin McCumbers, and Joyce Nicholas testified to the appellant's alleged confessions. Dr. Katherine Grant, the physician who examined the three victims on July 22, 1988, also testified that Patty, the appellant's daughter, had physiological symptoms that were normal for a mature woman having sexual intercourse, but not for a five-year-old girl. Dr. Grant also examined Missy and Emma, but the examination revealed no physiological indications of recent sexual intercourse. However, Dr. Grant stated that the physical signs of sexual intercourse could recede within as little as six months. Also testifying was Pamela Rockwell, a sexual assault counselor for the Charleston-based Family Services. Ms. Rockwell had counseled Missy, Emma, and Patty on several occasions prior to trial. Ms. Rockwell testified that the three girls displayed symptoms of children who had been sexually assaulted or abused.

Following the closing statements, the jury found the appellant guilty on all six counts. Accordingly, the trial court sentenced him to thirty-to-fifty years in the State penitentiary, fined him $10,000, and ordered him to pay for the medical and counseling expenses incurred by the three girls. It is from the conviction that the appellant files this appeal.

The appellant presents twenty-four separate allegations of error to this Court for review. This Court will address only those assignments of error which have some substance and merit discussion. The remaining assignments of error, which we believe to be meritless, will not be addressed in this opinion.

Initially, we note that the appellant's argument that he had ineffective assistance of counsel at the trial level is erroneous. A review of the transcript reveals that the appellant's trial counsel, who is also his appellate counsel, did all things reasonable and necessary to defend his client. In State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1973), this Court set the standards for determining ineffective assistance of counsel:

Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interest, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.

Id. at syl. pt. 21. Further, the Thomas Court ruled that "[o]ne who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Id. at syl. pt. 22. As we can find no evidence that the trial counsel's performance resulted in the appellant's conviction or that no reasonably qualified defense attorney would have so acted, we do not find ineffective assistance of counsel.

The appellant next argues that the trial court erred when it allowed Joyce Nicholas, the appellant's ex-wife, to testify regarding his acts and statements which occurred while they were still married. The appellant argues that his ex-wife's testimony should have been limited to acts alleged to have been committed against their daughter, Patty, and that the marital privilege would prevent her from testifying regarding Emma and Missy.

West Virginia Code § 57-3-3 (1931) explains the marital privilege against acting as a witness against a spouse:

> In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them . . . . (Emphasis added.)

In this case, the charged sexual assaults were against their child and against the wife's two younger sisters. Thus, the marital privilege is not applicable to this case by the specific language of W.Va. Code § 57-3-3.

The appellant next argues that the statements made by him to Denver and Joyce Nicholas while in jail were hearsay and thus, should have been held inadmissible by the court below. We disagree. Rule 801(d)(2)(A) of the West Virginia Rules of Evidence holds that admissions by a party opponent do not fall within the hearsay rule. In syllabus point 1 of Heydinger v. Adkins, 178 W.Va. 463, 360 S.E.2d 240 (1987), this Court stated that "[a] statement is not hearsay if the statement is offered against a party and is his own statement, in either his individual or

representative capacity." We believe the statements were properly admitted by the trial court.

The appellant next contends that his constitutional right to due process was violated when the Circuit Court of Calhoun County denied his request to order court appointed experts access to the victims for physical and psychological examinations. The appellant was permitted both medical and psychological experts to interpret the examinations that had already been performed upon the three girls, but denied the opportunity to have the three girls re-examined by another physician and psychologist.

While we agree that a defendant has a right to present evidence on his own behalf and to confront adverse witnesses, pre-trial discovery is generally within the discretion of the trial court. Syl. pt. 8, State v. Audia, 171 W.Va. 568, 301 S.E.2d 199 (1983); see also, State v. Fortner, 182 W.Va. 345, 387 S.E.2d 812 (1989). This Court has held that the decision whether to require a psychiatric evaluation prior to determining a child's capacity to testify is within the trial court's discretion. Burdette v. Lobban, 174 W.Va. 120, 323 S.E.2d 601, 602 (1984). However, the Court has also ruled that "the traditional challenge to the competency of minors . . . does not require a psychological profile." State v. McPherson, 179 W.Va. 612, 371 S.E.2d 333, 339-40 (1988).

The State counters that the court must balance the defendant's right to discover possible evidence against the victims' privacy interests in ordering another physical examination. The State urges this Court to adopt a balancing test in order to determine whether additional examinations would be required, pointing to the test developed in State v. Ramos, 553 A.2d 1059 (R.I. 1989). See footnote 1 In Ramos, the Supreme Court of Rhode Island adopted "a compelling need or reason" test, stating that:

The practice of granting physical examinations of criminal witnesses must be approached with utmost judicial restraint and respect for an individual's dignity. In determining whether to order an independent medical examination, the trial justice should consider (1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedures, (4) the potentially debilitating physical effects of such an examination, and (5) any other relevant considerations.

Id. at 1062.

Although less specific than the Ramos test, Alaska utilizes a similar balancing test in determining whether the trial court was correct. In Moor v. State, 709 P.2d 498 (Alaska App. 1985), the Alaska Court of Appeals required a strong showing of

materiality on the part of the requesting party before it would reverse a trial court's decision not to grant a psychiatric evaluation of a prosecution witness. Id. at 508. In making the decision, the court weighed the defendant's right to a fair trial and to challenge the veracity of the prosecution witnesses against the witness' right to privacy and the risk that such crimes would go unreported if witnesses were subject to harassment. Id. The Alaska court concluded that the defendant's offer of proof was inadequate and the trial court's denial of the evaluation would be upheld where the defendant's evidence showed the victim had discussed possible imaginary sexual activity with friends.

We believe the guidelines established in Ramos are a reasonable method of balancing the defendant's need for the examinations against the victim's right to privacy. Thus, in order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence he has a compelling need or reason for the additional physical or psychological examinations. In making the determination, the judge should consider (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

Although the trial court below does not state specific and detailed reasons for denying the request, we believe that it followed, in essence, the test enunciated in Ramos. In light of the victims' tender ages, the intrusiveness and humiliation associated with a gynecological examination of the three young girls, and the remoteness in time from the incidents in question to the proposed examinations, the court was correct in denying the request for a physical examination. Most persuasive to this Court is the fact that the State's expert testified that physical symptoms of sexual assault can dissipate in as little as six months. It has been several years since the dates of the alleged assaults. Thus, any evidence the appellant hopes to obtain from these tests would have long ago disappeared. In balancing the appellant's need against the consideration of the victims' ages, the intrusiveness of the examinations, and the remoteness of time, we conclude that there would be no probative value of such physical examinations at this point. Thus, the trial court was correct in denying additional physical examinations of the three victims.

The appellant's request for a psychological evaluation likewise fails. In many cases with similar circumstances, the trial court would be justified in allowing the examination. In this case, however, despite the appellant's professed need, he did little more than ask for the evaluation. Under the six part test set forth above, the

appellant failed to present any reason, compelling or otherwise, to justify the examination. Given the effect of a probing mental interrogation on children of their tender years, we believe the trial court was correct in ruling that, in essence, the probative value to the appellant was outweighed by the trauma and intrusiveness to the victims. The appellant had available to him a psychologist to assist with the evaluation and cross-examination of the State's expert testimony. The appellant's counsel cross-examined the State's witness extensively on perceived failures in her treatment and questioning of the children's background. See footnote 2 Since we cannot find that the appellant's need is greater or more compelling than the burden it would impose on the victims, the trial court did not abuse its discretion in denying the appellant's request. See footnote 3

The appellant's remaining assignments of error are without merit and are not addressed by the Court in this opinion. Accordingly, we affirm the verdict of the Circuit Court of Calhoun County.

Affirmed.

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1. Other jurisdictions have adopted some form of the "compelling need or reason" test in determining whether a request for an additional physical examination should be granted. See People v. Chard, 808 P.2d 351 (Colo. 1991), cert. denied ___ U.S. ___, 112 S.Ct. 186, 116 L.Ed.2d 147 (1991); State v. Farr, 558 So.2d 437 (Fla.App. 1990); State v. Drab, 546 So.2d 54 (Fla.App. 1989); People v. Beauchamp, 483 N.Y.S.2d 946 (N.Y.Supp. 1985); Lanton v. State, 456 So.2d 873 (Ala.Crim.App. 1984), cert. denied 471 U.S. 1095, 105 S.Ct. 2314, 85 L.Ed.2d 834 (1985); State v. Glover, 273 N.E.2d 367 (Ill. 1971).

A balancing test has also been applied in cases in which psychological testing was requested. See People v. Chard, 808 P.2d 351 (Colo. 1991); State v. LeBlanc, 558 So.2d 507 (Fla.App. 1990); State v. Nelson, 453 N.W.2d 454 (Neb. 1990); People v. Graham, 434 N.W.2d 165 (Mich.App. 1988); Moor v. State, 709 P.2d 498 (Alaska App. 1985); State v. Filson, 613 P.2d 938 (Idaho 1982).

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2. Ms. Rockwell qualified as an expert at trial. She testified that she had a bachelors degree with fifteen hours toward her masters degree and approximately ninety hours of continuing education specializing in childhood sexual abuse. At the time of trial, she had been employed by the Sexual Assault Program at the Charleston-based Family Services for five and one-half years and in social services for another two years. She testified that she had treated approximately 400-450 children as victims of sexual assault, with ages ranging from three years through teenagers. Ms. Rockwell also stated that she received training in California, Chicago, and Washington, D.C. No objection was made by the appellant's counsel at the time of her testimony.

3. We also note the appellant's argument that the testimony of the rape counselor expert was improper is erroneous. In syllabus point 7 of State v. Edward Charles L., ___ W.Va. ___, 398 S.E.2d 123 (1990), this Court held that:

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse. An expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused . . . .

As a result, we believe that the testimony of Ms. Rockwell was proper.

214 W. Va. 657, 591 S.E.2d 215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

_____

No. 31432

_____

FILED
December 2, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: DESARAE M., DESTINY M. AND BRITNEY M.

Appeal from the Circuit Court of Hampshire County
The Honorable David H. Cookman, Judge
Juvenile Action Nos. 02-JA-17, 02-JA-18 and 02-JA-19

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: November 5, 2003
Filed: December 2, 2003

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS concurs in part and dissents in part and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "'When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.' Syl. Pt. 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996)." Syl. Pt. 1, *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998).

2. "The purpose of the family case plan as set out in W.Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. Pt. 5, *State ex rel. Dep't of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

3. "Under W.Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va. Code, 49-6D-3 (1984)." Syl. Pt. 3, *State ex rel. Dep't of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

4. "Under W.Va. Code, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel

and to submit it to the court for approval within thirty days." Syl. Pt. 4, *State ex rel. Dep't of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

5. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family. Syl. Pt. 4, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

6. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994)." Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

7. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are

involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991).

8. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991).

9. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

This is an appeal by Shannon R.[1] (hereinafter "Appellant") from a final order of the Circuit Court of Hampshire County terminating her parental rights to her three children, Britney, Destiny, and Desarae M.[2] The Appellant appeals that termination order to this Court, alleging that the lower court committed several reversible errors. Upon thorough evaluation of the record, briefs, and arguments of counsel, we reverse the determination of the lower court and remand for one additional improvement period to be conducted in compliance with applicable statutory mandates and consistent with this opinion.

I. Factual and Procedural History

The Appellant and Dwayne M.[3] are the biological parents of Destiny, Britney, and Desarae M. On March 9, 2002, Desarae, then two years of age, was admitted to Hampshire Memorial Hospital in Romney, West Virginia, suffering from anemia and

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[1]We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties. *See, e.g., West Virginia Dept. of Human Services v. La Rea Ann C.L.*, 175 W. Va. 330, 332 S.E.2d 632 (1985).

[2]Britney was born on March 20, 1996; Destiny was born on May 28, 1998; and Desarae was born on January 26, 2000.

[3]Dwayne M. is currently incarcerated in Maryland until 2024 for attempted murder and robbery, and we consequently do not address any issues surrounding the termination of his parental rights to these children. While the father has not appealed, and we therefore do not have a complete record regarding the father, it appears that Dwayne M. refused service of process at the prison in which he was incarcerated.

vomiting. She was then transferred to Cumberland Memorial Hospital in Cumberland, Maryland. Examining physicians observed that Desarae had suffered a double fracture of her left leg which had been placed in a cast on March 1, 2002. Desarae also had a bruise on her forehead; a scar between her eyes which resembled the pattern of her leg cast; several bruises on her thighs, knees, back, upper abdomen, and calves; and severe abdominal pain due to a mass in her stomach which resulted from a pancreatic split due to something striking Desarae with blunt force.[4] The Appellant was unable to explain the origin of these wounds, except to state that Desarae had been bouncing on a stair step. Likewise, the mother failed to provide a explanation for the abdominal bruising, except to state that this injury may have occurred at the same time Desarae broke her leg. Moreover, the Appellant's accounts of the injury and who may have witnessed the injury were inconsistent. She first said that only children had witnessed the incident; she later indicated that her boyfriend, Victor, was with the children when the incident occurred. Britney, the oldest child, indicated that both her mother and Victor were home when the incident occurred.

Desarae was subsequently transferred to Ruby Memorial Hospital in Morgantown, West Virginia.[5] She was also transported to Pittsburgh Children's Hospital in

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[4]Desarae also suffered anemia. Her medical history revealed that she had been prescribed iron drops; however, the Appellant admitted that she had not given the iron drops to Desarae routinely because she thought Desarae was gagging on the drops.

[5]While visiting Desarae at Ruby Memorial, the Appellant was arrested on a (continued...)

Pittsburgh, Pennsylvania, for a period of approximately one week before returning to Ruby Memorial Hospital. Including all four hospitals, Desarae was hospitalized from March 9, 2002, through April 29, 2002.

On March 11, 2002, the Department of Health and Human Resources (hereinafter "DHHR") filed an application for emergency custody, alleging imminent danger to all three children. On March 13, 2002, the DHHR filed an Abuse and Neglect Petition requesting that custody of all three children be placed with the DHHR. The DHHR alleged that all three children were "abused and neglected children primarily based upon the unexplained multiple and serious injuries to Desarea and the failure of [the mother] to provide the children with needed medications and supervision." Attorney Joyce Stewart was appointed as guardian ad litem for the children. Attorney Karen Garrett was appointed to represent the Appellant, and Attorney William Keaton was appointed to represent the children's father, Dwayne M.

Psychologist Renee Harris began working with the children in April 2002 and reported that Destiny had indicated that she had been subjected to sexual abuse by the Appellant's boyfriend. Subsequent medical examinations of Destiny and Britney were

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[5](...continued)
1999 outstanding burglary warrant from Hampshire County, West Virginia, and she subsequently posted bond.

inconclusive regarding the alleged sexual abuse. On May 2, 2002, the lower court conducted an adjudicatory hearing and received testimony from Child Protective Services Worker Susan Wilt regarding her visit to Desarae at Cumberland Memorial Hospital and subsequent experience in this matter. The lower court also entertained telephonic testimony concerning Desarae's injuries from Dr. Peter Ehrlich, a pediatric surgeon in Morgantown, West Virginia. Dr. Susan Nuber of Cumberland, Maryland, also testified telephonically and explained her findings regarding Desarae's injuries. Both physicians opined that Desarae's injuries were caused by physical abuse rather than accidental means. The Appellant also testified at this hearing, maintaining that neither she nor her boyfriend, Victor, had caused any of Desarae's injuries. At the conclusion of the adjudicatory hearing, the lower court found that Desarae was an abused and neglected child.

During a May 29, 2002, hearing, the lower court granted the Appellant an improvement period[6] and placed goals and requirements for such improvement period on the

[6]The guardian ad litem for the children objected to the improvement period based upon the Appellant's continued relationship with Victor and her denial of abuse to Desarae. The guardian ad litem also asserted that the Appellant had not located a permanent place of residence or employment and that service workers had found it difficult to contact the Appellant to schedule services.

record.[7] A formal family case plan, as required by West Virginia Code § 49-6D-3(a) (1984) (Repl. Vol. 2001), was not submitted.

The record reveals multiple areas of difficulty and delay encountered by all parties during the improvement period. One of the most troubling issues is the Appellant's apparent lack of ability to remove herself from the relationship with her boyfriend, Victor. Counsel for the Appellant informed the lower court during the May 29, 2002, hearing that her client had chosen her children over her boyfriend, but economic limitations had made it difficult to remove herself from the home she and Victor shared.

The Appellant also alleges that personnel shortages within DHHR limited her success during her improvement period. She emphasizes an incident in September 2002 in which the children were not transported to the designated visitation site for visitation. The caseworkers had apparently terminated their employment with the DHHR and alternate arrangements had not been made.

The Appellant was initially counseled by Mr. Greg Trainor but was requested by the DHHR to begin counseling with Cindy Hay since Ms. Hay had conducted some

[7]Pursuant to these requirements, the Appellant was to become gainfully employed, to visit with the children, to continue parenting classes, to continue individual therapy, to obtain permanent housing, and to continue to participate in in-home services.

parenting classes in which the Appellant had participated. The Appellant asserts that her counseling sessions were limited since the therapist was on vacation from July 15, 2002, through August 5, 2002.

During a September 2002 MDT meeting, the Appellant reported that she had maintained a job for two weeks at a gas station store in Winchester, Virginia. Although the Appellant alleged that she had not seen Victor for a few months, members of Victor's family had allegedly informed the DHHR that Victor had been staying with the Appellant. The DHHR also presented a letter from the Appellant to Victor, written in September 2002, in which she had told Victor that she wanted to have a child with him. The Appellant was also incarcerated in Baltimore City Jail on a warrant for Failure to Appear at a scheduled court hearing.

On December 18, 2002, the lower court conducted a dispositional hearing and heard testimony from the individual counselor providing services to the Appellant, the therapist for the children, a representative from Family Preservation Services, and a caseworker from the DHHR. The evidence revealed that the Appellant was unable to locate steady employment during the improvement period, continued to maintain some degree of relationship with Victor, and failed to follow through with all therapy goals. Guardian ad litem Joyce Stewart, DHHR caseworkers, the therapist for children, and therapist for mother all indicated that termination of parental rights was in best interest of children. The lower

court found that, pursuant to West Virginia Code § 49-6-5(6), there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future, and the Appellant's parental rights were terminated to all children by order dated January 29, 2003.

The Appellant appeals the termination of parental rights, alleging that the lower court erred by (1) allowing physicians from Morgantown, West Virginia, and Cumberland, Maryland, to testify at the adjudicatory hearing through a telephonic conference; (2) failing to require the DHHR to prepare an individualized family case plan; (3) erroneously ruling that the conditions of neglect or abuse cannot be corrected; (4) failing to recognize a conflict of interest of a DHHR worker because she had previously worked in the Appellant's home; (5) failing to grant a less restrictive alternative; (6) allowing a psychologist for Britney and Destiny to testify regarding the statements of the children on the issue of sexual abuse; (7) terminating her parental rights to Britney and Destiny despite the absence of an adjudication finding them to be neglected or abused; (8) refusing to permit counsel for the Appellant to argue a motion for return of custody of Britney and Destiny.

II. Standard of Review

In reviewing the proceedings conducted in the lower court and the lower court's resolution of this matter, this Court is guided by the two-prong deferential standard enunciated in syllabus point one of *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177

(1998), as follows: "'When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.' Syl. Pt. 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996)."

III. Discussion

A. Failure to Formulate Family Case Plan

At the outset, our evaluation of this record guides us to the firm conviction that the record of the adjudicatory hearing is totally supportive of the findings of abuse and neglect notwithstanding any deficiency in the circumstances under which the telephonic testimony of the two physicians was received. It is beyond doubt that the children who are the subject of this case are abused and neglected children. Of the multitude of alleged errors asserted by the Appellant, however, our evaluation reveals that the Appellant's most compelling argument is the absence of a statutorily-required family case plan.[8] We therefore proceed to address two significant assignments of error presented by the Appellant because

[8]We address only two assignments of error: the absence of the family case plan, upon which we are premising the reversal and remand, and the failure of the lower court to specifically find that Destiny and Britney were abused children. We find no merit to the other assignments of error forwarded by the Appellant and decline to address those issues.

it is apparent from the record that the Appellant is entitled to an additional opportunity to put forth a genuine effort to preserve her parental relationship with these children.

The Appellant alleges, and the State concedes, that a family case plan, as envisioned and mandated by West Virginia Code § 49-6D-3(a), was not formulated in the present case. The State maintains that a list of goals and requirements for the improvement period placed on the record by the lower court satisfied the "spirit," if not the "letter," of the law. We disagree. A formal family case plan, as mandated by West Virginia Code § 49-6D-3(a), is not only for the benefit and information of the parent seeking improvement; it is equally beneficial and necessary for the caseworkers and other assistive personnel. Without a family case plan, the individuals seeking to assist a parent are limited in their ability to formulate distinct goals, methods of achieving such goals, or means by which success will be judged. While we applaud the lower court for attempting to clarify matters by placing specific goals upon the record in open court, such means of clarification could have been used in conjunction with the implementation of a family case plan but should not have been employed to the exclusion thereof.

This Court has repeatedly examined the benefits of a family case plan and the statutory requirement for the family case plan as an important component of an improvement period. *See In re Jamie Nicole H.*, 205 W. Va. 176, 182, 517 S.E.2d 41, 47 (1999)

("Pursuant to West Virginia Code § 49-6D-3 (1998), a family case plan must be developed by the DHHR and submitted to the circuit court"). In syllabus point five of *State ex rel. Department of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987), we explained that "[t]he purpose of the family case plan as set out in W.Va.Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syllabus point three of *Cheryl M.* stated: "Under W.Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order *shall require* the Department of Human Services to prepare a family case plan pursuant to W.Va. Code, 49-6D-3 (1984)." 177 W. Va. at 688, 356 S.E.2d at 181 (emphasis supplied). Syllabus point four of *Cheryl M.* continued as follows: "Under W.Va. Code, 49-6D-3 (1984), the Department of Human Services is required to prepare a family case plan with participation by the parties and their counsel and to submit it to the court for approval within thirty days."

In *Cheryl M.*, somewhat similar to the case at bar, the lower court and the Department of Human Services had failed to formulate a family case plan.[9] This Court in *Cheryl M.* emphasized that a family case plan "is designed to foreclose a natural parent from being placed in an amphorous improvement period where there are no detailed standards by

[9]In *Cheryl M.*, unlike the case at bar, the lower court had also refused to grant an improvement period. This Court in *Cheryl M.* reversed and remanded based upon the absence of the family case plan and the denial of the improvement period. 177 W. Va. at 695, 356 S.E.2d at 188.

which the improvement steps can be measured." 177 W. Va. at 693-94, 356 S.E.2d at 186-87. The *Cheryl M.* Court also noted that the family case plan "also provides a meaningful blueprint that the [DHHR] can monitor and which will also give the court specific information to determine whether the terms of the improvement period were met. Without such a plan, a court is then confronted with general testimony as to whether the natural parent has shown the requisite 'improvement.'" 177 W. Va. at 694, 356 S.E.2d at 187.

In *Cheryl M*, this Court provided the following explanation of the improtance of the family case plan:

> The point that bears emphasizing is that under W.Va. Code, 49-6-2(b), the family case plan is triggered when a court orders an improvement period. Here, the court took no formal action to order an improvement period and, as a consequence, there was never any court-approved family case plan as required by W.Va. Code, 49-6D-3(b).
>
> It must be remembered that W.Va. Code, 49-6D-3, is a part of a larger enactment known as the West Virginia Child Protective Services Act (CPSA), W.Va. Code, 49-6D-1, *et seq*. Its purpose and intent are set out in W.Va. Code, 49-6D-2, which emphasizes that "the intention of the legislature [is] to provide for the removal of a child from the custody of the child's parents only when the child's welfare cannot be otherwise adequately safeguarded." (Emphasis added).

177 W. Va. at 694, 356 S.E.2d at 187.

This Court in *Cheryl M.* also addressed the issue of rigorous compliance with statutory mandates and quoted the following language from a Connecticut case, *In re Juvenile Appeal*, 420 A.2d 875 (Conn. 1979):

> Insistence upon strict compliance with the statutory criteria before termination of parental rights and subsequent adoption proceedings can occur is not inconsistent with concern for the best interests of the child. Rather, it enhances the child's best interests by promoting autonomous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusion disguised under the rubric of the child's 'best interests.'

420 A.2d at 886-87. We also explained as follows in syllabus point four of *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991):

> In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Id. at 616, 408 S.E.2d at 368. We further explained as follows in *Carlita B.*:

> The goal [of improvement periods and case plans] should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the

> D.H.S. and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

Id. at 625, 408 S.E.2d at 377.

The record in this case indicated that extreme cruelty was inflicted upon Desarae. Despite the egregiousness of these accusations, however, once the lower court grants an improvement period, certain procedural requirements have to be followed. It is very tempting to circumvent the statutory requirement by focusing upon the severity of abuse, the absence of clear indication that the mother is capable of improvement even given a concise family case plan, or the recalcitrance of the mother in removing herself from the relationship with the alleged abuser. Indeed, these are compelling arguments. The fact remains, however, that the Legislature has set forth certain requirements, explained in detail in the statutes, for the proper conduct of an improvement period during an abuse and neglect proceeding. A pre-eminent factor is the preparation and adoption of a family case plan.

One of the purposes served by such a family case plan is the identification not only of goals but of specific means of measuring progress or the lack of progress toward those goals. A properly prepared and implemented family case plan provides the parent or parents, the DHHR, and the court with a means of measuring progress and effort, of dealing promptly with failure to provide or avail oneself of services, or in the best of circumstances,

of documenting successful completion of an improvement effort. By contrast, a mere recital of goals, as included on the record in this case, may lead, as it has here, to conflicting testimony about which, if any, goals were met or the degree to which such goals were met. It may also lead to uncertainty regarding whether the failure to achieve one or more of the goals arises from mere obstinacy, the lack of or interruption of services to the family, or some other cause or circumstances.

This Court concludes that we cannot overlook the requirement of a family case plan in this case where it is crystal clear that none was prepared and there is substantial evidence that oversight of the family's progress was simply non-existent during the weeks in which there were no DHHR caseworkers available to monitor that progress. Moreover, we believe it inappropriate to overlook the absence of a family case plan in this case, lest courts, workers, and families who strive to meet designated requirements and work through such plans come to view such plans as optional rather than the mandatory tools our statute envisions.

Based upon the foregoing, we find that the lower court committed reversible error in failing to require a family case plan as mandated by West Virginia Code § 49-6D-3. In an effort to formulate an appropriate remedy for this error, we instruct the lower court, on remand, to grant one final six-month improvement period to the Appellant. Such improvement period shall include the formulation and implementation of a family case plan.

While we require a new improvement period in lieu of the one previously awarded, we heartily endorse the past efforts of the lower court to require strict compliance by the Appellant with the factors which the lower court deemed to be critically important to the Appellant's success. Accordingly, notwithstanding our grant of a new improvement period, the Appellant must be aware that this is essentially a last opportunity. The circuit court retains discretion to terminate the new improvement period and enter an order terminating the Appellant's parental rights to all three children if, at any time during such improvement period, the lower court finds that (1) the Appellant has resumed a relationship with Victor M. (2) has failed to provide permanent housing for the children, or (3) has failed to maintain steady employment.

While we do not anticipate that a family case plan would include a provision for immediate reunification, we caution that based upon the length of separation between the mother and children, the family case plan, as well as any subsequent reunification plan, must provide for the gradual development of parental contacts with the children at a pace and in circumstances specifically reviewed and approved by the trial court. In a later section of this opinion, we address the question of reunification at the conclusion of the improvement period, if such reunification is deemed appropriate by the lower court. We leave it to the discretion of the lower court to assure that any contacts during the improvement period are developed in a gradual and orderly manner to minimize the trauma to the children. Finally, at the conclusion of the improvement period, the circuit court must make such dispositional

order as it deems appropriate under its findings of fact and conclusions of law then found and determined.

B. Termination of Rights to Britney and Destiny

The Appellant assigns error to the lower court's termination of parental rights to Britney and Destiny without an explicit finding of abuse and neglect of these children in the adjudicatory order. While the favorable practice would be to place an explicit explanation for this action on the record, we do not find reversible error in this matter. The statutory basis for the lower court's termination of parental rights to Britney and Destiny is solid and indisputable. In syllabus point two of *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), this Court held as follows: "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994)." West Virginia Code § 49-1-3(a) (1994) (Repl. Vol. 2001) states as follows:

> "Abused child" means a child whose health or welfare is harmed or threatened by:
>
> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or

(2) Sexual abuse or sexual exploitation[.]

We explained as follows in *Christina*:

> We find that the language of the statute is clear on its face. The West Virginia Legislature plainly articulated its intention that "an 'abused child' means a child whose health or welfare is harmed or threatened by" the abuse inflicted upon "another child in the home." Under the statute, there need not be a showing by the Department that each child in the home is directly abused, either sexually or physically, before termination of parental rights is sought.

194 W. Va. at 452, 460 S.E.2d at 697-98 (footnote omitted).

C. Subsequent Reunification of the Family, If Deemed Appropriate

If the Appellant satisfies the requirements of the improvement period, including both the requirements set forth above and additional requirements implemented in the family case plan, and the lower court determines that reunification of the family is appropriate, such reunification should be accomplished through a gradual, orderly plan of transition. As this Court explained in syllabus point three of *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991):

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

If, however, reunification is not suitable, the lower court should consider the possibility of post-termination sibling contact, as explained in syllabus point four of *James M.*, as follows: "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact."

IV. Conclusion

Based upon the foregoing reasoning, we reverse the termination of parental rights ordered by the lower court and remand for the implementation of a final six-month improvement period, with conditions as outlined above. As this Court explained in syllabus point six of *Carlita B.*,

> At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

185 W. Va. at 616, 408 S.E.2d at 368. If the Appellant fails to comply with the required conditions, the lower court shall immediately conclude the improvement period and make such further order as it deems appropriate, which may include an order that the Appellant's parental rights to all three children be terminated.

Reversed and Remanded with Directions.

No. 31432 In re: Desarae M., Destiny M. and Britney M.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring, in part, and dissenting, in part:

I agree with the majority's decision insofar as it concluded that family case plans are an integral and necessary part of a parent's improvement period in abuse and neglect cases. However, I dissent from the majority's ultimate conclusion that the failure to develop a formal family case plan in this case was reversible error insofar as the conditions of the appellant mother's improvement period were clearly communicated to her; she nevertheless failed to achieve those goals; and there is no evidence that, during this additional improvement period, she will be likely to successfully correct the conditions of abuse and neglect with which she has been charged.[1]

I am most troubled, however, by the potentially devastating effect that the majority's Opinion will have on the most important parties to this proceeding–the children of the appellant for whose benefit and safety the underlying abuse and neglect proceedings were initiated. Time and again we have reiterated that abuse and neglect cases must be given

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[1]*See* Syl. pt. 3, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993) ("Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected[.]").

the utmost attention to ensure their prompt resolution in order to provide permanency for the children involved therein. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). *Accord In re Stephen Tyler R.*, 213 W. Va. 725, 733 n.11, 584 S.E.2d 581, 589 n.11 (2003); *In re Daniel D.*, 211 W. Va. 79, 95, 562 S.E.2d 147, 163 (2002) (Davis, C.J., dissenting); *In re Edward B.*, 210 W. Va. 621, 635 n.20, 558 S.E.2d 620, 634 n.20 (2001); Syl. pt. 4, *In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. pt. 2, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999); *State v. Michael M.*, 202 W. Va. 350, 356 n.14, 504 S.E.2d 177, 183 n.14 (1998); Syl. pt. 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. pt. 5, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); *State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 191, 444 S.E.2d 62, 69 (1994); Syl. pt. 3, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); *Mary D. v. Watt*, 190 W. Va. 341, 346, 438 S.E.2d 521, 526 (1992). *See also State v. Michael M.*, 202 W. Va. at 356 n.14, 504 S.E.2d at 183 n.14 ("[W]e reemphasize that decisions about the permanent placement of a child should not be delayed unnecessarily."); Syl. pt. 5, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 ("The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.").

We have recognized this need for immediate disposition in an attempt to shield the children subject to such proceedings from the extreme trauma they face when they are first removed from their parents' home, then shuttled to numerous foster placements, and finally are placed into a permanent home or returned to their parents upon the conclusion of such proceedings. *See* Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians."). *See also David M. v. Margaret M.*, 182 W. Va. 57, 64, 385 S.E.2d 912, 919 (1989) (observing that "[c]hildren under six years of age are called 'children of tender years'" because "[t]hey are the most dependent on their parents").

Had there been any indication that the appellant herein was a fit and suitable mother for her children or that she could correct the conditions of abuse and neglect with which she has been charged, I would wholeheartedly agree with the majority's attempt to protect and preserve her parental rights. *See* Syl. pt. 6, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000) ("'"In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody [of] his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, *In Re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).' Syllabus point 1, *In Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1998)."); Syl. pt. 6, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642

(1997) (same). *See generally Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998) (protecting biological father's parental rights through recognition of cause of action for tortious interference with parental relationship).

Sadly, though, such evidence is not before us, and the majority has even conceded that "the record of the adjudicatory hearing is totally supportive of the findings of abuse and neglect . . . . It is beyond doubt that the children who are the subject of this case are abused and neglected children." Maj. op. at 8. Despite this recognition, however, the majority has blatantly refused to acknowledge the paramount consideration at issue in this case: the best interests of the appellant's minor children. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). *See also* Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."); *David M. v. Margaret M.*, 182 W. Va. at 60, 385 S.E.2d at 916 ("[A]ll parental rights in child custody matters are subordinate to the interests of the innocent child.").

Mindful of the best interests of Desarae, Destiny, and Britney and the need to

provide them with the safe and secure home which they so rightfully deserve, I respectfully dissent from the majority's decision to grant the appellant an additional improvement period. Such an award can serve no purpose other than to prolong the dangerous and uncertain living conditions these three little girls have far too long already endured.

For the foregoing reasons, I respectfully concur, in part, with and dissent, in part, from the Opinion of the Court.

211 W. Va. 481, 566 S.E.2d 618

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

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OF WEST VIRGINIA

Nos. 30511 and 30512

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: DESTINY ASIA H.

Appeal from the Circuit Court of Cabell County
Honorable John Cummings, Judge
Civil Action No. 01-JA-129

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: June 11, 2002
Filed: June 17, 2002

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.
JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.
JUSTICE ALBRIGHT concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS

"When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syllabus Point 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

Per Curiam:

This is an appeal by the guardian ad litem for Destiny Asia H., an infant child, from a decision of the Circuit Court of Cabell County holding that Destiny Asia H. was not a neglected and abandoned child and holding that she should be returned to the custody of her natural mother, Shacara H.[1] The guardian ad litem, on appeal, claims that the evidence shows that Destiny Asia H. was neglected and abandoned and that the circuit court erred in ruling that she was not.

I.
FACTS

The child whose custody is in issue in this case, Destiny Asia H., was born in Florida on February 13, 2001. Shortly after her birth, Destiny's mother, Shacara H., met a lady in Florida named K. T. K. T. was a resident of Huntington, West Virginia, but was visiting her son at the time.

At a certain point, K. T. decided to return to West Virginia and invited Shacara H. and Destiny Asia H. to accompany her.

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[1]Actually two petitions for appeal were filed in this matter, one by the guardian ad litem, and one by K. T., the individual who had actual custody of the child at the time of the institution of the original neglect and abandonment proceeding. Since the issues and facts are the same, the Court has treated the two petitions as a single appeal.

Upon arriving in West Virginia, Shacara H. and Destiny Asia H. originally lived with K. T. in K. T.'s home. Eventually, however, they moved out and moved into an apartment. In June 2001, Shacara H. decided to return to Florida. At the time, she told K. T. that she intended to return in about a week and asked if K. T. would care for Destiny Asia H. during her absence. K. T. agreed.[2]

Shacara H. did not return in one week, and, in fact, did not return during the following four months. Over that period of time, although she called K. T. approximately six times, she provided no financial support for Destiny Asia H., and she provided K. T. with no information regarding her whereabouts.

In October 2001, K. T. approached the West Virginia Department of Health of Human Resources to request financial assistance for Destiny Asia H. At the time, she indicated that it would be difficult for her to continue to care for Destiny Asia H. without such assistance.

Based on the information that the whereabouts of Shacara H. were at the time unknown, as well as the fact that she had been absent for approximately four months and had

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[2]Before leaving, Shacara H. provided K. T. with a Power of Attorney authorizing her to act *in loco parentis*. Although the Power of Attorney extended from June 26, 2001, to June 26, 2005, it is clear from the record that the understanding between Shacara H. and K. T. was that Shacara would return in about a week.

failed to provide K. T. with the means of contacting her, the Department of Health and Human Resources on October 29, 2001, filed an abuse and neglect petition alleging that Destiny Asia H. had been neglected and abandoned.

A preliminary hearing was held in the matter on November 5, 2001, and at that hearing, the circuit court ruled that there was probable cause for the taking of Destiny Asia H. The court also scheduled an adjudicatory hearing in the matter for January 14, 2002.

By the time of the adjudicatory hearing, some information regarding the whereabouts of Destiny's mother, Shacara H., had been developed and counsel for Shacara H. moved for a continuance to allow time for Shacara H. to travel from Florida to West Virginia so that she could be heard. The circuit court granted the motion, and the adjudicatory hearing was reset for January 28, 2002.

Shacara H. returned to West Virginia and attended the adjudicatory hearing on January 28, 2002. This was the first time she had returned to West Virginia since leaving in late June 2001. At the hearing, evidence was adduced describing how Shacara H. had met K. T., and how she and Destiny Asia H. had accompanied K. T. to West Virginia.

Additional evidence showed that Shacara H. had only rarely called to check on Destiny Asia H. between June 26 when she left West Virginia, and October 2001, when the

neglect petition was filed, and that thereafter she had not called at all. Evidence was also introduced showing that she had not provided any financial support for Destiny Asia H. during the time of Destiny's stay with K. T. The evidence also showed that Destiny Asia H. was four and one-half months old when Shacara H. left for Florida, and that Shacara H. had not seen her for a full seven-month period thereafter.

After reviewing the evidence, the circuit court, while recognizing that Shacara H. had physically left West Virginia and Destiny Asia H., also noted that the child had been left in the care of K. T. who appropriately cared for her and had not neglected or abused her. The court stated: "The evidence before the Court is not sufficient to prove abandonment to any extent. Instead, what happened was a transfer of guardianship." The Court also found that the Department of Health and Human Resources had acted properly in taking custody of Destiny Asia H., but that its actions had been based on miscommunications.

Subsequent to the entry of the final order in the case, information was produced by the State of Florida relating to Shacara H. and her care of Destiny Asia H. in Florida. That information showed that Shacara H. suffers from a mental disability. The information also showed that in May 2001, Destiny Asia H. was hospitalized in Florida due to weight loss, apparently due to malnutrition, and that at that time she had not receive the appropriate shots. Additionally, there is also some suggestion that Shacara H. had been attending, but stopped attending, parenting classes.

In the present proceeding, the guardian ad litem and K. T. claim that the circuit court erred in failing to find Destiny Asia H. neglected and abandoned.

II.
STANDARD OF REVIEW

In *In Re: Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998), this Court indicated that in a child abuse and neglect case the Court employs the two-pronged standard of review set forth in Syllabus Point 1 of *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

III.
DISCUSSION

For the purposes of child abuse and neglect proceedings, the West Virginia Code defines as neglected child as a child:

> Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian. . . .

W. Va. Code 49-1-3(h)(1)(A).

The facts in the present case show that Shacara H. left Destiny Asia H. temporarily in the custody of K. T. with the understanding that Shacara H. would return in about a week. She failed to return during that time, and, in fact, had not returned some four months later. Thus, the length of her absence before the bringing of the present proceeding was some fifteen to sixteen times what was contemplated when K. T. initially undertook to care for the child.

During the absence, Shacara H. maintained some sporadic contact with K. T. but provided nothing toward the support or care of the child. Eventually, the sporadic contact ceased, and Shacara H. failed to provide K. T. with information as to her whereabouts or as to how she could be contacted.

The circuit court, as has previously been stated, found that Shacara H. did not abandon Destiny Asia H. but transferred her "guardianship." In reviewing the facts presented, the Court believes that those facts show clearly and convincingly that initially Shacara H. did temporarily transfer custody to K. T. who, it appears from the evidence, adequately cared for the child. Thus, the evidence, in this Court's view, supports a finding that in June 2001, when Shacara H. initially returned to Florida, she did not abandon, or neglect, Destiny Asia H., as contemplated by W. Va. Code 49-1-3(h)(1)(A).

The facts also show clearly and convincingly that it was contemplated that the initial transfer was to be for a limited time only, and Shacara's absence extended far beyond her initially anticipated return date. If she had not returned precisely upon the date fixed for her return, but within a reasonable time thereafter, in the Court's view, there would be a factual question as to whether she had abandoned or neglected Destiny Asia H. However, Shacara's lengthy absence in the present case, in this Court's view, extended so far beyond the originally contemplated period as to throw into question her intent to return, her motivation to provide for the care of Destiny Asia H., and Destiny's actual future.

While there may have been an initial custodial arrangement, the evidence shows that that arrangement was to be of limited duration, and after the expiration of the limited period of time, there is no evidence that Shacara H. made any additional arrangement or showed any substantial interest in the welfare of the child. Eventually, she even ceased to contact K. T. or keep K. T. informed of her whereabouts.

Overall, this Court believes that the facts as developed show that Destiny Asia H. was abandoned and neglected, not when Shacara H. initially left for Florida, but when her stay exceeded what was contemplated and when she allowed the thread of potential contact between her and the child's actual care giver to break. Under the circumstances, this Court believes that the circuit court erred in failing to hold that Destiny Asia H. was an abused and neglected child within the meaning of the statute.

For the reasons stated, the judgment of the Circuit Court of Cabell County is reversed, and this case is remanded with directions that the circuit court enter an order granting the petition of the West Virginia Department of Health and Human Resources.

Reversed and remanded
with directions.

Nos. 30511 and 30512 - *In re Destiny Asia H.*

FILED
July 2, 2002
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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring in part, and dissenting in part:

While I concur with the majority's determination that Destiny should not be returned to her mother (Shacara H.), I must respectfully dissent from the majority's conclusion that the facts establish that Destiny was neglected within the meaning of West Virginia Code § 49-1-3(h)(1) (1999) (Repl.Vol.2001). The statute is clear regarding what conduct amounts to neglect:

> (h)(1) "Neglected child" means a child:
> (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
> (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]

W.Va. Code § 49-1-3(h)(1) (A), (B).

Under these standards, the lower court was correct in determining that Destiny was not a "neglected child." *See id.* There is no indication in the record that the care Destiny

received was inadequate at the time the petition was filed and she was residing with her guardian and custodian K.T., or that she was then without the necessary food, clothing, shelter, supervision, or medical care. *Id.* K.T. was presumably taking good care of, or at least adequate care of, Destiny, as the lower court specifically found that "[t]here has been no showing of abuse or neglect on the part of the guardian, Kim T."

In its rush to approve this child's removal from her caretaker's home, the majority has concluded, with little discussion of the law, that Shacara S. abandoned Destiny for purposes of our neglect statutes. *See* W.Va. Code §§ 49-6-1 to -12 (Repl.Vol.2001). Unfortunately, the term "abandonment" is not defined within the sections of the Code that address abuse and neglect other than for purposes of an emergency taking situation. See W.Va. Code § 49-6-9 (1980) (Repl.Vol.2001) (defining "abandoned" as "without supervision . . . for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child"); cf. W.Va. Code §§ 48-22-102, -306 (2001) (providing definition of abandonment for purposes of adoption law and identifying conduct presumptively constituting abandonment). Given this statutory omission, this Court has on occasion looked to the definition provided in the adoption statutes for guidance in specific cases. *See State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997) (involving issue of whether voluntary relinquishment of parental rights incident to adoption placement could constitute abandonment for abuse and neglect purposes). That definition identifies as abandonment "any conduct . . . that demonstrates a

settled purpose to forego all duties and relinquish all parental claims to the child." W.Va. Code § 48-22-102.

Based on the mother's execution of a Power of Attorney and, apparently, the intermittent, albeit limited, contact that Shacara S. had with Destiny during the months she resided in Florida, the trial judge viewed the evidence in this case as not rising to the level of abandonment. While enunciating the proper standard for reversing the lower court's finding of fact, the majority fails to state that the lower court was clearly erroneous in its determination regarding the issue of abandonment.[1] Interestingly, the majority suggests that

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[1]This case aptly illustrates the point made by Justice Starcher, who joins in this concurrence and dissent, in *State of West Virginia v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997), when he observed how a double standard appears at times to exist with regard to the level of deference this Court gives to circuit court decisions regarding neglect findings:

> When circuit judges determine that a child is neglected, or that parental rights be terminated, the decisions of this court often (and in my view quite properly) state that in these difficult cases we must give deference to the circuit court's perception and weighing of the evidence. Why? Because the judges see the people involved. The judges get a sense and feel of the situation and can size it up. Is this parent well-meaning and trying? Could the parent, with enough support, do a decent job? Look at the child – is it really fair to say that the child is neglected? Is it really fair to say that the parent is an abuser? Is it fair to separate a child from a parent, even when limited parenting skills are obvious? It's a tough call to make such determinations, and I think that it's a call that requires a face-to-face look at the people involved, to be done well.
>
> But when circuit judges say – based on the same sorts of assessments – that a child should *not* be found to be neglected, or

factual issues arose regarding "her [Shacara H.'s] intent to return, her motivation to provide for the care of Destiny . . . and Destiny's actual future." Rather, than remanding for a determination of those issues, however, this Court summarily concluded that abandonment had occurred.

The facts of this case demonstrate, as the lower court noted in its order,[2] that the statutes at issue do not expressly provide a method for dealing with the situation that was presented below. Certainly, the issues presented in the instant case demonstrate a flaw inherent to the system for providing financial assistance to care givers. Apparently, the DHHR determined that it could not provide K.T. any financial assistance in the care of the child, but could provide such financial assistance if the child were placed with other persons selected by

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> that parental rights should *not* be terminated, that the court should give the parent-child relationship another chance – then I sense that our decisions too often tend to find reasons why we shouldn't defer to or trust the circuit judge's judgment.

Id. at 775, 500 S.E.2d at 888.

In this case, the majority simply discarded the lower court's determination that Destiny had not been neglected under our law to expedite the process under which DHHR could obtain legal custody of the child. Engaging in statutory "end runs," such as that employed by the majority in this case to obtain the specific result of removing a child from his or her home, especially where no statutory basis for the removal exists, can only serve to harm both the child in the short term and the judicial system in the long run.

[2]The lower court observed: "There is some confusion as to how to proceed in matters such as this. When someone asks, a petition o[f] abuse and neglect may be the only option, or the only way to handle a situation [such as that presented here by the guardian's request for financial assistance]."

the DHHR who were perfect strangers to this little child.

What the majority overlooks in its rush to rubberstamp Destiny's removal from the only continuous care givers she had known at the time the petition was filed,[3] is the critical issue of the child's psychological and emotional attachment to K.T. This Court has long advised the DHHR and the courts dealing with these matters that children cannot be plucked from one home environment, absent emergency situations that were not present here, without due consideration of the effects on the child and the child's attachment to caretakers and siblings. *See In re Brian D.*, 194 W.Va. 623, 638, 461 S.E.2d 129, 144 (1995) (recognizing that "a child has a right to continued association with those to whom he has formed an emotional bond") (citing *Honaker v. Burnside*, 182 W.Va. 448, 452-53, 388 S.E.2d 322, 325-26 (1989)). Yet, in this case, the child was apparently removed from K.T.'s home with little concern for these important issues that play an undeniably pivotal role in the child's formation as an individual.

Further troubling is the majority's use of a validly executed document transferring physical custody of Destiny to a guardian, ostensibly prepared not for the purpose of abandoning the child, but to secure the child's attainment of proper medical care, if

[3]Even during the first four and a half months of Destiny's life when her mother was present, K.T. was also present in Destiny's life for a month and a half of that time period.

necessary, and to alleviate any question of K.T.'s legal right to have Destiny in her physical custody. While the majority makes clear in its opinion that this document on its own was not evidence of Sharcara H.'s intent to abandon Destiny, my concern is that the decision will perhaps be relied upon to obtain rulings of abandonment, possibly without the proper statutory basis, rather than forcing the DHHR to go through the requisite statutory steps of proving that a child was in actuality "abused" or "neglected" within the statutory scheme established by the Legislature. *See* W.Va. Code §§ 49-6-1 to -12.

When the facts of this case are fairly examined, one is left with a definite sense that the DHHR has managed to obtain legal custody of Destiny with no proper showing that the child was "abused" or "neglected" under our law. *See* W.Va. Code § 49-1-3. Any conclusion that the mother in this instance never intended to return and reclaim her child amounts to rank speculation on the record before us. In my judgment, it is simply wrong for this Court to sanction, even indirectly, a finding of abandonment that is grounded in fact on the proper exercise by the mother of her legal right and duty to provide for the care of her minor child during an anticipated absence, especially in light of the fact that there were no findings of improper care related to the guardian's (or custodian's) physical custody of the child.[4] Obviously, if actual evidence of neglect had been present, this would be an open and shut case.

[4]A "benefit" to the DHHR that obtains when a child is removed from a home based on abandonment is that the agency does not have to "make reasonable efforts" to preserve the family unit for temporary custody purposes. *See* W.Va. Code § 49-6-3(d).

Paradoxically, the child was removed from the home of the only care givers she knew based primarily on the care givers's professed need of financial assistance and yet, the statutory definition of a "neglected child" expressly excludes a determination of neglect based on "lack of financial means on the part of the parent, guardian or custodian." W.Va. Code § 49-1-3(h)(1)(A).

My final concern involves the manner in which the majority grants relief to the DHHR. Typically, in a case where the underlying decision of the circuit court included a finding of no abuse and/or neglect, and this Court determined that a reversal of such decision was warranted, the matter would be remanded with specific instructions that the lower court enter an order adjudicating the child to be abused and/or neglected. The majority opinion lacks any such direction. This is of concern as this Court cannot *sua sponte* make such a factual finding. Also missing from the relief delineated in the majority opinion is any direction for the circuit court, upon its entry of a finding of neglect, to proceed to the dispositional phase of such litigation. *See* W.Va. Code § 49-6-5. As we observed in *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999), "neither this Court nor circuit courts can simply ignore mandatory procedural requirements." *Id.* at 486, 525 S.E.2d at 677.

I am authorized to state that Justice Starcher joins in this concurring and dissenting opinion.

230 W. Va. 542, 741 S.E.2d 100

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

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No. 12-1124

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FILED
February 7, 2013
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE of WEST VIRGINIA EX REL.
WEST VIRGINIA DEPARTMENT of HEALTH and HUMAN RESOURCES
Petitioner Below, Petitioner
and
E.P., K.P., L.P., III, and N.P.,
Infant Petitioners Below, Petitioners

v.

THE HONORABLE DAVID J. SIMS,
Judge of the Circuit Court of Ohio County,
Respondent,
and
S.P., and L.P., JR.
Respondents Below, Respondents

PETITION FOR A WRIT OF PROHIBITION

WRIT DENIED

Submitted: February 5, 2013
Filed: February 7, 2013

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under *West Virginia Code* §§ 49–6–2(b) and 49–6–5(c) (1995)." Syllabus Point 2, *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996).

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Per curiam:

The West Virginia Department of Health and Human Services, Bureau for Children and Families ("DHHR"), and the Guardian ad Litem ("GAL") of four infant children, E.P., K.P., L.P., III, and N.P. ("infant children") jointly seek a writ of prohibition. They ask this Court to prohibit the enforcement of the circuit court's order granting each of the respondent parents, S.P., and L.P., Jr., a six month post-adjudication improvement period (collectively referred to as "improvement period").

In the petition the DHHR and GAL endeavor to convey a sense of "urgency" for this Court to rule on the requested writ. However, ninety-seven days passed between the date of the circuit court's order granting the improvement period and the date that the petition for a writ of prohibition was filed with this Court. Stated differently, the improvement period was more than half over before the writ was filed. No satisfactory explanation for this delay was offered by the petitioners.

Having fully considered the record, the petition for a writ of prohibition is denied.

I. Factual Background

In the abuse and neglect action below the respondent parents filed stipulated admissions "that they had neglected their children by failing to maintain their home in a safe and sanitary condition, and by failing to provide their children with adequate supervision." The circuit court accepted the stipulations and adjudicated that the parents had neglected their children. The parents then moved for a post-adjudication improvement period, stating that with help and assistance they believed they could become better parents and eventually be reunited with their children.

The DHHR and GAL objected, arguing that the parents had been provided every service that the DHHR had to offer during a pre-adjudication improvement period and, despite those efforts, they remained unable to provide for the health, safety and well-being of their children. The DHHR and GAL indicated a preference for termination of parental rights and placement of the children for adoption.[1]

The circuit court held a hearing on the parents' motion. During the hearing the parents introduced evidence that they had successfully completed a substance abuse program after the neglect action was filed. The mother's substance abuse therapist testified that the

[1]The infant children were removed from the family home when the neglect and abuse petition was filed and placed with a foster family. The parents have had supervised and unsupervised visitation with the children during the pendency of the action.

mother not only complied with all that was required of her, but that she "went beyond what was required to successfully complete" the program. It was the therapist's opinion that the mother's "attitude and willingness . . . showed . . . that her probability of doing well, [were she] given that opportunity for some added time, [is] higher than average." The therapist described that the mother had been helped with self-esteem issues, which included making her aware that it was not a bad thing "to reach out to access some of the services that folks need[,] whether it's mental health issues or community service issues[.]" The therapist also testified that the mother "refused to allow individuals over to her home because they had alcohol," and that she was "very impressed with her ability to stand up to set boundaries and not allow folks who were under the influence, or had alcohol or other drugs on them into her home."

The Director of the substance abuse program testified on behalf of the father. This testimony related that the father had also completed a several-week-long substance abuse program. The Director testified that, at the beginning of the program, the father was resistant to the help being offered to him. However, "something finally clicked" and the father began taking advantage of the help being offered to him. On cross-examination by the GAL, the Director explained that while he could not assess the father's parenting abilities, the father had often discussed his children with him. In these discussions the father would

talk about not being able to see his children, and "how much he wanted to be a father to his children."

The DHHR and GAL sought to introduce evidence that formed the basis for the abuse and neglect action. They argued that this evidence was relevant to the issue of whether a post-adjudication improvement period should be granted. The circuit court refused to allow the testimony, concluding that the parents had already admitted that they were neglectful parents. The circuit court held that the issue was not whether the parents were neglectful (because by the parents' own admission they were neglectful). Instead, the issue was whether the parents should be given another chance to improve.

In addition, DHHR argued that the parents had not met their pre-adjudication improvement goals despite efforts to help them. The circuit court acknowledged that "[w]hat is in the past may be prologue" of what may occur should the court grant a post-adjudication improvement period. Nevertheless, the parents had "both carried out their burden to show, by clear and convincing evidence, they will fully participate in the improvement period" were the court to grant it. The circuit court further noted that the statutory scheme permitting post-adjudication improvement periods is not a superfluous bagatelle. Instead, this statutory scheme shows the Legislature's intent that a parent's failed effort at a pre-adjudication improvement period does not automatically foreclose further efforts at reunifying the family

by giving the parent even more help. The court may allow a post-adjudication improvement period as a final effort to try and save the nuclear family.

At the end of the May 30, 2012, hearing the circuit court orally granted the parents a six month post-adjudication improvement period, and ordered that a plan outlining the parents' goals and responsibilities be completed within thirty days. A written order was entered on June 19, 2012.

Improvement period plans, reflecting the findings of the multidisciplinary treatment team tasked to the parents case, were thereafter filed with the circuit court. These plans described "exactly what the [parents] needed to do to regain custody of the children," and set forth two broad goals that would need to be met: (1) "provide a clean, healthy, and safe living environment" for the children; and (2) "provide a level of parenting that ensures the health, safety and well-being" of the children.

On September 25, 2012, the DHHR and GAL filed with this Court a joint petition seeking a writ of prohibition to bar enforcement of the Circuit Court's June 19, 2012, order. In the petition, the DHHR and GAL argue that the circuit court erred by not allowing evidence of the parents' pre-adjudication neglect, and that the parents failed to meet the requisite legal standards for granting a post-adjudication improvement period.

By order dated November 20, 2012, this Court issued a rule to show cause as to why a writ of prohibition should not be granted.

II. Standard of Review

In Syllabus Point 1 of *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953), we made clear that a writ of "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." *See also* Syllabus Point 2, *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996) ("Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under *West Virginia Code* §§ 49–6–2(b) and 49–6–5(c) (1995).").

In Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the standard of review for cases where it is alleged that the circuit court exceeded its legitimate powers:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is

> clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

We also made clear that in reviewing the conclusions of law and findings of fact by a circuit court in abuse and neglect cases, we will not overturn a finding simply because we would have decided it differently, and will affirm the finding if it is plausible in light of the record viewed in its entirely. *See* Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

III. Discussion

Post-adjudication improvement periods are permitted by *W.Va. Code* § 49-6-12(b) [2012] [Supp.2012].[2] In its June 19, 2012, order, the circuit court found that "granting

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[2]*W.Va. Code* § 49-6-12(b) states as follows:

> (b) After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:
> (1) The respondent files a written motion requesting the improvement period;
> (2) The respondent demonstrates, by clear and convincing

(continued...)

Respondents' motion for a post-adjudicatory improvement period will not jeopardize the health, safety, and well-being" of the infant children, and that the parents had "demonstrated by clear and convincing evidence that they are likely to fully participate in a post-adjudicatory improvement period." The circuit court ordered that the parents be granted a six month improvement period, that a hearing to review the parents' progress be held as required by *W.Va. Code* § 49-6-12(b)(3),[3] that the DHHR submit an individualized family

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[2](...continued)

> evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
> (3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or (B) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;
> (4) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and
> (5) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d of this chapter.

[3]*See supra*, note 2.

case plan as required by *W.Va. Code* § 49-6D-3 [2012] [Supp.2012], and that legal and physical custody of the infant children remain with the DHHR.

It is clear that the circuit court had statutory authority to grant a post-adjudication improvement period to the parents. It is also clear that the circuit court properly considered the factors set forth in *W.Va. Code* § 49-6-12(b) when it approved the parents' motion for a post-adjudication improvement period. Therefore, the circuit court had jurisdiction under the statute to grant a post-adjudication improvement period. The more pertinent question is whether the circuit court, having jurisdiction, exceeded its legitimate powers. Syllabus Point 1, in part, *Crawford v. Taylor*, *supra*.

While the DHHR and GAL dispute the weight of the evidence introduced by the parents at the May 30, 2012, hearing, and contend that the circuit court erroneously found that the parents had met the required legal standards set forth in *W.Va. Code* § 49-6-12(b)(2), we do not find the circuit court's findings of fact and conclusions of law to be "clearly erroneous as a matter of law." Syllabus Point 4, in part, *State ex rel. Hoover v. Berger*, *supra*. In Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, *supra*, Justice Cleckley set forth our standard for determining whether a circuit court's ruling is "clearly erroneous as a matter of law":

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse

> and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety*.

(Emphasis added).

Reviewing the circuit court's June 19, 2012, order, and the hearing transcript of May 30, 2012, it is clear that the circuit court took evidence on the parents' motions for a post-adjudication improvement period, and entertained the objections to the motions by the DHHR and GAL. The DHHR and GAL contend that the circuit court erred by not permitting them to introduce additional evidence of the failed pre-adjudication improvement periods or the parents' neglect. We agree with the circuit court's conclusion that the proffered evidence was already known to the court—the parents admitted that they had been neglectful and were adjudicated as such following failed efforts to help them become better parents.

The circuit court indicated to the parties that it was not focusing on past events, but whether circumstances had changed showing that the parents would now fully participate

in a post-adjudication improvement period. The fact that the parents had been neglectful was not a fact in dispute. Neither was it in dispute that the DHHR had made prior efforts to assist the parents, and that those efforts had not been successful. The proffered value of the excluded testimony would not have been helpful to the circuit court in making its decision—the evidence was already known and part of the record.

In the case *sub judice* the circuit court was intimately familiar with the facts of the abuse and neglect case against the parents. That familiarity was likely to give the circuit court a feel for the case that is not readily apparent from the sterile record that is before this Court. This may include such subtleties as the demeanor of the parents—were they earnest in their requests? Was there an impression that they would really try this time? The circuit court took evidence, heard the parties' objections, and made findings and a ruling that it believed to be in the best interest of the infant children. These actions were within the circuit court's discretion and requirements of applicable law. It is not for this Court to reverse that decision simply because we may have decided the case differently. Syllabus Point 1, *In the Interest of: Tiffany Marie S., supra.*

IV. Conclusion

The petitioners have failed to demonstrate that the circuit court lacked jurisdiction to grant the parents a six month post-adjudication improvement period, or that

the circuit court exceeded its legitimate powers in granting the same. Accordingly, the petition for a writ of prohibition is denied.

Writ denied.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2010 Term

No. 35693

FILED
November 1, 2010
released at 10:00 a.m.
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner,

v.

THE HONORABLE JOHN C. YODER,
JUDGE OF THE CIRCUIT COURT OF BERKELEY COUNTY,
Respondent.

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED

---

and

No. 35694

STATE OF WEST VIRGINIA EX REL.
LAWRENCE JAY A., INFANT,
Petitioner,

v.

THE HONORABLE JOHN C. YODER,
JUDGE OF THE CIRCUIT COURT OF BERKELEY COUNTY,
Respondent.

Submitted: October 26, 2010
Filed: November 1, 2010

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED.

Submitted: October 26, 2010
Filed: November 1, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus Point 6, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

In these consolidated matters, the West Virginia Department of Health and Human Resources (hereinafter DHHR) and the *guardian ad litem* for Lawrence A.[1], a 19-month-old infant, invoke this Court's original jurisdiction seeking a writ of prohibition to halt the enforcement of two orders entered by the Honorable John C. Yoder, Judge of the Circuit Court of Berkeley County. These two orders direct the DHHR to return custody of Lawrence A. to his mother, Crystal W., and grant her a dispositional improvement period. The petitioners argue that Judge Yoder's findings in these two orders are clearly erroneous and contrary to the evidence presented to the circuit court. The petitioners contend that returning custody of Lawrence to his mother is not in the child's best interest because of her continued association with an individual involved in illegal drug activity. The petitioners also cite numerous instances in which Crystal W. committed perjury while testifying before the circuit court and argue that Judge Yoder committed clear error by relying on her testimony.

After thoroughly reviewing these two matters, we conclude that the two orders issued by Judge Yoder are in excess of the circuit court's jurisdiction and are not in the best interest of Lawrence A. We therefore grant the requested writ of prohibition.

[1] We adhere to our usual practice in cases involving sensitive facts and refer to the parties by their first names and last initials only. *See In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

I.
Facts & Background

Lawrence A. was born on January 22, 2009. Three days later, a referral was made to Child Protective Services (hereinafter CPS) after Lawrence tested positive for amphetamines, cocaine and opiates. CPS subsequently interviewed Lawrence's mother, Crystal W., who admitted to smoking crack cocaine and using heroin during her pregnancy. On January 26, 2009, CPS initiated an in-home safety plan requiring Crystal and Lawrence's father, James A., who lived together, to refrain from using illegal drugs, submit to random drug testing, and attend Narcotics Anonymous meetings three times a week.

Approximately two months after entering into the in-home safety plan, James and Crystal tested positive for cocaine. Thereafter, Crystal admitted that she and James used cocaine together and did not attend any Narcotics Anonymous meetings as required by the in-home safety plan. Following the positive drug test and interview with Crystal, the DHHR filed an abuse and neglect petition against Crystal and James, alleging that their child, Lawrence, was in imminent danger due to their continuing drug use. By order entered March 26, 2009, the circuit court removed the child from the family residence and awarded temporary custody to the DHHR. On May 21, 2009, the circuit court found that Crystal and James abused and neglected Lawrence and granted both of them post-adjudicatory improvement periods. These improvement periods required Crystal and James to comply with a number of conditions including:

> James A. and *Crystal W. may not have contact with anyone involved in illegal activities* and he/she may not participate in any illegal activities of any kind during his/her improvement period.

(Emphasis added).

From June through September of 2009, James and Crystal seemingly complied with the terms of their improvement periods. Based on their compliance, the DHHR asked the circuit court to return custody of Lawrence to his parents for a trial reunification period, which Judge Yoder granted by order dated September 28, 2009. Approximately one month after Lawrence was returned to his parents, the Eastern Panhandle Drug and Violent Crimes Task Force executed a raid on James and Crystal's residence, 226 Avondale Road. The task force seized crack cocaine from the residence that was hidden behind a fire alarm in the kitchen, as well as $500 in cash, two flat screen high-definition televisions and a printer. The task force found $300 in a jewelry box that belonged to Crystal. This $300 was identified by serial number as money the task force provided to a confidential informant to make a controlled drug purchase at 226 Avondale Road.

Following the task force raid, James A. was arrested and charged with distributing crack cocaine in violation of *W.Va. Code*, § 60A-4-401 [2005].[2] After learning about the task force raid at 226 Avondale Road, the DHHR removed Lawrence from the residence and the *guardian ad litem* filed a motion to revoke Crystal and James'

[2]These charges were subsequently dismissed in anticipation of federal drug charges being brought against him.

improvement periods. Two weeks after the task force raid, Crystal filed a motion for the return of physical custody of Lawrence, arguing that she had complied with the terms of her improvement period, was unaware that James was engaging in criminal activity in the family residence, and "*is no longer living with (James) nor continuing a relationship with him*." (Emphasis added). The circuit court held evidentiary hearings on February 18, 2010, and March 24, 2010, to consider the *guardian ad litem's* motion to revoke Crystal and James' improvement periods and Crystal's motion to return physical custody of Lawrence to her.

At the February 18, 2010, hearing, Crystal testified that she was a recovering crack cocaine addict and had previously sold crack[3], but was unaware of any illegal drug activity that was taking place at her residence in October 2009. She also stated that the $300 that was seized from her jewelry box was money she made from selling promotional candy through her job at Walgreens Pharmacy and offered the following explanation why she was in possession of the marked bills:

> I asked James the night before when the door got kicked in to switch me out on the small bills to bigger bills, like I said, my savings. I always want bigger money and not just like twenties and fives and tens.

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[3]Q. And tell us why you're familiar with crack cocaine?

A. Because I am a recovering addict.

Q. And isn't it true you also sold crack cocaine?

A. Yeah, but I never got charged for that. I got charged – I pled guilty to possession of a controlled substance.

Crystal testified that she has had no contact with James since the October 30, 2009, task force raid because associating with someone involved in illegal drug activity is "not safe for my son." Crystal was asked a second time whether she had any contact with James since October 30, 2009, and stated that she had not seen or spoken to him at all, other than occasionally seeing him in court, "because after Lawrence was taken again I decided that it would be better off not to have him (James) involved in my life at this moment."

Following Crystal's testimony, the circuit court continued the hearing until March 24, 2010. Crystal was called at the beginning of the March hearing and asked if she wanted to change or clarify any of her testimony from the February hearing. She replied:

> Well, now that you bring that up, I guess on March 3rd – my lawyer approached me with some new evidence. On March 3rd James and I were seen at the Roc's Shell in Charles Town I believe. We were resolving some property issues and matters that we had with where his property was going to go, I mean, and some of his dog kennel stuff that he's left at the trailer.
>
> And we were resolving that and he helped me with gas. He ended up there. So we went to the Shell to fill up the tank. I'm finalizing that. Thank you for giving me the opportunity to bring that to light.

Crystal and James were observed at the gas station by Kimberley Crockett, counsel for the DHHR. A video of this meeting was taken[4] and provided to Crystal's attorney prior to the March 24, 2010, hearing. Crystal stated that this gas station meeting was the only time she had seen James since the October 30, 2009, task force raid. She also

[4] The record does not state who recorded the video.

reiterated the reason she ended her relationship with James was because he was involved in dealing crack cocaine, which she acknowledged is a dangerous and illegal activity.

James A. testified after Crystal and stated that he had been back at 226 Avondale Road on a number of occasions since October 30, 2009. He testified that he went there when Crystal was at work and said that he had a key to the residence until January 2010. When asked about the task force raid on October 30, 2009, and whether he had taken part in illegal drug activity at the family residence, James A. invoked his Fifth Amendment Rights and declined to answer questions relating to the raid and his subsequent arrest.

West Virginia State Trooper Brian Bean, who was a member of the task force that raided 226 Avondale Road on October 30, 2009, testified that Crystal could face a federal charge in connection with the drug activity that occurred at her residence. When asked specifically what charges Crystal could face, Trooper Bean replied:

> Aiding and abetting, possibly what's commonly referred to as the crack house statute which is the federal statute that deals with maintaining a residence and allowing controlled substances to be sold from it.[5]

The *guardian ad litem* next called Deputy Thomas Funk of the Berkeley County Sheriff's Office. Deputy Funk testified that he went to 226 Avondale Road on December 11, 2009, to serve property forfeiture papers on both James and Crystal. James answered the door and accepted service for both he and Crystal. James advised Deputy Funk

[5] Crystal has not been charged with these crimes in connection with the October 30, 2009, task force raid.

that Crystal was his girlfriend and that they lived together. This occurred approximately five weeks after the task force raid.

Deputy Funk had another paper to serve on James in January 2010. He again went to 226 Avondale Road and this time Crystal answered the door. Deputy Funk asked Crystal if James was home, she said yes and called to him. James then came to the door and Deputy Funk served him with the papers.

Travis Lutrell was called by the *guardian ad litem* and testified that he saw Crystal and James together in late January or early February 2010, in a K-Mart parking lot. Mr. Lutrell stated that he got into an argument with Crystal in the parking lot because she blamed Mr. Lutrell for losing custody of Lawrence.[6]

The *guardian ad litem* next called Jimmy Williams, an investigator for the Berkeley County Prosecuting Attorney's Office. Mr. Williams stated that he conducted surveillance on 226 Avondale Road on February 18, 2010, and on March 24, 2010. On both occasions, he observed Crystal and James leaving the residence in different vehicles, approximately fifteen minutes apart, both traveling to the county courthouse for the hearings in this matter.[7]

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[6]At an August 10, 2010, forfeiture hearing, West Virginia State Trooper Brian Bean testified that Travis Lutrell was the confidential informant who made the drug purchase from James at 226 Avondale Road on October 30, 2009. During cross-examination at the March 24, 2010, hearing, Mr. Lutrell stated that he was convicted for drug possession in February 2010 and that he was currently taking methadone.

[7]During cross-examination, there was some question as to whether Mr. Williams could (continued...)

Jennifer Foster was the CPS case worker assigned to this case. She testified that the DHHR's official position was that James and Crystal violated the terms of their improvement period. Ms. Foster was asked:

> Q. Okay. What concerns do you have about the fact that we've heard testimony from witness after witness that she's (Crystal) continued to have contact with him (James) after learning about this, after the raid occurred?
>
> A. Well, it's very concerning because she's maintained that she wants her child back and yet she's participating in something that could be unsafe by maintaining a relationship, plus she's lied to the Department. So, there's lack of truth and putting

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[7](...continued)
positively identify James A. as the man who exited 226 Avondale Road on February 18, 2010. Mr. Williams stated that the African-American male who exited 226 Avondale Road was wearing the same clothes that James A. had on in court that morning. The *guardian ad litem* asked Mr. Williams:

> Q. Okay. And you feel fairly certain, well, you've testified so I assume you are certain that the gentleman that you saw on February 18th leave the house, come in here to the van, come into the courtroom was the same gentleman from point A at Avondale Road to the courthouse, correct?
>
> A. Yes.
>
> Q. Okay. Do you have any doubt that it's James A. this morning (March 24, 2010)? You've testified about him wearing the same clothes?
>
> A. Same clothing, the same, you know.
>
> Q. So you're sure that it's James A. today?
>
> A. Yes.

> herself at risk regarding her own sobriety and interacting with someone who as she said, you know, risked her losing her child for an illegal activity.

Following Ms. Foster's testimony, Crystal was again called to testify and asked about the discrepancies in her testimony. Crystal admitted that she lied to the court at both the February 18th and March 24th hearings. She admitted that she had maintained contact with James after the October 30, 2009, task force raid, explaining that he came to 226 Avondale Road from time to time to check on his pit bull dogs.[8] Crystal admitted that James was at the residence when Mr. Williams came to serve the forfeiture papers in January 2010. Crystal admitted that James was at the residence with her on the morning of February 18, 2010, before the court hearing in this matter, the same hearing in which she denied having seen James at all since the October 30, 2009, task force raid. When asked about being seen at the gas station, counsel asked Crystal:

> Q. The reason you did that (admitted you met with James there) is that Ms. Crockett caught you and we have a video, is that true?
>
> A. Is it? I think it might be true.
>
> Q. So you don't tell the truth do you?
>
> A. I haven't been completely honest, no.

[8] James A. operated a pit bull kennel at 226 Avondale Road.

Crystal also initially denied that she had seen Travis Lutrell in the K-Mart parking lot, but later confirmed that she did see him and that she did get into an argument with him there.

At the conclusion of the March 24, 2010, hearing, Judge Yoder asked the parties to submit proposed findings of facts and conclusions of law. By order dated June 18, 2010, Judge Yoder denied the *guardian ad litem's* motion to revoke Crystal's improvement period and granted Crystal's motion to return custody of Lawrence to her. The DHHR filed a motion to reconsider and reverse this order, which Judge Yoder denied on July 22, 2010. The circuit court subsequently entered an order, on July 27, 2010, granting Crystal a dispositional improvement period over the objection of the DHHR and the *guardian ad litem*.

On August 12, 2010, the DHHR and Lawrence A.'s *guardian ad litem* filed separate petitions for writs of prohibition with this Court, seeking to halt enforcement of the June 18, 2010, and July 27, 2010, orders from the circuit court. The petitions requested that we issue a rule to show cause against Judge Yoder. On September 22, 2010, we entered an order commanding the respondents to show cause why a writ of prohibition should not be awarded against Judge Yoder.

II.
Standard of Review

"The writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syllabus, *State ex rel. Vineyard*

v. O'Brien, 100 W.Va. 163, 130 S.E. 111 (1925). *See also* Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) ("Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari."); Syllabus Point 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977) ("A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1.").

In Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we set forth the following standard for issuance of a writ of prohibition when it is alleged a lower court is exceeding its authority:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With this standard in mind, we turn to the parties' arguments.

III.
Discussion

The *guardian ad litem* and the DHHR argue that the circuit court's orders denying the motion to revoke Crystal's improvement period and granting the order returning custody of Lawrence to Crystal are in excess of the circuit court's jurisdiction based upon the evidence presented at the February 18, 2010, and March 24, 2010, hearings.

In this case, as with all abuse and neglect proceedings, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). This Court has repeatedly stated that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

In the case *sub judice*, the petitioners contend that the circuit court should have revoked Crystal's improvement period. This Court has explained that "an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged." *In re Emily*, 208 W.Va. 325, 334, 540 S.E.2d 542, 551 (2000). In Syllabus Point 6 of *In the Interest of Carlita B.*, 185 W.Va. 613, 408

S.E.2d 365 (1991), we provided direction on how a court should assess a parent's compliance with an improvement period, stating:

> At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

In his June 18, 2010, order, Judge Yoder stated that the court did not "look favorably" upon Crystal's "lack of candor and willingness to be forthcoming with information regarding her contact" with James. Judge Yoder determined, however, that Crystal did not lack credibility on all matters. The order goes on to state:

> That (Crystal's) contact with (James), while ill-advised, did not violate the terms of her improvement period, as there was no written provision forbidding contact with (James). Further the Court recognizes that some contact with (James) may have been necessary to divide up communal property and relocate (James') business from the home.

This finding is clearly erroneous. Crystal's motion to return custody of Lawrence to her was based in large part on her contention that following the drug raid, she was "*no longer living with (James) nor continuing a relationship with him*." (Emphasis added). Crystal testified that she ended her relationship with James following the drug raid because associating with someone involved in illegal drug activity is "not safe for my son." It is undisputed that following the October 30, 2009, drug raid, Crystal was aware that James

was involved in illegal drug activity.[9] Crystal's improvement period requires that she "may not have contact with anyone involved in illegal activities." Therefore, if Crystal had contact with James after October 30, 2009, when she was aware that he was involved in illegal activity, she violated the terms of her improvement period.

As discussed at length above, the evidence presented at the March 24, 2010, hearing overwhelmingly supports the DHHR and *guardian ad litem's* contention that Crystal continued to have a relationship with James after October 30, 2009. James testified that he went to 226 Avondale Road on multiple occasions following the task force raid and that he had a key to the residence until January 2010. Deputy Funk served papers at 226 Avondale Road in December 2009 and January 2010, and James was at the residence on both occasions. Investigator Jimmy Williams observed James and Crystal together at the residence on the mornings of February 18, 2010, and March 24, 2010. On both occasions, they drove to the courthouse in separate vehicles in an apparent attempt to maintain the

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[9]At the February 18, 2010, hearing, Crystal testified as follows:

Q. And what part of the relationship with Mr. A.'s not safe?

A. Whatever is illegal that's going on. I mean, anything illegal.

Q. And is it your understanding that illegal activity is drug dealing?

A. Drug dealing is illegal.

Q. And is it your understanding that's what he's alleged to have been involved in?

A. Yes.

appearance that their relationship was over. James and Crystal were also seen together in late January or early February 2010 at a K-Mart parking lot and on March 3, 2010, at a gas station.

This evidence clearly shows that Crystal continued to maintain a relationship with James after the October 30, 2009, task force raid, even though she admitted that maintaining this relationship would be "unsafe for my son." These multiple contacts between Crystal and James far exceeded the minimal contact that would have been necessary to divide up their communal property, and we find it difficult to understand how Judge Yoder arrived at that conclusion.

Consistent with our principle that "the best interests of the child is the polar star by which decisions must be made which affect children," we granted the *guardian ad litem's* motion to supplement the file and will consider matters that have occurred since Judge Yoder issued his June 18, 2010, and July 27, 2010, orders. One such matter was an August 10, 2010, property forfeiture hearing in the Circuit Court of Berkeley County before the Honorable Gina M. Groh.[10] At this hearing, Crystal was asked whether she continued living with James after the task force raid and she stated, "Yes, we did. Yes, I did. But I did - we

[10] Crystal filed a motion to have the $300, two high-definition televisions and printer that the task force seized during the October 30, 2009, raid at 226 Avondale Road returned to her. Judge Groh found that all of these items were gained from illegal drug transactions and were therefore forfeited into the State's possession.

are no longer together and I live with my grandfather." Crystal testified that she has lived with her grandfather since June 2010, and was then asked:

> Q. Okay. And so until that time, were you residing at the Avondale residence?
>
> A. Yes, I was. I was on a lease and so was he (James).
>
> Q. Okay. So the two of you continued to reside together until June (2010) at the Avondale residence?
>
> A. Yes.

While there was overwhelming evidence presented at the March 2010 hearing that Crystal continued to maintain a relationship with James after October 30, 2009, the above testimony removes any doubt on this issue. We are confident that had Judge Yoder heard this testimony - that Crystal not only maintained a relationship with James, but continued living with him for eight months following the task force raid - he would not have ordered custody of Lawrence returned to Crystal and he would have granted the motion to revoke her improvement period.

Based on all of the foregoing, Judge Yoder's finding that Crystal's contact with James did not violate the terms of her improvement period is clearly erroneous. We find that granting a writ of prohibition to halt enforcement of Judge Yoder's June 18, 2010, and July 27, 2010, orders is necessary to protect Lawrence from imminent danger.

IV.
Conclusion

Crystal continued living with James for eight months after he was arrested and charged with selling crack cocaine out of the residence where their infant son lived. Crystal testified that continuing a relationship with James would be unsafe for her son. We agree with her and accordingly issue the requested writ of prohibition halting the enforcement of Judge Yoder's June 18, 2010, and July 27, 2010, orders returning custody of Lawrence to Crystal and granting her a dispositional improvement period. We further direct Judge Yoder to enter an order granting the DHHR and *guardian ad litem's* proposed order revoking Crystal's improvement period.

Because the circuit court exceeded its jurisdiction and did not act in the best interest of the child, this writ of prohibition is warranted.

Writ Granted.

200 W. Va. 555, 490 S.E.2d 642

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA EX REL. DIVA P.,
AND THE STATE OF WEST VIRGINIA, Petitioners

v.

HONORABLE TOD J. KAUFMAN, JUDGE OF THE CIRCUIT COURT
OF KANAWHA COUNTY, AND SHERRY P., Respondents

No. 23928
Submitted: February 25, 1997
Filed: July 12, 1997

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, State ex rel. Virginia M. v. Virgil Eugene S. II, 197 W.Va. 456, 475 S.E.2d 548 (1996).

2. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

3. "The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, Sec. 2; art. 3, Sec. 2; art. 9, Sec. 1." Syl. Pt. 2, State ex rel. Preissler v. Dostert, 163 W.Va. 719, 260 S.E.2d 279 (1979).

4. In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va. Code § 49-6-10 (1996) that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

5. When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals' appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

6. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

7. "Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court." Syl. Pt. 8, In Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

8. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994)." Syl. Pt. 2, In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995).

9. "W.Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syl. Pt. 2, State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987).

10. "'Under W.Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va. Code, 49-6D-3 (1984)." Syl. pt. 3, State ex rel. W.Va. Department of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987)." Syl. Pt. 3, In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

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Davis, Justice:

This case is before the Court on a petition for a writ of prohibition, mandamus and writ of error See footnote 1 against the Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, by the petitioners, Diva P. (hereinafter the "child" or "Diva") See footnote 2 and the State of West Virginia. Sherry P., mother of the child, is also named as a respondent. See footnote 3 Both the State and the child's guardian ad litem See footnote 4 seek relief from the November 19, 1996, disposition order which returned Diva to her mother for a three month improvement period. Petitioners contend that an additional improvement period is not in the best interest of Diva. Petitioners seek termination of Sherry P.'s parental rights.

I.
FACTUAL BACKGROUND

At the age of 16, Sherry P. gave birth to Diva on May 11, 1993. At the time of the child's birth Sherry P. lived with her mother and two sisters Brandy and Shelly. See footnote 5 Sherry P.'s sister Shelly is autistic and has extremely limited functioning capabilities. On July 17, 1993, Sherry P. and her mother left home to go to a local store. Diva was left in the care of Brandy. Without Brandy's knowledge, Shelly removed baby Diva from her crib. When Brandy attempted to take baby Diva from Shelly, Shelly threw the baby against the wall.

Upon learning that the child was thrown against a wall by Shelly, Sherry P. and her mother immediately took the child to Women's and Children's Hospital. The child was diagnosed as having a closed head injury. No further diagnosis was made at that time. The record indicates that Sherry P. questioned hospital personnel about what appeared to be a soft area on the left side of the child's head. Sherry P.'s concern about the soft area was dismissed as insignificant. Sherry P. was permitted to take the child home within hours of bringing her to the hospital.

On July 18, 1993, Sherry P. again took Diva to the hospital because of a lethargic look on her face. While at the hospital the second time, it was discovered that the child had a fractured right arm, hairline right skull fracture, as well as a depressed skull fracture. See footnote 6

The West Virginia Department of Health and Human Resources (hereinafter "DHHR") was contacted regarding the child's injuries. DHHR filed a neglect and abuse petition against Sherry P. on July 23, 1993. Diva was taken into the custody of DHHR. After successfully completing an improvement period, the circuit court entered an agreed order on May 27, 1994, dismissing the petition. Diva was returned to Sherry P. See footnote 7

On October 16, 1994, Sherry P. gave birth to a second child, Destiny P. (hereinafter the "Destiny"). Destiny was born prematurely. Sherry P.'s physician recommended a heart monitor be used for the infant because of a high risk of sudden infant death syndrome. The heart monitor was designed to sound an alarm if Destiny's heart stopped beating. Sherry P. utilized the heart monitor for two months. During that two month period the evidence showed that the heart monitor was only disconnected a few days. See footnote 8 Unknown to Sherry P. the heart monitor was actually defective. Medical expert , Dr. Joseph Werthammer testified that a review of the recorded printout from the heart monitor revealed that it recorded a total of 6,000 alarms during the two month period that Sherry P. had the infant connected to the monitor. See footnote 9

There was further evidence that both the hospital and the supplier of the heart monitor were aware after the first month of use by Sherry P., that the monitor was defective. Neither took steps to inform Sherry P. of this fact. See footnote 10 On

December 29, 1994, Sherry P. gave Destiny a bath. Sherry P. laid down on a sofa holding the infant in her arms. A short time afterwards Sherry P.'s mother picked the infant up while Sherry P. slept and found that Destiny was dead. An autopsy was performed on Destiny. The autopsy determined that Destiny died of natural causes. See footnote 11

Immediately after the death of Destiny an amended abuse and neglect petition was filed by DHHR against Sherry P. The petition alleged that Diva was abused and neglected. On October 4, 1996, Judge Kaufman held a final adjudication hearing on the matter. On October 30, 1996 the court issued an order, which was subsequently amended on November 15, 1996, finding the child to be neglected within the meaning of W.Va. 49-6-2 (1996). See footnote 12 A disposition hearing was held on October 21, 1996. Based upon testimony at the disposition hearing and the recommendation of DHHR, the court entered a disposition order on November 19, 1996. Diva was ordered returned to the custody of Sherry P. for a three month post-dispositional improvement period. See footnote 13 The State objected to the disposition order and urged the court to terminate the parental rights of Sherry P. Shortly after entry of the disposition order, Sherry P. was "indicted by the grand jury for the murder of her infant child, Destiny P." See footnote 14 Subsequent to the indictment, petitioners instituted this proceeding challenging the disposition order.

II.
STANDARD OF REVIEW

We begin by outlining the standard of review in civil abuse and neglect proceedings. The standard of review was established by this Court in syllabus point 1 of State ex rel. Virginia M. v. Virgil Eugene S. II, 197 W.Va. 456, 475 S.E.2d 548 (1996) as follows:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its

> entirety. Syl. Pt. 1, In the Interest of Tiffany Marie S. , 196 W.V a. 223, 470 S.E.2d 177 (1996).

The above standard of review requires deference by this Court to the findings of a circuit court in a civil abuse and neglect proceeding. The critical nature of unreviewable intangibles justify the deferential approach we accord findings by a circuit court. As we said in Brown v. Gobble, 196 W.Va. 559, 563, 474 S.E.2d 489, 493 (1996), "the standard of review for judging a sufficiency of evidence claim is not appellant friendly." See Gentry v. Mangum, 195 W.Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995) ("Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.").

A writ of prohibition is an appropriate remedy in cases where the lower court has no jurisdiction over the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers. W.Va. Code § 53-1-1 (1994). In the instant matter the circuit court has jurisdiction, therefore we look to syllabus point 1 of Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979):

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Thus "prohibition may be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy." State ex rel. Chafin v. Halbritter, 191 W.Va. 741, 743-44, 448 S.E.2d 428, 430-31 (1994) (citations omitted).

III.
DISCUSSION

We are confronted with three issues in this case: (1) the State as a party in this proceeding, (2) the sufficiency of evidence, and (3) the disposition case plan. We will review each in its turn.

A.
The State Is Not A Proper Party In This Proceeding

During the litigation before the circuit court, all parties were represented by counsel. At the circuit court level, DHHR was represented by the Kanawha County Prosecutor (hereinafter "prosecutor"). DHHR did not request the prosecutor initiate proceedings in this Court. DHHR is not represented by the prosecutor before this Court. See footnote 15 The record indicates that DHHR agreed with the disposition order of the circuit court and DHHR recommended the disposition adopted by the court. The prosecutor disagreed with its client below, DHHR, and proceeded with the State See footnote 16 as its client in this proceeding. See footnote 17 The question for this Court is whether the State is a proper party to this matter. See footnote 18

It is set out in W.Va. Code § 49-6-10 (1996), See footnote 19 in relevant part, that:

> It shall be the duty of every prosecuting attorney to fully and promptly cooperate with persons seeking to apply for relief under the provisions of this article in all cases of suspected child abuse and neglect, to promptly prepare applications and petitions for relief requested by such persons[.] See footnote 20 (Emphasis added).

DHHR sought relief against Sherry P. pursuant to the civil abuse and neglect statutes. The clear language of W.Va. Code § 49-6-10 made it mandatory for the prosecutor to fully and promptly cooperate with DHHR. See footnote 21 See Syl. Pt. 7, Hodge v. Ginsberg, 172 W.Va. 17, 303 S.E.2d 245 (1983) ("'It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, Nelson v. Public Employees Insurance Board, [171] W.Va. [445], 300 S.E.2d 86 (1982).").

In this proceeding the prosecutor attempts to justify his actions in this matter, without its client or its client's expressed approval, on several grounds. First, it is argued that W.Va. Code § 49-6-10 is unclear as to the role of the prosecutor in civil abuse and neglect proceedings. We discern no such ambiguity in the statute. """When a statute is clear and unambiguous and legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 1, Cummins v. State Workmen's Compensation Comm'r., 152 W.Va. 781, 166 S.E.2d 562 (1969).' Syl. pt. 3, Kosegi v. Pugliese, 185 W.Va. 384, 407 S.E.2d 388 (1991)." Syl. Pt. 3, City of Kenova v. Bell Atlantic-West Virginia, Inc., 196 W.Va. 426, 473 S.E.2d 141 (1996). The statute provides that the prosecutor must cooperate with DHHR's efforts to pursue a civil action against Sherry P. pursuant to the civil abuse and neglect statutes. The record reveals that the prosecutor and the DHHR have disagreed regarding the civil action against Sherry P. The brief of the prosecutor states that: "The West Virginia Department of Health and Human Resources and

the office of the Prosecuting Attorney have, throughout this case, disagreed as to the resolution of this case."

In prosecutions under our criminal abuse and neglect statutes, the State is the client of the prosecutor. W.Va. Code § 7-4-1 (1971) provides, in relevant part, that "[i]t shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected[.]" We indicated in State ex rel. Skinner v. Dostert, 166 W.Va. 743, 752-753, 278 S.E.2d 624, 631 (1981), that "[a]s criminal offenses are offenses against the State which must be prosecuted in the name of the State, the prosecutor, as the officer charged with prosecuting such offenses, has a duty to vindicate the victim's and the public's constitutional right of redress for a criminal invasion of rights." (Citations omitted). Because the State is the client in criminal abuse and neglect cases, prosecutors have almost absolute discretion in determining the course of such prosecutions. We noted in Skinner, 166 W.Va. at 752, 278 S.E.2d at 631, "that the prosecuting attorney is vested with discretion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest." However, we provided caution in syllabus point 2 of State ex rel. Preissler v. Dostert, 163 W.Va. 719, 260 S.E.2d 279 (1979), when we held that "[t]he prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, Sec. 2; art. 3, Sec. 2; art. 9, Sec. 1."

In civil abuse and neglect cases, the legislature has made DHHR the state's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va. Code § 49-6-10 that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

In the instant proceeding, DHHR recommended a disposition of this case which the prosecutor opposed. The circuit court adopted the disposition recommended by DHHR. The prosecutor has now, independently of its client, challenged the adopted recommendation of its client. As an initial matter, the prosecutor's decision to seek a writ of prohibition in this case compromised many of the provisions of the Rules of Professional Conduct relating to the attorney-client

relationship. E.g. Rule 1.2(a), See footnote 22 Rule 1.6(a) See footnote 23 and Rule 1.7(b). See footnote 24

Loyalty is one of the cornerstones of the attorney-client relationship. The Comment to R.P.C., Rule 1.7 admonishes that "[a]s a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent." Further, information that is exchanged between a client and attorney is clothed in the ancient common law attorney-client communication privilege. See also Lawyer Disciplinary Bd. v. McGraw, 194 W.Va. 788, 799-800, 461 S.E.2d 850, 861-862 (1995) ("[A] lawyer's ethical duty of confidentiality under Rule 1.6 of the Rules of Professional Conduct applies to all information relating to representation of a client, protecting more than just 'confidences' or 'secrets' of a client. The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it." The course of conduct engaged in by the prosecutor in this case makes loyalty and the attorney-client communication privilege meaningless. See footnote 25

Additionally, the prosecutor has attempted to interject in the case, for the purpose of this petition, a new client. That is, the prosecutor in filing this appeal has named the State as its client. The prosecutor justifies introducing the State as its new client in this case by citing language in our decision in In re Jeffrey R.L., 190 W.Va. 24, 32-33, 435 S.E.2d 162, 170-71 (1993), wherein we indicated "that the State, in its role of parens patriae, 'is the ultimate protector of the rights of minors[,]' and 'has a substantial interest in providing for their health, safety, and welfare, and may properly step in and do so when necessary." Quoting In re Betty J.W., 179 W.Va. 605, 608, 371 S.E.2d 326, 329 (1988). The language from Jeffrey R.L. does not aid the prosecutor.

In Jeffrey R.L., DHHR sought to terminate parental rights, but the lower court returned the child to the mother. The issue on appeal was whether the lower court committed error in not terminating the mother's parental rights. In addressing that issue we spoke about the State as the ultimate protector of children and DHHR's role in carrying out the State's interest in civil abuse and neglect proceedings. We did not indicate that prosecutors were statutorily entrusted with independent enforcement of civil abuse and neglect proceedings. To the contrary, we made clear that the State had reposed that responsibility upon DHHR. In the instant proceeding, the prosecutor had no authority to invoke the State as its client. We further find that, absent statutory authority, when county prosecutors represent the DHHR, they may not invoke this Court's appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR. We point out that this does not impair the right of a child's guardian ad litem to invoke the original or appellate jurisdiction of this Court, regardless of the

position taken by DHHR. As a matter of fact, the guardian ad litem has an affirmative duty to take an assertive role in securing the child's rights, including prosecuting an appeal if the case so warrants. See Scottie D., 185 W.Va. at 198, 406 S.E.2d at 221 ("[T]he 'guardian ad litem representing an infant plaintiff has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end.' 42 Am.Jur.2d Infants Sec. 178, at 165 (1969). Securing the infant's rights includes taking an assertive role and, if in the judgment of the guardian ad litem, a case so warrants, prosecuting an appeal.").

B.
Did The Evidence Support An Abuse Finding
And Termination Of Parental Rights

The circuit court found the evidence insufficient to support terminating Sherry P.'s parental rights to the child. The guardian ad litem contends that the evidence in this case sustained a finding that Sherry P.'s parental rights should be terminated. The position taken by the guardian ad litem presents two issues: (1) did the evidence support an abused child adjudication and (2) was termination of parental rights the proper disposition.

As an initial matter we note that in syllabus point 1 of In Re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973), this Court indicated that:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

There is tremendous responsibility imposed upon the judiciary when it is confronted with termination of parental rights. No greater connection to a child's existence can be found than that which links a child to its natural parents. In syllabus point 10 of Matter of Brian D., 194 W.Va. 623, 461 S.E.2d 129 (1995) we said, in part, that "'[w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child....' Syl. Pt. 5, In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995)." In the single syllabus of State ex rel. Kiger v. Hancock,153 W.Va. 404,168 S.E.2d 798, (W.Va. 1969) we indicated, in part, that "[a] parent has the natural right to the custody of his or her infant child[.]"

Notwithstanding the natural link between parent and child, this Court articulated in syllabus point 1 of Willis that, "[t]hough constitutionally protected, the right of the

natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with child care." In syllabus point 3 of Jeffrey R.L. we held:

> Parental rights may be terminated where there is clear and convincing evidence th at the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that th e conditi ons of a buse can be substantially corrected because the perpetrator of the a buse has not been identified and the parents, even in the f ace of knowledge of the abuse, have taken no action to identify the abuser.

Did the evidence support an abused child adjudication? The circuit court's amended order of November 15, 1996 concluded that the child was a neglected child within the meaning of W.Va. Code § 49-1-3(g)(1) (1994). The court deemed the evidence insufficient to find the child was an abused child within the meaning of W.Va. Code § 49-1-3(a) (1994). The guardian ad litem contends that the evidence supported a finding that the child was an abused child.

W.Va. Code § 49-1-3(a), in pertinent part, defines abused child to mean a child whose welfare or health is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts ... or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" In syllabus point 1, in part, of Brenda C. we pointed out that """"W.Va. Code, 49-6-2(c) [1996], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof[.]'" Syllabus Point 1, In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W.Va. 60, 399 S.E.2d 460 (1990).' Syllabus Point 1, In re Beth, 192 W.Va. 656, 453 S.E.2d 639 (1994). Syl. Pt. 3, In re Christina L., 194 W.Va. 446, 460 S.E.2d 692 (1995)." (Emphasis added).

In determining whether the circuit court was clearly erroneous in finding that DHHR failed to meet its burden of proving by clear and convincing evidence that the child was an abused child, we must first place this case in its proper context. The initial petition filed against Sherry P. was dismissed, without prejudice, by an agreed order dated May 27, 1994. See footnote 26 The dismissal order stated that "the situation which lead to the filing of the initial petition is no longer present[.]" The order further indicated that Sherry P. "has fully complied with the services provided [by] the Department[.]" Therefore, the initial incident could only be considered in this proceeding as evidence of other allegations of child abuse and

neglect. We pointed out in syllabus point 8 of In Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991) that:

> Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

The amended petition filed after the December 29, 1994 death of baby Destiny did not revive the averments contained in the initial petition filed on behalf of Diva. The guardian ad litem contends that the evidence concerning the July 17, 1993, injuries to Diva and the December 29, 1994, death of baby Destiny, established by clear and convincing evidence that Diva was an abused child. As to the July 17 incident it is argued that Sherry P. failed to provide an adequate explanation for the injuries to the child. See footnote 27 We disagree.

First, there is no evidence in the record to show that Sherry P. personally injured Diva. Nor was there any evidence to establish that Sherry P. was actually present when the child was injured. The record indicates that the child was briefly left in the care of Brandy, while Sherry P. and her mother went to a store. There was no evidence to suggest that Brandy was not a responsible babysitter. Brandy testified that Shelly threw the child against a wall after she was discovered holding the child. The guardian ad litem alleges that its witness, Dr. M.L. McJunkin, testified that the injuries to the child could not have occurred as indicated by Brandy. Our review of Dr. McJunkin's testimony reveals the opposite. During cross-examination Dr. McJunkin clearly stated that the injuries could have come as a result of being thrown against a wall.

Shelly was not allowed to hold the child unless some adult was present. Shelly was not allowed to remove the child from the crib. The restrictions placed on Shelly evidenced sensitivity to the fact that she was autistic or emotionally unstable. See footnote 28 Further, the record establishes that Shelly had not injured the child prior to July 17. There was no evidence that Shelly inflicted injuries on the child after the July 17 incident.

The record further reveals that Sherry P. immediately took the child to the hospital upon learning of the incident. Sherry P. returned to the hospital the very next morning upon observing that the child appeared lethargic.

As to the December 19, 1994, death of Destiny, the guardian ad litem contends that this incident constituted child abuse against Diva. See footnote 29 In syllabus point 2 of Christina L. we held that:

> Where there is clear and convinc ing evidence th at a child has suffered physical and/ or sexual a buse while in the custody of his or her parent(s), guardia n, or custodian, a nother child re siding in t he home w hen the abus e took plac e who is not a direct victim of the physical and/or sexual abuse but is at risk of bei ng a bused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Under the authority of Christina L. clear and convincing proof that Sherry P. abused Destiny by bringing about her death supports a finding that the child, Diva, was an abused child.

The circumstances surrounding the death of Destiny troubles this Court. The most compelling and persuasive evidence regarding Destiny's death comes from the autopsy report and the testimony of Dr. Werthammer. The autopsy report reveals no foul play or wrong doing in bringing about the death. The autopsy report concluded the infant died of natural causes.

Dr. Werthammer testified that the heart monitor provided to Sherry P. was not merely defective--he testified that it was "worthless." Dr. Werthammer opined that if the heart monitor had been working correctly the infant might be alive today.

The guardian ad litem points out that during the few days prior to the infant's death, Sherry P. had disconnected Destiny's heart monitor. The evidence indicates that the heart monitor sent out 6,000 false alarms during the two month period that Sherry P. had the machine. In spite of each and every false alarm, Sherry P. faithfully kept the machine connected to Destiny. Dr. Werthammer testified that it was unprecedented for anyone to endure the sound of the alarm for such an extended period of time.

There was further evidence that, while Sherry P. was not aware that the heart monitor was defective, the hospital and supplier of the machine knew or reasonably should have known of the defect. Sherry P. took the infant to the hospital a month after getting the machine. The hospital retrieved data from the machine which indicated that it sounded 4,200 false alarms during the first thirty day period. The hospital took no action to correct the problem. The hospital failed to inform Sherry P. that the machine was defective. The evidence also indicates that Sherry P. reported to the supplier of the machine that it was constantly sounding an alarm. Again, no action was taken to inform Sherry P. that the machine was defective. In view of the facts presented the evidence did not establish by clear and convincing proof that Sherry P. abused Diva.

Was termination of parental rights the proper disposition? The guardian ad litem contends that the circuit court abused its discretion in granting Sherry P. a post-

disposition improvement period. The guardian ad litem argued that the evidence supported terminating Sherry P.'s rights to baby Diva. As previously noted, W.Va. Code § 49-6-5(c) permits a post-disposition improvement period. In syllabus point 4 of Matter of Jonathan P.,182 W.Va. 302, 387 S.E.2d 537 (1989) we held that:

> Termination of parent al rights, the m ost drastic rem edy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6- 5 [1977] m ay be employed without the use of intervening less restrictiv e alternatives when it is found that there is no reasona ble likelihood under W.Va .Code, 49-6- 5(b) [1977] that conditions of neglect or abus e can be substantially corrected. Syllabus Point 2, In re R.J.M. , 164 W.Va. 496, 266 S.E. 2d 114 (1980).

See Syl. Pt. 2, State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987) ("W.Va.Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.").

In our review of the record we find that the circuit court was not clearly erroneous, in determining that the guardian ad litem failed to establish that there was no reasonable likelihood the conditions of neglect could be substantially corrected. The record clearly establishes that a strong bond has developed between Sherry P. and Diva. Sherry P. complied with all the demands placed upon her by DHHR. The record does not reflect one instance where DHHR has requested something from Sherry P. and she failed to follow through on the matter. Every effort has been made by Sherry P. to do what DHHR has deemed necessary to reasonably assure the safety and well-being of Diva. See footnote 30

C.

Disposition Case-Plan

The guardian ad litem argues that the circuit court was obligated to provide a case-plan in view of the decision to grant Sherry P. a disposition improvement period. We noted in syllabus point 3 of Tiffany Marie S. that:

> Under W.Va. Code, 49- 6-2(b) (1984), when an im provement period is authorized, then the court by or der shall require the D epartment of Human Services to prepare a family case plan pursuant to W.Va. Code, 49-6D-3 (1984). Syl. pt. 3, State ex rel. W.Va. Department of Human Se rvices v. Cher yl M. , 177 W.Va. 688, 356 S.E.2d 181 (1987).

The record indicates a case-plan was prepared by DHHR. The case plan was not submitted to the circuit court for approval. We have reviewed the case-plan and instruct the parties to submit the same to the circuit court for appropriate inclusion in this case.

IV.
CONCLUSION

In view of the foregoing, we find that the petitioners are not entitled to relief and, therefore, we deny the requested writ.

Writ denied.

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1. This case is being viewed exclusively as a petition for writ of prohibition.

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2. We follow our past practice in domestic cases that involve sensitive facts, and do not use the last names of the parties. See State ex rel. West Virginia Dep't of Human Servs. v. Cherly M., 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

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3. Sherry P. is represented by counsel in this matter and has filed a response brief. Judge Kaufman submitted a letter to this Court requesting his ruling be upheld.

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4. This Court has previously indicated that a guardian ad litem "must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children[,]" including "exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary." Syl. Pt. 3, in part, In re Scottie D., 185 W.Va. 191, 406 S.E.2d 214 (1991) (emphasis in original).

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5. It is not clear from the record but Brandy is a few years older than Sherry P. Shelly is a few years younger than Sherry P.

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6. At a hearing in the case, medical evidence was introduced that the hairline right skull fracture was evident during the initial visit to the hospital on July 17. However, medical personnel did not diagnose the condition. There was also evidence that the hospital did not x-ray the child's arm during the first visit. The brief of respondent points out that medical records introduced into evidence revealed that critical entries were tampered with in this case. Erasures and re-entries were made that were not initialed. One incident identified in the brief refers to an ancillary note entry on July 19, 1993 which originally read: "On review of radiographics with radiologist today and with help of CT bone windows done [July] 18 it was evident that a small partial fracture was present at initial visit [July] 17." It was pointed out that material portions of the ancillary note had

been erased and replaced with the following entry: "...it is possible that a questionable right partial fracture was present at initial visit [July] 17."

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7. The order read in pertinent part:
"Based upon the fact [that] the situation which lead to the filing of the initial petition is no longer present, the parties moved that this action be dismissed." (Emphasis added).

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8. Numerically speaking, the testimony indicated that Sherry P. utilized the heart monitor approximately 84% of the time.

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9. Dr. Werthammer testified that Destiny was having an alarm about every 12 minutes, day and night.

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10. Sherry P. took the infant for a routine check up after the first month of having her home. During that hospital visit the heart monitor's data base was retrieved by hospital personnel, which data base informed the hospital that the heart monitor was defective as a result of the 4200 false alarms that were recorded. Additionally, the evidence indicates that Sherry P. contacted the supplier of the heart monitor on several occasions to inform the supplier that the machine was sounding an alarm constantly. However, nothing was done or said to her about the machine being defective.

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11. In addressing the role of the heart monitor, Dr. Werthammer testified as follows:
THE COURT: Would you say the alarm was just worthless?
A. I would say it was less than worthless. It was a noise hazard.
THE COURT: Is there any conclusion you could reach about the mother's relationship to the monitor or the mother's relationship to the baby based on the monitor?
A. I would say this mother went the full hundred yards in keeping this baby on this monitor as long as she did with the compliance that's demonstrated by this thing. You know, you sent me these things and then you sent me the report and told me a little bit about what this case was about.
I feel that there was negligence in this case--
MS. MCCLURE: Your honor, I'm going to object as to this isn't a civil action for negligence and I'm going to object if you're going to place any blame on somebody else or some deviation from the standard of care.
That's irrelevant as to whether she neglected or abused her child.
A. That's the question I was asked --- Did this mother comply with what she was instructed to do. And my judgment is she went the full distance with it.
I think there was a problem, however, in making this an effective piece of equipment that might have prevented this child's death.

12. The brief of the petitioners bring up the point that the court sua sponte issued an amended order of neglect. This issue is irrelevant in light of the fact that the ultimate conclusion by both orders was the same. A review of the original order which was drafted by the State supports the assertion in the respondent's brief that the original order mischaracterized material facts in the case.

13. W.Va. Code § 49-6-5(c) (1996) provides that "[t]he court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed six months."

14. The indictment indicates that Sherry P. was charged under the criminal child neglect statute. See W.Va. Code § 61-8D-4 (1996).

15. Subsequent to oral arguments DHHR submitted a brief in this case through its in-house counsel, the Office of the Attorney General. The only issue addressed by DHHR is its position that the prosecutor did not have authority to initiate the instant proceeding before this Court.

16. Under normal circumstances it would be correct to refer to DHHR as the State. However, in this proceeding the prosecutor has manufactured a distinction by naming the State as it would in any criminal prosecution. Therefore, the designation of State in this proceeding does not encompass DHHR.

17. We believe it is necessary to commend the prosecutor's efforts for vigorously advocating for the rights of the child in this proceeding. However, as we have established in the body of this opinion, there are laws and principles which govern the relationship between the prosecutor and the DHHR.

18. In a recent decision, In re Jonathan G., ___ W.Va. ___, 482 S.E.2d 893 (1996), we indicated that county prosecutors are required to act as attorneys for DHHR in civil abuse and neglect proceedings. The decision in Jonathan G. did not address the issue in a syllabus point. Consequently, the matter is again raised by the prosecutor. In the instant proceeding we make clear in the syllabus of this opinion what Jonathan G. declared regarding the relationship between county prosecutors and DHHR in civil abuse and neglect proceedings.

19. W.Va. Code § 49-6-10 is to be read in para materia with W.Va. Code § 49-6-1(a), which provides in relevant part:
(a) If [DHHR] or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court[.]"

20. The requirement regarding civil matters in general is set out in W.Va. Code § 7-4-1, in relevant part, as follows:
It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the State, or any department, commission or board thereof, is interested[.]"
This statute is not relevant or controlling because the legislature has enacted a specific statute setting out the role of prosecutors in civil abuse and neglect proceedings. "The rules of statutory construction require that a specific statute will control over a general statute[.]" Daily Gazette Co., Inc. v. Caryl, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989). Citing Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W.Va. 330, 325 S.E.2d 120 (1984); State ex rel. Simpkins v. Harvey, 172 W.Va. 312, 305 S.E.2d 268 (1983).

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21. Although the civil abuse and neglect statutes refer to DHHR and reputable persons, we are concerned here only with the authority granted DHHR. In the event anyone other than DHHR filed a petition, DHHR would ultimately be brought into the case in accordance with its statutory duty to so intervene.

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22. The relevant part of Rule 1.2(a) provides: "(a) A lawyer shall abide by a client's decisions concerning the objectives of representation.... A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

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23. The relevant part of Rule 1.6(a) provides: "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation[.]"

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24. The relevant part of Rule 1.7(b) provides: "(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests[.]"

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25. See W.Va. Code § 49-6A-7 (1977) wherein it is provided that:
The privileged quality of communications between husband and wife and between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect. (Emphasis added).

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26. The dismissal occurred without adjudication and disposition hearings taking place.

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27. The guardian ad litem contends that separate injuries occurred to the child on July 17 and July 18. The evidence to sustain this contention is weak at best. The

medical documents indicate that hospital authorities should have discovered on July 17, the injuries that were diagnosed on July 18.

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28. The guardian ad litem contends that there was insufficient evidence that Shelly was autistic. Brandy testified that Shelly was diagnosed as autistic at age three and that Shelly was placed in a special class in school for emotionally unstable children. No evidence was offered to refute this testimony.

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29. The prosecutor was only able to get a grand jury to return an indictment against Sherry P. for criminal neglect child abuse.

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30. The guardian ad litem contends that the circuit court's order returning the child to Sherry P. conflicts with the condition of bond set in the criminal proceeding against her. The record indicates that the circuit court in the case sub judice stayed return of the child pending the outcome of this proceeding. This matter is addressed by Rule 5 of the Rules of Procedure for Child Abuse and Neglect, wherein it is provided that "[u]nder no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings."

Workman, C. J., concurring:

Justice Davis has done a fine job of examining this very difficult case from both a legal and a human perspective---which is what should be done in every child abuse and neglect case. Baby Diva may definitely be in harm's way, not (it seems from the record before us) from any malevolent intent on the part of this mother, but because she appears to lack any real parenting skills and perhaps because she may have very limited intellect. Yet, there appears to be a strong emotional bond between mother and child, and the mother has attempted to sustain a relationship with this child during all of these proceedings. Thus, the lower court in his discretion decided to make one last effort at remedying the problems leading to these proceedings. During the course of this post-dispositional improvement period the department should monitor Diva very closely. At the final dispositional hearing, the court will have Diva's life---figuratively and perhaps literally---in its hands, just as we do now.

I write separately on the issue of the role of the prosecuting attorney in abuse and neglect cases. When I authored the Jonathan G. case last year, we were presented with a classic case of the Department of Health and Human Resources and the prosecuting attorney taking conflicting positions on a termination issue. See In Re Jonathan G., ___ W. Va. ___, 482 S.E.2d 893 (1996). In the instant case, it is the

same. From a very pragmatic view, this issue was particularly hard for me because over the course of almost sixteen years on the bench, I have seen the department fail to protect children and fail to advocate vociferously for them on many occasions. See footnote 1 In addition, although guardians ad litem are appointed to represent children, most of them until relatively recently, did not do much aggressive advocacy either, frequently not even appearing on appeal on behalf of the children. In Justice McHugh's case, In Re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993), however, we clearly set forth the responsibilities of guardians ad litem in abuse and neglect cases. That opinion, together with an intensive effort to develop continuing legal education in this area, has created steady improvement in the quality of representation of children. See footnote 2

Furthermore, I believe strongly that the community at large (all of us in the corporate sense) have an interest and a responsibility in abuse and neglect proceedings which could and probably should be represented by prosecuting attorneys. Thank goodness, we as a society have stopped looking at child abuse as a "family problem" and now recognize that it's everyone's business. But as I have said in other contexts, it is up to courts to interpret the law, not create it. As much as I would like to make the policy decision that prosecuting attorneys have the right and responsibility to represent the public interest in protecting abused and neglected children when their position conflicts with the department's, I do not believe the law as currently constituted See footnote 3 permits them that role. Thus, it is my recommendation that the Prosecuting Attorneys Association and child advocacy organizations explore the possibility of bringing this issue to the attention of the Legislature and seeking legislative change in this area.

There cannot be too much advocacy for children. The public has a legitimate interest in protecting abused and neglected children, and the prosecutors are very logical representatives to carry out that mission if the Legislature chooses to modify the law to accord them that responsibility.

Footnote: 1 A September 1996 legislative audit of the Child Protective Services Division (CPS) for the 1995 fiscal year, involving a twelve-county survey, found that despite the requirement that it conduct a face-to-face interview with the child or children within 14 days of being notified of suspected abuse or neglect, CPS failed to conduct any such interview in 46% of the cases. In 29% of cases, CPS conducted the interview within 14 days, in 15% of the cases, CPS conducted the interview within 15 to 90 days, and in 10% of the cases, CPS took over 90 days to interview the alleged victims. Information from Office of Legislative Auditor, Performance Evaluation and Research Division, September 1996 Report.

Footnote: 2 The Jonathan G. case and the instant one, precluding prosecutors from an independent role in abuse and neglect, impel me to re-emphasize that,

now more than ever, guardians ad litem more than ever must be strong advocates for the children they represent.

Footnote: 3 See Jonathan G. and Diva for further reasoning of this conclusion.

197 W. Va. 489, 475 S.E.2d 865

Supreme Court of Appeals of West Virginia

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ex rel. Brenda WRIGHT,
Social Service Worker, Plaintiff Below, Appellee,
v.
DORIS S. and Rosalee S., Defendants Below, Appellants.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ex rel. Brenda WRIGHT,
Social Service Worker, Plaintiff Below, Appellee,
v.
MELISSA C., Brian "S." C., Larry "M." C., Joseph E., David E., and any known and unknown Putative Father or Fathers of the Infant Children, Brian "S." C. and Larry "M." C., Defendants Below, David E., Appellant.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ex rel. Brenda WRIGHT,
Social Service Worker, Plaintiff Below, Appellee,
v.
DORIS S. and Rosalee S., Defendants Below, Appellants.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ex rel. Brenda WRIGHT,
Social Service Worker, Plaintiff Below, Appellee,
v.
MELISSA C., Brian "S." C., Larry "M." C., Joseph E., John E., David E., and Any Known and Unknown Putative Father or Fathers of the Infant Children, Brian "S." C. and Larry "M." C., Defendants Below, Melissa C. and Doris S., Appellants.

Nos. 23156, 23157
Submitted Jan. 23, 1996
Decided July 8, 1996

SYLLABUS BY THE COURT

1. Implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.

2. Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

3. "W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, In re Betty J.W., 179 W.Va. 605, 371 S.E.2d 326 (1988).

4. Pursuant to the provisions of West Virginia Code § 49-1-3(a)(1) (1995), the definition of child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her child(ren), even though that child is not the parent's natural or adopted child.

5. "Termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, In re Scottie D., 185 W.Va. 191, 406 S.E.2d 214 (1991).

6. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

7. The term "knowingly" as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

8. A parent's parental rights to his/her child(ren) may be terminated: 1) where there is clear and convincing evidence that the parent knowingly allowed another person to inflict extensive physical injury upon another child residing in the same home as the parent and his/her child(ren), even though the injured child is not the parent's natural or adopted child; and 2) where there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parent, even in the face of knowledge of the abuse, has taken no action to identify the abuser.

Barbara L. Baxter, Assistant Attorney General, Charleston, for Appellee West Virginia Department of Health and Human Resources.

Jerry Blair, Huntington, for Appellants Doris S. and Melissa C.

Lisa Fredeking White, Guardian Ad Litem, Huntington, for Brian" S." C., Larry" M." C., Joseph E., John E., and Rosalee S.

Dwight J. Staples, Henderson, Henderson & Staples, Huntington, for David E.

Scott Tyree, Huntington, for Mark S.

Richard L. Vital, Huntington, for Paternal Grandparents, Brando & Monroe M., of B.S.C. & L.M.C.

R. Lee Booten, Huntington, for Polly Jean D.

WORKMAN, Justice:

This case is before the Court upon the consolidated appeal See footnote 1 of Melissa C., Doris S. See footnote 2 and David E. See footnote 3 from the February 10, 1995, final order of the Circuit Court of Cabell County, which resulted in the termination of the following parental rights: Doris S.'s parental rights to her minor child, Rosalee S., five years old; Melissa C.'s parental rights to her minor children, Brian "Scott" C., seven years old, Larry "Mike" C., five years old, Joseph E., four years old, and John E, three years old; and, David E.'s parental rights to his minor children, Joseph E. and John E. The Appellant, David E., argues that the lower court erred in terminating his parental rights where the Appellee failed to present clear and convincing evidence that there was no reasonable likelihood that conditions of neglect or abuse could be substantially corrected and where the trial court denied him a meaningful improvement period. The Appellants, Doris S. and Melissa C., argue that the lower court erred and abused its discretion by denying them a meaningful improvement period without clear and convincing evidence of compelling circumstances that would justify such a denial and by terminating their parental rights where the State failed to satisfy its burden of clear and convincing evidence, especially with regard to Melissa C. Based on a review of the record, the parties' briefs and arguments, the guardian ad litem's brief, and all other matters submitted before the Court, we conclude that the circuit court committed no error and, accordingly, affirm.

I.

Detective Jim Scheidler of the Cabell County Sheriff's Department testified that on the morning of April 19, 1993, he responded to a call at 4105 Green Valley Road in Huntington, West Virginia, regarding the death of Allen Ray S., Appellant Doris S.'s

twenty-two-month-old son. Detective Scheidler indicated that upon his arrival to the residence, he first noticed the infant's body in the back of an ambulance. The officer testified that the child's body felt cool when he touched it and that the child's clothing was wet or damp in spots. Appellant Melissa C. told the detective that she had discovered the child face down on the couch on which he slept. The officer stated that it was his opinion that the child had been dead for "five to ten hours or more[,]" at the time of his arrival upon the scene. See footnote 4 The detective learned that in addition to the children, Rosalee S., Scott C., Mike C., Joseph E. and John E., the following adults had been present through the evening preceding the child's death: David E., See footnote 5 Melissa C., Larry C., See footnote 6 Doris S, and James Nance, Doris S.'s boyfriend. See footnote 7 Detective Scheidler also testified that "[i]n talking to Melissa and all of those at the scene that day, they all indicated to me, to their recollection, that there was never any violent injury or anything of a violent nature that was done to Allen Ray." Moreover, the detective indicated that at no time after he left the scene did he receive any information about the child's death from any of the adults present in the home the night the child died. Finally, the detective testified that he made the decision to call the Department of Health and Human Resources ("DHHR") concerning the other children after he entered the residence and observed "[v]ery unsanitary" living conditions, See footnote 8 including mice in the garbage. See footnote 9

Dr. Irvin Sopher, Chief Medical Examiner for the State of West Virginia performed an autopsy on the deceased child. The autopsy results revealed that there were "no external evidence of significant trauma, either old or recent." Further, x-rays did not reveal any old or new bone fractures. The doctor's examination, however, indicated that the child sustained a "severe injury to the spinal column ... which resulted in a severe hemorrhage surrounding the spinal cord[,]" the length of which was approximately fifteen inches long. Dr. Sopher testified that "[t]his is a finding which we rather clasically [sic] see in a condition called shaken baby syndrome[,]" and that "there was severe injury to ... [the child's] body in the form of vertebral column trauma as by shaking, violent shaking, which ... is the cause of death in this particular infant." The doctor further testified that the onset of blood coming from the child's nostril, as depicted in a photograph taken of the deceased, was "[p]robably immediate." The doctor also stated that "it's hard to imagine in any kind of an accidental setting in a household environment, in other words, where there aren't velocities of motor vehicles or aircraft involved, that you could have this extensive of an injury without an abusive situation." Finally, Dr. Sopher estimated the time of death at 10:00 p.m. on April 18, 1993, based on the child's stomach contents and the doctor's assumption that the child last ate at 7:00 p.m. prior to his death; however, he also indicated that while the child probably only lived minutes after the infliction of the injury, it was possible that there could have been a delay of several hours from the shaking until the time the child died.

Gary McMullen, a DHHR child protective service worker, testified that Phyllis Justice, the aunt with whom Rosalee was placed after her removal from her mother's custody,

contacted him regarding nightmares that Rosalee was having. Mr. McMullen stated that he interviewed the child in order to ascertain what type of services would be available for her. Mr. McMullen indicated that when he spoke with five-year-old Rosalee about the events surrounding Allen Ray's death, she became very anxious and nervous. Mr. McMullen testified that through the use of drawing, Rosalee told him that

> she was pl aying by t he creek, along with Scott y and Mi key, and t hat Melissa C [ ][.] was there and s ome ot hers, and she said that Allen went into the creek and got wet and that Jimmy Nance became very upset, and as a result, sh e went with Jimmy Nance and with Allen Ray into the hous e into one of the be drooms, and i t wa s at that time that ... Jimmy Nance started shaking Allen Ray and that his nos e started bleeding and that ... [s]he said, 'well, he quit moving [,]' ... [and] 'started turning blue.' She said ... that Jimmy told her not to say anything about it an d they left the room at that time, 'they ' being Jimmy Na nce and Allen Ray.... Through the conversation, I asked her if she had di scussed this with anyone else. And she said that ... her mother visited th e home and--had a visit with her and that she did disclose to her m other a bout the nightm ares, and she said that her m other told her not to say a nything a bout the nightm ares, and t hat was basically it. See footnote 10

According to Mr. McMullen's testimony, Rosalee also told him that she was afraid of Jimmy Nance. See footnote 11 Finally, in response to inquiry by David E.'s counsel, Mr. McMullen testified that Rosalee never indicated to him that David E. was present during these events.

None of the children who were removed from the home testified at the termination proceeding; however, the lower court, without the Appellants' objection, See footnote 12 admitted statements that Mike C. and Rosalee S. See footnote 13 made to their respective therapists. First, Elizabeth Brachna, a counselor at Family Services, Inc. and an expert in the area of child therapy for traumatized children, testified that through her sessions with Rosalee, the child relayed to her essentially the same statement See footnote 14 she previously made to Mr. McMullen. See footnote 15 Additionally, Rosalee indicated to Ms. Brachna that after Allen Ray turned blue, they returned to the creek again where Jimmy Nance placed the deceased child in the creek and again removed him from the creek. Ms. Brachna testified that Rosalee indicated to her through pictures that Jimmy Nance, Melissa C., Mike and Scott C., as well as Doris S. were present at the creek when Jimmy Nance placed the deceased child in the creek. See footnote 16 In response to questioning by David E.'s attorney, Ms. Brachna testified that Rosalee never mentioned the presence of David E. during the shaking incident or later on after that incident.

Next, Lucy Earl, a therapist with Family Service, Inc. and a qualified expert in the area of child abuse and child therapy, testified that Mrs. Miller, the grandmother with whom

Mike and Scott C. were placed, called her office requesting services for five-year-old Mike because he was acting out sexually. Ms. Earl stated that during sessions with Mike, the child kept wanting to talk about the creek. In one of those sessions, Mike stated that "his mommy told him and Jimmy to take Allen Ray to the creek" and that " 'he [Allen Ray] was already dead....' " Mike also stated that "[t]hey put Allen in the creek." Additionally, regarding Mike's brother, seven-year-old Scott, Ms. Earl testified that the only thing that he discussed with her was "a hole that was dug that Mommy and Doris and Jimmy had to fill in before they left the house" the day Allen died. See footnote 17 Further, according to Ms. Earl, both children were fearful of talking about Allen Ray's death with her. Finally, Ms. Earl testified that neither child discussed David E. in any fashion.

All the Appellants declined to take the witness stand, upon advice of counsel. See footnote 18 Further, none of the Appellants presented any testimony through other witnesses or any evidence in their own defense.

Based on the above-mentioned testimony the lower court terminated the Appellants' parental rights for the following reasons: See footnote 19

> 1. the unexplained hom icide of the in fant child, Allen Ray S[ ][.], age 22 months, in April, 1993, while in the custody of the respondent adults, Doris S[ ][.], Melissa C[ ][.], and David E[ ][.];
> 2. the failure of respondents, Doris S[ ][.], Melissa C[ ][.] E[ ][.], and David E[ ][.] to cooperate with law enfor cement authorities to solving [sic] the homicide of Allen Ray S[ ][.]; and
> 3. the absence of any reasonable likelih ood that conditions of abus e can be substantially corrected because the respondent, Doris S[ ][.], Melissa C [ ][.] E[ ][.], and David E[ ][.] failed to cooperate in the id entification of the person responsible for the homicide of Allen Ray S[ ][.]....

II.
CLEAR AND CONVINCING EVIDENCE
DAVID E.

The first issue concerns whether the trial court was presented with the requisite clear and convincing evidence necessary for termination of the Appellant's parental rights. Appellant David E. maintains that the deceased child was not his. Further, he contends that none of the evidence presented before the trial court concerning the deceased child's cause of death implicated him in any way. Finally, he argues that he was asleep in a separate and distinct bedroom at the time the child's death occurred. It is important to note, however, that although David E. makes this last contention on appeal, he presented no evidence whatsoever to support it in the proceeding below. In contrast, the Appellee, as well as the guardian ad litem, contend that David E., as an adult present in the home at the time of Allen Ray's death, had a duty to protect his children and Allen Ray from the

harm which occurred in the home or, if the opportunity to protect was not available, then the duty to cooperate in identifying the perpetrator. Finally, the Appellee argues that David E. resided with his children in a filthy house at the time his children were removed from his custody, which was indicative of the fact that the Appellant also was ignoring his duty to provide a clean house, plumbing facilities in working order and adequate furnishings for his children. See footnote 20

The thrust of David E.'s argument centers upon the lack of evidence that he was actually present at the time the child was killed and the fact that the deceased child was not his. Based on these factors, he contends that his parental rights were improperly terminated because he did not "knowingly or intentionally inflict[ ], attempt to inflict or knowingly allow[ ] another person to inflict, physical injury ... upon ... another child in the home...." W.Va.Code § 49-1-3(a)(1) (1995) (emphasis added). It is apparent from the statute, however, that the Appellant's contention that the statutory term "knowingly" connotes only actual presence at the time the fatal injury was inflicted is flawed.

Implicit in the definition of an abused child under West Virginia Code § 49-1-3 is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, See footnote 21 rather choosing to remain silent. There is no basis in law for requiring that a court be disallowed from considering a parent's or guardian's choice to remain silent as evidence of civil culpability. See footnote 22 Moreover, the invocation of silence by a parent or guardian in an abuse and neglect proceeding goes to the heart of the treatability question which is essential in these cases, as the nature of the proceedings is remedial and not punitive. See footnote 23 Thus, in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

Furthermore, as the United States Supreme Court stated in Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), "the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' " See footnote 24 Id. at 318, 96 S.Ct. at 1558 (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961); see 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 5-2(B)(1) (3rd ed.1994). Moreover, "aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred by the Due Process Clause." 425 U.S. at 319, 96 S.Ct. at 1558. " 'Silence is often evidence of the most persuasive character.' " Id. (quoting United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923)). Accordingly, because the

purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

In the present case, we are hard-pressed to accept David E.'s circuitous reasoning that if one "hears no evil, sees no evil and speaks no evil," then no evil exists. The lower court was presented with clear and convincing, as well as unrefuted, evidence which established that David E. was present in the home where both the deceased child and his children resided at the time the deceased child suffered his fatal injuries. Further, Detective Scheidler, the investigating officer, testified that he did not receive any information from the adults present in the home the night the child died concerning the circumstances leading to the child's death, despite the medical examiner's report that the child's injuries were sustained as a result of "shaken baby syndrome" and were not consistent with accidental injury. Finally, even though Mike C. and Rosalee S. did not mention David E.'s presence at the time of Allen Ray's death in their respective statements, both statements indicated that Allen Ray's death was caused by his mother's boyfriend, in the home in which David E. was also present. See footnote 25 With all the commotion surrounding Allen Ray's death, as described by the children and as substantiated by other evidence submitted before the lower court, we cannot conclude that the lower court was clearly erroneous See footnote 26 in its factual determination that the death occurred while the child was in the custody of the Appellants, and that they failed to cooperate in identifying the perpetrator. See footnote 27 In the face of knowledge of abuse, David E. chose to remain silent and, thereby, clearly failed to take steps to identify the perpetrator. The failure to identify the abuser creates such a hostile and unsafe atmosphere that it effectively would have placed his children in jeopardy had they remained in his custody. See In re Jeffrey R.L., 190 W.Va. 24, 35, 435 S.E.2d 162, 173 (1993).

DORIS S. AND MELISSA C.

Like David E., the Appellants, Melissa C. and Doris S., argue that the trial court was not presented with clear and convincing evidence which would justify a termination of their parental rights. As support for their argument, these Appellants assert there was no evidence of abuse and neglect other than "the probably tainted and unreliable proffered statements of the children." Further, the Appellants maintain that there was never a rationally-based allegation that the "living" children were in any kind of danger. Finally, the Appellants contend that they voluntarily did everything in their power to cooperate with law enforcement personnel in investigating Allen Ray's death, yet claim they were deemed uncooperative because they could not provide more information about the child's death and because they would not fabricate an acceptable explanation for the death. See footnote 28 In contrast, the Appellee asserts that the Appellants' parental rights were properly terminated on the grounds that there was no reasonable likelihood that conditions of abuse and neglect could be substantially corrected based on the evidence

developed which included: 1) the child's death in the Appellants' home; 2) the information supplied by the Appellants was inconsistent with the police investigation and the Appellants failed to cooperate in solving the child's death; and 3) the evidence of the Appellants' gross neglect of these children.

First, with regard to Doris S., in syllabus point three of In re Betty J.W., 179 W.Va. 605, 371 S.E.2d 326 (1988), we held that

> W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Id. at 606, 371 S.E.2d at 327, Syl. Pt. 3; see Syl. Pt. 3, In re Jeffrey R.L., 190 W.Va. at 25-26, 435 S.E.2d at 163-64.

The evidence presented against Doris S. included not only the statements made by her daughter and Mike C., which placed her in the room when her son, Allen Ray, suffered his fatal injuries, but also Rosalee's statement to her aunt, that the child's mother had told her not to tell anyone about the events surrounding her brother's death. Moreover, the only explanations See footnote 29offered by Doris S. are inconsistent with the uncontroverted medical evidence admitted before the trial court which established that Allen Ray's death was not accidental in nature. Consequently, it is obvious that Doris S. not only refused to protect her child, but insists on protecting the suspected abuser of her child. See footnote 30

With regard to Melissa C.'s contention that clear and convincing evidence was not presented to justify termination of parental rights, West Virginia Code § 49-1-3 defines an abused child as "a child whose health or welfare is harmed or threatened by ... [a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home...." Id. § 49-1-3(a)(1). Thus, it is clear that pursuant to the provisions of West Virginia Code § 49-1-3(a)(1), the definition of child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her child(ren), even though that child is not the parent's natural or adopted child.

Precedent in this area includes In re Darla B., 175 W.Va. 137, 331 S.E.2d 868 (1985), a case in which the appellant father asserted that his parental rights should not have been terminated because "he was not a direct participant in the acts giving rise to the petition." See footnote 31 Id. at 141, 331 S.E.2d 873. In upholding the termination,

> [w]e note[d] that appellant ... supports the testimony of his wife entirely, even though the explanation is inconsistent with the medical evidence. See footnote 32 Further, he testified that he was in attendance when the first injury to Darla B. occurred, which involved the child's right frontal lobe. See footnote 33 Importantly, the explanation given for this injury by both appellants is inconsistent with the medical evidence. Aside from his direct support of his wife's version of the reasons for the infant's injuries, it is ludicrous for him to assert that he should be held blameless for his nonaction in protecting his child.
>
> Id. (footnotes added).

Next, in In re Scottie D., 185 W.Va. 191, 406 S.E.2d 214 (1991), the Department of Human Services appealed the circuit court's final order which concluded that the appellee father "did not neglect or abuse his children ... within the meaning of W.Va.Code, 49-1-3 [1984]" and further found that there was no evidence of abuse by the appellee. Id. at 193, 406 S.E.2d at 216. The evidence indicated that three-year-old Rebecca, the natural daughter of the appellee's wife, was admitted to the emergency room suffering from severe submersion burns to both her feet; a laceration on one foot; cigarette burns which were secondary to the submersion burns; a laceration on her lip; bruises on her back; and spots on her head where her hair had apparently been pulled out. Id. While Rebecca's mother's testimony indicated that all of the child's injuries were accidental in nature, both Rebecca and Scottie D., See footnote 34 the appellee's natural son, who was not adopted by the appellee's wife, testified that the injuries had been intentionally inflicted by the appellee and his wife. Id. at 193-94, 406 S.E.2d at 216-17. We found that the father's testimony was

> consistent with ... [the mother's] to the extent that it [wa]s supportive of her testimony. In addition to denying the commission of any abusive acts toward the children, the appellee essentially testified that he believed that the injuries to the children occurred in the manner as expressed to him by his wife....

Id. at 195, 406 S.E.2d at 218. Finally, the appellee testified that he was not present at the time Rebecca suffered the burns to her feet. Id.

Upon review, "we fail[ed] to see how the circuit court reached the conclusion that the appellee's children [we]re not abused within the meaning of W.Va.Code, 49-1-3 ... insofar as their father is concerned." Id. at 197, 406 S.E.2d at 220. Accordingly, we held that

> [t]ermination of parental rights of a pare nt of an abused child is aut horized under W.Va.Code, 49- 6-1 to 49- 6-10, as amended, where s uch parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evid ence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.V a.Code, 49-6-1 to 49-6-10, as am ended, w here such nonparticipating parent supports the other parent' s version as to how a child's injuries occurred, but there is clear and convincing e vidence that such version is inconsistent with the medical evidence.
>
> 185 W.Va. at 197, 406 S.E.2d at 220 and Syl. Pt. 2.

In a case analogous to the instant case, In re Jeffrey R.L., the infant child was diagnosed as suffering from battered child syndrome. Jeffrey R.L.'s mother denied knowing the cause of her child's injuries and suggested that the child had sustained the injuries "while rolling around in his crib." 190 W.Va. at 27, 435 S.E.2d at 165. A pediatrician testified that it would have been "impossible" for Jeffrey to sustain the injuries in the manner suggested by his mother, indicating rather that "great force would be necessary to cause fractures of the ribs, and that the other fractures ... [the child] sustained were 'consistent with a twisting, torsion, shaking of limbs[.]' " Id. at 27-28, 435 at 166 (some alterations in original). Both of the child's parents admitted that some trauma occurred, but neither parent admitted to inflicting the trauma upon the child or identified the perpetrator. Id. at 29, 435 S.E.2d at 167. Finally, a DHHR representative testified that while they had no evidence that either of Jeffrey's parents caused his injuries, "if the DHHR does not know who the perpetrator of the abuse is then they believe the child would be at risk to be placed back into the home." Id. at 30, 435 S.E.2d at 168.

In determining whether the trial court erred in failing to terminate the parental right of both parents, as well as whether the trial court abused its discretion in returning custody of Jeffrey to his mother, we expounded on the parents' duty to identify the perpetrator of child abuse before a circuit court should ever consider reuniting the child with the parents. Id. at 32- 35, 435 S.E.2d at 170-73. We adamantly stated that

> [e]stablishing the identity of the person or pers ons who inflicted these injuries on Jeffrey R.L. is crucial to hi s health, safety and welfare.... Yet, despite the fact that the perpetrator ha s not been identified, the circuit court returned custody of Jeffrey R.L. to his mother. We find that the circuit court clearly erred in returning Jeffre y R.L. to his mo ther before the perpetrator who inflicted such extensive physical abuse on this helpless infant has been identified.
> There is no reasonable likelihood t hat the conditions of abus e can be substantially corrected because the pe rpetrator of Jeffrey R.L.' s p hysical

> abuse has not been identified. Jeffrey R.L., due to his young age and physical condition, needs consistent close interaction with fully committed adults. Jeffrey R.L.'s health, safety and welfare would be seriously threatened if he were to be placed back into the environment where he suffered extensive physical injuries when his abuser has not been identified. Therefore, because it appears that Jeffrey R.L.'s abuser will never be identified, this Court will not place him back into the environment where he suffered his abuse.
>
> Id. at 35, 435 S.E.2d at 173.

We held in syllabus point three of Jeffrey R.L. that:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

Id. at 25-26, 435 S.E.2d at 164; see In re Danielle T., 195 W.Va. 530, 535, 466 S.E.2d 189, 194 (1995) (terminating parental rights and finding that trial court committed reversible error in granting improvement period where neither of child's parents acknowledged abuse or neglect of child and parents "sought to explain Danielle's burn and malnutrition conditions with testimony inconsistent with the medical evidence"); In re Brianna Elizabeth M., 192 W.Va. 363, 367, 452 S.E.2d 454, 458 (1994) (reversing lower court's decision granting father improvement period, where father "insisted that he did not know how such horrendous injuries had been inflicted, and he repeatedly refused to acknowledge that his wife could be the abuser even in the fac[e] of overwhelming medical evidence of extreme child abuse[,]" stating that "the rights of children to be free from abuse require that a parent's first loyalty be to the protection of his or her children"); State v. Jessica M., 191 W.Va. 302, 308, 445 S.E.2d 243, 249 (1994) (stating that "it is further troubling to this Court that ... [mother] has failed to acknowledge ... [husband's] abusive behavior towards her children and to identify him as the abuser").

Even though we have recognized "the constitutionally-protected right of the natural parent to the custody of his or her minor children, we have also emphasized that such right is not absolute." In re Jeffrey R.L., 190 W.Va. at 32, 435 S.E.2d at 170. Furthermore, we explained that this right to custody "is limited and qualified by the fitness of the parent to honor the trust of the guardianship and custody of the child." In re: Willis, 157 W.Va. 225, 238, 207 S.E.2d 129, 137 (1973). Thus, the above-mentioned case law clearly establishes that the term "knowingly" as used in West Virginia Code § 49-1-3(a)(1), does not require that a parent actually be present at the time

the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse occurred. This interpretation of the term "knowingly" arises from a parent's paramount duties of loyalty to his/her child(ren) and to provide such child(ren) with a safe environment free from abuse and neglect, both of which are crucial to ensuring a child's health, safety and welfare.

Extending our decision in In re Jeffrey R.L., we hold that a parent's parental rights to his/her child(ren) may be terminated: 1) where there is clear and convincing evidence that the parent knowingly allowed another person to inflict extensive physical injury upon another child residing in the same home as the parent and his/her child(ren), even though the injured child is not the parent's natural or adopted child; and 2) where there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parent, even in the face of knowledge of the abuse, has taken no action to identify the abuser. See Syl. Pt. 3, 190 W.Va. at 25-26, 435 S.E.2d at 163-64.

We find that even though the deceased child was not Melissa C.'s, she knowingly allowed another person to inflict extensive physical injury upon the child who resided in the same home as she and her children. Unlike the Appellant David E., the clear and convincing evidence established that Melissa C. was actually present at the time her nephew, Allen Ray, was shaken to death. Melissa C., like the other two Appellants, has never taken steps to identify the abuser and has only offered evidence which conflicts with the medical evidence. Thus, both Doris S. and Melissa C. simply have chosen to ignore the unrefuted evidence presented against them, choosing to continue to protect the abuser's identity. It is that choice which ultimately caused the trial court's proper termination of their parental rights. We therefore find no abuse of discretion.

B.
IMPROVEMENT PERIOD

The next issue is whether the trial court denied the Appellants a meaningful improvement period. The Appellant David E., without any supporting authority, maintains that he was not given a meaningful improvement period and that only "[t]he guise of a six (6) month improvement period is reflected in a Court Order entered September 14, 1993[.]" The Appellants, Melissa C. and Doris S., maintain that they were never granted an actual improvement period, See footnote 35 that the circuit court never made any findings of fact that compelling circumstances existed which justified a denial of an improvement period and that a family case plan was never developed and submitted in accordance with West Virginia Code § 49-6-2(b). See footnote 36 The Appellee, however, argues that the record indicates that the Appellant was granted an improvement period.

At the outset we note that the record is clear that all of the Appellants were granted an improvement period. By two separate orders each dated July 8, 1993, each of the Appellants were granted a six-month improvement period, wherein the DHHR was given

physical and legal custody of the children, with the Appellants receiving visitation rights. The circuit court, however, placed the following restriction on the improvement period: "A condition of the improvement period shall be that the respondent ... fully cooperate, within Constitutional limits, into the investigation of the death of Alan Ray S [.]...." Thus, the crux of the Appellants' argument is whether the imposition of this condition denies them a "meaningful" improvement period.

West Virginia Code § 49-6-2(b) provides:

> In any proceeding under this artic le, any parent or custodian may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one suc h improvement period unless it finds co mpelling circumstances to justify a denial thereof, but may require tem porary custody with a responsible relative, which may include any parent, guardian, or other custodian, or the state department or other agency during the improvement period. An order granting such im provement period sha ll require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-d of this chapter.

W.Va.Code § 49-6-2(b). It is clear from the statute that a circuit court may deny an improvement period where "compelling circumstances" exist. Id. Further, we have previously determined that the compelling circumstances necessary to deny a request for an improvement period exist where a parent, who knows that abuse has occurred, refuses to identify a perpetrator of abuse and neglect. In re Jeffrey R. L., 190 W.Va. at 35, 435 S.E.2d at 173; In re Darla B., 175 W.Va. at 141, 331 S.E.2d at 872.

Where, however, a circuit court does not deny an improvement period on the grounds of compelling circumstances, we have recently stated the "importance of circuit courts crafting improvement periods in a manner designed to remedy the problem that led to the abuse and neglect action." In re Renae Ebony W., 192 W.Va. 421, 426-27, 452 S.E.2d 737, 742-43 (1994). In Renae Ebony W., we reiterated the principles previously established in In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991):

> 'The goal [of im provement periods and fam ily case plans] shoul d be t he development of a program designed t o assist the parent(s) in dea ling with any problems which interfere with his ability to be an effective parent and to foster an im proved relations hip between parent a nd c hild with an eventual r estoration of full parent al rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in w hich the D.H. S. and t he

> court should attempt to facilitate the parent's success, but wherein the parent must understand t hat he be ars a responsi bility to demonstrate sufficient progress and improvement to justify return to him of the child.'

192 W.Va. at 427, 452 S.E.2d at 743 (quoting, in part, Carlita B., 185 W.Va. at 625, 408 S.E.2d at 377) (alteration not in original).

It is apparent in this case that the circuit court decided to give the Appellants another opportunity to determine whether their priorities lay in protecting the safety of their children or in protecting the abuser, rather than to deny outright their request for an improvement period. The circuit court's opinion reflects its attempt to design an improvement period which would help the Appellants remedy the abuse and neglect. In order to achieve that goal, the circuit court determined that it was vitally important for the Appellants to cooperate with law enforcement and that such abuse and neglect could not be remedied without that necessary cooperation. Consequently, the imposition of such a condition comports with this Court's recent decisions in which we have found that circuit courts have erroneously granted improvement periods where the parents have either failed to acknowledge that any abuse and neglect have occurred and/or refused to identify the abuser, where there was knowledge of abuse. See In re Danielle T., 195 W.Va. at 535, 466 S.E.2d at 194 (finding that circuit court improperly granted improvement period where parents failed to identify abuser and failed to acknowledge that abuse and neglect of child had occurred); In re Jeffrey R.L., 190 W.Va. at 35, 435 S.E.2d at 173 (stating that "reunification between Jeffrey R.L. and his parents is not in his best interests because his parents have not identified his abuser"); see also Syllabus, In re Renae Ebony W., 192 W.Va. at 422, 452 S.E.2d at 738 (holding that in-home improvement periods should not be granted where child removed from home on emergency basis because of finding of imminent danger until circumstances constituting imminent danger cease to exist or alleged abusing person has been precluded from residing in or visiting home). Therefore, the Appellants were not denied a meaningful improvement period simply because they were required to cooperate with law enforcement.

Based on the foregoing opinion, we find that the Circuit Court of Cabell County committed no error and, accordingly, affirm.

Footnote: 1 A joint appeal was filed by Melissa C. and Doris S., while David E. filed a separate appeal. We consolidated the appeals because the termination of parental rights arose out of the same facts.

Footnote: 2 Melissa C. and Doris S. are sisters who are represented by the same counsel and raise the same errors on appeal.

Footnote: 3 David E. is married to Appellant Melissa C.

Footnote: 4 *David E.'s attorney elicited this opinion during his cross- examination of the officer. There were no objections raised as to the officer's expertise in rendering such an opinion.*

Footnote: 5 *The information given to the detective revealed that David E. and his children stayed in a separate bedroom in the dwelling. Moreover, the detective testified that he observed no physical injuries with regard to David E.'s children.*

Footnote: 6 *According to Detective Scheidler's testimony, Larry C. (also referred to in the transcript as Larry D. and Larry S.) is Melissa's and Doris's brother. The guardian ad litem indicated in her brief that according to Detective Scheidler's notes, which are not a part of the record on appeal, Larry C. slept on the couch with Allen Ray, the deceased child. Further, the guardian ad litem stated that "[t]he adults in the home first reported that Larry C. must have rolled over on the infant during the night causing the child to suffocate." No evidence concerning Larry C.'s involvement in the child's death was presented before the trial court, other than the fact that he gave Detective Scheidler a signed statement. As we recently noted in Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996), evidence not submitted before the trial court may not be considered by this Court on appeal. Id. at 703, 474 S.E.2d at 883 n. 16; accord O'Neal v. Peake Operating Co., 185 W.Va. 28, 32, 404 S.E.2d 420, 424 (1991) (stating that "[t]his court may only properly consider those issues which appear in the record before us"). Accordingly, it is the parties' duty to make sure that evidence relevant to a judicial determination be placed in the record before the lower court so that we may properly consider it on appeal. Unfortunately, as an aside, in cases involving abuse and neglect, we are with increasing frequency seeing records wherein the court and attorneys involved failed to observe sufficient formality in building a record. It would behoove the attorneys who undertake representation in abuse and neglect proceedings to be meticulous in presenting evidence and building an adequate record before the lower court documenting their respective cases.*

Footnote: 7 *James Nance was arrested and charged with Allen Ray's murder; however, he was released from custody after a no probable cause determination was made at the preliminary hearing. Mr. Nance was not the father of any of the subject children; however, the Appellant, Doris S., did give birth to Mr. Nance's child subsequent to the lower court's termination of her parental rights. According to Doris S.'s brief, the Department of Health and Human Resources ("DHHR") has instructed her not to let Mr. Nance have any contact with the infant or they will seek custody of the child.*

Footnote: 8 *All of the Appellants entered into stipulations reflected in two separate court orders dated May 27, 1993, that the "house in which the said infant children were residing at the time of the filing of this petition was filthy, and inadequate in plumbing and furnishings to provide for young children." The court-appointed special advocate report dated July 7, 1993, described this filth further as "feces, garbage and maggots."*

Finally the petition filed in 93-J-267 stated that there are "no bathroom facilities ... and there are maggets (sic) and rats in one room." Furthermore, Detective Scheidler testified that
[a]s you enter the front door, immediately straight ahead is a sofa.... To the left of that was a bedroom with a single bed in it, and to the left of that as you enter is an extra ... bedroom, but it was filled with garbage and trash that was three, four foot in depth. Again, as you enter the front door, to the right is the kitchen. Then through the kitchen is another bedroom on the extreme end of the house.

Footnote: 9 An emergency hearing was held on April 20, 1993, with Melissa C. and David E. present. The court, based on a finding of imminent danger to the children, placed legal and physical custody of the children with the DHHR. Likewise, by order entered April 23, 1993, Doris S. stipulated that there was imminent danger to the children and allowed temporary legal and physical custody of her child to be placed with the DHHR.

Footnote: 10 Phyllis Justice, Rosalee's aunt, also testified that Rosalee told her that "Mommy had told her [Rosalee] not to say anything."

Footnote: 11 Ms. Justice's testimony was also offered to corroborate that "[t]he only one ... [Rosalee] is really afraid of is Jimmy. And the only other thing that Rosalee tells us is, '[a]s long as Mommy is with Jimmy,' she don't want to see Mommy either, because she is afraid of Jimmy."

Footnote: 12 The Appellants, Melissa C. and Doris S., now claim that these statements were "probably tainted and unreliable" since they were "made after many months of counseling and contact with law enforcement and human services support personnel almost exclusively." The record, however, reflects that these statements were admitted in evidence without any objection by any of the Appellants. Moreover, these two children were in separate placements at the time they came forward with their respective statements.

Footnote: 13 The lower court found Rosalee S. psychologically unavailable for testimony. This finding was based on Rosalee's counselor's, Elizabeth Brachna's, testimony that her "concern for ... [Rosalee's] emotional health would be that this child would become extremely agitated, possible very withdrawn and depressed afterwards, as a long-term effect [of testifying]." Moreover, the counselor did not "believe that ... [Rosalee] could verbalize to the Court what she ha[d] told ... [the counselor] in therapeutic sessions[.]" Ms. Brachna also stated that the child is terrified and "feels that she will be killed if she talks about any of these things that she has been told not to say." While the court made no concomitant finding with respect to Mike C., the Appellee did lay a foundation regarding why this child could not testify. Specifically, when Ms. Lucy Earl, Mike and Scott C.'s therapist, was asked whether Mike or Scott could testify

regarding Allen Ray's death, she responded that "[n]either of the boys are able to talk about the death of the baby. They become extremely anxious, very upset.... It would be extremely traumatizing for the children to try to testify." Furthermore, the Appellants did not object to the admissibility of Mike C.'s statements. Since none of the Appellants either objected below, or made this issue the subject of an assignment of error, we need not address it further.

Footnote: 14 Ms. Brachna testified that Rosalee told her the same story at least four times and each account of the events was consistent with the prior versions.

Footnote: 15 Ms. Brachna used clay and art work in her therapy with Rosalee.

Footnote: 16 Corporal Tom McComas of the Cabell County Sheriff's Department offered testimony that he was a hunter and that the placement of the child in the creek postmortem was similar to what some hunters do when they kill a large animal ... and they're going to be unable to skin the animal or get it to a meat processing plant for a period of time, there's a chance of spoilage of the meat[.] [I]t's common practice if you're near a creek or a mountain stream to ... put the animal in the stream. That keeps the tissues from spoiling, the blood from really setting in, coagulating in the meat tissues....
The trial court struck the above-mentioned testimony based upon the Appellant's, David E.'s, objection that it was purely speculation.

Footnote: 17 Ms. Brachna testified that Rosalee also showed her a hole when she and the child visited the scene during the course of Rosalee's therapy. Rosalee indicated that it was an area where they played. The Appellee also offered the testimony of Corporal Tom McComas of the Cabell County Sheriff's Department who went to the property and found the hole, thereby corroborating Scott's testimony concerning the existence of a hole.

Footnote: 18 The Appellants, Melissa C. and Doris S., assert that the reason they did not testify was somehow connected with a request to have their counsel replaced. A review of the record, however, reflects no correlation between the Appellants' refusal to testify and their request to have new counsel appointed. We, therefore, find no merit regarding the Appellants' assertion.

Footnote: 19 The lower court "expressly decline[d] to rule on the parental rights of Brian C[ ][.], father of Brian "Scott" C[ ][.] and Larry "Mike" C [ ][.], and Mark S[ ][.], father of Rosalee S[ ][.], on the grounds that both fathers have represented, through counsel, their willingness to fully and completely relinquish their parental rights to assure permanent placement of their children." At oral argument, we directed the guardian ad litem to obtain from the circuit court the necessary order terminating Brian C.'s and Mark S.'s parental rights in this matter.

Footnote: 20 *The DHHR averred in its April 23, 1993, petition seeking the temporary custody of David E.'s children that "the house were [sic] the children reside is filthy, there is inadequate furniture, no bathroom facilities, kitchen is unclean, and there are maggots and rats in one room." The Appellee presented evidence before the trial court which substantiated this allegation, but the lower court made no finding with respect to the condition of the house.*

Footnote: 21 *We have previously held in syllabus point three of In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993) that [p]arental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.*
Id. at 25-26, 435 S.E.2d at 164.

Footnote: 22 *Such a parent or guardian may be invoking his/her right to remain silent pursuant to the Fifth Amendment because that individual also may be facing criminal charges arising out of the abuse and neglect of the child. The rights of the criminally accused are sufficiently protected, however, by the following statutory provisions: 1) West Virginia Code § 49-6-4(a) (1995) which allows medical and mental examinations of the child or other parties involved in an abuse and neglect proceeding provides that "[n]o evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person; 2) West Virginia Code § 49-7-1 (1995) provides that "[a]ll records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released ...[;]" and 3) West Virginia Code § 57-2-3 (1966) provides that "[i]n a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."*

Footnote: 23 *This concept is clearly established by West Virginia Code § 49-1-1(a) (1995) which provides:*
(a) The purpose of this chapter is to provide a comprehensive system of child welfare throughout the State which will assure to each child such care and guidance, preferably in his or her home, and will serve the spiritual, emotional, mental and physical welfare of the child; preserve and strengthen the child's family ties whenever possible with recognition of the fundamental rights of parenthood and with recognition of the State's responsibility to assist the family in providing necessary education and training.... In pursuit of these goals it is the intention of the legislature to provide for removing the

child from the custody of parents only when the child's welfare ... cannot be adequately safeguarded without removal.... Id.

Footnote: 24 See Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) (holding that purpose behind Illinois' Sexually Dangerous Persons Act was treatment of sexually dangerous persons; therefore, proceedings conducted pursuant to Act were not considered criminal and privilege was not available).

Footnote: 25 Even without the statements made by the children Mike C. and Rosalee S., there was still unrefuted evidence that a death, that was determined to be not accidental, occurred in the home occupied by the parents, who are the subject of the present appeal. Additionally, the unrefuted evidence established that not one of those parents came forward with any information or knowledge concerning the death, even though the deceased child presumably laid on the sofa in living room as an inanimate object for a period of time.

Footnote: 26 See In re Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996) (holding that trial court's findings of fact in abuse and neglect proceedings shall not be set aside by a reviewing court unless clearly erroneous).

Footnote: 27 David E. argues that the Appellee failed to present the trial court with clear and convincing evidence that there was no reasonable likelihood that conditions of neglect or abuse could be substantially corrected. West Virginia Code § 49-6-5 (1995) defines "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" as meaning "that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help." See id. § 49-6-5(b). We interpreted the meaning of this phrase in Jeffrey R.L., wherein we held that where a parent has knowledge of abuse and, in the face of such knowledge, fails to take action to identify the abuser, then no reasonable likelihood that the conditions of abuse can be substantially corrected exists. See 190 W.Va. at 25-26, 435 S.E.2d at 163-64, Syl. Pt. 3. The record in the instant case demonstrates that the Appellee met its burden concerning this issue and, therefore, the circuit court committed no error with regard to its ruling on this matter.

Footnote: 28 We are unpersuaded by the Appellants' attorney's characterization of the events which led to the termination of their parental rights as a witch hunt, arising out of the "unexplained death [ ]" of a child. To advance such an argument requires one to ignore the uncontroverted evidence in this case that this child's death has a very concrete explanation--an adult shook him to death!

Footnote: 29 Both Doris S. and Melissa C. now assert the following: 1) that "the adults could have easily been in their own areas of the house apart from the child" at the time the injuries were sustained; 2) that "[o]ne of the larger children bouncing up and down

upon the baby lying on the couch could have easily caused the hemorrhage that resulted in his death[;]" and 3) that there is simply no explanation for the child's death. We are mindful that none of this evidence was presented before the trial court for its consideration in rendering its decision. Moreover, we are not a fact-finding court and, therefore, it is improper for us to consider facts which were not admitted before the trial court.

Footnote: 30 The record reflects that Doris S. continues to associate with the suspected abuser, James Nance, in that she has had a child by him since this termination proceeding originated.

Footnote: 31 The approximately five-week-old infant child was hospitalized after sustaining a skull fracture, a brain contusion, fractures of the leg, arm and collarbone, and swellings over the mouth and eye. Id. at 138, 331 S.E.2d at 870.

Footnote: 32 The child's mother testified that the child may have been accidentally injured during an episode in which she determined that her child was not breathing. The mother testified that she shook the child and struck her on the back in an attempt to get the child to start breathing again. Id. at 139, 331 S.E.2d at 871 n. 1.

Footnote: 33 The parents claimed that the child was accidentally struck on the left side of her head when the child was being carried by her mother and her head came into contact with a gun rack. See id.

Footnote: 34 There was also evidence of child abuse with regard to Scottie D. Id. at 193-94, 406 S.E.2d at 216-17.

Footnote: 35 The Appellants also contend, within the same paragraph of their brief, that "[t]hough neither the appellants or their trial counsel knew it, an order granting an improvement period (with the contingency clause regarding their cooperation with law enforcement) was entered[,]" and that they were "denied an improvement period contrary to law."

Footnote: 36 The record suggests that the Appellee did develop, prepare and submit a family case plan. An order dated July 8, 1993, provides that "[w]hereupon, respondent, Doris S[.] ..., acknowledged receipt of the Family Service Plan and that she had had time to review the Plan with her counsel." The identical language is also found in a July 8, 1993, order regarding Melissa C.

201 W. Va. 463, 498 S.E.2d 35

Supreme Court Of Appeals Of West Virginia

E. H., ET AL., Petitioners

v.

MATIN, ET AL., Respondents

FAYETTE-MONROE-RALEIGH-SUMMERS MENTAL HEALTH COUNCIL, INC., ET AL., Intervenors-Petitioners

v.

STATE OF WEST VIRGINIA, ET AL., Respondents

AND

R.A.R. AN INFANT UNDER THE AGE OF 18 YEARS OLD, AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED, Intervenors-Petitioners

v.

GRETCHEN LEWIS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Respondent

No. 23999

Submitted: October 8, 1997

Filed: November 21, 1997

SYLLABUS BY THE COURT

1. "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982).

2. Multidisciplinary treatment teams must assess, plan, and implement service plans pursuant to W.Va. Code § 49-5D-3.

3. The language of W.Va. Code § 49-5D-3 is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.

4. "While a circuit court should give preference to in-state facilities for the placement of juveniles, if it determines that no in-state facility can provide the services and/or security necessary to deal with the juvenile's specific problems, then it may place the child in an out-of-state facility. In making an out-of-state placement, the circuit court shall make findings of fact with regard to the necessity for such placement." Syllabus Point 6, *State v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

5. Circuit courts may specify direct placements of juveniles in out-of- state facilities only: (1) if in accord with the plan(s) of the juvenile's multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific findings of fact, following an evidentiary hearing, that the plan(s) of the juvenile's multidisciplinary treatment team is inadequate to meet the child's needs.

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Maynard, Justice:
In this case we are presented with two certified questions from the Circuit Court of Kanawha County, West Virginia, regarding the utilization of multidisciplinary treatment teams when children are involved in delinquency proceedings.

The questions certified to this Court and the circuit court's answers are:

> 1.Whether multidisciplinary team assessments, plans, and service plan implementation must be developed pursuant to W.Va. Code § 49-5D-3.
> Circuit court's answer: YES
>
> 2. Whether courts may specify direct placements of juveniles in out-of-state/area facilities only: (1) if in accord with the plan(s) of the juvenile's multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific fact-based findings following an evidentiary hearing that the plan(s) of the juvenile's multidisciplinary treatment team is inadequate to meet the child's needs.
> Circuit court's answer: YES

The facts are not in dispute and were stipulated by the parties below. R.A.R. See footnote 1is a sixteen year old minor resident of Marion County, West Virginia. He is currently in the custody of the Department of Health and Human Resources (DHHR) and has been placed by the circuit court in an out-of-state facility.

Psychological evaluations have arrived at varying diagnoses. One evaluation determined R.A.R. suffered from attention deficit hyperactivity disorder. R.A.R. has also been diagnosed as suffering from conduct disorder/oppositional defiant disorder, learning disability, substance abuse and dependence, and possible emotional problems.

R.A.R.'s mother sought treatment for R.A.R. at the Olympic Center in Preston County, West Virginia. While at the center, a psychological assessment recommended psychiatric consultation to determine if psychopharmacological treatment was needed for the attention deficit hyperactivity disorder. Also recommended were weekly counseling sessions with a drug and alcohol specialist and participation in Alcoholics Anonymous. R.A.R. did not receive this recommended treatment.

R.A.R. got into trouble for stealing money from his mother by using her ATM card and for fighting with his brother. In December 1995, R.A.R. was placed in Chestnut Ridge Hospital for thirty days and sentenced to two years probation for petit larceny and battery.

While attending day school at Chestnut Ridge Hospital, R.A.R. screened positive for marijuana. As a result, the circuit court sent R.A.R. to the Northern Regional Juvenile Detention Facility in Ohio County, West Virginia, for sixty days. That detention was to be followed by twenty-four hour detention except to attend school. While detained at Northern Regional Juvenile Detention Facility, R.A.R. collapsed during a recreation period due to a rapid heartbeat. R.A.R. was diagnosed with tachardyia arrhythmia at the Ohio State University Heart Center in Columbus, Ohio.

While on probation, R.A.R. had an argument with his mother and ran away from home. One week later, he was taken from a friend's house and sent by the court to the Kanawha County Children's Home for one month. Upon release, R.A.R. was ordered to live with his grandparents outside Pittsburgh. While there, R.A.R. skipped school to visit with friends and returned to Pittsburgh by the end of the school day. As a result of this incident, the court sentenced R.A.R. to serve from fifteen months to two years confinement at High Plains Youth Center, a facility located in Brush, Colorado which is operated by the Rebound Corporation (Rebound).See footnote 2

A petition for writ of habeas corpus and mandamus was filed with this Court on behalf of R.A.R. The circuit court then granted a motion to review R.A.R.'s disposition to Rebound. During that hearing, the court changed R.A.R.'s placement to George Junior Republic juvenile facility in Grove City, Pennsylvania.

R.A.R. did not receive a multidisciplinary treatment team assessment plan during the 1995 and 1996 placements. The record seems to indicate that a multidisciplinary treatment team was established for R.A.R. when he was placed at George Junior Republic; however, the court did not receive or consider information from the team once it was created. Rather, R.A.R.'s dispositions were based solely on the judgment of the circuit court and R.A.R.'s probation officer.

The Circuit Court of Kanawha County, in its order entered on February 10, 1997, considered the questions presented here and found the issue was not moot, even though R.A.R.'s placement had been changed from Rebound to George Junior Republic. The court reasoned that the possibility exists for the issue presented here to be repeated with a different juvenile. The court found "[t]his issue of first impression affects a large number of children in West Virginia and merits authoritative interpretation of this legislation by the West Virginia Supreme Court of Appeals." The two questions previously noted were thereby certified to this Court.

The circuit court's first certified question to this Court is framed as follows:

> Whether multidisciplinary team assessments, plans, and service plan implementation must be developed pursuant to W.Va. Code § 49-5D- 3 (1996).

The language of W.Va. Code § 49-5D-3See footnote 3is mandatory and requires the DHHR to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect. This Court previously said, "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982). The Legislature used the word "shall" in W.Va. Code § 49-5D-3; therefore, West Virginia's fifty-five counties are not granted the discretion as to whether they will establish treatment teams. W.Va. Code § 49-5D-3 is patently clear that this is a mandatory duty.

The original obligation to coordinate treatment teams was first set forth by this Court in the case of *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). At that time this Court said:

> The formulation of the improvement period and family case plans should therefore be a consolidated, multidisciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family. The

> goal should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result.

Id. at 625, 408 S.E.2d at 377 (footnote omitted). The multidisciplinary treatment planning process was later mandated by statute and the process is now set forth in W.Va. Code § 49-5D-3.

The purpose of multidisciplinary treatment teams is stated in the statute itself. W.Va. Code § 49-5D-1(a) (1996) provides in pertinent part:

> The purpose of this article is . . . to establish, as a complement to other programs of the department of health and human resources, a multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning, following the initiation of judicial proceedings, to recommend alternatives and to coordinate evaluations and in-community services.

The treatment planning process was statutorily mandated to be established in each county by January 1, 1995. Once the process is in place, the treatment teams are directed to "assess, plan and implement" comprehensive, individualized service plans for the children they serve. See footnote 4The comprehensive plan includes child case plans and family plans.

> The makeup of the team is also mandated by statute. The child's or family's case manager convenes and directs the team. Other members include
>
> * the child's custodial parent(s) or guardian(s)
> * other immediate family members
> * attorney(s) representing the parent(s) of the child if assigned by a judge of the circuit court
> * the child
>   (a) if child is over the age of 12 and if child's participation is otherwise appropriate
>   (b) if child is under 12, when team determines child's participation is appropriate
> * the guardian ad litem
> * prosecuting attorney or prosecuting attorney's designee
> * any other agency, person or professional who may

> contribute to the team's efforts to assist the child and family.

W.Va. Code § 49-5D-3(b) (1996).

The treatment team is mandated to coordinate their activities with local family resource networks as well as with regional child and family service planning committees. This is "to assure the efficient planning and delivery of child and family services on a local and regional level." W.Va. Code § 49-5D-3(c) (1996). There is no statutory requirement that mandates how often a treatment team must meet, but the team must justify the basis for not reviewing a given child's case if the case is not reviewed every six months. W.Va. Code § 49-5D-4 (1994).See footnote 5

Notwithstanding the clear statutory mandates, R.A.R. did not receive an assessment or a service plan prior to the petition in this case being filed in this Court. By failing to follow the statutes, the DHHR has failed to fulfill its statutorily mandated role in R.A.R.'s disposition. The statutes indicate the multidisciplinary team plays a fundamental role in juvenile placements. We therefore hold that multidisciplinary treatment team assessments and individualized service plans must be developed and implemented pursuant to W.Va. Code § 49-5D-3. Accordingly, we answer the first certified question affirmatively.

The second certified question, as set forth above, is as follows:

> Whether courts may specify direct placements of juveniles in out-of-state/area facilities only: (1) if in accord with the plan(s) of the juvenile's multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific findings of fact, following an evidentiary hearing that the plan(s) of the juvenile's multidisciplinary treatment team is inadequate to meet the child's needs.

The parties do not question the authority of circuit courts to place juveniles who are adjudicated delinquent. In fact, the parties acknowledge that this Court has specifically stated, "West Virginia Code § 49-5-13(b) (Supp.1996) expressly grants authority to the circuit courts to make facility-specific decisions concerning juvenile placements." Syllabus Point 1, *State v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996). However, the Legislature has also said it is the duty of multidisciplinary treatment teams to provide courts with the information that is necessary to make an informed decision as to which facility can best meet a juvenile's needs. The DHHR must "assist the court in making its placement

determination by providing the court with full information on placements and services available both in and out of the community. It is the court's responsibility to determine the placement." Syllabus Point 3, in part, *State v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996).

We pause here to note that juvenile out-of-state placements cost West Virginia huge sums of money every year. See footnote 6Also, this Court has previously stated that out- of-state placements are not favored. We realize that it is very difficult, if not impossible, to provide needed family counseling when a child is placed hundreds or thousands of miles away from home and family. These long-distance placements have detrimental emotional effects on children. Therefore, we reiterate this Court's previous holding in syllabus point 6 of *State v. Frazier*, 198 W.Va. 678, 482 S.E.2d 663 (1996):

> While a circuit court should give preference to in-state facilities for the placement of juveniles, if it determines that no in- state facility can provide the services and/or security necessary to deal with the juvenile's specific problems, then it may place the child in an out-of-state facility. In making an out-of-state placement, the circuit court shall make findings of fact with regard to the necessity for such placement.

That directive remains intact, we are not altering it. Rather, we are expanding it to include the requirement of individualized service plans. If the lower court is going to depart from the recommendations of the multidisciplinary treatment team and thereby place juveniles in out-of-state facilities, then the court must hold a full evidentiary hearing on the adequacy of the individual service plan and the report of the multidisciplinary team. Following the hearing, and before any out-of-state placement can occur, the court must make specific written findings of fact in the dispositional order which set forth with particularity which provisions of the service plan should not be followed and why.

Sending children to an out-of-state facility is strongly disfavored for many reasons. Aside from the cost, which is after all, a legitimate consideration, other important factors weigh heavily against long-distance placements. These include separation from parents and siblings, the loss of emotional support from the extended family, the inability to have meaningful family counseling, and simply the loss of visitation and regular family contact. Accordingly, we believe an out-of-state placement should usually be the disposition of last resort for a child.

In the case of R.A.R., the record indicates that no realistic goals were developed and no service plan was instituted. Here is a juvenile with possible substance abuse problems, a learning disability, and emotional problems who was accused in

the court system of nothing more than stealing from his mother and fighting with his brother. Nonetheless, the child was ordered by the court to be placed in a highly secure correctional institution over fifteen hundred miles from his home. If a multidisciplinary treatment team had been convened and had provided the court with information regarding the needs and capabilities of R.A.R., perhaps R.A.R. would have initially been placed at George Junior Republic.

For the foregoing reasons, we find that the institution of multidisciplinary treatment teams is statutorily mandated when a juvenile is adjudicated delinquent or is found to be a victim of abuse and neglect. We agree with the Circuit Court of Kanawha County that once a treatment plan is in place for a juvenile, if the court chooses not to follow the plan and places a child in an out-of-state facility, then the court must hold an evidentiary hearing and make specific findings of fact which explain why the plan was not followed.

Certified questions answered.

Footnote: 1 *Consistent with our practice, the juvenile involved in this case is identified only by initials. See In re Johnathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

Footnote: 2 *Rebound is a highly secure facility that serves a correctional, as opposed to rehabilitative, population. Rebound targets males, ages twelve to twenty who are violent offenders, sex offenders and/or arsonists.*

Footnote: 3 *W.Va. Code § 49-5D-3 (1996) states in pertinent part:*

(a) On or before the first day of January, one thousand nine hundred ninety-five, a multidisciplinary treatment planning process shall be established within each county of the state, either separately or in conjunction with a contiguous county by the secretary of the department with advice and assistance from the prosecutor's advisory council as set forth in section four [§ 7-4-4], article four, chapter seven of this code.

Treatment teams shall assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families when a judicial proceeding has been initiated involving the child or children and for children and their families involved in delinquency proceedings.

(b) Each treatment team shall be convened and directed by the child's or family's case manager. The treatment team shall consist of the child's custodial parent(s) or guardian(s), other immediate family members, the attorney(s) representing the parent(s) of the child, if assigned by a judge of the circuit court, the child, if the child is over the age of twelve, and if the child's participation is otherwise appropriate, the child, if under the age of twelve when the team

determines that the child's participation is appropriate, the guardian ad litem, the prosecuting attorney or his or her designee, and any other agency, person or professional who may contribute to the team's efforts to assist the child and family.

Footnote: 4 *See supra* note 4 for the relevant language of W.Va. Code § 49-5D-3.

Footnote: 5 *W.Va. Code 49-5D-4 (1994) states in pertinent part:*

All persons directing any team created pursuant to this article shall maintain records of each meeting indicating the name and position of persons attending each meeting and the number of cases discussed at the meeting, including a designation of whether or not that case was previously discussed by any multidisciplinary team. . . . All treatment teams shall maintain a log of all cases to indicate the basis for failure to review a case for a period in excess of six months.

Footnote: 6 *The cost for out-of-state placements in the county where this proceeding originated was $5,828,278.15 last year.*

210 W. Va. 621, 558 S.E.2d 620

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28732

RELEASED
November 9, 2001
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: EDWARD B., JOHN DAVID F., DAVID DEWANE F., GEORGE FRANKLIN F., AND BENNY JAY J.

Appeal from the Circuit Court of McDowell County
Honorable Kendrick King, Judge
Civil Action Nos. 00-JA-13, 14, 15, 16, 17, 18

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 18, 2001
Filed: November 8, 2001

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

3. "The purpose of the family case plan as set out in W.Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems

and the logical steps to be used in resolving or lessening these problems." Syl. Pt. 5, *State ex rel. W.Va. Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

4. Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an allegedly neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

5. Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

6. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of

family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. Pt. 4, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Albright, Justice:

This is an appeal by Patricia J.[1] (hereinafter "Appellant" or "mother") from an order of the Circuit Court of McDowell County terminating the Appellant's parental rights to her son Benny J., transferring exclusive legal and physical custody of three other children to their father, and transferring legal and physical custody of a fifth child to the Department of Health and Human Resources (hereinafter "DHHR"). The Appellant contends, *inter alia*, that the lower court erred by failing to make specific findings of fact required by West Virginia Code §§ 49-6-5(a)(5) and 49-6-5(a)(6) (1998) (Repl. Vol. 2001) when transferring custody or terminating parental rights as a result of a finding of abuse or neglect.[2] Based upon our

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[1]We follow our traditional practice in child abuse and neglect matters, as well as other cases involving sensitive facts, and do not use the last names of the parties. *See, e.g., In re Scottie D.*, 185 W.Va. 191, 192 n.1, 406 S.E.2d 214, 215 n.1 (1991); *State ex rel. Div. of Human Servs. by Mary C.M. v. Benjamin P.B.*, 183 W.Va. 220, 222 n.1, 395 S.E.2d 220, 222 n.1 (1990).

[2]The Appellant raised certain assignments of error in her September 12, 2000, petition for appeal that were not raised in her brief after this Court granted the petition for appeal. The petition for appeal raised five assignments of error, as follows: lack of clear and convincing evidence of neglect; hearsay testimony of child protective services worker John Propst; improper denial of improvement period; refusal to comply with recommendations of DHHR reunification plan; and failure to comply with West Virginia Code § 49-6-5(a)(6) by stating facts supporting the court's finding that there was no reasonable likelihood that conditions of neglect could be substantially corrected in the near future. After the petition was granted on November 30, 2000, and substitute counsel for the Appellant had been appointed, the assignments of error were consolidated, restated, or abandoned, leaving only two issues remaining, as follows: failure of the lower court to grant a post-adjudicatory improvement period and insufficient evidence to warrant termination of parental rights.

Because the errors, as assigned in the Appellant's petition for appeal, were neither

(continued...)

review of the record and the arguments of counsel, we reverse the decision of the lower court and remand this matter for further proceedings consistent with this opinion.

I. Facts

A. Activities Pre-Dating the Neglect Petition

Although the record regarding DHHR action prior to the filing of the neglect petition is scant, it appears that DHHR began working with the Appellant in 1997, attempting to assist her with allegedly inadequate housing conditions at her mobile home near Panther, West Virginia.[3] The DHHR represented to the court below that it had attempted to coordinate transportation to medical appointments for the Appellant and her children and arranged family counseling, individual counseling, and homemaking, infant care and parenting skills training through the Children's Home Society and Tug River Health. The record contains nothing

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[2](...continued)
assigned nor argued in the Appellant's brief, they are hereby waived. *See Britner v. Medical Sec. Card, Inc.*, 200 W. Va. 352, 354 n.5, 489 S.E.2d 734, 736 n.5 (1997) ("The defendants' petition for appeal cited as error the circuit court's application of the five year statute of limitations to this case. However, the defendants did not address that issue in their brief and therefore have abandoned that assignment of error"); *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues which are not raised . . . are not considered on appeal"); Syl. Pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived").

[3]During portions of the period in which DHHR provided assistance, a boyfriend and five of the Appellant's children resided with her in the mobile home. The children involved in this appeal include Edward Floyd B., Jr. (born 5-30-86), John David F. (born 3-15-91), David Dewane F. (born 9-23-93), George Franklin F. (born 4-16-96), and Benny Jay J. (born 12-27-99). A sixth child, Allison J. F. (born 5-1-89), resided with her father and was not the subject of the underlying matter.

beyond the bare representations of the child protective services worker regarding these third-party efforts and does not contain the testimony of representatives of these agencies. Consequently, this Court is unaware of the frequency and content of such services or the degree of success attained by these outside agencies.

On February 29, 2000, child protective services worker John Propst[4] visited the home for approximately twenty minutes and concluded that the Appellant's eight-year-old son John required medical attention for a cut on his face, incurred in a fall on a railroad tie. The Appellant had treated the child's injury, but had not sought medical attention for the injury.[5] Mr. Propst also noticed that the home was dirty and that furniture and bags of clothing cluttered the rooms of the mobile home. As had been the case during the time Mr. Propst had been working with the family, there was no running water coming into the home. There was, however, a water line to the front door of the mobile home where the mother obtained water for flushing the toilet and other purposes. A neighbor had assisted the Appellant in obtaining a water line to the front door of the home.

B. The Petition, Amended Petition and Preliminary Proceedings

[4]Mr. Propst had been employed by child protective services for approximately one and one-half years and had been dealing with the Appellant's case for approximately one year.

[5]Mr. Propst took John to the emergency room the day after the home visit. John's face was treated conservatively and he was released. An x-ray revealed no broken bones. As the Appellant emphasizes in her brief to this Court, "[t]he treatment provided by the hospital was not much different than the treatment provided by . . . [the Appellant]."

The day after that visit, March 1, 2000, Mr. Propst, acting for the DHHR, filed a petition against the Appellant, alleging that she had neglected her children. The petition alleged that the mobile home was dirty and had no running water. In the petition, Mr. Propst explained that the Appellant had cursed him and "the DHHR for not being there when needed and sticking our noses up her ass when we didn't need to." Mr. Propst further alleged in the petition that the Appellant had failed to keep medical appointments and that a truancy warrant was pending for her failure to send the children to school. No allegations of abuse were filed, and the petition stated that the DHHR did not believe that there existed any imminent danger to the children.

Incident to filing the petition, an order was entered granting emergency powers to the DHHR, and the children were taken to physicians for examinations under the authority of that order. All children were healthy, except two-month old Benny, who had low weight and was diagnosed with failure to thrive. He was admitted for hospitalization on March 1, 2000, and discharged to foster care on March 4, 2000.[6]

[6]Benny had suffered health problems since his December 27, 1999, date of birth. He was taken to the emergency room on January 12, 2000, after his mother called 911 regarding irregular respiration and short apnea episodes. He was admitted for observation from January 12, 2000, to January 14, 2000, while he was still less than one month old. There is no indication in the record concerning what special services, if any, the DHHR provided for Benny's particular health needs prior to the emergency order.

The lower court conducted a hearing for further temporary relief on March 9, 2000, and placed the children in the legal custody of the DHHR. Edward, John, David, and George were placed in the physical custody of Mr. David F., the biological father of John, David, and George. The infant, Benny, was placed with the State due to his special medical needs. The Appellant was granted visitation with the children.[7] An amended petition was filed on April 7, 2000, alleging that Benny suffered from failure to thrive and further alleging that the infant suffered a rash where the Appellant had taped a diaper to his skin.

C. The Adjudication of Neglect

An adjudicatory hearing was held on May 24, 2000, and testimony was taken. Mr. Propst testified concerning the children's medical conditions, school attendance, and missed medical appointments. The lower court asked Mr. Propst why the petition had been filed at this time "[i]f this has been going on in some way, shape or form involving this whole family for about a year or so. . . ." In response, Mr. Propst raised the issue of lice and nits, an issue which does not appear in the petition or amended petition, and explained as follows: "Mainly, the absences of the children from school and the fact that they were coming to school every day with lice, the teachers were sending them home."[8] The lower court then suggested as follows:

[7]The record does not reveal the extent to which the Appellant attempted to exercise visitation with the children subsequent to their removal.

[8]The Appellant testified in response that she used her neighbor's washer and dryer to clean the bed linens and applied lice medication on the children.

> Well, you've been in and out of the home, as well as the others, for, you know, at least twenty times and so forth for a year, did anyone give her any direction or supervision or any help in, you know, getting rid of the mites. . . . [D]id the Department or anyone else involved do something to find her a better place or a cleaner place or to bring someone in if she was unable to do it. . . .

Mr. Propst responded: "No, sir, we didn't bring anybody in to do that. I was informed that they had a vacuum cleaner, and they could've vacuumed."

During that adjudicatory hearing, the Appellant testified that she had extended running water from the outside into the home. She explained that when Mr. Propst told her to get the water fixed, she was able to obtain running water in the home by paying a neighbor $146.00 to repair the mobile home's broken water pipes after the landlord, residing in Virginia, failed to respond to the Appellant's request for running water and some type of heat other than the coal furnace in the home.

She also testified about her bond with the children, as follows:

> Just that I love my children. They are my life. Nobody can live without air, and I can't live without them. They're the reason I go on. They're the reason I struggle. Sure, I had to pack that water, and it was hard on me, but I didn't make it harder for them. I still kept them clean and stuff. I tried.

When the lower court asked why she had not demanded further assistance with running water from the DHHR, the Appellant responded: "It would be kind of hard to demand that the

Department . . . do something for me when - - I mean, they say I - - I miss appointments and things. . . .”

When questioned regarding the family income, the Appellant explained that she received $460.00 per month on behalf of David, based upon his seizure disability, and that she received $312.00 per month in benefits and $148.00 per month in food stamps. Mr. F. also allegedly paid the Appellant $50.00 in support monthly. The record does not disclose how much, if any, of that income ended upon the entry of the temporary relief order on March 9, 2000, transferring custody to persons other than the Appellant.

Having conducted this adjudicatory hearing on May 24, 2000, the lower court entered the resulting order on June 26, 2000,[9] finding that the Appellant had neglected the children. Specifically, the lower court found as follows:

> [The Appellant] failed to provide a safe home for the children, who lived with her in two rooms of a mobile home with dangerous electrical wiring and without hot or cold running water inside the home. She further failed to send the children to school on a regular basis, resulting in her prosecution for truancy, and she failed to seek readily available medical treatment for one of the children even though he had suffered a serious injury to his face that should have received immediate, emergency medical care.

[9]As will appear, the adjudicatory order was entered *after* the dispositional hearing, some 33 days after the adjudicatory hearing and in plain contravention of the requirements of Rule 27 of the Rules of Procedure For Child Abuse and Neglect Proceedings.

With specific regard to the infant Benny, the court found as follows:

> The Court additionally finds that . . . [the Appellant] seriously neglected the basic needs of infant respondent Benny . . . [J.] by failing to provide adequate nourishment and emotional support, resulting in the infant being diagnosed by a pediatrician with "failure to thrive" and anemia. Said child had gained only a few ounces in the two months since his birth on December 27, 1999. . . .

The lower court ordered "that the parents continue to have reasonable visitation, contact and communication with the infants under the Department's supervision, but there shall be no forced visitation." The record is silent regarding the degree to which the visitation privileges granted by the lower court were exercised by the Appellant after the adjudicatory hearing.

D. Activities Prior to Dispositional Hearing

On June 9, 2000, the Appellant filed a written motion for a post-adjudicatory improvement period. The Appellant asserted that she would fully participate in an improvement period and requested a family case plan, in accordance with West Virginia Code 49-6D-3 (1998) (Repl. Vol. 2001).

On June 14, 2000, Mr. Propst provided a child youth and family case plan recommending reunification of the family as the permanency plan,[10] with an estimated achievement date of December 12, 2000. There is no indication in the plan, as filed, regarding whether it was preceded by the convening of a multi-disciplinary treatment team, as required

[10]The permanency plan is required by West Virginia Code 49-6-5(a) and Rule 28 of the Rules of Procedure For Child Abuse and Neglect Proceedings.

by Rule 51 of the West Virginia Rules of Procedure For Child Abuse and Neglect Proceedings, nor does the record contain any order of the court convening such a team. The plan identified desired outcomes for the Appellant as follows: problem solving, self-sufficiency, parenting knowledge/skill, and learning the importance of scheduling and being in charge of every day life. Weekly visits by the Paul Miller Home-Based Services were recommended.[11]

E. Dispositional Hearing

On June 19, 2000, the lower court conducted a dispositional hearing for which it entered its order dated July 10, 2000, despite the requirement of Rule 36 of the Rules of Procedure for Child Abuse and Neglect Proceedings that such an order be entered within ten days of the conclusion of the hearing. At the dispositional hearing, neither the State nor the DHHR objected to the Appellant's request for an improvement period, and counsel for the Appellant informed the lower court that the Appellant was undergoing counseling. The lower court was advised that Dr. Heather Hagerman, a psychologist consulted by the Appellant, had requested a four-week period in which to assess the Appellant's response to counseling and medication, incident to an effort to improve the Appellant's parenting abilities.

The lower court refused to delay its disposition for the requested four-week period, denied the Appellant's request for an improvement period without express findings of

[11]There is no explanation in the plan as to what services Paul Miller Home-Based Services might provide.

fact or conclusions of law, and proceeded to the following dispositions. The court placed exclusive physical and legal custody of John, David, and George with their father, David F. The custody of Edward, whose location was unknown due to the fact that he ran away from Mr. F.'s home, was placed in the DHHR until his eighteenth birthday. With regard to these children, the dispositional order recites that liberal visitation is to be allowed the mother.[12]

With regard to the infant Benny, the lower court found, in the July 10, 2000, dispositional order, that "there is no reasonable likelihood that . . . [the Appellant] can eliminate the conditions which led to the neglect of the child." Consequently, the lower court terminated the Appellant's parental rights to Benny and ordered that he be placed for adoption. The lower court further found that Benny's biological father, Charles C., had abandoned his rights to Benny. The court provided that, upon application of the Appellant at some later date, the Appellant might secure visitation rights with Benny to be exercised under the supervision of the DHHR.

The lower court, through its dispositional order, implicitly rejected the case and permanency plan submitted by the DHHR. Despite the clear requirements of West Virginia Code §§ 49-6-5 and -5a, as well as Rules 36 and 39 of the Rules of Procedure for Child Abuse and Neglect Proceedings, the dispositional order did not require the DHHR to submit a revised plan, a permanency plan, or to conduct a permanent placement review conference.

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[12]Again, the record before this Court is silent regarding the degree to which visitation has occurred.

II. Standard of Review

In syllabus point one of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court explained as follows:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

See also Syl. Pt. 1, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999); Syl. Pt. 1, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999).

III. Discussion

A. Inadequate Findings and Determinations

As previously noted,[13] the Appellant relies on two alleged errors below: (1) insufficiency of the evidence to warrant the relief awarded against the interests of the Appellant below, and (2) the failure of the lower court to allow a post-adjudicatory

[13]*See supra* note 2.

improvement period.[14] The Appellant's primary contention on appeal is that the lower court erred by failing to include sufficient findings of fact in its dispositional order to support the termination decision with regard to the infant Benny and the transfer of custody with regard to the other four children. We find this issue of inadequate findings controlling in light of the limited discussion in the record of the factors leading to the lower court's decision and the court's apparent lack of attention to the various requirements of the applicable statutes and rules.[15]

West Virginia Code § 49-6-5(a)(6) enumerates the standards to which courts must adhere in deciding whether parental rights may be terminated. The statute provides that the court must include specific findings within the dispositional order, as follows:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, **and** when necessary for the welfare of the child, terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. If the court shall so find, then in fixing its dispositional order, **the court shall**

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[14]This Court finds that the Appellant has abandoned any allegations of error in the adjudicatory order finding the children neglected, and we therefore treat that order as final.

[15]We emphasize that the rules apply only to the extent that they do not conflict with the statutory mandates. Rule 1 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides in pertinent part as follows: "These rules apply only to the extent that they are not in conflict with the Rules of Evidence and other court rules or *statutes* applicable to such proceedings." W. Va. R. P. Child Abuse & Neglect Proc. 1, in part (emphasis provided).

> **consider the following factors**: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, regarding the permanent termination of parental rights. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. **The court order shall state**: (1) That continuation in the home is not in the best interest of the child and why; (2) why reunification is not in the best interests of the child; (3) whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made such efforts unreasonable or impossible; and (4) whether or not the department made reasonable efforts to preserve and reunify the family including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances.

W. Va. Code § 49-6-5(a)(6) (emphasis supplied).[16]

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[16]In *In re Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999), this Court, in dictum, permitted a termination of parental rights to be upheld where the transcript of the dispositional hearing, rather than the order, disclosed, to the satisfaction of this Court, that the lower court found no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future, as well as the other findings required by West Virginia Code § 49-6-5(a)(6). 205 W. Va. at 184, 517 S.E.2d at 49. We do not find the transcript in the instant case helpful in filling the voids in the dispositional order or procedures.

Under West Virginia Code § 49-6-5(a)(5), a trial court may commit the child or children to "a suitable person who may be appointed guardian by the court" where the court finds "that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs." *Id*. When this manner of disposition is utilized, as it was for Edward, John, David, and George in this case, the statute provides the following guidance for the court:

> **The court order shall state**: (1) That continuation in the home is contrary to the best interests of the child and why; (2) whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family and to prevent or eliminate the need for; removing the child from the child's home and to make it possible for the child to safely return home; what efforts were made or that the emergency situation made such efforts unreasonable or impossible; and (3) the specific circumstances of the situation which made such efforts unreasonable if services were not offered by the department.

W. Va. Code § 49-6-5(a)(5) (emphasis supplied).

Rule 36 of the Rules of Procedure for Child Abuse and Neglect Proceedings has supplemented these statutory requirements by specifying that there shall be findings of fact and conclusions of law set forth in writing or on the record and that the dispositional order shall fix the date and time of the first permanent placement review conference and may include the following information, all of which was omitted from the lower court's order in this case:

> (1) Terms of visitation;
> (2) Services to be provided to the child and family;
> (3) Restraining orders controlling the conduct of any party who is likely to frustrate the disposition order;

> (4) Actions to be taken by the parent(s) to correct the identified problems;
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> (5) Conditions regarding the child's placement, including steps to meet the child's special needs while in placement;
> (6) If the child is separated from siblings, steps to unite them and/or to maintain regular contact during the separation if it is in the best interest of each child; and
> (7) Terms and conditions of the family case plan or the child's case plan.

W. Va. R. P. Child Abuse & Neglect Proc. 36(c).

The lower court's findings regarding the basis for the termination of parental rights with regard to Benny consisted of the following: "It is further ORDERED that the parental rights of . . . [the Appellant] with respect to infant Benny . . . [J.] be permanently terminated due to this Court's finding that there is no reasonable likelihood that . . . [the Appellant] can eliminate the conditions which led to the neglect of the child."

Similarly, the lower court failed to make specific findings in its order with regard to the disposition of Edward, John, David, and George. The court's findings with regard to those four children consisted of the following:

> Upon due consideration of the Department's recommendations, it is ORDERED that the full and exclusive legal and physical custody of infants John . . . [F.], David . . . [F.], and George . . . [F.] be transferred and awarded to their biological parent, David . . . [F.]. [The Appellant] is granted reasonable and liberal contact, communication and visitation with those children.
>
> It is ORDERED that the full and exclusive legal and physical custody of infant Edward . . . [B.] be awarded to the West

> Virginia Department of Health and Human Resources until he becomes 18 years of age.

As it pertains to Benny, the dispositional order fails to state, as required by statute in termination of parental rights cases, why reunification is not in the best interests of Benny, whether the DHHR made reasonable efforts to "preserve the family and to prevent the placement or to eliminate the need for removing the child from the child's home," and whether the DHHR "made reasonable efforts to preserve and reunify the family including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances." W. Va. Code § 49-6-5(a)(6). With regard to the other four children, the order fails to state why reunification with their mother is contrary to their best interests and whether the DHHR has made reasonable efforts to preserve the family and to prevent the need for removal. *See* W. Va. Code § 49-6-5(a)(5).

B. Pertinent Requirements of Abuse and Neglect Litigation

Abuse and neglect cases are undoubtedly among the most difficult cases with which our court structure must grapple. The lives of the parties are irretrievably altered by the court rulings, and the people most fundamentally affected are blameless young children. Moreover, as the Supreme Court of the United States recently underlined in *Troxel v. Granville*, 530 U.S. 57 (2000), the state's involvement with children's and parental rights and privileges implicates substantial liberty interests that enjoy constitutional guarantees of due

process of law which must be respected by the state, its legislature, and the courts. Similarly, this Court long ago recognized the constitutional dimensions of abuse and neglect proceedings under both the federal and state constitutions. In syllabus point one of *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973), this Court explained:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Id. at 225, 207 S.E.2d at 130-31; s*ee also* Syl. Pt. 1, *State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

In clear recognition of these critical interests, and by steadfastly adhering to the polar star test of looking to the best interests of our children and their right to healthy, happy productive lives, this Court, over a substantial period of time, has expressed an unwavering interest in providing comprehensive and fair procedures for the consideration of abuse and neglect cases. As this most important area of the law has expanded, this Court has insisted that the directives of applicable rules and legislative enactments must be carefully identified, respected, and incorporated within our court system. The Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our

courts, intended to protect the due process rights of the parents as well as the rights of the innocent children.

Procedurally, these various directives also provide the necessary framework for appellate review of a circuit court's action. Where a lower court has not shown compliance with these requirements in a final order, and such cannot be readily gleaned by this Court from the record, the laudable and indispensable goal of proper appellate review is thwarted. As the Supreme Court of Wisconsin emphasized in *In re T.R.M.*, 303 N.W.2d 581 (Wis. 1981), "[a]dequate findings must be made in order to protect the rights of litigants and to facilitate review of the record by an appellate court." *Id*. at 583. The Wisconsin court also emphasized that the trial court's "findings are also deficient with respect to a lack of a specific and formal determination regarding the best interests of . . . [the child]" and noted that the trial court was "under an obligation to make findings with regard to the best interests of the child in relation to the evidence adduced." *Id*; s*ee also In re Welfare of M.M.*, 452 N.W.2d 236 (Minn. 1990) (holding trial court's findings of fact inadequate to facilitate effective appellate review and reversing decision after independent review of record).

In *In re Adoption/Guardianship No. 87A262*, 590 A.2d 165 (Md. 1991), the Maryland court explained as follows:

> [The] legislative requirement of consideration of the factors itemized in [the statute] demonstrates the intent that the utmost caution should be exercised in any decision to terminate parental

> rights. In cases where parental rights are terminated, it is important that each factor be addressed specifically not only to demonstrate that all factors were considered but also to provide a record for review of this drastic measure.

Id. at 168. "Clear and complete findings by the trial judge are essential to enable us properly to exercise and not exceed our powers of review." *Nicpon v. Nicpon*, 157 N.W.2d 464, 467 (Mich. Ct. App. 1968); s*ee In re Denzel A.*, 733 A.2d 298 (Conn. App. Ct. 1999) (holding that trial court mandated to consider and make written findings of fact regarding statutory factors in dispositional phase of termination of parental rights hearing).

C. The Process for Disposition of Abuse and Neglect Cases

This State has developed a thorough process for the disposition of cases involving children adjudicated to be abused or neglected. Pursuant to Rule 51 of the Rules of Procedure for Child Abuse and Neglect Proceedings, a multidisciplinary treatment team, as defined in West Virginia Code §§ 49-5D-1 to -7 (1998) (Repl. Vol. 2001), is to be convened for each abuse and neglect case within thirty days of its filing, consisting of the parties and representatives of agencies who may be able to help in the particular situation. Rule 28 contemplates that a child's case plan is to be prepared, with the specific and detailed contents to be determined by the recommendations included therein and the applicable provisions of West Virginia Code § 49-6D-3, and timely filed with the court. *See* W. Va. R. P. Child Abuse and Neglect Proc. 28.

Furthermore, Rules 29 to 31, 34, and 36 to 42 of the Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes provide an orderly but prompt process for bringing about a full consideration of the best interests of children adjudicated to be neglected or abused and the proper disposition of such cases. The Rules provide a full opportunity for hearing, judicial consideration of the case plan and its possible revision, and timely disposition of the case under the provisions of West Virginia Code § 49-6-5, with adequate findings in the order or on the record. The Rules further provide stringent guidelines and time limitations for any improvement period granted and timely follow-up regarding the efficacy of any plan for the permanent placement of the child or children outside the parental home.

D. Deficiencies in the Management of the Instant Matter

In the case *sub judice*, these procedures simply were not followed. Specifically, nothing in the record suggests the convening of the required multidisciplinary team or its consideration of or input into the child's case plan submitted by the child protective services worker, Mr. Probst. A review of that case plan demonstrates beyond question that it fails to satisfy the requirements of West Virginia Code § 49-6D-3, as also identified by this Court in syllabus point five of *Cheryl M.*, as follows: "The purpose of the family case plan as set out in W.Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." 177 W. Va. at 689, 356 S.E.2d at 182, syl. pt. 5. The case plan in the instant

matter neither "clearly set[s] forth an organized realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems" nor does it address satisfactorily, if at all, the specific matters required by West Virginia Code § 49-6D-3. *Id.*

Although the family case plan was formulated and submitted to the lower court prior to the dispositional hearing, the strategies recommended in the plan were never employed to address the family's problems. Similar strategies may have been utilized in previous contact between the DHHR and the Appellant, but the forms of outreach referenced in the plan were not attempted. Additionally, the family case plan does not appear to adequately address one of the predominant obstacles facing the Appellant, her alleged lack of financial resources. It does suggest the use of Paul Miller Home-Based Services for weekly monitoring and guidance in instructing the Appellant in scheduling her normal routines. Yet it does not otherwise appear to identify precise methods by which the Appellant might improve her parenting skills, and many desired outcomes are stated in abstract terms, such as "problem solving," "self-sufficiency," and "parenting knowledge/skill."

Moreover, it appears that the court below rejected the case plan during the dispositional hearing after the father of three of the children objected and asked the court to proceed to terminate the Appellant's parental rights, contrary to the child case plan filed by the DHHR, and the court proceeded to terminate Appellant's parental rights. In contrast to this

procedure, Rule 34 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings requires the court to rule by order on the case plan and, if the court rejects the plan, order the DHHR to submit a revised plan within thirty days and schedule a new dispositional hearing within forty-five days. In violation of Rule 36, the lower court failed to set the date and time for the first permanency review conference.

E. Conclusions

This Court concludes that where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code 49-6-5(a)(6) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an allegedly neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate. Accordingly, where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Based upon the lower court's numerous failures to comply with the statutory requirements and the procedures required by the Rules of Procedure for Child Abuse and Neglect Proceedings, this matter must be reversed and remanded. As promptly as may appear feasible to the trial court, this matter shall be brought on for the development of an appropriate family and child case plan, including the utilization of a multidisciplinary team;[17] a determination of the propriety of an improvement period; subsequent improvement period hearings, if an improvement period is granted; a full dispositional hearing and decision; and such permanency conferences, plans, hearings, foster care reviews, and status conferences as the lower court concludes will bring this matter to prompt closure, with due regard to the Rules of Procedure For Child Abuse and Neglect Proceedings.

IV. Issues for Evaluation on Remand

[17]In the special circumstances of this case, to avoid further interminable delays, we see no impediment to the lower court requiring, if it wishes to do so, the inclusion of alternative plans in the case plan such as (1) granting; or (2) denying an improvement period; (3) the continuation of the custody of the children other than Benny with Mr. David F.; (4) any appropriate alternative to that placement; (5) the placement of Benny for adoption; (6) the eventual reunification of Benny with the Appellant; (7) visitation plans for the siblings, the Appellant, and/or other parties entitled thereto, if desirable; and (8) such other matters as the lower court shall require, so long as the parties have ample notice and opportunity to be heard on all alternatives. Finally, when a plan is prepared, with plans for alternative dispositions, it is imperative that the directives of Rule 28 of the Rules of Procedure For Child Abuse and Neglect Proceedings and West Virginia Code § 49-6D-3 be carefully followed in order to provide the trial court and all interested parties an opportunity for thorough reflection on the realistic alternatives available to serve the best interests of the children involved and fairly afford Appellant and other concerned parties an opportunity to resolve the serious problems evidenced by this case and its course to date.

A. Entitlement to an Improvement Period

The Appellant contends that the lower court erred in the dispositional phase by denying her an improvement period.[18] The Appellant made a written motion for an improvement period prior to the dispositional hearing, and her counsel explained that her psychologist had requested a four-week period in which to assess the Appellant's progress. The motion for an improvement period was not opposed by the DHHR or the guardian ad litem.[19] In fact, the position of the DHHR, as evidenced by its family case plan, appears to have supported the motion by providing a permanency plan calling for reunification by December 2000.

In *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996), this Court explained its position of improvements periods, as follows: "The goal of an improvement period is to facilitate the reunification of families whenever that reunification is in the best interests of the children involved." *Id.* at 258, 470 S.E.2d at 212. We recognized that "[b]oth the statute and our case law grant trial courts considerable flexibility in developing meaningful improvement periods designed to address the myriad possible problems causing

[18]This Court recognizes the more stringent requirements of West Virginia Code 49-6-12 (1996) (Repl. Vol. 2001), with regard to post-adjudicatory improvement periods, as requested by the Appellant in the case *sub judice*.

[19]The motion was opposed by Mr. David F., the biological father of four of the six children. Counsel for Mr. F. explained that Mr. F. was "of the opinion that no good will result from an improvement period because his ex-wife has had time and time again the opportunity to do better by the children. . . ."

abuse and neglect." *Id*. at 258, 470 S.E.2d at 212; s*ee also In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000). Additional guidance is found in syllabus point four of *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991):

> In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

We are puzzled by the lower court's refusal of the four-week delay in the dispositional hearing to determine if the children might profit from such an improvement period when the lower court itself delayed the entry of the dispositional order nearly that long, from June 19, 2000, to July 10, 2000. We cannot ascertain from the record before us, however, the basis for the lower court's decision not to grant the requested improvement period. Accordingly, the lower court should reexamine its determination regarding the propriety of an improvement period. The determination of whether to grant an improvement period is discretionary with the trial court and our discussion here should not be read either as favoring or disfavoring the grant of such a period in this case. We leave that to the lower court.

B. Other Considerations

This Court is confident that the lower court, on remand, will also consider such supplementary issues as the following: (1) the effect of the passage of time upon the children;[20] (2) the Appellant's financial constraints;[21] (3) a gradual, but reasonably prompt, transition period for the children where alteration in custody is necessary;[22] (4) the children's

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[20]This Court has consistently recognized child abuse and neglect cases as high priority. *See* Syl. Pt. 1, in part, *In re Carlita B.*, 185 W.Va. at 615, 408 S.E.2d at 367 ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security"). We are troubled by the long period of time it has taken this case to move from the entry of the dispositional order below to its consideration and decision by this Court, particularly in view of our oft-stated interest in prompt disposition of these cases However, in the particular case presently before this Court, the delay cannot be said to be the fault of any of the parties. Original counsel for the Appellant was compelled to withdraw, and substitute counsel twice requested, and this Court granted, enlargements of time within which to file a brief with this Court.

[21]The Appellant suggests that poverty prevented her from maintaining a suitable home and emphasizes that West Virginia Code § 49-1-3(h)(1) (1999) (Repl. Vol. 2001) specifies that the conditions allegedly constituting neglect cannot arise from a lack of financial means. While the issue of neglect has been determined, the lower court should endeavor on remand to distinguish derelictions of the mother attributable to her personal lack of ability and/or desire to parent the child from omissions primarily occasioned by a lack of financial means. Any child and family case plan proposing reunification should clearly address measures designed to assist with financial obstacles.

[22]We emphasize that we are not recommending any particular disposition in this case. However, if reunification is determined to be appropriate for any of the children upon remand, such children's custody arrangements should be altered gradually, within a fixed time frame, to minimize disruption to their young lives. *See* Syl. Pt. 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

rights to continued association;[23] and (5) evaluation of propriety of the termination of Charles C.'s parental rights.[24]

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[23]In syllabus point four of *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), this Court explained:

> In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

Through syllabus point five of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court expanded that concept, as follows.

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

As we explained in *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995), a court should "inquire into the relationship . . . [the child] has formed with his foster parents and, if it is in his best interests, fashion a plan for continued association between the foster parents and the child." *Id.* at 638, 461 S.E.2d at 144.

[24]If the lower court determines that Benny should be reunified with the Appellant, the court should also reevaluate the decision to terminate the rights of Benny alleged natural father, Mr. Charles C. According to the record before this Court, it does not appear that a paternity action has been brought against Mr. C., nor has any child support been paid. Similarly, it appears that no paternity action has been brought against Edward's natural father. Although the termination decision regarding the father has not been appealed, it appears that the termination decision was presumably made to facilitate Benny's adoption. If the

(continued...)

Based on the foregoing, we hereby reverse the July 10, 2000, decision of the Circuit Court of McDowell County and remand this matter for further proceedings and evaluation consistent with this opinion. Based upon the time problems discussed earlier, the mandate herein shall issue forthwith. While this Court is cognizant that thorough evaluation on remand may consume significant time for the honorable judge to whom this matter will be assigned, this Court respectfully recommends that the lower court make all reasonable efforts to promptly conclude these proceedings, to the end that these children may enjoy a stable and certain future as early as is practicable. The urgency of the lower court's further consideration is underscored by the seriousness of these matters, as well as the fact that considerable delays, over which no party had control, were encountered in the proceedings.

Reversed and Remanded With Directions.

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[24](...continued)
Appellant's rights are not terminated after consideration on remand, adoption is no longer an issue, and the Appellant's rights to receive support from the natural father would be negated by termination of the father's parental rights. *See Swinney v. Mosher*, 830 S.W.2d 187 (Tex. Ct. App. 1992) (holding that termination of father's parental rights should be reversed since it was done to facilitate child's adoption and would prejudice rights of child and mother to receive support from father).

183 W. Va. 641, 398 S.E.2d 123

Supreme Court of Appeals of West Virginia

STATE of West Virginia

v.

EDWARD CHARLES L., Sr.

No. 19004

July 27, 1990

Dissenting Opinion Sept. 21, 1990

SYLLABUS BY THE COURT

1. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b).

2. Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986), it is overruled.

3. " 'Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.' Syllabus Point 2, State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert denied, 445 U.S. 904, 100 S.Ct. 1081, 63 L.E.2d 320 (1980)"; Syl. Pt. 3, State v. Maynard, 183 W.Va. 1, 393 S.E.2d 221 (1990) (quoting Syl. Pt. 6, State v. Smith, 178 W.Va. 104, 358 S.E.2d 188 (1987)).

4. The following [is] ... not excluded by the hearsay rule, even though the declarant is available as a witness: ... (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. W.Va.R.Evid. 803(4).

5. The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

6. "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statements must be offered to prove the material fact. Third, the statement must be shown to be more probative in the issue for which it is offered than any other evidence that the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purposes of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syl. Pt. 5, State v. Smith, W.Va. , 358 S.E.2d 188 (1987).

7. Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

8. "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syl. Pt. 19, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

9. "Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syl. Pt. 21, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

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Roger W. Tompkins, Atty. Gen., John E. Shank, Deputy Atty. Gen., Attorney General's Office, Charleston, for State of W.Va.

WORKMAN, Justice.

This case is before the Court upon an appeal of the conviction of Edward Charles L. See footnote 1 on May 28, 1987, in Mineral County, West Virginia, of two counts of first-degree sexual assault and two counts of first-degree sexual abuse. See footnote 2 The appellant raises four assignments of error based on the proceedings which occurred before the lower court: 1) the trial court committed plain error in permitting the state to make references to unrelated sexual acts and tendencies of the appellant; 2) the trial court committed plain error in allowing the state to elicit secondhand accounts of the sexual offenses which constituted hearsay evidence; 3) the uncorroborated testimony of the child victims was inherently incredible and does not sustain the guilty verdicts; and 4) the appellant was denied effective assistance of counsel. We find that the lower court committed no reversible error in the proceedings and affirm the appellant's convictions.

The appellant was married to Sharon L. from October 1977 until July 1984. The couple had three children, twins, a boy and girl named C.L. and S.L. respectively, born on August 7, 1979, and another son D.L., born on September 4, 1983. When the events surrounding this case occurred in the fall of 1983, the family was living together in Mineral County, West Virginia. Mrs. L. would attend meetings of the Fountain Volunteer Firemen's Auxiliary or visit a neighbor while leaving the children in the care of her husband, the appellant. The twins were four-years-old when the alleged crimes against them occurred.

On occasions when Mrs. L. was not at home, C.L.'s testimony revealed that the appellant took him into a bedroom, took his clothes off, made the child lie on his stomach and then inserted his penis (identified at the trial by the child as his "georgie") into the boy's rectum. S.L. testified that she heard her brother cry out but that she was afraid to go to him because she was watching her younger brother, D.L., on the couch and he could have fallen off the couch had she left. C.L. further testified that his father had stuck his finger up the child's rectum and had placed his mouth on the boy's "georgie".

The appellant was accused of abuse against his daughter as well. The girl's testimony indicated that on a night in which her mother was away, she was abused by her father in the bathroom. She testified that while she and her father were in the bathroom, he stuck his finger up her vagina (identified at trial by the child as her "tweetie"). When the child screamed that this hurt her, the appellant desisted in his action. The appellant also

attempted to force his penis into the girl's vagina but ceased in his attempt because it was not possible.

According to the children's testimony at trial, the appellant was able to silence the children regarding the incidents by threatening to cut off the little boy's "georgie" and by threatening to cut open the girl's "tweetie" so that his penis would fit there if they told anyone.

The appellant and Mrs. L. were separated on December 26, 1983, and divorced in July 1984. The appellant maintained visitation with his children subsequent to the divorce.

According to Mrs. L.'s testimony, it was not until October 1984 that she observed strange behavior See footnote 3 being exhibited by her son. When she asked the child about his behavior, he said his daddy told him to do it, because it would feel good. When the mother questioned the boy further, he began crying and said his father told him not to tell her. Mrs. L. then asked a close friend, to question her son about his behavior. The child told the friend about sexual acts performed on him by his father, and later told his mother as well. The friend was not called to testify at trial. See footnote 4

Subsequently, the child began to display more behavior problems at home, including flushing his mother's keys down the toilet. The child, according to his mother's testimony, told her that the reason he did it was because "my daddy had keys to get in our house, and daddy told me if I ever told you what he did to me, he would cut my 'georgie' off." In September 1985, C.L.'s first grade teacher reported to Mrs. L. that C.L. was inattentive in class to the point that the teacher would have to yell his name or smack a book on his desk to gain his attention. A school counselor referred the matter to a licensed psychologist, Greg Trainor. Trainor treated C.L. and S.L. for several months. From his treatment, he concluded that both children had been sexually abused by their father. Trainor conveyed his opinion about the children to Mrs. L. and urged her to contact the authorities. At Trainor's insistence, Mrs. L. contacted the prosecuting attorney's office.

The appellant was indicted in January 1987 and tried in May of that year. The prosecution's case rested on testimony of the two child victims, C.L. and S.L.; Trainor, the psychologist; an evidentiary deposition See footnote 5 of Dr. Ryland, a gynecologist, and the children's mother, Sharon L. The appellant's defense consisted of his own testimony, denying all the charges but stating he may have accidentally touched his son and daughter while bathing them; and the testimony of his fiance, which centered around the appellant's good relationship with his children. No expert witnesses were called on the appellant's behalf. At the close of all the evidence, the jury convicted the appellant of two counts of first-degree sexual assault and one count of first- degree abuse against his son and one count of first-degree sexual abuse against his daughter.

I.

The appellant's first assignment of error concerns the trial court permitting the state to make reference to unrelated sexual acts and sexual tendencies of the appellant. Specifically, the appellant contends that the trial court permitted the state to introduce the following evidence over objections raised by appellant's trial counsel:

> 1. The appellant fondled his infant baby boy through a diaper;
> 2. The appellant made long distance telephone calls to sex clubs between 1980 and 1983 which he at times made the children listen to under the pretense that Mickey Mouse was on the phone;
> 3. The appellant's wife found a bag of her daughter's underwear in the basement of their home which the wife claimed had been ejaculated on, presumably by the appellant;
> 4. The appellant would frequently pat the front of his pants;
> 5. The appellant would masturbate following sex with his wife;
> 6. The appellant would lean against the washing machine during the spin cycle for sexual gratification;
> 7. The appellant would masturbate in front of his son, while looking at what were described at trial as pornographic See footnote 6 magazines and stimulating himself rectally, and that the appellant also showed the magazines to the children.

Further, the defense counsel elicited evidence from Mrs. L. that the appellant had been accused by the child of having intercourse with the family dog in front of his son and pulling his vasectomy stitches out during masturbation. Both of these specific instances were brought out during the defense attorney's cross-examination of the appellant's ex-wife in an attempt to impeach her credibility, and will be examined more fully in our discussion of the fourth assignment of error relating to ineffective assistance of counsel.

The appellant contends that the above-mentioned evidence was not only highly prejudicial but that none of the alleged acts or tendencies were remotely relevant to the offenses charged. The state, however, argued that several of the alleged evidentiary "errors" were elicited or used by the appellant himself.

West Virginia Rule of Evidence 404(b) provides that in addressing the issue of the admissibility of collateral crime evidence

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, in State v. Jackson, 181 W.Va. 447, 450, 383 S.E.2d 79, 82 (1989), this Court recognized that:

> [W]here the state attempt[s] to introduce evidence of other crimes or wrongful acts on the part of a defendant to prove system, motive, intent or opportunity, as outlined in Rule [404(b)], known as the collateral crime rule, 'we have emphasized that [to be admissible, evidence of] the collateral crimes must [relate to crimes that] have occurred reasonably close in point of time to the present offense.' State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208, 214 (1986). See, e.g., State v. Messer, 166 W.Va. 806, 277 S.E.2d 634 (1981) (per curiam); Syllabus Point 7, State v. Withrow, 142 W.Va. 522, 96 S.E.2d 913 (1957); Syllabus Point 3, State v. Gargiliana, 138 W.Va. 376, 76 S.E.2d 265 (1953); Syllabus Point 2, State v. Evans, 136 W.Va. 1, 66 S.E.2d 545 (1951); Syllabus Point 4, State v. Lewis, 133 W.Va. 584, 57 S.E.2d 513 (1949).

The significance of Rule 404(b) See footnote 7was further explained by the Fourth Circuit Court of Appeals in United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980). In that case, the court stated that "[t]he circumstances under which such evidence may be found relevant and admissible under the Rule have been described as 'infinite.' Some of such circumstances are set forth in the Rule itself, but the cataloguing therein is merely illustrative and not exclusionary." Consequently, W.Va.R.Evid. 404(b) is an "inclusive rule" in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition. Masters, 622 F.2d at 86.

In our analysis of the collateral acts involved in the present case, we begin by first examining just those acts that occurred in the presence of the children close in time to the offenses charged. From a review of the record, it is evident that the phone calls to sex clubs to which the appellant would make the children listen under the pretense that Mickey Mouse was on the phone, the masturbation in front of the appellant's son and the viewing of graphic sexual magazines with the children, all occurred not only in the presence of one or more of the victims, but close in time to the alleged offenses charged.

In dealing with the admissibility of other sexual acts under Rule 404(b), courts have allowed such evidence to be introduced under a number of different circumstances. For instance, in United States v. Beahm, 664 F.2d 414 (4th Cir.1981), a case in which the defendant was charged with two counts of taking indecent liberties with children involving the fondling of the boys' genitals on a United States military installation, the

court upheld the admissibility of the testimony of two male juvenile witnesses, neither of whom were the victims in the case, that the defendant had approached and made sexual advances toward them some three years prior to the current offenses. Id. at 415-16. The witnesses' testimony revealed that there was similarity between the sexual advances made toward them and the acts constituting the offense charged, along with temporal proximity to the offense charged. Id. at 417. The court, in its decision, found that since the defendant was contesting whether the government sufficiently proved the lascivious intent as required by the Virginia statute, the admission of these other wrongs or acts was not in error since "the burden was on the government to show that the defendant's acts were performed with lascivious intent and did not occur by accident." Id.

The Fourth Circuit has also allowed other specific crimes, acts or wrongs to be introduced because they are so closely connected with the offense charged that they are found to be part of the res gestae of the offense. See Masters, 622 F.2d at 86. In Masters, while not a sexual offense case, the defendant was charged with dealing in firearms or ammunition without a valid license. The court permitted the introduction of taped conversations between the defendant and undercover agents which tended to show that the defendant had sold guns of all types, including sawed-off shotguns and grenades, to other customers on occasions other than those charged and was willing to supply them to the agents. Id. at 84-85.

Specifically, the court reasoned that

> [o]ne of the accepted bases for the admissibility of evidence of other crimes arises when such evidence, 'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the 'res gestae' or the 'uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... [and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense, '[t]here is no reason to fragmentize the event under inquiry' by suppressing parts of the 'res gestae.'

Masters, 622 F.2d at 86 (citing United States v. Smith, 446 F.2d 200, 204 (4th Cir.1971); United States v. Weems, 398 F.2d 274, 275 (4th Cir.1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 894, 21 L.Ed.2d 790 (1969); State v. Spears, 58 Ohio App.2d 11, 387 N.E.2d 648, 651 (1978); United States v. Howard, 504 F.2d 1281, 1284 (8th Cir.1974); United States v. Beechum; 582 F.2d 898, 912 n. 15 (5th Cir.1978), cert. denied, 440 U.S. 920,

99 S.Ct. 1244, 59 L.Ed.2d 472 (1979); United States v. Copeland, 295 F.2d 635, 637 (4th Cir.1961), cert. denied, 368 U.S. 955, 82 S.Ct. 398, 7 L.Ed.2d 388 (1962); United States v. Gano, 560 F.2d 990, 993- 94 (10th Cir.1977)).

This reasoning seems particularly applicable to the transactions involved in a child sexual abuse or assault case. Certainly involving children in the process of viewing or listening to explicit sexual material or graphic sexual behavior is highly probative in presenting a full presentation of the circumstances surrounding the alleged offenses.

Finally, the issue of other sexual acts and their admissibility arose in Morgan v. Foretich, 846 F.2d 941 (4th Cir.1988). In that case, a four- year-old female child and her mother brought civil action against the child's father and his parents for damages arising out of alleged child sexual abuse. Specifically at issue was the admissibility of evidence which tended to prove that plaintiff child's sister had also been sexually abused while visiting with defendants. Id. at 944. This evidence was offered not only to identify the defendants as the perpetrators but also to disprove several defenses raised by the defendants including fabrication of the injuries and self-infliction. Id.

The court in upholding the admissibility articulated that as long as the prior acts were being admitted to disprove disputed issues involved in the case such as the defendant's identity, the absence of mistake or accident, or the intent of the defendant to commit the crimes with which he is charged, then there was no violation of the other crimes evidence rule. Id. (citing Comment, Other Crimes Evidence to Prove the 'Corpus Delicti' of a Child Sexual Offense, 40 U.Miami L.Rev. 217, 220 (1985)).

We therefore find that the acts which occurred in the presence of either one or both children or as part of the transactions with the children which constituted the basis for the indictment were admissible under W.Va.R.Evid. 404(b). These acts not only showed lascivious intent See footnote 8 or sexual gratification See footnote 9 on the part of this appellant towards his children to commit the crimes charged, but also that the acts did not occur accidentally as the appellant attempted to establish as part of his defense through his own testimony. Furthermore, the acts were so intrinsically related to the alleged offenses that they may be considered as part of the transactions with the children and so interwoven with his pattern of conduct toward the children that they are part of the res gestae of the crimes charged. Lastly, they were highly probative on the issue of whether this defendant committed sexual abuse against these children. See footnote 10

We now turn to a consideration of those acts directly involving the victims together with those acts in which the appellant allegedly fondled this infant boy and ejaculated on his daughter's underwear. We originally addressed the issue of collateral crimes evidence being admitted to show lustful disposition in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986).

In Dolin, the defendant was accused of first degree sexual assault of his daughter who was under the age of eleven at the time the crime was committed. The crimes occurred within three years prior to the indictment. 176 W.Va. at 690, 347 S.E.2d at 211. At trial, the only evidence presented against the defendant was the uncorroborated testimony of his then sixteen-year-old daughter who was the victim of the crime charged. In her testimony, she was unable to recall specific details regarding the places and times of the incidents involved in the indictment. See footnote 11 The daughter, in her testimony however, was able to recall specific activity involving six collateral acts which included:

> 1. When she was seven years old, the defendant drove her in a van to a quarry, where he forced her to perform oral sex on him;
> 2. When she was eight or nine years old, after shopping for a new bicycle, the defendant took her to a motel in St. Albans and rubbed his sex organ on her stomach until he ejaculated;
> 3. In August of 1977, when she was ten years old, the defendant drove her to a remote location in South Charleston and rubbed his sex organ on her;
> 4. When she was twelve years old, the defendant took her on a shopping trip to Parkersburg, where they spent the night in a motel. During that night, the defendant rubbed his sex organ on her;
> 5. When she was twelve or thirteen years old, the defendant drove her to a hollow in South Charleston and forced her to perform oral sex on him; and
> 6. When she was twelve years old, the defendant drove her to Tennessee, where they stayed in a motel and he rubbed his sex organ on her.
> Id. n. 2.

Although this Court noted that other jurisdictions did recognize a sexual propensity exception, we opined that

> [t]o recognize a sexual propensity exception in addition to the numerous exceptions to the collateral crime rule would provide a convenient path to damage a defendant's character and would sweep additional sexual offenses into evidence which would obviously prejudice and confuse a jury in its consideration of the crime charged in the indictment. What renders the reasoning of those courts which have adopted a sexual propensity exception so anomalous is their failure to acknowledge that sexual crime cases are by their very nature likely to be highly offensive to the average jury. Thus, the ability to further prejudice the jury by admitting additional collateral sexual offenses is even more apparent.

Id. 176 W.Va. at 695, 347 S.E.2d at215. This Court further reasoned that since the uncorroborated testimony of the victim is sufficient evidence for a conviction in sexual

offense cases, unless inherently incredible, "courts should be particularly wary of collateral sexual offense evidence...." Id. (citing Syl. Pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981)). Finally, this Court specifically held "[i]t is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim." Id. 176 W.Va. at 690, 347 S.E.2d at 210, Syl. Pt. 7. To the extent that the Dolin decision finds evidence introduced to show lustful disposition to be impermissible in cases involving child victims, it is overruled.

The importance of allowing such evidence to be admitted under a lustful disposition exception was noted in the dissenting opinion to Dolin in which Justice McHugh, joined by Justice Brotherton, stated that

> [t]he victim's testimony as a crucial element of the State's case must be examined in context in order to establish a complete record of events, thereby reducing the incredibility of the victim's testimony. Therefore, carving out a sexual propensity exception allows the finder of facts to weigh the credibility of the victim's unabridged testimony.

176 W.Va. at 699, 347 S.E.2d at 220. We find this rationale to be particularly applicable in cases involving child victims. This is evident since these cases generally pit the child's credibility against an adult's credibility and often times an adult family member's credibility. Since sexual abuse committed against children is such an aberrant behavior, most people find it easier to dismiss the child's testimony as being coached or made up or conclude that any touching of a child's private parts by an adult must have been by accident. In addition, children often have greater difficulty than adults in establishing precise dates of incidents of sexual abuse, not only because small children don't possess the same grasp of time as adults, See footnote 12 but because they obviously may not report acts of sexual abuse promptly, either because they are abused by a primary care-taker and authority figure and are therefore unaware such conduct is wrong, or because of threats of physical harm by one in almost total control of their life. In most cases of sexual abuse against children by a care-taker or relative, the acts of sexual abuse transpire over a substantial period of time, often several years. Consequently, under the existing collateral acts rule, a child victim is unable to present the complete record of events forming the context of the crime. Lastly, there is a common misconception that children have a greater propensity than adults to imagine or fabricate stories of sexual abuse. Research indicates, however, that absent coaching, children are far less likely to lie about matters in the sexual realm than adults, See footnote 13 and that absent sexual experience there is little means by which children can imagine sexual transactions. See footnote 14 In consideration of all these factors, the probative value of such testimony far outweighs the potential for unfair prejudice.

Therefore, collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment. To the extent this conflicts with our decision in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986) it is overruled. In adopting such an exception to W.Va.R.Evid. 404(b) we follow a number of other jurisdictions which have permitted such evidence to be admitted in sexual assault or abuse cases on the theory that such evidence shows the accused's incestuous and lustful attitude toward that particular person, See footnote 15 and upon the theory that in cases involving child victims, a full disposition of the facts forming the context of the crime presents a fairer opportunity for the triers of fact to assess the credibility of the witnesses.

Finally, the evidence that the appellant patted the front of his pants, would masturbate after having sex, See footnote 16 and would lean against the washing machine during the spin cycle was not relevant to the issues at trial, and its admission was error. We reach this conclusion because it appears this evidence was introduced solely for the purpose of proving the character of the defendant and his propensity for obtaining sexual gratification in unusual ways. There was no evidence that these particular instances either occurred in the presence of the children or as part of the transactions with them. We further find, however, that this error was harmless. We base our decision on the Fourth Circuit Court of Appeals decision in United States v. Davis, 657 F.2d 637 (4th Cir.1981). In Davis, the court found harmless error where the lower court admitted testimony concerning alleged sales of heroin to twelve or thirteen-year-old children that were made some six to eleven years before the current offenses of conspiracy to distribute heroin were supposed to have begun.

The court stated that "[t]he test for harmlessness for nonconstitutional error is when it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial." Id. at 640 (emphasis added) (citingUnited States v. Nyman, 649 F.2d 208 (4th Cir.1980)). The court further opined that it was proper to consider other evidence which tended to show the defendant's guilt and that in this case "the evidence supporting Carter's [the defendant's] conviction was so conclusive that it is altogether unlikely that the error affected the verdict." Davis, 657 F.2d at 640.

Similarly, in West Virginia, we have held that the test for determining whether the introduction of improper evidence at trial constitutes harmless error is:

> '(1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt;

> (2) if the remaining evidence is found to be insufficient, the error is not harmless;
> (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.'

Syl. Pt. 3, in part, State v. Maynard, 183 W.Va. 1, 393 S.E.2d 221 (1990) (quoting Syl. Pt. 6, State v. Smith, 178 W.Va. 104, 358 S.E.2d 188 (1987); Syl. Pt. 2, State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980)).

In the present case, the evidence which was properly introduced certainly constituted a sufficient basis to support the convictions. While obtaining sexual gratification from the movement of a washing machine is unusual, it certainly is not the sort of evidence which would have any real prejudicial effect against a defendant such as to cause a jury to convict him. Since the evidence of masturbation actually involved sexual activity with an adult, the defendant's wife, it would seem to indicate the defendant's normalcy in the sexual arena. In the face of such direct evidence as the testimony of the two victims, this evidence cannot seriously be considered to have had any prejudicial effect on the jury's consideration of the issues.

In cases of this sort, where the victims themselves testify and where the defendant testifies and denies the charges, it really comes down to whether the jury believes that the victims are telling the truth, or that they are lying, either because of their own motivations or as a result of having been coached or coerced. Thus, the likelihood that the improperly admitted evidence had any prejudicial effect whatsoever on the jury is minimal.

II.

The appellant contends the trial court committed plain error when it permitted the victim's mother, Sharon L., and the psychologist, Greg Trainor, to testify concerning the children's extrajudicial statements which directly implicated the appellant. These statements were made between one and four years after these sexual assaults allegedly took place. The state contends that not only did the appellant fail to object to this testimony, but the appellant utilized the testimony to bolster his own theory of the case--which was that the children were coached by their mother and thereby fabricated the alleged offenses against the appellant stemming from the parent's divorce--and that Trainor's testimony was not offered solely to bolster the credibility of the child witnesses but was also offered to give his opinion as to whether the children fit the profile of child sexual abuse victims and whether they were sexually abused.

In order to address the issue of whether the psychologist's testimony and the victims' mother's testimony was properly admitted it is helpful to examine each of the witness' testimony separately. First, the psychologist's testimony included the following excerpts:

> You know there's one description that Bubbie said his dad, I believe, it was in conjunction with some pornographic magazines, you know, masturbating in front of Bubby and while he was doing that and inserting his other, taking his other hand and inserting a finger in his rectum, again....
> ....
> ... we had a session after that where, as I described earlier, we, we had, had her tell a story about a girl in the third person and so she described the story in the third person where a little girl had her dad in a bathtub insert his finger into the little girl's vagina, and so, at our next session ... she acknowledged that that's, that happened to her ... I think she described earlier that she was the magazines and the, and heard, the telephone calls, too, but denied actually any contact with them. And then as we went along further, she acknowledged that dad, had on one occasion had inserted his finger in her vagina and then, on another occasion, attempted intercourse with his penis and tried to put his penis in her....

In deciding whether the psychologist's testimony was properly introduced, the state contends that: (1) the statements were given to the medical health profession for the purpose of diagnosis and treatment See footnote 17 and are therefore admissible; and (2) the statements are not hearsay since they were not "offered in evidence to prove the truth of the matter asserted," See footnote 18 but rather were cited only as support used by the psychologist in forming his opinion.

West Virginia Rule of Evidence 803(4) provides that:

> The following ... [is] not excluded by the hearsay rule, even though the declarant is available as a witness: ... (4) Statements for Purposes of Medical Diagnosis or Treatment--Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Even though we have previously held in Syl. Pt. 3, State v. Murray, 180 W.Va. 41, 43, 375 S.E.2d 405, 407 (1988) that "[o]ut-of-court statements made by the victim of a sexual assault may not be introduced by a third party unless the statements qualify as an excited utterance under Rule 803(2) of the West Virginia Rules of Evidence," that case is

factually distinguishable from the instant case. It did not in any way concern W.Va.R.Evid. 803(4) or what is admissible thereunder.

In Murray, a nine-year-old girl, made statements to a secretary and a principal at her school and a child protective services worker to the effect that she had been sexually assaulted by the defendant some two weeks earlier. 375 S.E.2d at 408-09. The school principal and protective services worker were permitted to testify about these statements at trial. On appeal, this Court found that the statements were inadmissible because they failed to meet the criteria for the excited utterance exception found in W.Va.R. of Evid. 803(2). See Syl. Pt. 2, State v. Young, 166 W.Va. 309, 273 S.E.2d 592 (1980).

In contrast, in the present case, the statements made by the children regarding the sexual abuse by their father were made to the psychologist who the children were seeing in a therapeutic context. Similarly, in Matter of Lucas, 94 N.C.App. 442, 380 S.E.2d 563 (1989), the Court of Appeals of North Carolina was faced with determining whether statements made by a three-year-old child to a medical doctor when she was taken to a local hospital within fourteen days of an alleged sexual assault incident for medical attention were admissible. Matter of Lucas, 380 S.E.2d at 566.

In that case, the doctor was permitted to testify that while conducting an exam to determine whether there was evidence of sexual abuse, the child told him that the fourteen-year-old juvenile offender pulled his penis out and pulled the victim's pants down. The doctor was further permitted to testify:

> A. And then [child] said that he put a spring in me and I questioned her, 'Where was this spring?', 'On his whacker'. Did it hurt when he put this spring in you? She said yes. Did he tell you that he had a spring and she said yes. Then I asked her 'Where did he put it in you, can you show me?' Show me on the doll baby where he put it and I asked her to pull the doll baby's pants down and 'Where did he put it in?'; she pointed to the vaginal area of the female doll. Then I asked her, 'Did he do this one time?' and she indicated two times. She said that it was on two different days.
> ....
> A. ... In obtaining the rectal culture, she stated that this was where Ronnie put his 'whacker'. When I did the vaginal exam, she said, 'This is not where Ronnie put his whacker.' ...
> A. The rectal structure appeared to be normal. There were no tears, lacerations or other abnormalities or alteration than normal [word not audible] tone. It was a normal examination....,
> Id. at 565.

The court found that "the trial court properly admitted Dr. Fisher's testimony as to the out-of-court statements of the child pursuant to Rule 803(4)." Id. at 568. The North Carolina Court reasoned that the above-mentioned statements of the doctor were admissible since the doctor used those statements in making his diagnosis and on recommending follow-up treatment by a psychologist. Id. at 567.

Likewise in Morgan v. Foretich, 846 F.2d 941 (4th Cir.1988), the court considered whether the testimony of a psychologist who had spent over one hundred hours examining and working with the victim was permitted to testify about out-of-court statements made by the child. Id. at 948. In the Morgan case the trial court only permitted the psychologist to give his opinion as to the child's abuse and was excluded from testifying about out-of- court statements made by the child to him. Id.

The Fourth Circuit indicated that "the two-part test set for admitting these hearsay statements is (1) 'the declarants motive in making the statement must be consistent with the purposes of promoting treatment'; and, (2) 'the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.' " Id. at 949 (footnotes omitted) (citing United States v. Renville, 779 F.2d 430, 436 (8th Cir.1985)). The court, in its application of this test to the facts before it, found that the child's statements to her psychologist were properly admissible at trial. The court relied heavily upon the Renville decision which concluded that "not only would the young victim have a motive consistent with the purpose of treatment, but also, '[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment.' " Morgan, 846 F.2d at 949 (emphasis in original) (quoting Renville, 779 F.2d at 436.)

Consequently, we conclude that the statements made by the children to their treating psychologist, Trainor, were properly admitted at trial. In adopting the two-part test applied by the Fourth Circuit, we find that not only was the motive behind the statements made by the children consistent with promoting treatment, since the mother brought the children to the psychologist for the purpose of treatment at a time prior to any criminal action even being contemplated; but also, the statements were such that they would have been reasonably relied upon by Trainor in his diagnosis and treatment of the children.

The trial court also permitted the victims' mother to testify without objection regarding extrajudicial statements made by her son involving the sexual assaults. It is extremely important to note, however, that each child also testified regarding the matters contained in the statements made to the mother and to Dr. Trainor, and was subject to cross-examination by the appellant. These statements do not fall under the excited utterance exception to the hearsay rule found in W.Va.R.Evid. 803(2) because they were not statements made by the declarant "relating to a startling event or condition ... while the declarant was under the stress of excitement caused by the event or condition." Id.

However, other courts have admitted statements like these made by child victims to a parent under other exceptions to the hearsay rule.

In Matter of Lucas, the court admitted statements made by a three-year-old child to her mother that a juvenile boy had sexually assaulted the little girl anally. 380 S.E.2d at 565. The court upheld the admissibility of these statements made several days after the incident under Rule 803(4) which involve statements made for the purposes of medical diagnosis or treatment. Matter of Lucas, 380 S.E.2d at 566. The court reasoned that "the child's statements were pertinent to diagnosis and treatment as they suggested to the doctors, the nature of the problem which in turn directed the doctors in their examination of the child." Id. Likewise, in the instant case, the mother's testimony concerning her son's statements was presented primarily to explain why she took the children to the psychologist, not for the purpose of proving the matter asserted.

Other courts have permitted hearsay statements, such as those present before the Court, under Rule 803(24). West Virginia Rule of Evidence 803(24) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (24) Other Exceptions:--A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

In Mitchell v. State, --- Miss. ----, 539 So.2d 1366 (1989) the court indicated that the mother's and babysitter's testimony involving hearsay statements made by a five-year-old female child should be analyzed under Rule 803(24) exception on remand. See footnote 19 In its instructions to the lower court, the Mississippi Supreme Court stated:

> We note that, as other courts have applied the 'catch-all' to a child's out-of-court statement about an incident of sexual abuse, they have found that the statements did not fit under the excited utterance exception or under the exception for seeking medical treatment. In determining the equivalent

> guarantees of trustworthiness, these courts have considered the age of the child, under the rationale that young children do not possess enough sexual knowledge to fabricate such incidents. These courts further look at the length of delay in reporting the incident and the surrounding reasons for the delay, such as fear, threats, and lack of opportunity to report. They also consider the persons to whom the incident was reported--family, social workers, law enforcement officers.

Mitchell, 539 So.2d at 1370 (citing U.S. v. Dorian, 803 F.2d 1439 (8th Cir.1986); U.S. v. Renville, 779 F.2d 430 (8th Cir.1985); State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987); State v. Brown, 341 N.W.2d 10 (Iowa 1983)); See generally Note, A Comprehensive Approach to Hearsay Statements in Sex Abuse Cases, 83 Colum.L.Rev. 1745 (1983).

In examining the statements made to the mother by the child victim in the present case, we must look at the requirements this Court has set out in order for a statement to come in under W.Va.R. of Evid. 803(24). We have previously held that

> [t]he language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interests of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

Syllabus Point 5, State v. Smith, 178 W.Va. 104, 358 S.E.2d 188 (1987); See Syl. Pt. 1, State v. Bailey, 179 W.Va. 1, 365 S.E.2d 46 (1987).

These factors were set forth with an obvious eye towards evaluating the reliability of hearsay evidence in light of what legal writers have described as the four dangers of hearsay: See footnote 20 misperception, faulty narration, inaccurate memory, and insincerity. If the likelihood of these dangers is slight, the reliability of the evidence is enhanced.

Furthermore, it is important to bear in mind that most of the cases analyzing the admissibility of hearsay statements under Rule 803(24)(5) have been decided in contexts

where the declarant was not present to testify in person. It is extremely important to recognize that in the defendant's trial, each child was present, testified in court, and was cross- examined by defense counsel. Furthermore, neither the mother nor the psychologist added anything substantive to the children's testimony. It would cause us grave concern as to the propriety of the mother's testimony if the children gave a barebones or sketchy account of what occurred, and then the mother was permitted to expand upon or add detail and substance to such testimony through the children's extra-judicial statements. Such was not the case here. Judge Weinstein and Professor Berger have written that "[t]he availability of the declarant at trial vitiates the main concern of the hearsay rule, which is the lack of any opportunity for the adversary to cross-examine the absent declarant." See footnote 21

Not only are hearsay dangers minimized by the presence of the declarant, but such appearance removes potential confrontation clause issues as well. See footnote 22 Furthermore, since the defendant claimed maternal coaching of the children, the mother's account of the child's statements to her gave the jury a fuller opportunity to observe her demeanor and her motivations in recounting such statements. The testimony of the mother and psychologist presented the defendant an opportunity to explore on cross-examination any coaching or motive on behalf of the mother or psychologist to help the children fabricate the accusations. When a child witness is present to testify, however, it would generally seem to be a better practice not to permit a parent to testify as to the child's extrajudicial statements unless such testimony clearly falls into one of the hearsay exceptions. But it is harmless when, viewed in the spectrum of all the evidence, it creates no prejudice to the defendant. The statements comport to this hearsay exception and the general rules of evidence because they not only meet the relevancy and probativeness requirements but the fact that the children testified at trial and were subject to cross-examination ameliorates the real risks of admitting hearsay. Finally, we examine the requirement of giving adequate notice to the opposing party. In this case, not only did the defendant have notice that Mrs. L. would be called as a witness, but the court ordered the state to provide the defendant with a copy of the written statement of Mrs. L. if she were called as witness. A review of the statement which was contained in the record indicates that the defendant did have notice as to the nature of the evidence the state would offer through Mrs. L.'s testimony.

Therefore we conclude that the mother's testimony was properly admitted at trial by the lower court, since the children were present to testify and be cross-examined; the mother added nothing substantive to the children's direct testimony, and primarily related the child's statements not to prove the truth of the matter asserted, but to explain why she took them to the psychologist; and because the mother's motivations were an issue raised by the defense, and therefore her appearance on the stand provided the defendant an opportunity to cross-examine her and the jury a chance to observe her demeanor and assess her motivations and credibility.

III.

The appellant also argues that the trial court erred in permitting the family psychologist, Greg Trainor, to express his opinion that the children had been sexually assaulted by the appellant. The state argues that this case should be distinguished from cases involving the expert who is testifying about "rape trauma syndrome."

West Virginia Rule of Evidence 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Further, W.Va.R.Evid. 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

In this case, the expert psychologist testified as followed:

> (By the prosecuting attorney):
> Q: Okay, do you have an opinion as to whether Bubby was sexually assaulted and sexually abused?
> A: Yes, it's my opinion that, that Bubby, little [E.L.], was, was sexually abused.

The expert at that point went on to give the basis for his opinion. See footnote 23 Later, in the expert's testimony, the prosecutor asked the following with regards to both children:

> Q: Your professional opinion then is that both of these children, were, in fact, abused and assaulted as they have reported to you?
> A: That's, that's my opinion, yes.

In State v. McCoy, 179 W.Va. 223, 366 S.E.2d 731 (1988) this Court was faced with the admissibility of expert testimony on post-rape behavior, i.e. testimony regarding rape trauma syndrome. 179 W.Va. at 226, 366 S.E.2d at 734. We held that:

> [q]ualified expert testimony regarding rape trauma syndrome is relevant and admissible in a prosecution for rape where the defense is consent. The expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped.

Id. 179 W.Va. at229, 366 S.E.2d at737. The reason for this holding was concern over "[t]he danger involved in permitting an expert to include that because a complainant suffers from rape trauma syndrome, the complainant was, therefore, raped ... [since] '[such a] conclusion vouches too much for the victim's credibility and supplies verisimilitude for her on the critical issue of whether defendant did rape her.' " Id. 179 W.Va. at 228, 366 S.E.2dat 736 (footnote omitted)(citing State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984); see State v. Jackson, 181 W.Va. 447 , 383 S.E.2d 79 (1989). See footnote 24

While the facts of this case do not involve rape trauma syndrome, but rather sexual abuse and sexual assault on children, an analogy can be drawn in that children who are sexually abused or assaulted frequently display indications which may comport to a profile of child victims which has been developed by psychologists and social workers with experience in this area of expertise. In State v. Myers, --- Minn. ----, 359 N.W.2d 604 (1984) the Minnesota Supreme Court was asked to determine whether the trial court erred in admitting expert psychological testimony describing the behavior and symptoms typically exhibited by children who have been sexually abused and further, expressing an opinion that the child victim's allegations were not fabricated. 359 N.W.2d at 606. Specifically, the court addressed the issue of "whether or not the emotional and psychological characteristics observed in sexually abused children is a proper subject of expert testimony." Id. at 609.

The court ruled that such testimony was admissible even though the indirect result was to bolster the credibility See footnote 25 of the victim witness finding that

> [t]he nature ... of the sexual abuse of children places lay juror at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. As ... [the expert] testified, uncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child, is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed. When the child does complain of sexual abuse, the mother's reaction frequently is disbelief, and she fails to report the allegations to the authorities. By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the

> family, an expert can assist the jury in evaluating the credibility of the complainant.

Id. at 610; see State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); see also State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982).

Similarly, the Ohio Court of Appeals in State v. Timperio, 38 Ohio App.3d 156, 528 N.E.2d 594 (1987) was faced with expert testimony offered at trial which was very similar to the expert's testimony in the present case. In Timperio, the expert psychologist testified about the symptoms sexually abused children exhibit and stated that in her opinion the child in that case had been sexually abused. 528 N.E.2d at 595. The court held that "[i]t is permissible to permit an expert to testify for the purpose of helping the jury to assess the credibility of a sexually abused child," and further, "[a]n expert may state her opinion that a child has been sexually abused." Id. at 595, Syl.Pts. 1 and 2; see State v. Humfleet, (Sept. 9th, 1985), Clermont App. Nos. CA84-04-031 and CA84-05-036, unreported [available on WESTLAW, 1985 WL 7728]; State v. Geyman, 224 Mont. 194, 729 P.2d 475 (1986); Middleton, 657 P.2d 1215.

In McCoy, this Court pointed out that rape trauma syndrome is a phrase coined to describe those physical and emotional symptoms and behaviors frequently experienced by rape victims. McCoy, 179 W.Va. 223, 366 S.E.2d 731. Similarly, children who are the victims of sexual abuse or assault frequently manifest identifiable physical and emotional behaviors and characteristics. Certainly, then, qualified expert testimony may be taken regarding the behavioral and emotional indicia of child sexual abuse victims, and an expert may testify that an alleged victim exhibits behavior consistent with such a profile. There is no valid reason that a physician cannot give an opinion based on physical findings that a person has been sexually assaulted. Similarly, there is no valid reason a psychologist or psychiatrist should not be allowed to give an opinion based on objective findings as to whether an individual, most particularly a child, has been sexually assaulted. It is true that such an expert opinion aids the victim's verisimilitude, but it is a fair and proper basis for doing so and the probative value of such testimony far outweighs any potential for unfair prejudice. Furthermore, whether a person has been sexually assaulted is not the ultimate issue for a jury. The ultimate issue is whether the defendant committed the assault.

Consequently, we adopt the holding and rationale of the courts which permit expert psychological testimony in cases involving incidents of child sexual abuse, and determine that an expert may state a conclusion as to whether a child who is alleged to be the victim of sexual abuse or assault exhibits behavior consistent with being so victimized, and may give an opinion as to whether the child has been sexually abused. Such expert may not give an opinion on whether he personally believes the child, nor on the issue of whether the defendant was the perpetrator of the abuse or assault, for that would improperly and

prejudicially invade the province of the jury. Thus, we find that the expert's testimony in this case was permissible and the trial court committed no error in allowing the testimony in evidence.

IV.

The appellant next argues that the uncorroborated testimony of the children was inherently incredible and does not sustain the guilty verdict. The appellant based his contention on the time lapse from when the crimes actually occurred until they were reported approximately four years later, on the appellant's allegation that the children exhibited no unusual behavior during this time, and the fact that there was no physical evidence that either child had been sexually assaulted. See footnote 26

In State v. McPherson, 179 W.Va. 612, 371 S.E.2d 333 (1988) and State v. Humphrey, 177 W.Va. 264, 351 S.E.2d 613 (1986), this Court dealt with the issue of inherently incredible testimony. In McPherson, we held that "[i]nherent incredibility, ... is more than contradiction and lack of corroboration." 179 W.Va. at 617, 371 S.E.2d at 338 (footnote omitted). Inherent incredibility thus requires "a showing of 'complete untrustworthiness' ... [testimony which] defies physical laws." Id.

In the present case, we find the children's testimony far from inherently incredible. We base this finding on the children's descriptions of what happened to them. Although they were obviously upset and embarrassed at testifying, they related the incidents clearly. Also, the children were subject to thorough cross-examination during which the children were consistent in maintaining their accounts of what transpired. The jury was able to judge their demeanor and assess their credibility directly. Their testimony does sustain a guilty verdict.

V.

Finally, appellant's counsel on appeal raises an ineffective assistance of counsel argument based upon (1) the defense being a denial of any sexual conduct or misconduct; See footnote 27 (2) the failure to object to the assertion of the prosecuting attorney during opening statements that the appellant's divorce was the result of his fondling the four-month-old baby; (3) the defense counsel questioning defense See footnote 28 witnesses concerning improper sexual acts by the appellant; See footnote 29 (4) the failure to request that the lower court have the child victims examined by an independent psychologist for competency purposes; and (5) the failure to offer expert testimony concerning the lack of physical evidence of sexual assault or sexual abuse.

In Syl.Pt. 19, in part, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), this Court held that

> [i]n the determination of a claim that an accused was prejudiced by ineffective assistance of counsel ... courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary decree of skill possessed by attorneys who are reasonably knowledgeable of criminal law....

We also held in Syl. Pt. 21, of Thomas, that

> [w]here a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused.
> 157 W.Va. at 643, 203 S.E.2d at 449.

In applying Thomas to the case at bar, thorough pre-trial motions were filed in defendant's behalf and the defendant's counsel at trial conducted thorough voir dire, gave an effective opening statement, provided affirmative evidence in defense of the appellant, including the appellant's current girlfriend who testified as to the appellant's relationship with his children, placed the defendant on the stand who testified that he did not sexually assault his children, made a closing argument based on defendant's theories of fabrication and coercion, and finally made appropriate objections and motions with specificity and vigor throughout the trial.

While it is true that defense counsel did introduce the evidence relating to Sharon L.'s statements regarding the defendant having sex with the family dog and the defendant masturbating until he tore loose the surgical stitches from his vasectomy, it is necessary to read the cross-examination of Mrs. L. to discern trial counsel's strategy. First of all, the allegation concerning the dog supposedly took place as part of the transactions with the children, and therefore would have been admissible as part of the res gestae of the offense had the state attempted to introduce it. Secondly, defense counsel's question on cross-examination makes clear that the dog was such an extremely small animal that defense counsel was attempting to show that it would be patently unbelievable that a grown man could accomplish a sex act with it. Similarly, the former wife was questioned by defense counsel as to her previous statement on the incident relating to vasectomy stitches. The defense counsel was attempting to demonstrate that it was absurd to believe a person would derive sexual gratification from such a self-mutilating and painful act as that of tearing surgical stitches. The obvious strategy behind defense counsel's questions was to show what ludicrous stories Mrs. L. could concoct regarding her former husband's propensities. There is no doubt that defense attorney's strategy in attacking Mrs. L.'s credibility in this manner was arguable, and she obviously was not successful in the representation of her client in that he was not acquitted.

Finally, regarding the failure of the defense counsel to request that the child victims be examined by an independent psychologist for competency purposes, we have already discussed the competency issue supra at note 27. There we concluded that trial court properly exercised its discretion on the competency issue. See State v. Stacy 179 W.Va. 686, 371 S.E.2d 614 (1988).

The primary difficulty defense counsel had at this trial was that she did not have much to go on in the way of evidence favorable to the defendant. As is frequently the case in this type of charge, it really was a credibility contest. When young children testify that a defendant has sexually abused them and the defendant testifies and denies such charges, defense counsel must attempt to elicit evidence and make argument as to why they would lie.

In this case, the defense counsel attempted throughout to demonstrate that the children had been coerced or coached by their mother or that either they or their mother was upset at the defendant's girlfriend's role in the defendant's life. The defendant's girlfriend testified, however, that she had accompanied the defendant to Sharon L.'s home on a number of occasions to visit the children, and that Mrs. L. always made her feel welcome. In addition, there was a lack of evidence which tended to show that the children had been coached since their mother did not pursue prosecution until some time after the allegations came to her attention. Even after she reported it to the prosecutorial authorities, it was approximately two years before the grand jury indicted. Nor was there any basis to believe Mrs. L. was acting out of any animosity toward her former husband, both because of the passage of time and because she reported the offenses only upon the urging of the psychologist. Also, the reason the victims stated that they didn't disclose these events sooner was due to threats of bodily harm made upon them by the appellant.

> 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable....'

State ex rel. Levitt v. Bordenkircher, 176 W.Va. 162, 172, 342 S.E.2d 127, 137 (1986) (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). In reviewing the attorney's overall performance, we are hard pressed to conclude that it amounted to an ineffective assistance of counsel.

Therefore, based on the foregoing opinion, we affirm the judgment of the Circuit Court of Mineral County.

Affirmed.

Footnote: 1 Consistent with our practice in cases involving sensitive matters, we use the victim's initials. Since, in this case, the victims are related to the appellant, we have referred to the appellant by his last name initial. See Benjamin R. v. Orkin Exterminating Company, Inc., 182 W.Va. 615, 390 S.E.2d 814 n. 1 (1990) (citing In re Jonathan P., 182 W.Va. 302, 303, 387 S.E.2d 537, 538 n. 1 (1989)); State v. Murray, 180 W.Va. 41, 44, 375 S.E.2d 405, 408 n. 1 (1988).

Footnote: 2 Appellant's motion for a new trial was denied by the lower court. Appellant was subsequently sentenced on February 2, 1988, to serve two consecutive 15 to 25 year terms on the first degree sexual assault charges and two one to five year terms on each of the first degree sexual abuse charges running concurrently with the assault sentence.

Footnote: 3 According to Sharon L.'s testimony, the strange behavior exhibited by the boy included constantly bouncing on the floor and riding the chair arms in a sexually suggestive manner.

Footnote: 4 Mrs. L. contacted Potomac Mental Health seeking counseling for her son based on the information disclosed to Carolyn Durst. They told her to observe him for a period of six months to one year, but did not take him into counseling at this time.

Footnote: 5 The gynecologist's testimony revealed that she "found no medical indicators that would either confirm or rule out past sexual abuse," but when pressure was put on S.L.'s hymen, the child "exclaimed that it hurt the same as when her daddy had touched her."

Footnote: 6 According to the testimony of the defendant, the magazines were of all different kinds, including Hustler, and many of them “showed everything,” as he put it.

Footnote: 7 Both Fed.R.Evid. 404(b) and W.Va.R.Evid. 404(b) are virtually identical; therefore when discussing situations which involve both the federal and the West Virginia Rule 404(b), we refer to it simply as Rule 404(b).

Footnote: 8 See United States v. Beahm, 664 F.2d 414 (4th Cir.1981); see also Morgan v. Foretich, 846 F.2d 941 (4th Cir.1988).

Footnote: 9 The jury had to find, according to the instructions given at trial, in three of the charges against the defendant that the reason the defendant committed the crimes was for the purpose of gratifying his sexual desire.

Footnote: 10 *See United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980).*

Footnote: 11 *The daughter did testify that between August, 1976, and August, 1978, she had performed oral sex on the defendant " '[m]aybe once or twice every three months. I can't say just exactly, you know.' " Dolin, 176 W.Va. at 691, 347 S.E.2d at 211.*

Footnote: 12 *"Children, particularly those below age seven, conceptualize time differently than do older children and adults. Dates and times--so important to schedule-bound adults--are largely irrelevant to young children." Myers, Hearsay Statements by the Child Abuse Victim, 38 Baylor L.Rev. 775, 813 n. 120 (1986).*

Footnote: 13 *Id. at 901-02 n. 498.*

Footnote: 14 *See id.*

Footnote: 15 *Jurisdictions have termed such uses in different manners but still have permitted this evidence to show an accused's "emotional propensity for sexual aberration," "lewd disposition," "propensity to act out his sexual desires with young girls," or "moral disposition and perversity." See State v. Phillips, 102 Ariz. 377, 379, 430 P.2d 139, 141 (1967); State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); State v. Tarrell, 74 Wis.2d 647, 648, 247 N.W.2d 696, 703 (1976); State v. Shively, 172 Ohio St. 128, 131, 174 N.E.2d 104, 107 (1961).*

Footnote: 16 *The evidence concerning masturbation after sexual intercourse with his wife was elicited by the state from Sharon L. on re-direct. This question was permitted, however, because the defense opened up the issue of the marital sexual relationship. It was clear from the record, however, that in opening this line of inquiry, the defense was attempting to show that the appellant functioned perfectly normally in a marital context, which obviously was intended to dispel the notion that an adult male whose sexual functioning was normal would sexually abuse children.*

Footnote: 17 *See W.Va.R. of Evid. 803(4).*

Footnote: 18 *See W.Va.R. of Evid. 801(c).*

Footnote: 19 *The case was reversed and remanded to determine whether the hearsay statements of the victim were admissible under the Rules of Evidence, rather than evidentiary rules set out in case law. Mitchell, 539 So.2d at 1369. Further, the court found that even though Mississippi recognizes a lustful disposition exception to Rule 404(b), that exception "specifically limited evidence of other sexual relations to those between the defendant and the particular victim." Id. at 1371-72. Therefore, evidence*

that the defendant had exposed himself to children other than the victim was improperly admitted at trial. Id.

Footnote: 20 Myers, supra note 13 at 896.

Footnote: 21 Id. at 896 n. 471. See also J. Weinstein and M. Berger, Weinstein's Evidence, § 803(24)[01], at 803-377 (1985).

Footnote: 22 Myers, supra note 13 at 896.

Footnote: 23 Although the defense attorney did not specifically object to the opinion given, she did object to the foundation not being properly laid for the opinion asked by the question.

Footnote: 24 We clarify this holding in that McCoy is limited to the facts of that case. Hence, a physician can testify that in his or her opinion, based on physical findings, a particular victim was raped.

Footnote: 25 The expert in Myers testified as to the characteristics generally exhibited by victims of sexual abuse and that he had observed those characteristics in the complainant. He further testified that it is extremely rare for children to fabricate incidents of sexual abuse and opined that the victim was truthful in her allegations. Myers, 359 N.W.2d at 609.

Footnote: 26 The appellant also appears to question the competency of the children to testify at trial. However, we find that the trial court properly examined the truth-telling abilities of the children at trial and determined that they were competent to testify. We conclude therefore that the trial court properly exercised its discretion on this competency issue. See State v. Stacy, 179 W.Va. 686, 371 S.E.2d 614 (1988).

Footnote: 27 We are unable to discern how appellant alleges that this constituted ineffective assistance. Appellant neither explains this assignment nor argues it further, and we therefore deem it to be without merit.

Footnote: 28 It appears the appellant means to complain of such questions being propounded to state witnesses as well as defense witnesses, and we deal with this assignment as such. As to defense witnesses being questioned as to improper sexual acts, it certainly did not constitute ineffective assistance of counsel to elicit denials of such acts by the defendant once he decided to testify in his own defense.

Footnote: 29 We do not need to address the admissibility from an evidentiary perspective of the two specific instances involving other sexual acts since both were brought in by the defendant, in this case to impeach the credibility of previous testimony. See

W.Va.R.Evid. 404(a)(1). If the prosecution attempted to bring in these two instances, the family dog incident would have been admissible as part of the res gestae; however, the incident involving the vasectomy stitches would have been inadmissible.

MILLER, Justice, dissenting:

My disagreement with the majority involves a wide variety of issues. The majority has not only overruled several settled points of law in our jurisdiction, but has done so with only the most meager authority to support its position. The principles it has adopted are clearly outside the mainstream.

I.

On May 28, 1987, the defendant was convicted of two counts of first degree sexual assault and two counts of first degree sexual abuse. The defendant was sentenced to serve consecutive sentences of fifteen-to-twenty- five years for each of the two sexual assault convictions with concurrent sentences of one-to-five years for the sexual abuse convictions.

The events which led to these convictions allegedly occurred in the fall of 1983. During this period of time, the defendant resided with his wife, his four-year-old twins, a boy and a girl, and an infant son. In December of 1983, the defendant and his wife separated, at which time the defendant ceased living with his family. The divorce was finalized in July of 1984.

Approximately two years later, the ex-wife reported to the authorities that her husband had sexually abused the twins during the fall of 1983. The defendant had visitation rights with the twins during this two-year period, and their relationship appeared to be normal. The twins received therapy and, after several sessions, both of them stated that their father had sexually abused them. There was no physical evidence which supported these allegations. Because I believe the majority has misapplied the law to the facts of this case, I respectfully dissent.

II.

First, the majority's "lustful disposition" exception to Rule 404(b) of the West Virginia Rules of Evidence See footnote 1 will permit admission of evidence of a particular character trait of a defendant accused of a sexual offense in order to show that the defendant acted in accordance with the trait. Nothing could be more directly contrary to the explicit admonition of W.Va.R.Evid. 404(a): "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" The majority tacitly acknowledges the

inconsistency of its "exception" and W.Va.R.Evid. 404(a) by its failure to cite or discuss this rule.

In order to establish its "lustful disposition" exception, the majority had to overrule Syllabus Point 8 of State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). See footnote 2 The majority opinion cites four cases from other jurisdictions which it represents as sanctioning a lustful disposition collateral act exception. See footnote 3 Though four of the United States hardly represent most of the American jurisdictions, the prevalence of the majority's new view is even less than it asserts. Two of the jurisdictions, Ohio and Wisconsin, have abandoned their ill-conceived lustful disposition exceptions. See State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975); State v. Fishnick, 127 Wis.2d 247, 378 N.W.2d 272 (1985). The majority's position is against sound logic and the overwhelming weight of authority, which holds that collateral acts are inadmissible to show a lustful disposition. Such evidence serves no purpose other than to prove that the defendant acted in conformity with a character trait and is, therefore, guilty of the crime charged. E.g., Johnson v. State, 727 P.2d 1062 (Alaska App.1986); People v. Tassell, 36 Cal.3d 77, 201 Cal.Rptr. 567, 679 P.2d 1 (1984); Getz v. State, 538 A.2d 726 (Del.1988); Heuring v. State, 513 So.2d 122 (Fla.App.1987), decision quashed on other grounds, 559 So.2d 207 (Fla.1990); Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky.1985); People v. Major, 407 Mich. 394, 285 N.W.2d 660 (1979); State v. Schumann, 111 N.J. 470, 545 A.2d 168 (1988); State v. Curry, supra; Commonwealth v. Shively, 492 Pa. 411, 424 A.2d 1257 (1981); State v. Burchfield, 664 S.W.2d 284 (Tenn.1984); State v. Harris, 36 Wash.App. 746, 677 P.2d 202 (1984). Cf.Lehiy v. State, 501 N.E.2d 451 (Ind.App.1986), adopted and aff'd, 509 N.E.2d 1116 (Ind.1987) (limiting prior acts showing depraved sexual instinct to acts of sodomy and incest).

We recognized in Dolin that there are occasions when prior sexual acts could be admissible under W.Va.R.Evid. 404(b). We cited State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982), where we held that prior forcible acts against the victim or other persons known to the victim could be shown to establish the victim's fear of her attacker. See also State v. Lucas, 178 W.Va. 686, 364 S.E.2d 12 (1987); State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985). Dolin also acknowledged the specific exceptions for admission of character evidence under W.Va.R.Evid. 404(b). Thus, there are several purposes for which evidence of collateral acts involving prior sexual episodes are properly admissible, but none approach the lustful disposition exception adopted by the majority despite its rejection by almost every other jurisdiction.

Another point the majority ignores is the balancing test that has heretofore applied to the admission of
W.Va.R.Evid. 404(b) evidence. In Syllabus Points 15 and 16 of State v. Thomas, 157 W.Va. 640,203 S.E.2d
445 (1974), we outlined how to use the balancing test:

> "15. In the proper exercise of discretion, the trial court may exclude evidence of collateral crimes and charges if the court finds that its probative value is outweighed by the risk that its admission will create substantial danger of undue prejudice or confuse the issues or mislead the jury or unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.
> "16. In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried."

We have consistently followed Thomas and have recognized that the balancing test is now embodied in W.Va.R.Evid. 403. See footnote 4 See, e.g., State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989); State v. Stacy, 179 W.Va. 686, 371 S.E.2d 614 (1988); State v. Johnson, 179 W.Va. 619, 371 S.E.2d 340 (1988); State v. Dolin, supra; State v. Nicholson, 162 W.Va. 750, 252 S.E.2d 894 (1979), overruled on other grounds, State v. Petry, 166 W.Va. 153, 273 S.E.2d 346 (1980). Other jurisdictions uniformly agree that before evidence of collateral acts is admissible, its probative value must be weighed against its prejudicial effect to the defendant. See, e.g., United States v. Johnson, 893 F.2d 451 (1st Cir.1990); United States v. Scarfo, 850 F.2d 1015 (3rd Cir.), cert. denied, 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988); United States v. Conners, 825 F.2d 1384 (9th Cir.1987); United States v. Cuch, 842 F.2d 1173 (10th Cir.1988); Getz v. State, supra; State v. Just, 184 Mont. 262, 602 P.2d 957 (1979); State v. Micko, 393 N.W.2d 741 (N.D.1986).

Moreover, as we held in Syllabus Point 3 of Dolin, the trial court should conduct an in camera hearing to determine whether the prejudicial effect of the collateral act evidence outweighs its probative value. See footnote 5 Furthermore, in Syllabus Point 9 of that opinion, we explained that it is customary to give a limiting instruction to the jury that the collateral evidence is not offered to prove guilt of the present crime, but is to be considered exclusively in determining the particular issue on which it is properly offered, e.g., identity, intent, motive, etc. See footnote 6 The rule that evidence of collateral crimes is not admissible to prove guilt of the crime charged, but rather only to bear on subordinate issues such as system, motive, or intent, is black letter law and is explicitly stated in W.Va.R.Evid. 404(b). See United States v. Steele, 727 F.2d 580 (6th Cir.), cert. denied, Scarborough v. United States, 467 U.S. 1209, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984); United States v. Bartley, 855 F.2d 547 (8th Cir.1988); State v. Ramirez Enriquez, 153 Ariz. 431, 737 P.2d 407 (App.1987); State v. Walls, 541 A.2d 591 (Del.1987), cert. denied, 493 U.S. 967, 110 S.Ct. 412, 107 L.Ed.2d 377 (1989); State v. Guinn, 114 Idaho 30, 752 P.2d 632 (App.1988); Commonwealth v. Madyun, 17

Mass.App. 965, 458 N.E.2d 745 (1983); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Several courts have suggested that admission of evidence of prior collateral acts of the defendant is best deferred until after the defendant's case, in order to see whether intent, motive, or identity are actually disputed. See, e.g., United States v. Benedetto, 571 F.2d 1246 (2d Cir.1978). In this case, none of these safeguards were followed, mainly because defendant's trial counsel neglected to raise an objection to this inflammatory and prejudicial evidence. I will address this failure in Part VI(C).

III.

Also rather astounding to me is the majority's footnote 24 "limiting" (but for all intents overruling) State v. McCoy, 179 W.Va. 223, 366 S.E.2d 731 (1988). See footnote 7 In that unanimous two-year-old opinion, we held in Syllabus Point 2 that a qualified expert could opine that the victim of a sexual assault suffered from rape trauma syndrome, "but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped." See footnote 8

In isolation, it is possible to read the majority's footnote 24 to apply only to a situation where the physician, after making a physical examination of the victim, states that there are physical findings that are consistent with a person having been raped or sexually assaulted. Such a conclusion is entirely permissible. However, this rule would not require the limitation on McCoy.

The confusion springs from Syllabus Point 7 of the majority opinion which states, rather perplexingly, that "an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused." See footnote 9 (Emphasis added). I cannot reconcile the majority's statement in footnote 24 that "physical findings" might enable a physician to conclude that sexual abuse had occurred with its shift to the broader phrase "objective findings" in Syllabus Point 7.

In this case, the psychologist, Mr. Trainor, did not see the children until two years after the alleged abuse incidents. He made no physical examination of the children and did not state that there were physical findings consistent with sexual abuse. Instead, Mr. Trainor's testimony about his observation of the children and their behavioral characteristics was quite similar to that condemned in McCoy. He gave his permissible opinion that the children suffered from child abuse syndrome. However, the State went beyond this point and asked Mr. Trainor directly if, in his opinion, the children had been sexually abused; he responded in the affirmative.

In McCoy, the conviction was reversed because the expert indicated that the victim had been raped. Not only does this type of unfounded opinion bolster the credibility of the victim's testimony, a point that we emphasized in McCoy, but where, as here, the identity of the perpetrator is undisputed, it purports to directly prove the ultimate issue of guilt. Furthermore, because of the expert's credentials, his opinion carries with it a stamp of scientific legitimacy which obviously will weigh heavily upon the jury.

The majority offers scant authority for its new position. It relies chiefly on State v. Myers, 359 N.W.2d 604 (Minn.1984), in which the expert was not asked the ultimate question of whether in his opinion the child had been sexually abused. The expert testified only that the child exhibited characteristics consistent with sexual abuse. See footnote 10 Moreover, in footnote 25, 183 W.Va. at 658, 398 S.E.2d at 140, the majority incorrectly suggests that the Minnesota court sanctioned the prosecutor's elicitation of the expert's opinion as to the truthfulness of the victim. This line of questioning was only sanctioned because the defense challenged the victim's credibility during cross-examination. See footnote 11

Myers only permitted expert testimony to explain the often erratic and ambivalent conduct of sexually abused children. Significantly, the Myers opinion cites with approval the earlier case of State v. Saldana, 324 N.W.2d 227 (Minn.1982), where the Minnesota Supreme Court ruled that expert testimony regarding rape trauma syndrome was inadmissible because such "testimony furnishes no assistance to jurors, who are as capable as the expert in assessing the credibility of the alleged adult rape victim." 359 N.W.2d at 610. The Minnesota Supreme Court in Myers simply did not adopt the rule, espoused by the majority, that a psychological expert can opine that a child victim has been physically abused.

The majority also cites State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982); however, this case dealt solely with expert testimony regarding the credibility of the child abuse victim. As in Myers, the Kim court permitted this testimony only after the defendant had attacked the victim's credibility. The same credibility issue was involved in State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983), and State v. Geyman, 224 Mont. 194, 729 P.2d 475 (1986), also cited by the majority. The same cases relied on by the majority were used by the Ohio Court of Appeals in State v. Timperio, 38 Ohio App.3d 156, 528 N.E.2d 594 (1987), which talked about the credibility issue, but failed to discuss the implications of the expert's opinion that the child had been sexually abused.

Certainly, the majority's reliance on Kim is misplaced. Indeed, the majority does not attempt any analysis of the credibility issue under the appropriate beginning point, W.Va.R.Evid. 608(a), which limits attacks on credibility "to evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness[.]" See footnote 12 Indeed, the Utah

Supreme Court in State v. Rimmasch, 775 P.2d 388, 392 (Utah 1989), was sharply critical of Kim's failure to properly analyze Rule 608(a):

> "[Rule 608(a)] represents an important policy choice: it prevents trials from being turned into contests between what would amount to modern oath- helpers who would largely usurp the fact-finding function of judge or jury. State v. Moran, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986). The overwhelming majority of courts have expressly or impliedly rejected Kim. We join these courts and hold that rule 608(a)(1) bars admission of an expert's testimony as to the truthfulness of a witness on a particular occasion." (Footnote omitted). See footnote 13

It is impossible from the majority's opinion to state with any degree of accuracy what its view is on this issue. I take some comfort from the last sentence of Syllabus Point 7 that the majority does not sanction an expert expressing an opinion as to the child's credibility: "Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as this would improperly and prejudicially invade the province of the jury." See footnote 14 Certainly, as illustrated by the Utah Supreme Court's careful analysis in Rimmasch, the expert should not be able to give an opinion as to the truthfulness of the victim.

Finally, while some courts have permitted a qualified expert to testify that a child victim of sexual abuse displays symptoms of the typical child abuse profile, there is almost universal agreement that the expert is not entitled either to express an opinion as to the truthfulness of the victim or to state, in the absence of physical findings, that the child has been sexually abused. See footnote 15 The majority's position is, simply put, wrong.

IV.

Yet another point overlooked by the majority is the threshold question of whether the expert's testimony with regard to the child abuse syndrome had the necessary degree of scientific reliability to render it admissible. This issue was unfortunately not raised by defense counsel at trial and is part of the ineffective assistance of counsel claim that I discuss in Part VI, infra.

The majority instead cites W.Va.R.Evid. 702, which generally permits expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" See footnote 16 We have never interpreted W.Va.R.Evid. 702 as an open door to admit any supposed scientific testimony without some inquiry into its reliability. Before the adoption of W.Va.R.Evid. 702, we formulated two general rules on the admissibility of scientific tests in Syllabus Points 7 and 8 of State v. Clawson, 165 W.Va. 588, 270 S.E.2d 659 (1980):

> "7. In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test.
> "8. There are certain scientific tests that have been widely used over a long period of time, such that their general acceptance in the scientific community can be judicially noticed."

Since the adoption of W.Va.R.Evid. 702, we have acknowledged that its adoption may have liberalized the admissibility of scientific tests. See State v. Armstrong, 179 W.Va. 435, 369 S.E.2d 870 (1988); State v. McCoy, 179 W.Va. 223, 366 S.E.2d 731 (1988). Our most recent case, State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253 (1989), sets forth the approach used under W.Va.R.Evid. 702 in Syllabus Points 1 and 2:

> "1. Under W.Va.R.Evid., Rule 702, expert testimony concerning generally recognized tests is presumptively admissible and the burden of excluding such testimony is upon the side seeking exclusion. However, when a test is novel or not generally accepted, that circumstance alone meets the threshold requirement of rebutting any presumption of admissibility under Rule 702 and, therefore, with regard to tests that are not generally accepted the burden of proof that the test is reliable remains on the proponent.
> "2. When senior appellate courts have concluded that a test is generally accepted by the scientific community, a trial court may take judicial notice of a test's reliability."

In the present case, the State made no attempt to demonstrate the reliability of the so-called "child sexual abuse profile."

The Utah Supreme Court addressed this precise issue in State v. Rimmasch, 775 P.2d at 400 observing that there was an absence of any "unanimity in the legal community as to the inherent reliability of a child sexual abuse profile to show that abuse has actually occurred with respect to a specific alleged victim." See footnote 17 The court in Rimmasch surveyed scientific literature in this area and came to these conclusions in reversing the conviction:

> "Not only is there a lack of any consensus about the ability of the profile to determine abuse, but the scientific literature raises serious doubts as to the reliability of profile testimony when used for forensic purposes to demonstrate that abuse actually occurred. Scholars acknowledge that no uniformly identifiable psychological profile applies to sexually abused children as a class....
> "Suffice it to say, then, that the literature in the area is disparate and contradictory and that child abuse experts have been unable to agree on a

> universal symptomology of sexual abuse, especially a precise symptomology that is sufficiently reliable to be used confidentially in a forensic setting as a determinant of abuse. See Cerkovnik, The Sexual Abuse of Children: Myths, Research, and Policy Implications, 89 Dick.L.Rev. 691, 705-08 (1985) (compilation of studies on victims of sexual abuse); [Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo.L.J. 429] at 439-48 [(1985)]" 775 P.2d at 401. (Footnote omitted). See footnote 18

In this case, the State made no attempt to establish the reliability of the expert testimony under the Clawson-Woodall standard for admissibility. See footnote 19

V.

The majority has also mishandled the mother's hearsay testimony recounting what her son told her. In addressing the mother's recitation of her son's out-of-court statement, the majority says it "must look at the requirements ... under W.Va.R.Evid. 803(24)" and then quotes the general language of Syllabus Point 5 of State v. Smith, 178 W.Va. 104, 358 S.E.2d 188 (1987). See footnote 20 From its citation, I think that at least the majority agrees that the mother's recitation of her son's out-of-court statements was hearsay.

The age-old rule is that a witness's in-court testimony about an out-of-court statement, if offered to prove the truth of the matter asserted, is hearsay, and is not made admissible merely because the declarant testifies and is available for cross-examination. The Second Circuit Court of Appeals in United States v. Pedroza, 750 F.2d 187, 200 (2d Cir.1984), cert. denied, Pelaes v. United States, 479 U.S. 842, 107 S.Ct. 151, 93 L.Ed.2d 92 (1986), quoting from its earlier decision in United States v. Check, 582 F.2d 668, 675 (2d Cir.1978), agreed with this analysis:

> " '[T]he federal courts do not recognize any exception to the hearsay rule, or, except in the limited circumstances set forth in Fed.R.Evid. 801(d), any exclusion from the definition of hearsay, which would permit testimony in court relating to the prior out-of-court statements of a witness merely because the witness is available at trial for cross-examination and subject to cross- examination concerning those statements.' " See footnote 21

See also People v. Davis, 130 Ill.App.3d 41, 85 Ill.Dec. 19, 473 N.E.2d 387 (1984); Daly v. State, 99 Nev. 564, 665 P.2d 798 (1983); State v. Velasquez, 672 P.2d 1254 (Utah 1983).

Furthermore, I believe that any attempt to utilize the hearsay residual exception in W.Va.R.Evid. 803(24) to shoehorn the mother's testimony into admissibility is unavailing. In Smith, where we discussed this exception and its counterpart, Rule

804(b)(5), we warned "that Rule 803(24) and 804(b)(5) cannot be viewed as an open door to thrust hearsay statements into a trial." 178 W.Va. at 114, 358 S.E.2d at 198. Our rule is identical to the corresponding federal rule of evidence. The notes of the Senate Committee on the Judiciary as to the intended scope of this residuary exception are telling:

> "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rule 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action." Committee on the Judiciary, S.Rep. No. 93-1277, Note to Paragraph (24), 28 U.S.C.A. F.R.Evid. 583 (1975).

E.g., United States v. Kim, 595 F.2d 755 (D.C.Cir.1979); United States v. Bailey, 581 F.2d 341 (3rd Cir.1978).

In this case the out-of-court declarant, the son, was available and did testify. Consequently, there was absolutely no necessity to have the mother testify as to the child's out-of-court statements. It is true that from a purely technical standpoint, W.Va.R.Evid. 803(24) does not require that the out-of-court declarant be unavailable, as does its counterpart in W.Va.R.Evid. 804(b)(5). Nevertheless, several courts that have had occasion to consider this particular point have held that there is an implied requirement of unavailability.

This implication arises from language in W.Va.R.Evid. 803(24) that the proponent of out-of-court statements must demonstrate that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Thus, in United States v. Mathis, 559 F.2d 294, 299 (5th Cir.1977), the court found that the trial judge erred in admitting an extrajudicial statement of an available witness under Rule 803(24):

> "Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of Rule 803 because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity. Here there was no necessity to use the statements when the witness was within the courthouse."

See also Steele v. Taylor, 684 F.2d 1193 (6th Cir.1982), cert. denied, 460 U.S. 1053, 103 S.Ct. 1501, 1502, 75 L.Ed.2d 932 (1983); Cummins v. State, 515 So.2d 869 (Miss.1987); Daly v. State, supra; State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Velasquez, supra.

The cases cited by the majority for the proposition that courts use the exception to W.Va.R.Evid. 803(24) to permit third parties to testify to child abuse victims' out-of-court statements are not persuasive. In United States v. Dorian, 803 F.2d 1439 (8th Cir.1986), State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987), and State v. Brown, 341 N.W.2d 10 (Iowa 1983), the child victims were found incompetent to testify and, therefore, "unavailable." W.Va.R.Evid. 804(b)(5) would have come into play in these circumstances. We must also remember that our rules of evidence are written for all cases and must be more narrowly construed in the criminal than in the civil arena. This is because in a criminal case where the victim does not testify, a Sixth Amendment Confrontation Clause consideration would arise. None of the majority's cases held that a Confrontation Clause violation had occurred, but none had the benefit of the United States Supreme Court's recent decision in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which decided that in this type of situation the Confrontation Clause was violated.

United States v. Renville, 779 F.2d 430 (8th Cir.1985) typifies the confusion that can be encountered in addressing this issue. Renville involved testimony of a deputy sheriff who offered the out-of-court statement of the child victim identifying the defendant as the abuser. The victim also testified to this fact at trial. The defendant denied any responsibility for the act. The court, instead of finding that the out-of-court statement was one of identification and thus admissible under W.Va.R.Evid. 801(d)(1)(C), [FN22] proceeded to discuss only the trustworthiness of the statement under W.Va.R.Evid. 803(24).

Besides confusion, the majority's opinion demonstrates that the majority fails to understand the extremely limited purpose of the residual hearsay exception. Where the out-of-court declarant is unavailable to testify, but his statement provides a key piece of evidence, it is absolutely crucial to determine whether the strictures of W.Va.R.Evid. 804(b)(5) can be met. Even then, it is gravely doubtful that the Sixth Amendment confrontation question can also be satisfactorily resolved. See Idaho v. Wright, supra.

I cannot conceive that W.Va.R.Evid. 803(24) was designed to provide a means of corroborating the in-court testimony of a witness by permitting third parties to come forward at trial and testify that the witness had told them a similar story in a prior out-of-court conversation. Had that been the intent of the rule, it certainly could have been better expressed.

I daresay that if a defendant sought to use this tactic, it would be rejected. This point is aptly illustrated in two Mississippi Supreme Court cases announced within one month of each other. In Clanton v. State, 539 So.2d 1024 (Miss.1989), the court rejected the defendant's efforts to introduce two out-of-court statements he made to police officers wherein he said that the victim had consented to have sex with him. The court rejected the statements because they were hearsay and were consistent with the defendant's trial testimony. See footnote 23 The defendant's reliance on Rule 803(24) was dismissed almost out of hand. "Clanton overlooks 803(24)(B) which requires that 'the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts.' " 539 So.2d at 1028.

On the other hand, in Mitchell v. State, 539 So.2d 1366 (Miss.1989), the issue was whether two witnesses to whom the child victim had related her story of abuse could testify as to these statements. The child victim testified at trial. The court concluded that these statements had been admitted under a wrong theory, but suggested that upon a proper analysis they might be admitted under Mississippi's counterpart to Rule 803(24). See footnote 24 I find this disparate treatment irrational and disturbing.

Finally, I believe that even if we assume that W.Va.R.Evid. 803(24) is applicable, the evidence in this case does not meet the strictures of the rule. The majority overlooks the Supreme Court's opinion in Idaho v. Wright, supra, which dealt with Idaho's counterpart to Rule 803(24). The issue before the Supreme Court involved the Confrontation Clause because the child victim did not testify. See footnote 25 Her statements about the alleged sexual abuse were related at trial by a pediatrician. The Supreme Court's analysis bore a striking parallel to the requirements of W.Va.R.Evid. 803(24):

> "The crux of the question presented is therefore whether the State, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, has carried its burden of proving that the younger daughter's incriminating statements to Dr. Jambura bore sufficient indicia of reliability to withstand scrutiny under the Clause." 497 U.S. at ---, 110 S.Ct. at 3147, 111 L.Ed.2d at 652-53.

The United States Supreme Court began its analysis by recognizing that Rule 803(24) is not "a firmly rooted hearsay exception ... [that] satisfies the constitutional requirement of reliability because of the weight accorded long- standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." 497 U.S. at ---, 110 S.Ct. at 3147, 111 L.Ed.2d at 653. (Citations omitted). The Supreme Court went on to determine that the State must show "particularized guarantees of trustworthiness." 497 U.S. at ---, 110 S.Ct. at 3147, 111 L.Ed.2d at 655. " 'The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and

do not include those that may be added by using hindsight.' " 497 U.S. at ---, 110 S.Ct. at 3149, 111 L.Ed.2d at 655, quoting Huff v. White Motor Corp., 609 F.2d 286, 292 (7th Cir.1979).

Following this point, the Supreme Court in Wright took pains to point out that the "evidence ... must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." 497 U.S. at ---, 110 S.Ct. at 3150, 111 L.Ed.2d at 657. (Citations omitted). The majority's rejection in Idaho v. Wright of consideration of corroborating evidence to enhance the reliability of the out-of-court statement sparked the dissent. The majority made this unequivocal statement:

> "In short, the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial...." 497 U.S. at ---, 110 S.Ct. at 3150, 111 L.Ed.2d at 657.

Because the hearsay exception embodied in W.Va.R.Evid. 803(24) has no historical guarantee of trustworthiness, it is presumptively unreliable. In order to overcome this presumption, before a statement will be admitted under W.Va.R.Evid. 803(24), it must meet the strict test of Wright.

Another problem with the mother's recitation of the son's story is that no one attempted to elicit any coherent statement of what the child said to her. According to the mother's trial testimony, in October, 1984, she noticed her son, who was then five years of age, "constantly bouncing on the floor, at times I'd catch him ridin' the chair arms, and, I just knew it wasn't natural."

She spoke about the behavior to a neighbor, who agreed to baby-sit her two other children. While giving her son a bath, the mother then asked why he was bouncing up and down, and he told her that "daddy told me to do it, it feels good." She then inquired if daddy had said or done anything else. The mother testified that the child stated he could not tell her. She asked if he could tell the neighbor, "Aunt Kika." According to the mother, the child's response was, "well, daddy didn't say I couldn't tell nobody except you, mommy [.]" The mother then asked "Aunt Kika" to come into the room, and, according to the mother, the child then disclosed the sexual abuse incident. See footnote 26

If the analysis begins as suggested in Wright, that "the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of- court statements[,]" 497 U.S. at ---, 110 S.Ct. at 3152, 111 L.Ed.2d at 659, then there is little to lend any reliability to the declarant's statement. The statement was not made soon after the event. It was not

spontaneous or even made in a volunteered sense, because it came about as a result of interrogation by the mother. The Supreme Court in Wright placed special emphasis on this latter point by stating that "we note that it is possible that '[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.' " 497 U.S. at ---, 110 S.Ct. at 3152, 111 L.Ed. at 659-60, quoting State v. Robinson, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987).

I am convinced that there is no evidence to compel the conclusion that the child's statement to the mother had the "particularized guarantee of trustworthiness" necessary to admit it under Rule 803(24) as circumscribed by the Confrontation Clause. See footnote 27 This guarantee of trustworthiness is set out as the primary factor in Syllabus Point 5 of State v. Smith, supra, which outlines the requirement for admissibility under Rule 803(24): "First and most important is the trustworthiness of the statement which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule."

VI.

In its rush to throw a blanket of approval over the hearsay testimony of the psychologist, Mr. Trainor, the majority misunderstands the purpose of W.Va.R.Evid. 803(4), involving statements made to a physician for purposes of medical diagnosis or treatment. The two-part test set out in Syllabus Point 5 of the majority opinion misconceives the requirements of the rule. See footnote 28 The initial language of W.Va.R.Evid. 803(4) is "[s]tatements made for the purpose of medical diagnosis or treatment[.]" See footnote 29

As this language indicates by the disjunctive "or," there are two alternate grounds for permitting testimony by a physician of statements made to him by patients. A patient's statement to a treating physician as to present and past mental and physical conditions, including causative factors, have always been admitted, because the patient has a selfish interest to speak truthfully in order to receive appropriate treatment. This "self interest" guarantees the trustworthiness of the out-of-court statements. See generally E. Cleary, McCormick on Evidence § 292 (3d ed. 1984); Annot., 37 A.L.R.3d 778 (1971 & Supp.1990). We recognized this exception in Syllabus Point 8 of Sutherland v. Kroger Co., 144 W.Va. 673, 110 S.E.2d 716 (1959). See footnote 30

Prior to the adoption of W.Va.R.Evid. 803(4), courts consistently held that statements made by the patient to a nontreating physician who examined the patient for purposes of trial testimony were not admissible. See generally E. Cleary, supra at § 293. We adhered to this view in Syllabus Point 9 of Sutherland. See footnote 31

The adoption of Fed.R.Evid. 803(4) and its accompanying committee note explanation has resulted in a broadening of this hearsay exception to include statements made to a physician consulted for the purpose of diagnosis when no treatment is anticipated by the declarant. See footnote 32 See generally,, R. Mosteller, Child Sexual Abuse and

Statements For the Purpose of Medical Diagnosis or Treatment, 67 N.C.L.Rev. 257 (1986). I think the majority has failed to grasp the separate, alternative grounds available under W.Va.R.Evid. 803(4). This failure stems from its reliance on Morgan v. Foretich, 846 F.2d 941 (4th Cir.1988). Morgan followed the two-part test set out in United States v. Renville, 779 F.2d 430 (8th Cir.1985), which joins the alternative grounds for admissibility to make a combined two-part test, See footnote 33 in which the physician may occupy both roles, i.e., as a treating physician and as one who also gives a diagnosis.

Aside from the majority's incorrect legal analysis, I doubt from my reading of Mr. Trainor's rambling account of his contact with the children that he was a treating physician. The State did not attempt to establish a foundation that he was a treating physician by showing what treatment he actually rendered. Likewise, the State did not attempt to isolate what statements the children actually made to him.

Mr. Trainor's testimony suggests that on his first contact with the case, the sexual abuse story was told to him by the mother. He then began to work with the children, particularly the son who was not able to talk about the abuse. See footnote 34 Certainly, the mother's statements given to Mr. Trainor about what her son had told her do not qualify as a patient's statement under W.Va.R.Evid. 803(4). I cannot help but conclude that Mr. Trainor began his "treatment" with his "diagnosis" a foregone conclusion.

Other courts have expressed concern that where very young children are involved whose testimonial competence is questionable, and no physical findings of abuse are involved, the physician's testimony as to statements supposedly made by the children may not be admissible. At their young age, children can lack the maturity to appreciate the link between their statements and the treatment. Cassidy v. State, 74 Md.App. 1, 536 A.2d 666, cert. denied, 312 Md. 602, 541 A.2d 965 (1988). Colorado courts have required the State to demonstrate in camera that very young children understand the obligation to provide the doctor with accurate information in order for the statements to be admissible under its counterpart to W.Va.R.Evid. 803(4). See Olden v. People, 732 P.2d 1132 (Colo.1986); W.C.L. v. People, 685 P.2d 176 (Colo.1984).

Mr. Trainor was never specifically directed to define his role or to separate what the children actually told him from what their mother said that she had been told. Further confusion arose when he discussed general characteristics of the child abuse syndrome without explaining whether they were present in the case at hand. I discussed the foundation deficiency of his opinion in Part III, supra. Defense counsel made no pertinent objections on any of these points.

VII.

A.

The majority brushes aside the defendant's claim of ineffective assistance of counsel. However, the record is replete with incidents where counsel not only failed to object to evidentiary matters, but also to substantive issues that might well have produced a different result at trial or on this appeal. In addition, counsel questioned witnesses in such a faulty manner as to award the prosecution an erroneous and unwarranted advantage. I find it impossible to conclude that counsel's error can be washed away under the rubric of strategy and tactics.

First, the record discloses that the two child victims were permitted to testify by way of a closed-circuit television. The child witness was placed in the judge's office with a television camera. The defendant, attorneys, judge, and jury were in the courtroom where they could view the television screen and hear the questions and the child's answers. They could not be seen by the child witness. For some unexplained reason, in the judge's office with the witness was a state trooper who, according to the record, had participated in the investigation. This entire arrangement was by agreement between the prosecutor and defense counsel.

The Sixth Amendment guarantees that "[i]n all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. As the United States Supreme Court explained in California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489, 496 (1970): "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."

In Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the Supreme Court found the Sixth Amendment right of confrontation was violated when the trial court permitted the sexually abused child witness to be screened from the defendant while testifying, even though the witness could be observed by the jury. We followed Coy's dictates in Syllabus Point 5 of State v. Murray, 180 W.Va. 41, 375 S.E.2d 405 (1988):

> "Under Coy v. Iowa, 487 U.S. [1012], 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), and State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975), the right to confrontation assured by the Sixth Amendment and W.Va. Const. art. III, § 14 is violated where a witness testifies at trial and the defendant is denied the opportunity to confront the witness face-to-face."

We acknowledged in Murray the Supreme Court's caveat in Coy that "[w]e leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."

State v. Murray, 180 W.Va. at 48 n. 3, 375 S.E.2d at 412 n. 3, quoting 487 U.S. at 1021, 108 S.Ct. at 2803, 101 L.Ed.2d at 867.

This issue is weighty and difficult. In any event, by failing to raise a Sixth Amendment right of confrontation objection, counsel made a grievous mistake. I recognize that, after this case was tried, the United States Supreme Court held in a 5-4 opinion that in certain instances live television testimony is permissible at trial by a child who is a victim of sexual abuse. Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). However, Craig does not grant a blanket approval of this technique. In order to invoke the procedure, the Supreme Court decided that it must be shown that an important state interest could be furthered: "We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." 497 U.S. at ----, 110 S.Ct. at 3167, 111 L.Ed.2d at 683. The Supreme Court went on in Craig to spell out in some detail how a requisite finding should be made:

> "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.... The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.... Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus, i.e., more than 'mere nervousness or excitement or some reluctance to testify,'Wildermuth [v. State], 310 Md. [496], 524, 530 A.2d [275] at 289 [(1987)]; see also State v. Mannion, 19 Utah 505, 511-512, 57 P. 542, 543-544 (1899)." 497 U.S. at ----, 110 S.Ct. at 3169, 111 L.Ed.2d at 685. (Citations omitted).

Furthermore, the Supreme Court took pains to emphasize that the procedures used must ensure

> "the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserv[ing] the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause." 497 U.S. at ----, 110 S.Ct. at 3170, 111 L.Ed.2d at 686.

In the present case, no objection was made to the testimony by closed-circuit television, and there is no record of whether the initial requisite finding could be met. In Craig, there was expert testimony regarding the particular trauma that the child witnesses would have experienced if forced to confront the defendant face to face.

A further critical point is embedded in this case which was not present in Craig. Here, the child witness was in the room with an adult who was one of the State's investigating officers. I do not believe that any court would sanction this type of procedure. With the officer not on camera, the potential for him to influence the child witness by head nodding or other signals without detection by the court or jury is available. In short, I do not believe that the procedure used in this case comports with Craig, and I believe that a violation of the Sixth Amendment right of confrontation has occurred.

B.

I have previously addressed the admissibility of the expert's testimony in Part IV, supra. Counsel made no objection to the reliability of the expert's so-called tests that led to his child abuse profile. As a consequence, the State was never required to prove this threshold issue. Moreover, no objection was made to Mr. Trainor's conclusion that the children had been the victims of sexual abuse even though there were no physical findings of abuse. These omissions clearly demonstrate the inadequacy of trial counsel's representation.

C.

As I discussed in Part II, defense counsel made no attempt to preclude the prosecution from offering evidence of collateral crimes under W.Va.R.Evid. 404(b). Counsel did not request an in camera hearing to determine if the prejudicial effect of this testimony outweighed the probative value under W.Va.R.Evid. 403 and as required by State v. Dolin, supra. Finally, counsel did not request a cautionary or limiting instruction to the jury that such collateral crimes could not be considered as evidence of guilt. Counsel was totally ineffective in this regard, and there can be no doubt that the defendant was severely prejudiced.

D.

Defense counsel's ill-conceived questioning of witnesses, coupled with the failure to object to the prosecutor's questions, led to devastating results for the defendant.

First, the defendant's ex-wife testified that the defendant had made telephone calls to sex clubs. She was not present when the telephone calls were made and did not hear the conversations. Defense counsel made no objection.

The ex-wife also testified that the defendant had masturbated in front of his son. She did not witness these events, but testified that she had been informed of them by her son

approximately two years afterwards. Again, counsel did not object, although it was clear from the very beginning of the ex-wife's testimony that she was going to relate not what she observed, but what was related to her by her son.

Defense counsel's cross-examination of the defendant's ex-wife, who was the State's key witness, and who was hostile towards the defendant, led to some disastrous consequences. Despite defense counsel's failure to object to the direct testimony about the defendant's calls to sex clubs, there was no linkage of these calls to the children until defense counsel asked this question and received the following answer:

> "Q So, that there doesn't appear to be any connection between these phone calls and any abuse of the children, isn't that correct?
> "A That's not true, because my children said that their father made them listen to these phone calls."

In a bizarre attempt to impeach the ex-wife's credibility, defense counsel unaccountably brought into evidence another collateral act of the defendant which involved sex with a dog. Not only was this statement hearsay, but the ex-wife managed to expand on the statement to include the defendant's threat to the son. See footnote 35

Further unenlightened cross-examination of the ex-wife by defense counsel brought to the jury's attention that the defendant had pulled out his vasectomy stitches because he had been "playing with himself." See footnote 36 Even with defense counsel's absence of objections, the State had not tried to introduce these acts on direct examination of the defendant's ex-wife.

Finally, when defense counsel asked the ex-wife whether she and the defendant had a normal sex life, she responded: "I thought it was normal up until the end, towards the end." On redirect, the prosecutor made several more pulverizing points based on defense counsel's "opening the door" about the defendant's normal sex life. The prosecutor was able to have the ex-wife describe the defendant's inability to have an orgasm without masturbating. The ex-wife also described the defendant's practice of leaning against the washing machine and masturbating when it was in the spin cycle.

I cannot help but believe that all of this bizarre sexual information would cast the defendant as a monstrous sexual pervert who, in the eyes of the jury, was easily capable of accomplishing the sexual abuse of his children. For defense counsel to bring this information to the attention of the jury by direct and explicit questions defies any logic. In the words of Syllabus Point 21 of State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974), "no reasonably qualified defense attorney would have so acted in the defense of an accused." See footnote 37

I am at a loss to account for the majority's glossing over of the ineffective assistance of counsel claim.

Conclusion

I conclude on a rather elegiac note. Perhaps I have read more into the majority's opinion than was meant; perhaps it did not intend to stand the law in this area on its head. I trust that our circuit judges and counsel will approach this area with a cautionary balanced view of the law as it exists elsewhere, as I hope it will exist here, and as I have attempted to outline.

I am authorized to state that Chief Justice NEELY joins me in this dissent.

Footnote: 1 *W.Va.R.Evid. 404(b) provides:*
"Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Footnote: 2 *Syllabus Point 8 of Dolin states:*
"To the extent that State v. Beacraft, 126 W.Va. 895, 30 S.E.2d 541 (1944), State v. Lohm, 97 W.Va. 652, 125 S.E. 758 (1924), and State v. Driver, 88 W.Va. 479, 107 S.E. 189 (1921), allow collateral sexual offenses to be admitted into evidence to show an improper or lustful disposition toward the victim, they are overruled."

Footnote: 3 *In note 15, 183 W.Va. at 651, 398 S.E.2d at 133, the majority states:*
"Jurisdictions have termed such uses in different manners but still have permitted this evidence to show an accused's 'emotional propensity for sexual aberration,' 'lewd disposition,' 'propensity to act out his sexual desires with young girls,' or 'moral disposition and perversity.' See State v. Phillips, 102 Ariz. 377, 379, 430 P.2d 139, 141 (1967); State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); State v. Tarrell, 74 Wis.2d 647, 648, 247 N.W.2d 696, 703 (1976); State v. Shively, 172 Ohio St. 128, 131, 174 N.E.2d 104, 107 (1961)."

Footnote: 4 *W. Va. R. Evid. 403 States:*
“Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Footnote: 5 *Syllabus Point 3 of Dolin states:*

"Before a trial court can determine that evidence of collateral crimes is admissible under one of the exceptions, an in camera hearing is necessary to allow a trial court to carefully consider the admissibility of collateral crime evidence and to properly balance the probative value of such evidence against its prejudicial effect."

Footnote: 6 Syllabus Point 9 of Dolin provides:
"It is customary to give the jury a limiting instruction with regard to its consideration of a collateral crime. This instruction generally provides that the evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. When a defendant requests this limiting instruction, it must be given."

Footnote: 7 Footnote 24 of the majority's opinion, 183 W.Va. at 658, 398 S.E.2d at 140, states: "We clarify this holding in that McCoy is limited to the facts of that case. Hence, a physician can testify that in his or her opinion, based on physical findings, a particular victim was raped."

Footnote: 8 The full text of Syllabus Point 2 of McCoy states:
"Qualified expert testimony regarding rape trauma syndrome is relevant and admissible in a prosecution for rape where the defense is consent. The expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped."

Footnote: 9 The complete text of Syllabus Point 7 is:
"Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury."

Footnote: 10 Syllabus Point 4 of Myers demonstrates this point:
"It is within the trial court's discretion to admit qualified expert testimony describing the psychological and emotional characteristics typically observed in sexually abused children and those observed in the complainant and giving other background data providing a relevant insight into the conduct and demeanor of the child complainant which the jury could not otherwise bring to its evaluation of her credibility."

Footnote: 11 *In Syllabus Point 5 of Myers the Minnesota court stated: "Defendant opened the door to opinion testimony regarding the truthfulness of complainant's allegations by eliciting the opinion of complainant's mother about the truthfulness of her daughter's allegations."*

Footnote: 12 *The full text of W.Va.R.Evid. 608(a) is:*
"Evidence of Character and Conduct of Witness. (a) Opinion and Reputation Evidence of Character.--The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Footnote: 13 *In note 2 of Rimmasch, 775 P.2d at 392, the Utah Supreme Court listed jurisdictions which have rejected Kim's credibility rule:*
"E.g., United States v. Azure, 801 F.2d 336, 341 (8th Cir.1986); United States v. Binder, 769 F.2d 595, 602 (9th Cir.1985); State v. Moran, 151 Ariz. 378, 382-86, 728 P.2d 248, 252-56 (1986); Johnson v. State, 292 Ark. 632, 639-40, 732 S.W.2d 817, 819-21 (1987); People v. Roscoe, 168 Cal.App.3d 1093, 1098-99, 215 Cal.Rptr. 45, 49-50 (1985); Tevlin v. People, 715 P.2d 338, 341 (Colo.1986); Wheat v. State, 527 A.2d 269, 275 (Del.1987); Kruse v. State, 483 So.2d 1383, 1387-88 (Fla.Dist.Ct.App.1986); Simmons v. State, 504 N.E.2d 575, 579 (Ind.1987); State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986); Commonwealth v. Carter, 9 Mass.App. 680, 681-82, 403 N.E.2d 1191, 1193 (1980), aff'd, 383 Mass. 873, 417 N.E.2d 438 (1981); People v. Walker, 150 Mich.App. 597, 389 N.W.2d 704, 707 (1985); State v. Jackson, 239 Kan. 463, 470, 721 P.2d 232, 238 (1986); State v. Myers, 359 N.W.2d 604, 611 (Minn.1984); State v. Taylor, 663 S.W.2d 235, 239 (Mo.1984); In re J.W.K., [223 Mont. 1] 724 P.2d 164, 166 (1986); Townsend v. State, 103 Nev. 113, 734 P.2d 705, 709 (1987); People v. Reid, 123 Misc.2d 1084, 1087, 475 N.Y.S.2d 741, 743 (1984); State v. Staples, 120 N.H. 278, 281-82, 415 A.2d 320, 322 (1980); State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986); State v. Milbradt, 305 Or. 621, 628-29, 756 P.2d 620, 624 (1988); Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920, 922 (1986); State v. Castore, 435 A.2d 321, 326 (R.I.1981); State v. Fitzgerald, 39 Wash.App. 652, 656-57, 694 P.2d 1117, 1121 (1985); State v. Haseltine, 120 Wis.2d 92, 96-97, 352 N.W.2d 673, 676 (1984); Brown v. State, 736 P.2d 1110, 1115 (Wyo.1987); see United States v. Earley, 505 F.Supp. 117 (S.D.Iowa 1981); State v. Black, 537 A.2d 1154, 1156-57 (Me.1988); State v. Buell, 22 Ohio St.3d 124, 489 N.E.2d 795, 803-04, cert. denied, 479 U.S. 871, 107 S.Ct. 240, 93 L.Ed.2d 165 (1986); State v. Logue, 372 N.W.2d 151, 157 (S.D.1985); see also Feeney, Expert Psychological Testimony on Credibility Issues, 115 Mil.L.Rev. 121, 134-35 (1987) (discussing same prohibition in military courts)."

Footnote: 14 *For the full text of Syllabus Point 7, see note 9, supra.*

Footnote: 15 *See cases cited in note 13, supra.*

Footnote: 16 *The complete text of W.Va.R.Evid. 702 states:*
"Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Footnote: 17 *The Rimmasch court cited the following authorities for this statement: "Compare State v. Kim, 64 Haw. 598, 645 P.2d 1330, 1338-39 (1982) (admitting); Kruse v. State, 483 So.2d 1383, 1385-86 (Fla.Dist.Ct.App.1986) (admitting); ... People v. Roscoe, 168 Cal.App.3d 1093, 1098-1101, 215 Cal.Rptr. 45, 49-50 (1985) (excluding); State v. Hudnall, 293 S.C. 97, 100, 359 S.E.2d 59, 61-62 (1987) (excluding); People v. Pullins, 145 Mich.App. 414, 420-21, 378 N.W.2d 502, 505 (1985) (excluding); see State v. Taylor, 663 S.W.2d 235, 240-42 (Mo.1984) (rape trauma syndrome evidence inadmissible to prove rape occurred); [J. Myers, Child Witness Law and Practice] § 4.16; Comment, Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?, 8 St. Louis U.Pub.L.Rev. 207, 218 (1989); Comment, The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child, 42 U.Miami L.Rev. 1033, 1048-50 (1988); McCord, Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases, 66 Or.L.Rev. 19, 41 (1987)." 775 P.2d at 400.*

Footnote: 18 *In footnote 10 of Rimmasch, 775 P.2d at 401, these authorities were given: "The views of a number of these scholars are set out at length in McCord, Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Scientific Evidence, 77 J.Crim.L. & Criminology 1, 18-24 (1986) [hereinafter McCord, 77 J.Crim.L. & Criminology]; Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo.L.J. 429, 440-43 (1985) [hereinafter Georgetown Note]; and in J. Myers, Child Witness Law and Practice § 4.15, at 151-52 & n. 107 (1987) [hereinafter Myers]. See also Golding, [Mental Health Professionals and the Courts: The Ethics of Expertise], [___ Int'l J.L. Psychiatry note 6, at 32 n. 8 [(1989)] ('Currently, absent certain strong physical signs (e.g. presence of venereal disease or blatant vaginal or anal trauma), there are no scientifically acceptable scientific data on "sexual abuse profiles" based upon psychological data.')"*

Footnote: 19 *In both Clawson and Woodall, we emphasized that even where the reliability of the test is generally recognized, it must also be shown that the test was conducted in a proper manner by a qualified expert. See Syllabus Point 3, State v. Woodall, supra; State v. Clawson, 165 W.Va. at 620, 270 S.E.2d at 677-78.*

Footnote: 20 *Syllabus Point 5 of State v. Smith states: "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that*

five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence."

Footnote: 21 We have the same provisions in our Rule 801(d) which provides that certain out-of-court statements are not hearsay. W.Va.R.Evid. 801(d) provides:
"(d) Statements Which are not Hearsay.--A statement is not hearsay if--
(1) Prior Statement by Witness.--The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or (2) Admission by Party-Opponent.--The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co- conspirator of a party during the course and in furtherance of the conspiracy."

Footnote: 22 For the full text of W.Va.R.Evid. 801(d)(1)(C), see note 21, supra.

Footnote: 23 The court reasoned in Clanton, 539 So.2d at 1028, as follows:
"These statements were hearsay. Ordinarily, under prerules decisions, they would have been inadmissible even if Clanton had testified, as an attempt to bolster his testimony.... This has been carried over into the Mississippi Rules of Evidence. Rule 613 recognizes that prior inconsistent statements may be used for impeachment purposes, but prior consistent statements cannot be used to bolster a witness.... And, when a witness testifies, prior consistent statements are likewise inadmissible, except in rare and special circumstances, none of which are present here." (Citations omitted.)

Footnote: 24 The Court's remarks in Mitchell were: "[On remand], it will be incumbent upon the trial judge from the court proceeding before him to first determine and find that the hearsay testimony is not otherwise admissible under M.R.E. 803, but could qualify under 803(24)." 539 So.2d at 1371. (Citations omitted).

Footnote: 25 *From a technical standpoint, the trial court's finding that the child victim was incapable of testifying rendered the witness unavailable. In these circumstances, W.Va.R.Evid. 804(b)(5) would come into play. Both this rule and W.Va.R.Evid. 803(24), however, are identical as to the criteria that have to be met.*

Footnote: 26 *The child's story, as related by the mother, was:*
"[H]e opened up and said daddy had put his georgie in his butt and it hurt, and daddy had put his finger in his butt and it hurt, daddy had played with my georgie, meaning [E.L.]'s georgie, until daddy's georgie peed white, I'm tryin to get on a five year level to see if there was any, maybe oral sex, so I asked him, well [E.L.], did at any time did daddy put his mouth on your georgie, and he said but mommy, I told him not to with that brown stuff in his mouth, well, Ed used snuff, and he cried, at this point, I lost it, my only concern at that time was my God, my son needs help."

Footnote: 27 *Part of the problem with admitting such statements from adults is that their testimony about what the child victim told them is usually much more elaborate than the victim is able to actually testify about. This is demonstrated by the record in this case where both children answered most of the questions with either yes or no.*

Footnote: 28 *Syllabus Point 5 of the majority opinion states:*
"The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis."

Footnote: 29 *The full text of W.Va.R.Evid. 803(4) is:*
"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * * *

"(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Footnote: 30 *Syllabus Point 8 of Sutherland states:*
"It is a well recognized exception to the hearsay rule that a doctor who examines a patient for the purpose of treatment may testify as to his medical conclusions, which may be based on the history given to him by the patient with regard to subjective symptoms."

Footnote: 31 *Syllabus Point 9 of Sutherland states:*
"Where an examination by a doctor is not made within the doctor-patient relationship for the purpose of treatment but made solely for the purpose of using the doctor as a witness,

the exception to the hearsay rule, that a doctor who examines a patient for purpose of treatment may testify as to his medical conclusions based on the history given to him by the patient with regard to subjective symptoms, disappears."

Footnote: 32 The Advisory Committee notes to Fed.R.Evid. 803(4) state in material part: "Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field."

Footnote: 33 The courts' confusion in this area is discussed in R. Mosteller, supra at 274 n. 68:
"The error committed here of joining the two requirements is a relatively common one with courts, arising typically from the same mistake in two highly influential opinions from the United States Court of Appeals for the Eighth Circuit, United States v. Iron Shell, 633 F.2d 77 (8th Cir.1980), cert. denied, 450 U.S. 1001 [101 S.Ct. 1709, 68 L.Ed.2d 203] (1981), and United States v. Renville, 779 F.2d 430 (8th Cir.1985). See, e.g., Morgan v. Foretich, 846 F.2d 941, 949-50 (4th Cir.1988)."

Footnote: 34 Mr. Trainor's testimony was:
"[I]nitially, I, when, when we had a, when I had my first contact with the case, much of the story had been told to a, to a family friend and it was repeated to me by, by Mrs. [L.]. When we first got started, [E.L.] had a great deal of trouble talking about it, one thing that commonly happens in sexual abuse cases is after a disclosure, there is a suppression phase[.]"

Footnote: 35 The questioning was as follows:
"Q ... you made another, other statements to the officer in the course of the investigation, do you want to maintain now that everything you said in that report is accurate and true?
"A Yes, I haven't lied to nobody.
"Q Would you recall making a statement with respect to a dog?
"A Yes, I did.
"Q Uh-huh is that statement true?
"A I didn't see it, that's what my son told me.
"Q Wait a minute, you told the officer and I quote, 'she also indicated that he had sex with the poodle terrier in front of [E.L.] at some point in time,' is that statement true or false?

"A I stated that [E.L.] had told me that his daddy had let the dog, which was a poodle, her name was Mitzi, ride his georgie, and if he told mommy he would let the dog eat [E.L.]'s georgie off, I did not see that myself.
"Q Uh-huh, how old was this dog?
"A Maybe a year and a half, two years old.
"Q Uh-huh, how big is it? "A I haven't seen it, he's got it.
"Q Well, he had it when you lived in the house together, didn't you?
"A Oh, yeah, at that time, she was about this long, maybe stood about that high, (at this time, the witness showed the approximate length and height of the dog by showing with her hands).
"Q What sex was the dog?
"A Female.
"Q You sit there and you, you relay this statement that you, it's physically impossible for that to happen, isn't it?
"A I don't know, I wasn't there, I was just tellin you what my son told me."

Footnote: 36 The exchange from the record is as follows:
"Q [I]n the course of your discussions with Mr. Trainor, as in your discussions with the police officer, you made a number of statements regarding your, your husband's sexual behavior, and at one point, you stated that he pulled vasectomy stitches. "A I had company that came from the Auxiliary ... there visiting me and the children, we were sitting there talking and Ed hollered to ask if I could come in the bathroom with him, and when I did, he showed me where the stitches had been pulled loose, what am I supposed to do, I said I guess you'll have to go back up to the emergency room, you've pulled 'em loose, so he did, I think [a neighbor] went and got him and brought him home, and he said that Dr. Khurana had prescribed a couple prescriptions so that there wouldn't be any infections, and I made the comment that it's not gonna do a world of good if you didn't have handcuffs on the bottom of the prescription because it came from playing with himself."
"Q Now, are you going to maintain that that was the truth as seen by your own eyes?
"A I've seen him sit and pat the front of his pants more times than I would even want to try to estimate the amounts of time."

Footnote: 37 The full text of Syllabus Point 21 of Thomas states:
"Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused."

217 W. Va. 197, 617 S.E.2d 547

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

Nos. 31761 and 32166

FILED
June 10, 2005
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: ELIZABETH A., RICHARD O. AND KIMBERLY O.

Appeal from the Circuit Court of Roane County
The Honorable David W. Nibert, Judge
Case Nos. 02-JA-28, 02-JA-29, 02-JA-30
04-JA-11, 04-JA-12, 04-JA-13

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: April 6, 2005
Filed: June 10, 2005

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or

custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994)." Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

4. "'Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.' Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

5. "There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the

disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process." Syl. Pt. 3, *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996).

6. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Per Curiam:

This Court has received two separate appeals by H. Beth Sears, guardian ad litem for Richard O., Jr., and Kimberly O.,[1] from two orders of the Circuit Court of Roane County dismissing abuse and neglect petitions based upon the lower court's conclusion that the allegations of sexual abuse were unfounded. This Court has consolidated the two appeals for consideration in this opinion. The guardian ad litem (hereinafter "Appellant") asserts that the lower court erred by failing to provide a full and adequate opportunity for the development of evidence in these matters. Having thoroughly reviewed the briefs of the parties, all matters of record, and applicable precedent, this Court is of the opinion that the lower court's dismissal of the Department of Health and Human Resources' (hereinafter "DHHR") abuse and neglect petitions was in error. Accordingly, we reverse the decisions of the lower court dismissing these matters and remand for further proceedings consistent with this opinion.

[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the last names of the parties. *See In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

I. Factual and Procedural History

The first abuse and neglect petition in the case was filed on December 10, 2002, with an amended petition filed December 13, 2002. In that first petition, allegations were raised concerning a sexually explicit letter allegedly written by Richard O. to his stepdaughter Elizabeth A., indicating that the two individuals had engaged in oral sexual activity. The petition asserted that Elizabeth A.'s mother, JoAnn, had found the letter and had obtained a domestic violence order, dated December 6, 2002, against Richard O.[2] The petition further alleged that Richard O. had engaged his stepdaughter, Elizabeth, and a cousin, Melody, in inappropriate sexual conversation while the three camped in a tent in the backyard of the family home. Richard allegedly brought pornographic magazines and beer to the tent and attempted to engage in sexual behavior with the girls. The mother later found a portion of a condom wrapper in the tent.

[2]JoAnn also apparently signed a protection plan with the DHHR, indicating that she would not drop the protective order and would ensure that Richard O. did not have contact with the children. On December 9, 2002, however, JoAnn asked that the domestic violence petition be dismissed.

Three children, including Elizabeth A., Richard O., Jr., and Kimberly O.,[3] were removed from the home pursuant to an emergency petition. The mother, JoAnn, thereafter asserted that she had found a second letter ostensibly authored by Elizabeth indicating that the first letter had been written by Elizabeth to falsely implicate Richard O. as a sexual abuser.[4]

The lower court held adjudicatory hearings on this first petition in March and May 2003. Testimony was received from JoAnn regarding the condom wrapper in the tent, as well as both letters. JoAnn testified that she did not believe that Richard would sexually abuse Elizabeth or Melody. Richard testified that he had not had engaged in sexual contact with either girl. Melody, the cousin involved in the alleged incident in the tent, indicated that Richard had exposed himself in the tent. She also testified that although Richard had touched her breast area on top of her clothing, no actual sexual intercourse occurred in the tent. Melody testified that she had no knowledge of either letter.

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[3]Elizabeth A. was born on April 25, 1987, and was fifteen years of age at the time the first petition was filed in this case. She is currently eighteen years of age and will therefore not be directly affected by the outcome of this appeal. Richard O., Jr., was born on December 29, 1997, and is currently seven years of age. Kimberly O. was born on January 25, 2000, and is currently five years of age. Elizabeth A. is the step-daughter of Richard O. Kimberly and Richard O., Jr., are the biological children of Richard O.

[4]This second letter was printed from a computer that Richard and JoAnn immediately thereafter sold at a flea market for approximately one-half of its value. Although the computer had been used by the entire family, Richard allegedly used it to view pornography, and it was housed in Elizabeth's bedroom.

Elizabeth testified that Richard had given her the sexually explicit letter, telling her to read the letter and then burn it. She did not assert any knowledge concerning the basis for the assertions regarding oral sex that Richard made in the letter. She further testified that her mother had tried to convince her to protect Richard by claiming that she had written both letters. She also explained that she thought, based upon body positions, that Richard had sexual intercourse with Melody in the tent during the camping incident.

Janice Blake, a psychologist, testified that JoAnn had come to her office requesting assistance due to the sexually explicit letter she had found. Ms. Blake testified that JoAnn had informed her that she had spoken with Elizabeth about the letter and that Elizabeth had told her that Richard had sexually abused Melody in the tent. Ms. Blake then reported the situation to DHHR Child Protective Services.

On December 3, 2003, the lower court dismissed the first petition and ordered the children returned to their home. The lower court found that "[t]he testimony of two teenage girls was contradictory with one another [regarding whether Richard sexually assaulted Melody in the tent and] that this Court finds that the testimony is not worth [sic] of belief." The lower court further found that "[t]he petitioner has failed [to prove] by clear

and convincing preponderance of evidence that the acts alleged in the petition occurred."[5] The lower court stayed that order pending an appeal to this Court by the Appellant.

While that first appeal was pending in this Court, additional allegations came to the attention of the DHHR, and thus, on April 5, 2004, the DHHR filed a second abuse and neglect petition. The second petition alleged that Richard had sexually abused Elizabeth in the summer of 2002 by forcing her to engage in oral sexual activity while Richard was teaching Elizabeth to drive. The Appellant explains that Elizabeth recalled these additional incidents with specificity by virtue of the fact that she was safely out of the abusive home and in counseling. Process Strategies psychologists David Clayman and Cherie Cowder interviewed Elizabeth regarding the allegations of abuse and also reviewed the letters. They found that Elizabeth's allegations were credible and that the two letters appeared to have been written by the same person, based upon grammatical errors and style.

A hearing was conducted by the lower court on April 12, 2004. Elizabeth testified that Richard had taken her on a country road to teach her to drive. When they stopped to urinate on the side of the road, Elizabeth contends that Richard forced her to lie

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[5]This Court will assume that the lower court's finding regarding insufficiency of the evidence contained a typographical error. The appropriate standard is clear and convincing evidence, rather than "clear and convincing preponderance of evidence" as the lower court stated. *See* W. Va. Code § 49-6-2(c) (1996) (Repl. Vol. 2004) ("The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof").

down on the seat of the car and that Richard performed oral sex on her. Elizabeth explained that she had not informed the court about this incident of sexual abuse during the first abuse and neglect petition hearing "[b]ecause at the time I was in foster care and I was afraid I was going to go back home and if I did tell them nothing happened I'd go back home and I'd get hurt." Elizabeth stated that she was afraid Richard would beat her or do "something to Kimmy and Richard, II." Elizabeth further explained that she finally reported the abuse "[b]ecause when I told my foster mom about it I actually felt safe enough to where I could tell somebody and that I wouldn't, I knew that I wouldn't go back."

At the time of the April 12, 2004, hearing, the Appellant also filed a motion for a forensic maltreatment evaluation of Kimberly and Richard, Jr. The matter was continued to May 10, 2004, for further hearing. The hearing scheduled for May 10 did not occur, due to the lower court's decision to continue it.

On May 27, 2004, this Court granted the appeal of the dismissal of the first petition. The following assignments of error were submitted by the DHHR: (1) the lower court erred by dismissing the petition and ordering the return of the children to their home, and (2) the lower court erred by failing to terminate parental rights.

On July 22, 2004, the lower court dismissed the second DHHR abuse and neglect petition, finding that Elizabeth was not credible since she "forgot the event which

gives rise to the allegations of sexual misconduct" by Richard. The lower court also denied "all pending motions herein as MOOT." On November 10, 2004, this Court granted the appeal of the dismissal of the second abuse and neglect petition. The Appellant asserts the following assignments of error in the second appeal: (1) the lower court erred by finding no probable cause and dismissing the second petition; (2) the lower court erred by denying the Appellant's motion for forensic child maltreatment evaluations for her clients without holding a hearing; (3) the lower court erred by finding that Elizabeth was not credible based upon her failure to articulate all abusive events in the first abuse and neglect proceeding; and (4) the lower court erred by failing to act in a timely fashion pursuant to Rules of Procedure for Abuse and Neglect Cases.

II. Standard of Review

In syllabus point one of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court explained as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's

> account of the evidence is plausible in light of the record viewed in its entirety.

See also Syl. Pt. 1, *In re Travis W.*, 206 W.Va. 478, 525 S.E.2d 669 (1999); Syl. Pt. 1, *In re George Glen B.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). In *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), this Court explained that "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." 208 W.Va. at 332, 540 S.E.2d at 549.

III. Discussion

Any evaluation pertaining to the rights of children must be guided by this Court's consistent recognition that a child's rights are paramount. As this Court stated in syllabus point three of *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996), "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Within the abuse and neglect setting, this Court has also recognized the rights of children residing in the home, such as Kimberly and Richard, Jr., even where those children are not alleged to have been the direct victims of the abuse. In syllabus point two of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court explained:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a

> direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Implementing these guidelines designed to protect the crucial interests of children, "this Court, over a substantial period of time, has expressed an unwavering interest in providing comprehensive and fair procedures for the consideration of abuse and neglect cases." *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). This Court emphasized as follows in *Edward B.*,

> As this most important area of the law has expanded, this Court has insisted that the directives of applicable rules and legislative enactments must be carefully identified, respected, and incorporated within our court system. The Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children.

Id., 558 S.E.2d at 631. In addressing the precise statutory requirements regarding the handling of abuse and neglect matters, this Court has explained that "[t]he statutory scheme applicable in child abuse and neglect proceedings provides for an essentially two phase process." *In re Beth Ann B.*, 204 W.Va. 424, 427, 513 S.E.2d 472, 475 (1998). "The first phase culminates in an adjudication of abuse and/or neglect. *See W.Va.Code* § 49-6-2(c) (1996). The second phase is a dispositional one, undertaken to achieve the appropriate

permanent placement of a child adjudged to be abused and/or neglected. *See W.Va.Code* § 49-6-5 (1996)." *Id.*, 513 S.E.2d at 475 (footnote omitted).

During the proceedings in an abuse and neglect case, a guardian ad litem is charged with the duty to faithfully represent the interests of the child and effectively advocate on the child's behalf. In *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998), this Court explained that "guardians *ad litem* have a duty to fully represent the interests of their child wards at all stages of the abuse and/or neglect proceedings, both in the circuit court and on appeal." 202 W.Va. at 356 n. 11, 504 S.E.2d at 183 n. 11. In syllabus point four of *Christina L.*, this Court explained as follows:

> "Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client." Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

194 W.Va. at 448, 460 S.E.2d at 694. The essential right to the opportunity to be heard is also expressed in West Virginia Code § 49-6-2(c) (1996) (Repl. Vol. 2004), which provides, in pertinent part, as follows:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

This Court also observed as follows in syllabus point three of *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996):

> There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

See also W. Va. Code § 49-6-5(a) (2002) (Repl. Vol. 2004) ("The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard").

Thus, both statutory pronouncements and the precedents of this Court have directed that guardians ad litem must be afforded a meaningful opportunity to fully represent the children. Moreover, both statutory and case law have instructed trial courts that certain procedures, as outlined above, must be followed when progressing through an abuse and neglect case. Where such procedures are not followed, the resulting order is to be vacated, as syllabus point five of *Edward B.* instructs:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

210 W.Va. at 624, 558 S.E.2d at 623.

In this Court's review of the lower court's actions in the present case, we discern specific deficiencies in the lower court's evaluation and resolution which require reversal. The lower court conducted an abbreviated hearing[6] and thereafter dismissed the second petition without additional hearing and denied the Appellant's motion for evaluation of Kimberly and Richard, Jr. It does not appear that a probable cause hearing was necessary in this case since the children had already been removed from the home, had been placed in foster care, and were not in immediate danger. This matter should have proceeded to a full adjudicatory hearing, and the lower court should have provided all parties with an opportunity to be heard. As the guardian ad litem empathizes in her brief, the lower court "ruled and dismissed the matter prior to the completion of the preliminary hearing." A

[6]In the July 22, 2004, order dismissing the second petition, the lower court characterized the April 12, 2004, hearing as a preliminary hearing and concluded as follows: "The Court, being of the opinion to and having considered the evidence and the testimony taken at the Preliminary Hearing, does hereby find NO PROBABLE CAUSE and ORDERS that this case be DISMISSED and stricken from the docket of this Court."

complete evidentiary hearing on the allegations of sexual abuse, as raised in the second petition, was not provided.

Indeed, Elizabeth is now eighteen years of age and has apparently chosen not to reoccupy the family home. The two youngest children, however, would be returned to the family home if this Court affirms the lower court action. As the guardian ad litem asserts, the confines of the abbreviated hearing held by the lower court on April 12, 2004, did not provide the Appellant with the opportunity to effectively litigate the matters asserted in the second petition, to obtain an evaluation of the children whom she served, or to fully articulate matters regarding their welfare.

In *Christina L.*, this Court stated that "[e]rror of substantial proportion was committed when the guardian ad litem was not provided the opportunity to orally articulate his client's best interests." 194 W.Va. at 454, 460 S.E.2d at 700. In the present case, the error is compounded by the fact that the lower court denied the guardian ad litem the opportunity to obtain evaluations which would have been essential in determining the appropriate course of action for these children. Kimberly and Richard, Jr., are too young to articulate what had or had not occurred in their home, prior to their initial removal and placement in foster care in December 2002. Their guardian ad litem asserted that they should have been evaluated by a professional, with primary focus placed upon the safety and

welfare of those two children. "When, as in the case before us, there is credible evidence of sexual abuse, the risk of harm to the child weighs heavily in this balance, and courts should *err on the side of caution* if necessary to protect children at risk of possible abuse." *Mary Ann P. v. William R.P., Jr.*, 197 W.Va. 1, 10, 475 S.E.2d 1, 10 (1996) (emphasis supplied).

Thus, whether the April 12, 2004, hearing is characterized as a preliminary hearing or an adjudicatory hearing, we find that it provided an insufficient means of resolving the issues raised in the second abuse and neglect petition and failed to adequately protect the rights of Kimberly and Richard, Jr. The guardian ad litem and DHHR were not given a meaningful opportunity to introduce substantive evidence or obtain additional testing necessary to determine the best interests of the two children whom the guardian ad litem was appointed to serve.[7] As this Court determined in *George Glen B.*,

> The parties to an abuse and neglect proceeding must be given a meaningful opportunity to introduce substantive evidence in

---

[7]As recognized by the California court in *Blanca P. v. Superior Court*, 53 Cal.Rptr.2d 687 (1996):

> The hearing on a contested petition alleging child sexual abuse is thus, to repeat, extraordinarily important. It is not the sort of thing to be rushed, or taken routinely. Allegations of child molestation are *serious*; they merit more than a rubber stamp. With the exception of death penalty cases, it is hard to imagine an area of the law where there is a greater need for reliable findings by the trier of fact. The consequences of being wrong – *on either side* – are too great.

53 Cal. Rptr. 2d at 697.

> support of their respective positions, before a circuit court makes its final dispositional decision, and the guiding force behind such decision must be what was in the best interests of the child.

205 W.Va. at 444, 518 S.E.2d at 872. Further, the *George Glen B.* Court concluded:

> It is clear from the minuscule record in this case that the lower court's consideration of the abuse and neglect proceeding was inadequate. Mandated hearings did not occur, evidence was not taken, yet a determination to dismiss the petition and return custody to the Appellee mother was made. Thus, the lower court's action in this case was not in compliance with pertinent statutes, rules, and case law.

Id., 518 S.E.2d at 872.

We are also compelled to comment upon another aspect of the unusual circumstances presented herein. This case was initiated with the first abuse and neglect petition. The precise events alleged in the second petition, regarding the sexual activity allegedly occurring during a driving lesson, were not included in the first petition. They were arguably alluded to in the first petition by the very existence of the letter referencing oral sex, but they were not alleged with particularity in that first petition.

Consequently, this Court does not believe that Elizabeth's initial failure to testify regarding those driving lesson events, whether characterized as fear or forgetfulness, is fatal to the second petition. Such failure does not render her testimony inherently incredible, and it should not have been the sole basis, as appears from the record, for the

lower court's decision to dismiss the second petition. It may have provided the court with a legitimate basis for more rigorous investigation of the allegations, but Elizabeth's credibility, as an alleged child sexual assault victim, should not have been totally devalued by her failure to assert all abusive events during the initial hearing.

IV. Conclusion

The decisive issue in this case is whether the lower court erred by dismissing the abuse and neglect petitions filed against Richard O. The guardian ad litem contends that the dismissals were improper because the lower court failed to provide an adequate hearing. Based upon the foregoing evaluation of this matter, we conclude that the lower court erroneously dismissed the petitions for abuse and neglect. We further conclude that this case should be remanded to the lower court for a complete evidentiary hearing. Upon remand, the lower court should permit the DHHR to promptly file an amended petition, incorporating all allegations from the first and second petitions which are to be addressed.

This matter has lingered in the court system for two and one-half years. While the resolution of this case will no longer impact Elizabeth's residential situation, based upon the fact that she is now eighteen, it is certainly in the best interests of the two younger children to have these allegations properly and thoroughly presented and evaluated by the lower court. Upon remand, the lower court should consider the DHHR's combined petition,

as well as all briefs, arguments, and evidence presented by all parties. The court should proceed as expeditiously as possible through all procedures enunciated by the applicable child abuse and neglect statutes, as well as the Rules of Procedure for Abuse and Neglect Cases.

The dismissal orders of the Circuit Court of Roane County of December 3, 2003, and July 22, 2004, are reversed. We direct the lower court to reinstate this abuse and neglect matter for consolidated further proceedings consistent with this opinion.

Reversed and Remanded With Directions.

225 W. Va. 780, 696 S.E.2d 296

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

No. 35486

FILED
June 2, 2010
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: ELIZABETH F. AND KYIA F.

Appeal from the Circuit Court of Nicholas County
Honorable Gary L. Johnson, Judge
Civil Action Nos. 08-JA-15; 08-JA-16; 08-JA-17; and 08-JA-40

REVERSED AND REMANDED

Submitted: May 4, 2010
Filed: June 2, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "West Virginia Code § 49-3-1(a)[(3)] provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirements that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates

that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child." Syllabus point 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

3. "By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents 'would be suitable adoptive parents,' the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case." Syllabus point 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

4. "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody." Syllabus point 8, in part, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

5. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a

child's development, stability and security." Syllabus point 1, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

The instant proceeding involves the grandparent preference for adoptive placement recognized by the Legislature in W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2009)[1] and reiterated by this Court in Syllabus points 4 and 5 of *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).[2] By order entered October 9, 2009, the Circuit Court of Nicholas County concluded that the grandparent preference mandated that the permanent placement of the four minor children at issue herein be with their maternal grandparents. On appeal to this Court, the guardians ad litem for the children and the West Virginia Department of Health and Human Resources argue that the circuit court's decided placement is not in the children's best interests. Upon a review of the parties' arguments, the record presented for appellate consideration and the supplements thereto,[3] and the pertinent authorities, we reverse the decision of the Nicholas County Circuit Court and remand this case for further proceedings consistent with this opinion.

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[1]See Section III, *infra*, for the text of W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2009).

[2]See *infra* Section III for the text of Syllabus points 4 and 5 of *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

[3]During the pendency of the instant appeal, the Guardian ad Litem for Elizabeth and Kyia twice moved to supplement the record in this case, both of which motions were granted. For further discussion of the supplemented record, see Section III, *infra*.

I.

FACTUAL AND PROCEDURAL HISTORY

Janice and James ("Hollie") B.[4] are the maternal grandparents of the four minor children involved in this case: James M.,[5] Elizabeth F.,[6] Kyia F.,[7] and Jebadiah F.[8] Following the termination of the parental rights of the children's mother, Mary,[9] who is Janice's daughter, and of the children's fathers,[10] Janice and James sought to adopt the children and were granted intervenor status in such proceedings. The West Virginia Department of Health and Human Resources (hereinafter referred to as "the DHHR") thereafter conducted a foster care home study of Janice and James' home, and, by report dated May 6, 2009, determined that their home could be considered "a placement resource" for these grandchildren.

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[4]Consistent with our practice in similar cases involving sensitive facts, we will refer to the parties by their last initials rather than by their full names. *See, e.g.*, *In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007); *In re Randy H.*, 220 W. Va. 122, 125 n.1, 640 S.E.2d 185, 188 n.1 (2006); *In re Clifford K.*, 217 W. Va. 625, 630 n.1, 619 S.E.2d 138, 143 n.1 (2005).

[5]James was born on April 23, 2003.

[6]Elizabeth's date of birth is October 24, 2005.

[7]Kyia was born on September 1, 2007.

[8]Jebadiah's date of birth is November 2, 2008.

[9]Mary's parental rights to the subject children were terminated following her voluntary relinquishment of her parental rights on February 13, 2009.

[10]The children's fathers' parental rights were terminated following their voluntary relinquishment thereof between April 2009 and July 2009.

The circuit court then considered the children's permanent placement. By order entered October 9, 2009, the circuit court found that the DHHR had determined Janice and James to be an appropriate home with sufficient income; there are no psychological impediments to Janice's ability to "adequately protect the children"; Janice has reported her adult children's drug use to Child Protective Services (hereinafter referred to as "CPS"), which reporting resulted in CPS investigations thereof; and the four adoptive minor children currently in the home[11] are "doing well" and were placed there upon the recommendation of the DHHR that Janice and James' home was a suitable adoptive placement. Based upon these findings, the court concluded that

> *West Virginia Code* § 49-3-1 requires that appropriate grandparents be a preferred placement of the children.
>
> In order to rebut the presumption, the State and guardians ad litem must show by clear and convincing evidence that it would be in the best interest of the children to prevent the placement of the children with the grandmother.
>
> The State did show concerns, but there is no clear and convincing evidence to prevent placing the children with the maternal grandmother and step-grandfather Janice and [James] Holly [sic] B[.]
>
> The Court believes that based upon *Napoleon v. Walker*, [217 W. Va. 254, 617 S.E.2d 801 (2005),] the Court has no other alternative than to place the children with the maternal grandmother and step-grandfather, Janice and [James] Holly

[11]Apart from the four children at issue in this appeal, Janice and James previously have adopted two of Janice's grandchildren and two additional, unrelated children. All four of these adoptive children currently live with Janice and James.

> [sic] B[.], as their home has been found to be appropriate and there is no clear and convincing evidence to indicate that they will not protect the children. *Absent the grandparent preference, the Court doubts that his decision would be the same.*
>
> The Court further concludes that the age of the grandparents and the number of children in the home are not an impediment to the placement in this case.
>
> There will be a requirement in the adoption proceeding that the B[.s] must keep certain individuals away from the children.

(Emphasis added). From these rulings, the Guardian ad Litem for Elizabeth and Kyia appeals to this Court. The Guardian ad Litem for James and Jebadiah and the DHHR join in the request for relief from this Court.

II.

STANDARD OF REVIEW

The sole issue presented by the instant appeal concerns the preference accorded to grandparents to adopt their minor grandchildren after the parental rights of the grandchildren's parents have been terminated through abuse and/or neglect proceedings. We previously have explained the standard of review that governs appeals in abuse and neglect cases as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of

> law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). In accordance with these guidelines, we proceed to consider the errors assigned by the parties.

III.

DISCUSSION

On appeal to this Court, the two Guardians ad Litem and the DHHR contend that the circuit court erred by placing the four children at issue herein with Janice and James in accordance with the statutory grandparent preference for adoptive placements despite the fact that such placement does not serve the children's best interests. In support of their objections to the circuit court's ruling, the Guardians and the DHHR state that the circuit court should not have preferred the grandparents as an adoptive placement in this case because such placement does not promote the children's best interests and that, despite the stated preference, such placement also must be in the subject children's best interests.

The Guardians and the DHHR claim, before this Court, that the home of Janice and James is not a suitable placement for the children because these grandparents cannot adequately protect the children from the negative influences and criminal tendencies of Janice's adult children. In this regard, they represent that Janice has continued to permit her adult children to be around her adoptive minor children, including allowing the children's mother, Mary, to live in her home while she was using and abusing drugs. Additionally, they contend that Janice allowed her adult son and his wife to live in the trailer behind her house, and requested them to move only after the DHHR indicated that she would not be approved as a foster home while they continued to live there due to her son's numerous CPS referrals. Moreover, the Guardians and the DHHR submit that Janice has not seemed willing to curtail the influence of her adult children on her adoptive minor children until the circuit court cautioned her to cease such interaction during the proceedings underlying this appeal, but even then she has since hosted a family dinner for both her adult and adoptive minor children. Furthermore, since the circuit court's hearing in this matter indicating its concern over such interactions, they represent that Janice has posted bond for her adult son, who has used Janice's address as his own address in the paperwork related to his felony delivery of a controlled substance (methamphetamine) charge.

By contrast, the intervenor grandparents, Janice and James B., argue that the circuit court correctly preferred them as the children's adoptive placement as required by W. Va. Code § 49-3-1(a)(3). In support of their argument, the grandparents assert that the DHHR approved their home as an appropriate placement for the children on May 6, 2009, and that, during the circuit court's hearing, evidence was presented demonstrating their financial ability to care for four additional children and the suitability of their home to accommodate such children. The expert witnesses further indicated that they believed that Janice and James would be capable of caring for and adequately protecting the subject children. Thus, the grandparents argue that the concerns expressed by the Guardians and the DHHR are unfounded and that the circuit court correctly preferred them as an adoptive placement, consistent with the statutory mandate to do so.

During its consideration of the record evidence below, the circuit court ultimately determined that the four subject children should be placed with Janice and James. However, in reaching this decision, the circuit court opined, "[a]bsent the grandparent preference, the Court doubts that his decision would be the same." In light of this commentary, we feel compelled to revisit the grandparent preference to explain the parameters for its application to the facts of a particular case.

The Legislature adopted the so-called "grandparent preference" to govern the adoption of children whose parents' parental rights have been terminated through abuse and neglect proceedings. Pursuant to W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2009),

> [f]or purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

Following the promulgation of this statute, this Court reiterated the preference accorded to grandparents in the adoption of their grandchildren and explained its application in Syllabus points 4 and 5 of *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005):

> West Virginia Code § 49-3-1(a)[(3)] provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirements that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. *The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.*
>
> By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be

> suitable adoptive parents," *the Legislature has implicitly included the requirement for an analysis* by the Department of Health and Human Resources and circuit courts *of the best interests of the child, given all circumstances of the case.*

(Emphasis added). Our prior holdings in *Napoleon* are critically important insofar as we explicitly recognized that a crucial component of the grandparent preference is that the adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper.

In the case *sub judice*, the circuit court, while preferring the grandparents, Janice and James, as the children's permanent adoptive placement, expressed concern by commenting that, "[a]bsent the grandparent preference, the Court doubts that his decision would be the same." From this musing, this Court can surmise only that the circuit court believed the grandparent preference to be an absolute directive to place children with their grandparents in all circumstances. Such is not the case, however, as an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interests of the child.

> Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.

Syl. pt. 8, in part, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). *Accord* Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("[T]he primary goal in cases involving abuse and neglect . . . must be the health and welfare of the children."); Syl. pt. 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996) ("In . . . custody matters, we have traditionally held paramount the best interests of the child."). Thus, adoption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child's best interests, it is not obligated to prefer the grandparents over another, alternative placement that does serve the child's best interests. *See* Syl. pts. 4 & 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801. Because the circuit court accorded the grandparents an absolute preference in this case despite its expressed concerns about the propriety of such a placement, we reverse the circuit court's decision.

Furthermore, we find it necessary to remand this case for the circuit court to reconsider the record evidence, as supplemented, in determining whether adoptive placement of the subject children with their maternal grandparents, Janice and James, serves their best interests. Based upon our review of the record in this case, we share the circuit court's concerns as to whether permitting Janice and James to adopt their grandchildren serves the children's best interests. However, in addition to the record

initially presented for this Court's review, upon which the circuit court based its decision, the Guardian ad Litem for Elizabeth and Kyia twice moved to supplement the record during the pendency of the case before this Court. The first motion to supplement presented evidence of numerous warrants for James' arrest resulting from worthless check charges in several different counties. We granted this motion to supplement the record and find this information to be instructive as to the grandparents' financial ability to care and provide for eight minor children, *i.e.*, the four adoptive children who currently reside with them and the four grandchildren they seek to adopt in the case *sub judice*. To the extent that the DHHR's May 6, 2009, home study of Janice and James considered their "financial stability," the various worthless check charges should be evaluated to determine the extent to which, if any, such charges impact the grandparents' current financial status. Therefore, we remand this case to the circuit court so that it may consider this supplemental evidence.

The second motion to supplement the record filed by Elizabeth and Kyia's Guardian ad Litem indicates that the DHHR has revoked its prior approval of Janice and James' home as a "Relative Foster/Adoptive home." We also granted this motion. In support of her motion, the Guardian proffered a March 28, 2010, letter from the DHHR informing the grandparents of its decision. Although the letter conveying this information does not explain in great detail the exact reasons relied upon by the DHHR in reaching this decision, it does reference James' "criminal charges" and indicates that "[t]hese charges

appear to reflect your financial instability." Insofar as the Legislature has identified a favorable home study of the prospective adoptive grandparents as an indicator of their suitability as an adoptive placement for their grandchildren, *see* W. Va. Code § 49-3-1(a)(3); Syl. pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801, a change of circumstances that results in an unfavorable recommendation by the DHHR suggests an even more pressing need to consider not only the grandparent preference but also whether adoption by the children's grandparents would serve the children's best interests. To the extent that the March 28, 2010, letter alters the home study upon which the circuit court relied in finding the grandparents to be a suitable adoptive placement for the subject children, it is imperative that the circuit court reconsider its decision in light of this new evidence. Accordingly, we remand this case to the circuit court to permit it to additionally consider the supplemental evidence presented by the Guardian's second motion.

As a final matter, this Court is gravely concerned about the length of time that the four young children at issue in this case, namely, James, Elizabeth, Kyia, and Jebadiah, have been permitted to languish in foster care without a permanent placement. We previously have counseled that "[c]hild abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). *Accord* Syl. pt. 5, *In the*

Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 ("The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible."). In this vein, we urge the circuit court, as well as all of the parties to the instant proceeding, to conclude the children's permanency planning and ultimate placement as quickly and expeditiously as possible. To facilitate the commencement and conclusion of the remand proceedings, we issue the mandate of the Court contemporaneously with the issuance of this opinion.

IV.

CONCLUSION

For the foregoing reasons, the October 9, 2009, order of the Circuit Court of Nicholas County is hereby reversed, and this case is remanded for further proceedings consistent with this opinion. The mandate of the Court shall issue forthwith.

Reversed and Remanded.

192 W. Va. 656, 453 S.E.2d 639

Supreme Court Of Appeals Of West Virginia

IN RE: ELIZABETH JO "BETH,"
DEBRA KAY "DEBBIE" AND ROBERT LEE "ROBBIE" H.,

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner Below, Appellant

BENITA K.H.,
Respondent Below, Appellee

ROBERT L.H.,
Respondent Below, Appellee

NO. 21908
Submitted: September 20, 1994
Filed: December 15, 1994

SYLLABUS BY THE COURT

1. "'W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, In Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990).

2. "'Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984).' Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987)." Syllabus Point 3, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syllabus Point 4, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

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Per Curiam:
The West Virginia Department of Health and Human Resources (Department), the petitioner below and appellant, appeals a final order entered August 2, 1993, by the Circuit Court of Wood County. The circuit court dismissed the Department's petition which alleged that Elizabeth Jo "Beth," Debra Kay "Debbie," and Robert Lee "Robbie" H. See footnote 1 were neglected and/or abused children. The Department asserts on appeal that the circuit court erred because the evidence established that the children were emotionally and physically abused by their parents and neglected by their parents' failure to provide them with necessary shelter and supervision.

In June of 1993, Joan George, a Child Protective Services worker with the Department, filed a petition pursuant to W. Va. Code, 49-6-1 (1992), See footnote 2 alleging that nine-year-old Elizabeth, eight-year-old Debra, and six-year-old Robert were neglected and/or abused children according to W. Va. Code, 49-1-3 (1992). See footnote 3 More specifically, the petition alleged that their parents, Benita K.H. and Robert L.H., did not adequately supervise the children and abused the children emotionally and physically. Furthermore, it was alleged that their living conditions were unfit.

After receipt of the petition, the circuit court determined that the children were in imminent danger and ordered that the children be placed with their maternal grandmother. See footnote 4

At the adjudicatory hearing See footnote 5 held on July 30, 1993, the Department called the following persons to testify: two counselors employed by the Western District Guidance Center, a counselor from Action Youth Care, Elizabeth's teacher, and Joan George. The parents did not testify nor did they call witnesses on their behalf. The uncontroverted evidence showed that this family had been long-time recipients of social services and outside intervention, in part, to help them deal with Elizabeth's medical problems. See footnote 6 The parents sporadically complied with the instructions from the various services, and the condition of the home and their attitude and approach to parenting did not improve.

Elizabeth would frequently run away from home and wander around Parkersburg. On several occasions, the police returned her to the home. Likewise, Robert ran away from home and was returned by the police. When Debra ran away from home, her parents did not know of her whereabouts for an entire weekend. The record reflects that the mother suspected that Debra was sexually abused during that weekend.

The Department also established that the lack of supervision had resulted in injury to the children. Debra was burned by the stove when she was cooking dinner while her mother was sleeping. When Robert climbed into the family's truck and knocked it out of gear, the truck rolled over Elizabeth, causing a head injury which required stitches. Elizabeth and Robert had been known to consume beer while being unsupervised for several hours. Elizabeth told a counselor, in explicit detail, that she had had sexual relations with a boy.

The Department described the family home as "deplorable." The family had several cats and dogs, and feces were found throughout the house. The children slept on urine-stained mattresses. Elizabeth reported that a rat was found in her bed. All three children bathed in the same water. Generally, the house was unkept and had a foul odor.

There was some evidence that Elizabeth had been physically abused. She went to school on one occasion with a bloody nose and claimed that her father hit her. There was also some evidence of sexual abuse. During a family counseling session, Elizabeth kissed her father with an open mouth. At another session, she rubbed the upper part of his thigh in an inappropriate manner. On at least one occasion, Elizabeth washed her father's back while he was in the bathtub.

After hearing the foregoing evidence, the circuit court found that the Department failed to meet its burden of proof and dismissed the case. Furthermore, the Department's motion for a stay of the proceeding pending appeal was denied. However, this Court granted a stay of the proceedings. Therefore, the children remain in the custody of their grandmother.

The issue on appeal concerns the circuit court's dismissal of this action in light of the foregoing evidence. In Syllabus Point 1 of West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990), we set forth the Department's burden of proof in these matters:

> "'W. Va. Code, 49- 6-2(c) [1980], requires the State D epartment of Welfare [now t he Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the peti tion . . . by clear a nd convi ncing proof." The statute, however, does not specify any pa rticular m anner or m ode of testimony or evi dence by whic h the State D epartment of Welfare is obligated to meet this bur den.' Syllabus Poi nt 1, In Interest of S.C. , 168 W. Va. 366, 284 S.E.2d 867 (1981)."

Consistent with our cases in other areas, we give appropriate deference to findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law.

In this case, the circuit court entered a fairly cursory order, concluding as a matter of law that the State failed to sustain its burden of proof. A review of the circuit court's remarks at the time it made its ruling indicates that it found the petition "frivolous" and found there to be no evidence of abuse or neglect. After reviewing the record, we find that the Department presented sufficient evidence to prove, by clear and convincing evidence, that Elizabeth, Debra, and Robert H. are neglected children as defined by W. Va. Code, 49-1-3(g)(1).

The unsanitary condition of the home, as described by the Department's witnesses, was similar to the conditions described in State v. Carl B., 171 W. Va. 774, 301 S.E.2d 864 (1983). In Carl B., the house was very filthy with dirty dishes, roaches, no sheets or blankets on the beds, and dog feces on the floor. We found the evidence sufficient to establish by clear and convincing evidence that Carl B. was neglected. Similarly, the Department in this case attempted to work with Benita K.H. and Robert L.H., but the condition of the home did not consistently improve. In Carl B., the additional factor of a lack of food at the end of the month existed, which was not in the record in the case at bar. However, in this case the additional factor of the lack of supervision of the children exists.

Far more significant than the filth, however, is the fact that at least one of these children is deeply emotionally disturbed and in desperate need of consistent, caring parenting.

All the children have run away from home for significant periods of time while being unsupervised. Obviously, the parents failed to provide the necessary supervision to keep these children safely at home and off the streets of Parkersburg. We understand that Elizabeth's emotional problems may have contributed to her habit of running away. However, the lack of any meaningful supervision would have to be considered as a causative, as well as aggravating, factor with regard to emotional problems so severe that a young child would attempt suicide.

We, therefore, reverse the decision of the circuit court and remand this case for further proceedings. We specifically direct the circuit court to allow the parents the opportunity to move for an improvement period pursuant to W. Va. Code, 49-6-2(b) (1992). Syllabus Points 3 and 4 of In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), state:

> "3. 'Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984).' Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).
>
> "4. In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family."

For the foregoing reasons, the order of the Circuit Court of Wood County dismissing the petition is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Footnote: 1 *We follow our traditional practice in domestic relations and other cases involving sensitive matters and do not use the last names of the parties. See, e.g., Matter of Scottie D., 185 W.Va. 191, 406 S.E.2d 214 (1991); State ex rel. Div. of Human Serv. by Marcy C.M. v. Benjamin P.B., 183 W.Va. 220, 395 S.E.2d 220 (1990).*

Footnote: 2 *W. Va. Code, 49-6-1(a), states, in part:*
"If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child."

Footnote: 3 *W.Va. Code, 49-1-3(a), defines an "abused child":*
"(a) 'Abused child' means a child whose health or welfare is harmed or threatened by:
"(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or mental or emotional injury, upon the child or another child in the home; or
"(2) Sexual abuse or sexual exploitation; or
"(3) The sale or attempted sale of a child by a parent, guardian, or custodian[.]"
W.Va. Code, 49-1-3(g)(1), defines a "neglected child":
"(g)(1) 'Neglected child' means a child:
"(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
"(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]"
The statute was amended in 1994. The minor changes do not affect our determination of this case.

Footnote: 4 *See W. Va. Code, 49-6-3 (1992), which states, in part:*
"(a) Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible relative, which may include any

parent, guardian or other custodian pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child[.]"

Footnote: 5 The parents waived the preliminary hearing.

Footnote: 6 Elizabeth has been diagnosed as suffering from enuresis (bedwetting), attention deficit hyperactivity disorder, oppositional defiant disorder, parent child problems, a seizure disorder, and organic mental disturbance. It is undisputed that due to her health problems, she is a difficult child to deal with and requires special attention. In May of 1993, Elizabeth attempted suicide.

Workman, Justice, concurring:
I concur with the majority in order to expand upon their enunciation of the lower court's duty to fashion an improvement period, and to emphasize how vital it is not to permit this case and these children (and future cases involving other children) to get lost in some procedural shuffle.

First, the procedural shuffle: In 1991, we pointed out that West Virginia Code § 49-6-2(d) "clearly reflects the goal that such [abuse and neglect] proceedings must be resolved as expeditiously as possible. Syl. Pt. 5, in part, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). After setting forth the long and tattered procedural history of Carlita B., and directing that child abuse and neglect cases be recognized as among the highest priority, we pointed out:

> protracted procedural histories are far too common a phenomenon in child abuse and neglect cases, as well as other child custody matters. Several cases with which we have dealt have involved similar extended periods of time without any real resolution for the child.
> . . . .
> Certainly many delays are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied over night. The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them.
> The bulk of the most aggravated procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children--the most voiceless segment of our society--aren't left to languish in a limbo-like state during a time most crucial to their human development.

Id. at 622-23, 408 S.E.2d at 374-75.

The dissent is misguided in advocating remand for the preparation of an order more fully justifying its decision. The court below made it perfectly clear that it did not find the circumstances that these children were living in, as set forth by the unrefuted evidence, to constitute abuse or neglect. See footnote 1 There were no credibility issues. The judge basically classified as de minimus See footnote 2evidence of very small children constantly running away from home, living amongst animal feces, being subject to a level of neglect so aggravated that the

parents sometimes didn't even notify authorities when they disappeared for lengthy periods of time (in one case, an entire weekend), and having emotional problems so aggravated that an eight-year-old attempted suicide. Instead of making further inquiry into why these children are experiencing such problems, the court castigated the nine-year-old for all her problematic behaviors. See footnote 3

The practical effect of a remand for the development of a more extensive order would be (1) to delay for probably a year what this family desperately needs now: a meaningful improvement period, including interventive services for the whole family; and (2) to add further delay to any real resolution of a case that will probably take a long time to resolve in any permanent manner anyway. The last thing we need is another hoop to jump through before these children get the kind of focused attention owed to them by the legal and child protective services.

Beth, Debbie and Robbie have waited long enough for help from a child protective services system that had already done too little for too long. According to the record, this family has been involved in the system since 1988, when the children were four, three, and one. We, as a system, have let their most crucial formative years go by without ever really addressing their problems.

The circuit court was absolutely correct that adult individuals may live amongst animal feces, emotional chaos, and total non-structure. That is their choice. But the court was clearly wrong as a matter of law in suggesting that evidence of children living in this fashion is insufficient to constitute abuse and neglect, once such conditions are brought to the attention of the system whose mission it is to protect them.

Upon remand, the circuit court should review carefully the case of In re Carlita B. in the event the parents move for an improvement period. See 185 W. Va. 613, 408 S.E.2d 365. As we directed in Carlita B.,

> In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multidisciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family. The goal should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and

> child with an event ual restoration of full parental rights a hope d-for result. The im provement period a nd fa mily case plans m ust establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the D.H.S. and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a respon sibility to demonstrate sufficient progress and improvement to justify return to him of the child.

Id. at 625, 408 S.E.2d at 377.

Following the form ulation of any im provement plan, "it is imperative that the progress of the parent(s) toward the achievement of e numerated goals be monitored closely." Id. As we emphasized in Carlita B.,

> The clear im port of t he statute is that m atters invol ving t he abuse and neglec t of childr en shall take precede nce over a lmost every other matter with w hich a court deals on a daily basis, and it clearly reflects the goal that such proc eedings m ust be resolved as expeditiously as possible.

Id.

The improvement period should be carefully crafted and closely monitored on at least a monthly basis. This circuit judge must recognize that these children are not throwaway human beings; and further, that the way this case is handled may be the last best chance for effective intervention in their lives.

Footnote: 1 The court's order stated only that, "Based upon the evidence before the Court, the Court FINDS that the Petitioner has failed to sustain its burden of proof, and accordingly ORDERS that this matter be dismissed and stricken from the docket of this Court." The dissent is correct in that this essentially one-sentence order indicates that the court below, as appears to be the case with many other circuit courts, gave only cursory attention to the formulation of an order in this matter. This clearly flies in the face of this Court's admonitions in Carlita B. that these cases are both high priority and deserving of immediate and careful attention. See 185 W. Va. 613, 408 S.E.2d 365.

Footnote: 2 The record reflects that the judge, upon hearing the evidence regarding the petition, stated, "This is just diminimus [sic] stuff, all of it."

Footnote: 3 When evidence is presented which identifies developmental and emotional problems to the extent experienced by the children in this case, it should

be a signal to the court that immediate attention is necessary, both from the standpoint of ascertaining underlying problems in the home and implementing interventive services to the children and their family.

Cleckley, Justice, dissenting:

I must dissent from the majority because their decision is contrary to the explicit legislative directives. Because of the vital importance of children's welfare in West Virginia, see In Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991) (child abuse cases must be recognized as being among the highest priority for the court's attention), the legislature has made some procedural requirements mandatory. One such mandatory procedure is the requirement that the circuit court make specific findings of fact and conclusions of law to support its decision. Specifically, at the close of the adjudicatory hearing in an abuse and neglect case, the circuit court is required under W. Va. Code, 49-6-2(c) (1992), to "make findings of fact and conclusions of law as to whether such child is abused or neglected." See footnote 1 See State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983). The circuit court failed to do so in this case. The order merely states that "the Petitioner has failed to sustain its burden of proof, and accordingly . . . this matter [is] dismissed and stricken from the docket[.]" In Syllabus Point 1 of State v. T.C., supra, we state:

> "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case."

At this juncture, the only error committed by the circuit court was dismissing this case without making a proper determination of the evidence of abuse and neglect.

In our earlier case of State v. Clark, 171 W. Va. 74, 79, 297 S.E.2d 849, 854 (1982), we offered the following explanation as to why compliance with a similar procedure was important:

> "Basing its decision on the preponderance standard, the trial court must make findings of fact and conclusions of law regarding the admissibility of the evidence. When credibility of the witnesses is determinative on the issue of whether to admit or exclude evidence, the trial court must clearly indicate why it chose to believe one witness more than another. Such findings and conclusions are necessary so that this Court may properly fulfill its appellate review obligations by ensuring that the state did or did not meet its burden of proof."

In the case at bar, it is virtually impossible to review the conclusion made below without the assistance of the circuit court's specific findings and some evaluation as to how the evidence of the State was deficient. The sincerity and credibility of the State's witnesses is impossible to gather from the record before us. We need to know why the circuit court dismissed this case. The credibility of the witnesses and the weight accorded their testimony are matters solely within the discretion of the circuit court. Accordingly, I would remand this case with directions to comply with W. Va. Code, 49-6-2(c), giving the circuit court a reasonable chance to justify its decision.

Footnote: 1 W.Va. Code, 49-6-2(c), states, in pertinent part:

"At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof."

199 W. Va. 263, 483 S.E.2d 846

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ELMER JIMMY S. AND WILMA JEAN S., Plaintiffs Below, Appellants

v.

KENNETH B. AND PHYLLIS B., Defendants Below, Appellees

No. 23786
Submitted: January 28, 1997
Filed: February 28, 1997

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. W. Va. Code 48-2B-1 *et seq.* affords circuit courts jurisdiction to consider grandparent visitation under the limited circumstances provided therein, even though the parental rights of the parent through whom the grandparent is related to the grandchild or grandchildren have been terminated. Generally, those circumstances are: (1) where divorce or separate maintenance is ordered and the parent has not appeared, etc.; (2) upon abandonment or abrogation of visitation rights by the grandchild's parent or judicial preclusion of such visitation; (3) when the parent through whom the grandparent is related is deceased; (4) when the minor child has resided with the grandparent for six consecutive months or more within the past two years; and (5) under certain circumstances when the parents of the child are unwed, as contemplated by W. Va. Code 48-2B-2 to -6 (1992) (Repl. Vol. 1996).

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Attorney for the Appellees

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE MAYNARD, deeming himself disqualified, did not participate in the decision of this case.

Davis, Justice:

The appellants, Elmer and Wilma S., See footnote 1 plaintiffs below, appeal from an order of the Circuit Court of Mingo County denying their petition for visitation with their natural grandson. The circuit court found that Elmer and Wilma did not have standing to petition the court for visitation due to the previous termination of the parental rights of their son, the child's father. The appellants argue that they are entitled to visitation under the provisions of W. Va. Code 48-2B-1 *et seq*. We disagree. We hold that W. Va. Code 48-2B-1 *et seq.* affords circuit courts jurisdiction to consider grandparent visitation under the limited circumstances provided therein, even though the parental rights of the parent through whom the grandparent is related to the grandchild or grandchildren have been terminated. We conclude that, under the particular circumstances of this case, the circuit court was without jurisdiction under W. Va. Code 48-2B-1 *et seq.* to consider the appellants' request for visitation.

I. FACTS

The child with whom visitation is sought was born on March 12, 1986. On March 16, 1988, the child's father was convicted of murder, in the second degree, of the child's mother. The murder apparently occurred in February of 1987. Thereafter, the child resided with the appellants, his paternal grandparents, from February, 1987, until October, 1988, during which time Wilma S. became his primary caretaker. The child's father also lived in the appellants' household prior to his incarceration and conviction.

Despite the fact that the appellees, the child's maternal grandparents Kenneth and Phyllis B., were awarded visitation with the child in January, 1988, no visitation occurred until they brought contempt proceedings. Thereafter, Kenneth and Phyllis B. petitioned the circuit court for custody of the child and for termination of the father's parental rights. By order entered November 3, 1988, the circuit court awarded custody of the child to the maternal grandparents and terminated the father's parental rights. In addition, the court granted visitation rights to the appellants, the child's paternal grandparents.

Subsequently, the circuit court *sua sponte* directed the parties to work out a joint custody arrangement. Joint custody was awarded by order entered June 16, 1989. The maternal grandparents appealed the order to this Court, where we reversed and remanded the case for a determination of proper custody considering the best interests of the child. See footnote 2 Thereafter, by order entered March 21, 1991, the circuit court granted sole custody of the child to the appellees, the maternal grandparents, and granted visitation to the paternal grandparents.

Although the record is somewhat unclear, it appears that sometime after the March 21, 1991, order a dispute arose between the parties regarding visitation. On October 10, 1993, the paternal grandparents filed a complaint in the Circuit Court of Mingo County seeking visitation with their grandson. The case was referred to a Family Law Master who, after conducting a hearing, recommended that the paternal grandparents' request for visitation be denied. The Family Law Master suggested that the paternal grandparents lacked standing to assert visitation rights due to the termination of the parental rights of their son, the child's natural father. Thereafter, by order entered November 7, 1995, the Circuit Court of Mingo County denied the paternal grandparents' request for visitation. It is from this order that the appellants now appeal.

II. STANDARD OF REVIEW

We are asked to determine whether grandparents may assert the right to visitation with their grandchild when the parental rights of the grandparent's child, with regard to such grandchild, have been terminated. Our review of this legal question is *de novo.* "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

III. DISCUSSION

The appellants, the paternal grandparents of the child with whom visitation is sought, argue that they are entitled to visitation with their grandson under W. Va. Code 48-2B-1 *et seq*, which provides for grandparent visitation. The appellants further contend that the child's best interests were not considered when the court denied their request for visitation. See footnote 3

At common law, "grandparents possessed no legal right to custody or visitation of a grandchild over the parent's objection. Syl. pt. 1, *Brotherton v. Boothe*, 161 W. Va. 691, 250 S.E.2d 36 (1978); *Jeffries v. Jeffries*, 162 W. Va. 905, 907, 253 S.E.2d 689, 691 (1979)." *Petition of Nearhoof*, 178 W. Va. 359, 361-62, 359 S.E.2d 587, 589-90 (1987) (footnote omitted). However, the enactment of W. Va. Code 48-2B-1 in 1980, which provided for grandparent visitation with the child of a deceased child of such grandparent, "change[d] the common law rule in West Virginia as to the right of grandparents' visitation." *Id.* at 362, 359 S.E.2d 590.

In *Nearhoof*, the only case interpreting the 1980 version of W. Va. Code 48-2B-1 (1980) (1986 Repl. Vol.), grandparents sought a declaration that the adoption of their deceased daughter's child by the spouse of their daughter's former husband would not terminate their visitation rights. At the time *Nearhoof* was decided, W. Va. Code 48-2B-1 provided for grandparent visitation only when the grandparent's child (a parent of the grandchild) was deceased. Because the statute was silent as

to the effect of an adoption upon such visitation, the Court addressed what appeared to be conflicting visitation policies embodied in the statutes pertaining to adoption See footnote 4 and grandparent visitation. See footnote 5 The Court concluded that the policies embodied in these statutes were not conflicting and held that the grandparents had a right to visitation as provided for in W. Va. Code 48-2B-1. In concluding that the statutes were not conflicting, the Court commented that "had the legislature intended the adoption statute to limit the statute providing for grandparents' visitation, the statutes could have reflected that intention." *Nearhoof*, 178 W. Va. at 364, 359 S.E.2d at 592 (citation omitted). See footnote 6

In 1992, West Virginia Code 48-2B-1 *et seq.*, was substantially amended and reinacted. The new Article 2B begins by stating:

> (a) The Legislature finds that *circumstances may arise where it is appropriate for circuit courts of this state to have jurisdiction to grant to the grandparents of minor children a right of visitation* to enhance the best interests of the minor child or children as well as the grandparent. The Legislature further finds that in such situations, as in all situations involving children, the best interests of children must be the paramount consideration. *It is the express intent of the Legislature that the provisions for grandparent visitation set forth in this article shall be exclusive* and under all circumstances the interests of the child or children involved shall be the court's first and paramount consideration.

W. Va. Code 48-2B-1(a) (1994) (Repl. Vol. 1996) (emphasis added). See footnote 7 The next five sections of the statute enumerate five circumstances in which the Legislature has deemed it appropriate for circuit courts to have jurisdiction to consider grandparent visitation, when it is also in the best interest of the child. See footnote 8

While W. Va. Code 48-2B-1 *et seq.* is designated as the exclusive provision for grandparent visitation, it is silent with regard to grandparent visitation when the parental rights of the grandparent's child (the parent of the grandchild) have been terminated. In addition, we are not aware of any statute expressly prohibiting grandparent visitation under such circumstances. Thus, following the Court's reasoning in *Nearhoof*, we believe that had the legislature intended the termination of parental rights to affect the visitation rights of the corresponding grandparent, the statute could have reflected that intention. *Cf. Nearhoof*, 178 W. Va. at 364, 359 S.E.2d at 587. Consequently, we hold that W. Va. Code 48-2B-1 *et seq.* affords circuit courts jurisdiction to consider grandparent visitation under the limited circumstances provided therein, even though the parental rights of the

parent through whom the grandparent is related to the grandchild or grandchildren have been terminated. See footnote 9 Generally, those circumstances are: (1) where divorce or separate maintenance is ordered and the parent has not appeared, etc.; (2) upon abandonment or abrogation of visitation rights by the grandchild's parent or judicial preclusion of such visitation; (3) when the parent through whom the grandparent is related is deceased; (4) when the minor child has resided with the grandparent for six consecutive months or more within the past two years; and (5) under certain circumstances when the parents of the child are unwed, as contemplated by W. Va. Code 48-2B-2 to -6 (1992) (Repl. Vol. 1996). See footnote 10

However, we find that under the particular circumstances of the case *sub judice*, the circuit court was without jurisdiction to consider the appellants' request for visitation under the grandparents rights statute. See footnote 11

The appellants argue that they are entitled to visitation with their grandchild under the provisions of W. Va. Code 48-2B-3 (1992) (Repl. Vol. 1996). See footnote 12 We disagree. The appellants' analysis ignores paragraph (a) of that section, which requires first that the grandparent's petition be filed with the circuit court that "entered a final order of divorce or annulment or has granted a decree of separate maintenance." W. Va. Code 48-2B-3(a). No such final order or decree was entered in this case. Next, W. Va. Code 48-2B-3(a)(1) requires that the parent through whom the grandparent is related to the grandchild be deemed the "noncustodial parent." In this case the parental rights of the appellants' son, through whom they are related to their grandchild, were terminated. When an individual's parental rights have been terminated the law no longer recognizes such individual as a "parent" with regard to the child or children involved in the particular termination proceeding. Implicit in the term "noncustodial parent," as used in W. Va. Code 48-2B-3(a)(1), is the fact that such person is a "parent" to the child in question. Thus, the non-parent whose parental rights have been terminated could not then be deemed a "noncustodial *parent*." Furthermore, the criteria of subsections (1), (2) and (3) of W. Va. Code 48-2B-3(a) must all be met before a grandparent may petition a circuit court for visitation. Because the appellants do not meet the requirements of subsection (1), we need not address subsections (2) and (3).

The appellants also argue that their request for visitation should be considered under W. Va. Code 48-2B-5 (1992) (Repl. Vol. 1996), See footnote 13 by virtue of the fact that the child resided with them from February of 1987 through October of 1988 without interruption. W. Va. Code 48-2B-5(1) requires, in part, that the minor grandchild resided without significant interruption with the grandparent for a period of six consecutive months or more *within the past two years*. Although the child lived with the appellants for a period greater than six months, he has not lived with them since October, 1988. W. Va. Code 48-2B-5 did not become

effective until May, 1992, more than three years after the child left the appellants' residence. Moreover, the appellants did not petition the court for visitation until October, 1993, five years after the child stopped residing with them. Because the appellants could not have brought their petition for visitation within two years of the time the child stopped residing with them, we find the court correctly denied the appellants' request for visitation based upon W. Va. Code 48-2B-5 (1992) (Repl. Vol. 1996).

For the reasons herein stated, we find that the circuit court correctly denied the appellants' request for grandparent visitation under the statute. Therefore, the November 7, 1995, order of the Circuit Court of Mingo County is affirmed.

Affirmed.

Footnote: 1 We follow our past practice in domestic and juvenile cases involving sensitive facts and do not use the last names of the parties. See, e.g., State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996).

Footnote: 2 This Court's earlier decision was reported in Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 399 S.E.2d 192 (1990). In that decision, we also affirmed the termination of the father's parental rights.

Footnote: 3 The appellees respond that the "court found specifically" that the minor child involved in this case should not have contact with his paternal grandparents. The appellees also asserts that the best interests of the child were clearly "considered and given great weight by the court." We have thoroughly reviewed the record, as submitted to this Court, and find nothing to support these contentions. The circuit court apparently found it unnecessary to proceed to a consideration of the best interests of the child, after having concluded that the grandparents lacked standing to request visitation.

Footnote: 4 W. Va. Code 48-4-1, et seq.

Footnote: 5 At that time, there were two statutes related to grandparent visitation. W. Va. Code 48-2B-1 (1980) (1986 Repl. Vol.), which provided for grandparent visitation when the child's parent was deceased, and W. Va. Code 48-2-15(b)(1) (1986) (1986 Repl. Vol.), which provided for grandparent visitation under certain circumstances when the parents of the child were divorced.

Footnote: 6 However, the Nearhoof decision was limited, under the provisions of W. Va. Code 48-2B-1 as they existed at that time, to grandparent visitation with

the child of a deceased child of the grandparent. Grandparents otherwise had no right of visitation with a grandchild who had been adopted.

Footnote: 7 This section was amended in 1994 by the addition of paragraph (b), which defines the term "grandparent" and is not relevant to the issues herein addressed.

Footnote: 8 Generally, those circumstances are: (1) where divorce or separate maintenance is ordered and the parent has not appeared, etc.; (2) upon abandonment or abrogation of visitation rights by the grandchild's parent or judicial preclusion of such visitation; (3) when the parent through whom the grandparent is related is deceased; (4) when the minor child has resided with the grandparent for six consecutive months or more within the past two years; and (5) under certain circumstances when the parents of the child are unwed, as contemplated by W. Va. Code 48-2B-2 to -6 (1992) (Repl. Vol. 1996).

Footnote: 9 However, a court ordering termination of the rights of a parent for abuse or neglect may preclude continued contact with a grandparent if such continued contact might create a danger of further abuse or neglect.

Footnote: 10 Our opinion in no way erodes this Court's position that a child has a right to continued association with individuals with whom he or she has formed a close emotional bond. Syl. pt. 11, In re: Jonathan G., ___ W. Va. ___, ___ S.E.2d ___ (No. 23465, Dec. l8, l996). See also Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989), wherein we held that a child had a continued right of association
with a step-father (husband of deceased mother) and half-sibling upon a showing that an emotional bond existed and that such continued association was in the child's best interests.

Footnote: 11 While not applicable to the case at bar, we note that this Court recently approved Rules of Procedure For Child Abuse and Neglect Proceedings, which became effective on January 1, 1997. Rule 15 of those rules provides for the circuit court's consideration of visitation, and states in part:

The effect of entry of an order of termination of parental rights shall be, inter alia, to prohibit all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents, unless the court finds the child consents and it is in the best interest of the child to retain a right of visitation.

A footnote to this rule states that it "is intended to neither increase nor decrease any rights of the grandparents as set forth in W. Va. Code 49-6-1 et seq. and 48-

2B-1 et seq." In light of this footnote, and the Legislature's finding that "circumstances may arise where it is appropriate to grant grandparent visitation to enhance the best interests of the child," W. Va. Code 48-2B-1 (1994) (Repl. Vol. 1996), we believe Rule 15 is in accord with our holding today.

Footnote: 12 W. Va. Code 48-2B-3 (1992) (Repl. Vol. 1996) states:

(a) A grandparent may petition a circuit court, which has entered a final order of divorce or annulment or has granted a decree of separate maintenance, for an order granting visitation rights with a minor grandchild where:
(1) The parent through whom the grandparent is related to the minor grandchild is deemed the noncustodial parent of the minor child by virtue of the court's order regarding custody of the minor child;
(2) The parent through whom the grandparent is related to the minor child having been granted visitation rights with the minor child refuses, fails or is unable to avail himself or herself of the right of visitation for a period of six months or more or has been precluded visitation rights by court order or is an active duty member of the armed forces of the United States whose permanent duty station is located more than one hundred miles from the border of this state; and
(3) The petitioning grandparent has been refused visitation with a minor grandchild by the custodial parent for a period of six months or more.
(b) In determining the appropriateness of granting visitation rights to a grandparent pursuant to this section, the court shall consider the amount of personal contact between the grandparent and minor child prior to the filing of the petition, whether or not the granting of visitation would interfere with the parent-child relationship and the overall effect of such visitation on the minor child's best interest.

Footnote: 13 W. Va. Code 48-2B-5 (1992) (Repl. Vol. 1996), states:

(a) Notwithstanding any provision of this code to the contrary, a grandparent may petition the circuit court of the county in which he or she resides for an order granting said grandparent reasonable visitation rights where:
(1) Said minor grandchild has resided without significant interruption with the grandparent with the parents residing elsewhere for a period of six consecutive months or more within the past two years; S
(2) The minor grandchild is subsequently removed from the home by a parent or parents; and
(3) The removing parent or parents have refused to allow the petitioning grandparent visitation with the minor child who formerly resided in the grandparent's home.
(b) If the circuit court determines that the requirements set forth in subsection (a) of this section have been shown, it shall grant such reasonable visitation rights to

the petitioning grandparent as may be consistent with the minor child's best interests.

208 W. Va. 325, 540 S.E.2d 542

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
June 16, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26915

RELEASED
June 16, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: EMILY AND AMOS B.

Appeal from the Circuit Court of Mercer County
Honorable John R. Frazier, Judge
Juvenile Action Nos. 98-JA-0090-F and 98-JA-0091-F

REVERSED, IN PART, VACATED, IN PART,
AND REMANDED

Submitted: April 12, 2000
Filed: June 16, 2000

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JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES STARCHER and MCGRAW concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. """Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).' Syllabus Point 1, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)." Syllabus point 1, *In re Travis W.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26640 Dec. 7, 1999).

2. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 7, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

3. "Once a court exercising proper jurisdiction has made a determination upon

sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody." Syllabus point 8, in part, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. """Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).' Syllabus point 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996)." Syllabus point 2, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999).

5. The commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period.

6. At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by W. Va. Code § 49-6-2 (1996) (Repl. Vol. 1999), W. Va. Code § 49-6-5 (1998) (Repl. Vol. 1999), and W. Va. Code § 49-6-12 (1996) (Repl. Vol. 1999).

7. "A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal

offenses." Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W. Va. 209, 174 S.E.2d 742 (1970).

8. "'When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.' Syllabus Point 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)." Syllabus point 8, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

Davis, Justice:

The appellant herein and petitioner below, the West Virginia Department of Health and Human Resources [hereinafter "DHHR"], appeals the September 15, 1999, dispositional order entered by the Circuit Court of Mercer County regarding the minor children Emily B.[1] [hereinafter "Emily"] and her brother Amos B. (son) [hereinafter "A.J."]. In that order, the circuit court denied the DHHR's motion to terminate the parental rights of the children's parents, the appellees herein and respondents below, Tracy B. [hereinafter "Tracy"] and Amos B. (father) [hereinafter "Amos"],[2] and granted each of the parents a one-year improvement period to commence upon Tracy's successful completion of an inpatient substance abuse treatment program and Amos' release from federal incarceration. On appeal to this Court, the DHHR contends that the circuit court erroneously granted a delayed improvement period and improperly denied its motion to terminate Tracy's and Amos' parental rights. Upon a review of the parties' arguments, the appellate record, and the pertinent authorities, we reverse the decision of the Circuit Court of Mercer County granting the parents a delayed improvement period. We order reversal in this instance because such an improvement period is not permitted by the relevant statutes governing abuse and neglect matters. *See* W. Va. Code § 49-6-1, *et seq.* Furthermore, as a result of this ruling, we vacate the circuit court's order denying the DHHR's motion to terminate the respondent parents' parental rights, and remand this

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[1]In this case involving sensitive facts, we adhere to our usual practice adopted in other such cases and refer to the parties by their last initials rather than by their complete surnames. *See, e.g., In re Michael Ray T.*, ___ W. Va. ___, ___ n.1, ___ S.E.2d ___, ___ n.1, slip op. at 1 n.1 (No. 26639 Dec. 3, 1999); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 559 n.2, 490 S.E.2d 642, 646 n.2 (1997); *In re Tiffany Marie S.*, 196 W. Va. 223, 226 n.1, 470 S.E.2d 177, 180 n.1 (1996).

[2]Tracy and Amos were once married to each other, and it appears that a divorce action was instituted prior to Amos' incarceration. It is unclear, though, whether the parties' divorce has been finalized.

case to permit the lower court to reconsider the matter and to conduct further proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

On November 5, 1998, the DHHR filed in the Circuit Court of Mercer County a petition for the emergency custody of then five-year-old Emily[3] and then three-year-old A.J.[4] based upon Tracy's, their mother's, failure to retrieve the children from their day care provider,[5] and Amos', their father's, present inability to care for them as a result of his incarceration.[6] The events underlying this petition are as follows. On or about October 30, 1998, Tracy arranged for the children to spend the night with their day care provider, Patsy H. [hereinafter "Patsy"], presumably with the understanding that Tracy would retrieve the children the following day. However, Tracy did not return to Patsy's house the next day to pick up Emily and A.J. Additionally, she neither called nor checked on the children. Neither did she provide them with changes of clothing, food, medication, or a consent form giving Patsy permission to obtain medical care

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[3]Emily's date of birth is August 31, 1993.

[4]A.J. was born on September 20, 1995.

[5]The DHHR also based its allegations of abuse and neglect upon Tracy's history of substance abuse and prior police reports of her failure to supervise the children.

[6]During the events underlying this appeal, Amos has been incarcerated in the Federal Correctional Institution--Beckley, located in Beaver, West Virginia, where he is serving a fifty-one month sentence for the robbery of a bank and a convenience store. He is expected to be released from custody upon the completion of his sentence in March, 2001, but he may be released as early as October, 2000, to a "half-way house" in Dunbar, West Virginia, or on home confinement, as a result of good time credit.

for them.[7] After the youngsters had stayed with their day care provider for three days, Tracy called to inquire about them and requested Patsy to bring the children to her. When Patsy refused to do so, Tracy indicated that she could not pick up the children herself. Ultimately, on the fifth day of the children's stay with Patsy, on November 3, 1998, their grandmother and Tracy's mother, Aletha M., picked up Emily and A.J.

By order entered November 5, 1998, the circuit court determined Emily and A.J. to be in imminent danger,[8] with no alternative but to temporarily remove them from their mother's care. *See*

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[7]Patsy reported that, when Tracy left Emily and A.J. in her care, both children were ill with colds, and one child had a fever. When Pasty mentioned the children's medical conditions to Tracy and inquired about medication for them, Tracy did not respond.

[8]"Imminent danger," requisite to the removal of a child from the home of his/her parent or guardian at the behest of a petition to do so, *see* W. Va. Code § 49-6-3(a)(1) (1998) (Repl. Vol. 1999), is defined as follows:

> "Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is . . . reasonable cause to believe that the following conditions threaten the health or life of any child in the home:
>
> . . . .
>
> (4) Abandonment by the parent, guardian or custodian[.]

W. Va. Code § 49-1-3(e) (1998) (Repl. Vol. 1998). *See also* W. Va. Code § 49-1-3(e) (1999) (Repl. Vol. 1999) (same). In presenting its abuse and neglect petition to the circuit court, the DHHR relied upon the statutory definitions of "child neglect" and "neglected child" to demonstrate the children's imminent danger, as illustrated by the facts alleged in its petition. *See* W. Va. Code § 49-1-3(c) (1998) (defining "[c]hild abuse and[/or] neglect" as including "physical injury, mental or emotional injury, . . . or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's

(continued...)

W. Va. Code § 49-6-3(a) (1998) (Repl. Vol. 1999). In so ruling, the court also awarded legal and physical custody of the children to the DHHR. The DHHR, in turn, placed the children with their maternal grandmother, Aletha M., with whom they had been residing since November 3rd. Thereafter, a preliminary hearing was held on November 16, 1998. At that time, the circuit court found Emily and A.J. continued to be in imminent danger so as to preclude their return to Tracy's care, and continued their legal and physical custody with the DHHR. The court further ordered supervised visitation between Tracy and the children, and allowed the DHHR discretion as to whether to permit visitation with Amos.

Following these proceedings, the parties developed a family case plan whereby Tracy would complete extensive detoxification and substance abuse treatment programs, submit to random drug screens by the DHHR, and create a safe and stable home environment for Emily and A.J., including securing employment and maintaining a drug-free atmosphere. No family case plan was devised for Amos, however, presumably because the parties believed his incarceration would preclude his achievement of such goals.

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[8](...continued)
welfare, under circumstances which harm or threaten the health and welfare of the child"); W. Va. Code § 49-1-3(h)(1) (1998) (construing term "[n]eglected child" as a child "(A) [w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (B) [w]ho is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian"). *See also* W. Va. Code § 49-1-3(c,h(1)) (1999) (same).

The adjudicatory hearing scheduled for January 13, 1999,[9] was continued to March 31, 1999, at the request of Tracy's counsel, as a result of Tracy's enrollment in an inpatient substance abuse treatment program pursuant to the terms of her family case plan. On March 31, 1999, the court determined that Tracy had abandoned Emily and A.J. and that Amos had, by virtue of his incarceration, "technically abandoned" the children. Accordingly, the court adjudicated the children to be abused and/or neglected.

On April 28, 1999, the DHHR moved to terminate both parent's parental rights based upon the circuit court's findings of abandonment and its statutory obligation to seek termination of parental rights in cases involving abandonment.[10] *See* W. Va. Code § 49-6-5b(a)(2) (1998) (Repl. Vol. 1999) (directing that the DHHR "shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights . . . [i]f a court has determined the child is abandoned"). Finally, on September 15, 1999, the circuit court conducted a dispositional hearing in this case.[11] Upon the evidence presented

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[9]In its preliminary order, the court noted that the parties had waived the statutory time constraints for the adjudicatory hearing due to the Christmas and New Year's holidays. *See* W. Va. Code § 49-6-1(a) (1998) (Repl. Vol. 1999) (requiring, in abuse and neglect cases in which temporary custody of child has been awarded to DHHR, adjudicatory hearing to be held "within thirty days of such order [awarding temporary custody], unless a continuance for a reasonable time is granted to a date certain, for good cause shown"); W. Va. R. P. for Child Abuse & Neglect Proceed. 25 (same).

[10]The DHHR also alleged in its motion that, since her departure from her inpatient treatment program, Tracy's whereabouts had been unknown, and that, as a result of her absence, it had been unable to conduct random drug screens as permitted by an earlier order of the circuit court.

[11]The dispositional hearing, initially scheduled for May 19, 1999, was continued on numerous occasions due to the unavailability of the psychologist who evaluated Emily and A.J. and as a result of various difficulties in securing Amos' transport from federal prison to the circuit court proceedings. For further treatment of an incarcerated parent's right to attend a dispositional hearing concerning the possible termination of his/her parental rights, see Syl. pts. 10 and 11, *State ex rel. Jeanette H. v.*

(continued...)

for its consideration, the court rendered the following findings and conclusions:

> The Court **FINDS** that these infant children have a close and continuing relationship and strong bond with the respondent father,[12] that it appears the respondent mother was probably the primary caretaker prior to the initiation of this action, and the Court suspects there is a strong bond between the respondent mother and the infants. The Court **FINDS** that when a reunification plan is adopted as to one parent, termination of the other parent's parental rights normally serves no purpose. This Court has difficulty terminating the respondent mother's rights, because this Court **FINDS** it very difficult to terminate the rights of the respondent father under the facts before the Court. The Court **FINDS** that the respondent father has recently resided in a structured environment as a result of his conviction for bank robbery, that he is participating and complying with all services provided by the Federal Correction Facility, such as visitation, drug and alcohol counseling, and parenting programs. On the other hand, the respondent mother is in an unstructured environment, and has failed to comply with any services provided her, and suffers from an apparent drug addiction. The Court **FINDS** that this case is one of those rare exceptions to delay the implementation of a permanency plan; as the respondent father is due to be released from incarceration between October 2000 and March 2001; specifically that this is not a case where a limited six month improvement period will be appropriate. The Court **FINDS** that an extended improvement period, or delay in implementing the same, will not unduly prejudice the infants because the infants are doing well in their current foster placement with the visitation available, that it is in the best interest of the infants to currently maintain the existing bond with their parents, and although the Department of Health and Human Resources has identified adoption as the permanency plan for these infants, the Department has not secured a permanent placement as of this date.
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> This Court will defer further disposition in this matter, and it is the **ORDER** and **DECREE** of this Court that the State's Motion to

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[11](...continued)
Pancake, ___ W. Va. ___, ___ S.E.2d ___ (No. 27061 Apr. 24, 2000), which commits such a decision to the presiding circuit court's discretion.

[12]The parties represent that Amos has been visiting with Emily and A.J. approximately twice a month since his transfer to the federal correctional facility in Beaver, in March, 1998.

> Terminate Parental Rights be denied as to both respondent parents. It is the **ORDER** and **DECREE** of this Court that both respondent parents be granted a one (1) year post-adjudicatory improvement period,[13] that the formal implementation of the respondent father's six (6) month statutory improvement period be delayed until his release from incarceration, and that the formal implementation of the respondent mother's six (6) month statutory improvement period be delayed until she has successfully completed a long-term inpatient substance abuse treatment. . . .[14]

(Footnotes added). From this order of the circuit court, the DHHR appeals.

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[13]In its dispositional order, the circuit court refers to the improvement periods granted to the respondent parents as "post-adjudicatory improvement period[s]." Because this relief was granted in the context of the dispositional hearing, rather than during the adjudicatory hearing, which occurred some six months earlier, it seems that the improvement periods awarded are more aptly denominated "dispositional improvement periods," as they were, in fact, granted as a type of alternative disposition in this case. *Compare* W. Va. Code § 49-6-2(b) (1996) (Repl. Vol. 1999); W. Va. Code § 49-6-12(b) (1996) (Repl. Vol. 1999); *and* W. Va. R. P. for Child Abuse & Neglect Proceed. 37 (pertaining to post-adjudicatory improvement periods) *with* W. Va. Code § 49-6-5(c) (1998) (Repl. Vol. 1999); W. Va. Code § 49-6-12(c); *and* W. Va. R. P. for Child Abuse & Neglect Proceed. 38 (discussing alternative disposition improvement periods). Accordingly, we will henceforth refer to the relief granted by the circuit court to the respondent parents as *dispositional* improvement periods.

[14]In this regard, the circuit court further instructed the parties as to the conduct expected of them at this time:

> The Court **FINDS** that the reunification plan previously developed by the Department of Health and Human Resources for the respondent mother was a good plan, and directs that the same be implemented as a post-adjudicatory improvement period for the respondent mother; the Department is **ORDERED** to finance any substance abuse treatment programs it arranges for the respondent mother, and the respondent father should continue to pursue any appropriate services provided by the prison system, and not engage in any behavior that would delay his release.

II.

STANDARD OF REVIEW

For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard.

> "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 1, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999).

Syl. pt. 1, *In re Travis W.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26640 Dec. 7, 1999). With this standard in mind, we consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, the DHHR assigns two errors: (1) the circuit court improperly granted the respondent parents a delayed improvement period to begin after Amos' release from prison and Tracy's completion of an inpatient substance abuse/detoxification program and (2) the circuit court

erred by denying the DHHR's motion to terminate the parents' parental rights.

A. Delayed Improvement Period

The DHHR first complains that the circuit court erroneously granted the respondent parents a delayed improvement period.[15] In this respect, the DHHR argues that improvement periods of the type

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[15]The DHHR additionally complains that the circuit court improperly granted the parents a one-year improvement period in violation of the applicable governing statute which limits dispositional improvement periods to six months' duration, with a discretionary three-month extension. *See* W. Va. Code § 49-6-5(c); W. Va. Code § 49-6-12(c,g). For his part, Amos suggests that the circuit court properly followed the statutory guidelines in awarding both parents a one-year delayed improvement period. In this regard, Amos represents that, following the conclusion of the six-month dispositional improvement period authorized by W. Va. Code § 49-6-5(c), the circuit court is required to hold a new dispositional hearing. Because the court could, in theory, dispose of the case anew by granting the respondent parent(s) another six-month improvement period, Amos argues that the duration of the improvement periods awarded by the circuit court in the proceedings underlying this appeal were not in error.

While our final resolution of this assignment of error does not require us to consider whether the precise duration of the improvement periods awarded was appropriate, see text at page 24, *infra*, we nevertheless wish to speak briefly on this matter. In its dispositional order, the circuit court variously characterized the improvement periods awarded to the respondent parents both as a "one (1) year post-adjudicatory improvement period" and as "the respondent father's [and the respondent mother's] six (6) month statutory improvement period." As a result of this contradictory language, it is difficult to ascertain just how long the circuit court intended each of the parents' improvement periods to last, *i.e.*, six months or one year. In any event, however, we remind the circuit court that, on remand, it must heed the statutory guidelines for improvement periods, and mould the parents' improvement periods, if any should be warranted, to the time constraints provided by the Legislature. To reiterate our earlier admonition,

> [a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to

(continued...)

awarded by the circuit court in this case are not authorized by the statutory law governing child abuse and neglect proceedings. *See* W. Va. Code § 49-6-2(b) (1996) (Repl. Vol. 1999); W. Va. Code § 49-6-5(c) (1998) (Repl. Vol. 1999); W. Va. Code § 49-6-12 (1996) (Repl. Vol. 1999). In turn, Tracy and Amos reply that the circuit court properly awarded them improvement periods in accordance with the governing statutes.[16] *See id.*

At issue in this assignment of error is the authority of a circuit court to grant an improvement period to parents facing the termination of their parental rights, and the court's ability to further alter the commencement of such an improvement period. Typically, an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior

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[15](...continued)
provide the basic nurturance of life.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996).

[16]Tracy also contends that her entitlement to an improvement period should not be negated by her counsel's dereliction in duty, *i.e.*, his failure to follow the appropriate procedural rules which require a party to apply, in writing, for an improvement period. *See* W. Va. Code § 49-6-12(c) ("The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§ 49-6-5] of this article when . . . [t]he respondent moves in writing for the improvement period . . . ."); W. Va. R. P. for Child Abuse & Neglect Proceed. 17(c)(1) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is made in a written notice of the hearing on the motion."). Because our ultimate resolution of the improvement period issue concludes that the circuit court's ruling was clearly erroneous, see text at page 24, *infra*, we need not further consider this matter. We do, however, caution the circuit court, on remand, to pay strict allegiance to the procedural requirements for the issuance of improvement periods prescribed by the statutory guidelines therefor, should it deem that any such improvement periods are warranted in this case. *See, e.g.*, W. Va. Code §§ 49-6-5(c), 49-6-12; W. Va. R. P. for Child Abuse & Neglect Proceed. 17(c), 38.

so as to correct the conditions of abuse and/or neglect with which he/she has been charged. "The goal of an improvement period is to facilitate the reunification of families whenever that reunification is in the best interests of the children involved." *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 258, 470 S.E.2d 205, 212 (1996). *See also* Syl. pts. 3 and 5, *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987) (Syl. pt. 3: "Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984)."; Syl. pt. 5: "The purpose of the family case plan as set out in W. Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.").

As such, one who faces the termination of his/her parental rights may, during the pendency of an abuse and neglect proceeding, move the presiding court for an improvement period pursuant to W. Va. Code § 49-6-12(a(1),b(1),c(1)). *Accord* Syl. pt. 9, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997) ("'W. Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.' Syl. Pt. 2, *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987)."). *See also* W. Va. Code § 49-6-2(b) (1996) (Repl. Vol. 1999) (indicating that, "[i]n any proceeding brought pursuant to the provisions of this article, the court may grant any respondent an improvement period in accord with the provisions of this article"); W. Va. R. P. for Child Abuse & Neglect Proceed. 17(c) (explaining proper form of motions in child abuse and neglect

proceedings). Among the types of improvement periods that may be available to the petitioning parent are those that serve as an alternative disposition of an abuse and neglect proceeding [hereinafter "dispositional improvement period"],[17] such as the improvement periods at issue herein:[18]

> The court may as an alternative disposition allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person for the temporary care of the child during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section.

W. Va. Code § 49-6-5(c). *Accord* W. Va. R. P. for Child Abuse & Neglect Proceed. 38. Thus, a circuit court may, in its discretion, grant the abusing/neglecting parent an improvement period before it finally decides whether his/her parental rights should be ultimately terminated.

Improvement periods are further regulated, both in their allowance and in their duration, by the West Virginia Legislature, which has assumed the responsibility of implementing guidelines for child abuse and neglect proceedings generally. *See* W. Va. Code § 49-6-1, *et seq.* W. Va. Code § 49-6-12 (1996) (Repl. Vol. 1999), the main statute pertaining to improvement periods, contains various criteria to be considered by a circuit court in determining the propriety of such relief in a given case. For dispositional

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[17]*See infra* note 19.

[18]*See supra* note 13.

improvement periods,[19] the statute provides:

> (c) The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§ 49-6-5] of this article when:
>
> (1) The respondent moves in writing for the improvement period;
>
> (2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
>
> (3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;
>
> (4) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances, the respondent is likely to fully participate in the improvement period; and
>
> (5) The order granting the improvement period shall require the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d [§ 49-6D-3] of this chapter.

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[19]For the sake of brevity, and to maintain consistency with the legal question at issue in this appeal, our discussion of the applicable law will focus primarily upon dispositional improvement periods. In the context of this analysis, however, we also will include references to the standards governing pre- and post-adjudicatory improvement periods, to the extent that such authority is available.

W. Va. Code § 49-6-12(c).[20] While delineating a six-month duration for dispositional improvement periods,[21] this section also permits a circuit court to extend a dispositional improvement period for an additional three months, if the circumstances of an individual case warrant such an extension:

> (g) A court may extend any improvement period granted pursuant to subsection[] . . . (c) of this section for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.[22]

W. Va. Code § 49-6-12(g) (footnote added). Upon the conclusion of a dispositional improvement period, and any extension thereof, the circuit court is required to conduct a final dispositional hearing within sixty days of the improvement period's cessation. *See* W. Va. Code §§ 49-6-2(d), 49-6-12(k); W. Va. R. P. for Child Abuse & Neglect Proceed. 38. *But see* W. Va. Code § 49-6-12(j) (instructing that such a hearing may be continued only for "good cause").

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[20]A similar method is employed for pre- and post-adjudicatory improvement periods. *See* W. Va. Code § 49-6-12(a,b).

[21]Comparable time limits are imposed for pre- and post-adjudicatory improvement periods. *See* W. Va. Code § 49-6-12(a,b) (establishing three month and six month time frames for pre- and post-adjudicatory improvement periods, respectively).

[22]This three-month discretionary extension is applicable also to post-adjudicatory improvement periods. *See* W. Va. Code § 49-6-12(g). *See also* Syl. pt. 2, *In re Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999) ("Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.").

Even with these detailed guidelines, however, a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. For example, when the award of an improvement period would jeopardize the best interests of the subject child, the parent requesting such relief ordinarily will not be accommodated.

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . ." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Syl. pt. 7, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Similarly, when a parent cannot demonstrate that he/she will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded before the circuit court may terminate the offending parent's parental rights.

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989)." Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Likewise, when the conduct forming the basis of the abuse and/or neglect allegations consists of abandonment, such parental recalcitrance is perceived as so egregious as to warrant the virtually automatic denial of an improvement period. "Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period." Syl. pt. 2, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400

(1991). Finally, a dispositional improvement period is not available to a respondent parent "where a finding is made pursuant to *W. Va. Code*, 49-6-5(a)(6) [1977] that there is 'no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future,' and, pursuant to *W. Va. Code*, 49-6-2(b) [1980], 'compelling circumstances' justify a denial thereof." Syl. pt. 3, in part, *In re Darla B.*, 175 W. Va. 137, 331 S.E.2d 868 (1985).

A parent's rights are necessarily limited in this respect because the pre-eminent concern in abuse and neglect proceedings is the best interest of the child subject thereto. Syl. pt. 3, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999) ("'Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).' Syllabus point 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995).").

> Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.

Syl. pt. 8, in part, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). In other words, "'[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)." Syl. pt. 3, *In re Billy Joe M.*, ___ W. Va. ___, 521 S.E.2d 173 (1999). *Accord* Syl. pt. 1, *State v. C.N.S.*, 173 W. Va. 651, 319 S.E.2d 775 (1984) ("'Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be

entrusted with child care.' Syllabus Point 5, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).").

For this reason, then, the Legislature has very specifically commanded that abuse and neglect proceedings shall be accorded the utmost priority on circuit court dockets:

> Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under article two-a [§ 48-2A-1 et seq.], chapter forty-eight of this code and actions in which trial is in progress. Any petition filed under the provisions of this article shall be docketed immediately upon filing. . . .

W. Va. Code § 49-6-2(d). Echoing these directives, this Court has adopted comparable language in Rule 2 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, which provides, in relevant part:

> These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child. These rules are designed to accomplish the following purposes:
>
> (a) To provide fair, timely and efficient disposition of cases involving suspected child abuse or neglect[and]
>
> . . . .
>
> (d) To reduce unnecessary delays in court proceedings through strengthened court case management . . . .

In the same vein, we repeatedly have held in our case law that abuse and neglect proceedings should be resolved as expediently as possible in order to safeguard the well being of the young children at the heart of such proceedings.

> "'Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.' Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)." Syllabus point 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).

Syl. pt. 2, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999). *See also* Syl. pt. 7, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863 (1999) ("'The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.' Syl. Pt. 5, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).").

Having reviewed the law of this State regarding improvement periods, we turn now to the parties' contentions in the instant appeal. In its order granting Tracy and Amos dispositional improvement periods, the circuit court delayed the commencement thereof until Amos' "release from incarceration" and until Tracy "has successfully completed a long-term inpatient substance abuse treatment" program. This ruling, however, has no basis in the applicable governing law. While the Legislature has created various types of improvement periods and has established specific time limits therefor, nowhere has it provided for the delayed implementation thereof. *See* W. Va. Code §§ 49-6-2(b,d), 49-6-5(c), 49-6-12. In fact, the very nature of a delayed improvement period contradicts the established legislative purpose of expediting abuse and neglect proceedings to safeguard the welfare of the child(ren) subject thereto. *See* W. Va. Code § 49-6-2(d); Syl. pt. 7, *In re George Glen B.*, 205 W. Va. 435, 518 S.E.2d 863.

Moreover, under the circumstances of the present case, the delayed implementation of the respondent parents' improvement periods is particularly problematic because, by the very terms of the court's ruling, the delay is indefinite. By basing the commencement date upon such a speculative condition as Tracy's successful completion of a substance abuse treatment program, the circuit court presupposes that she will be able to accomplish, in the short-term, what she has been unwilling to do for the ten and one-half months preceding the circuit court's order.[23] Furthermore, the language employed by the circuit court in granting the respondent father a delayed improvement period is ambiguous. Because it has not defined what constitutes Amos' "release from incarceration," it is unclear as to whether his improvement period shall commence upon his release to a "half-way house" or home confinement, or whether his improvement period is further delayed until his ultimate release from federal custody in March, 2001. In any event, for each of the potential dates upon which Amos' improvement period could start, one naturally must assume that he will, in fact, be eligible for release upon those dates certain[24] and that he will not have lost any good time credited to his sentence. One must also suppose that Amos will be able to assimilate back into society, after a four year sojourn therefrom due to his own socially deviant behavior, to such a degree as to be determined a fit and proper caretaker for his children. As a result of the plethora of difficulties

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[23]In his appellate brief, counsel for the respondent mother has indicated that "Tracy B. entered a drug treatment facility in Parkersburg, West Virginia, with the assistance of DHHR, shortly after the Circuit Court's granting of her improvement period, and as of the date of the writing of this Brief, she remains in said facility." While we commend Tracy's efforts, we have no information before us, apart from her counsel's solitary representation, demonstrating that the respondent mother has, in fact, complied with the circuit court's condition by "successfully complet[ing]" this treatment program.

[24]Even the phrase "dates certain" is somewhat of a misnomer in this context as the precise dates upon which Amos anticipates to be released have repeatedly been communicated in the vague terms of particular months and years, rather than by reference to a precise day of such months and years.

surrounding the very idea of delayed improvement periods, not to mention the logistical impossibilities of implementing the same and the rights of the innocent children which will unquestionably be trammeled if such an attempt is made, we conclude that the circuit court's order granting such relief to the respondent parents was in error.

Accordingly, we hold that the commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period. We hold further that, at all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by W. Va. Code § 49-6-2 (1996) (Repl. Vol. 1999), W. Va. Code § 49-6-5 (1998) (Repl. Vol. 1999), and W. Va. Code § 49-6-12 (1996) (Repl. Vol. 1999).

As the delayed dispositional improvement periods at issue herein clearly violate the statutory mandates and contravene the judicial decisions pertaining to improvement periods, the decision of the circuit court awarding each of the respondent parents a delayed dispositional improvement period is hereby reversed.

B. Termination of Parental Rights

In its second assignment of error, the DHHR requests this Court to reverse the circuit court's order denying its motion to terminate the parental rights of Amos and Tracy. To support this argument, the DHHR contends that Amos, as a result of his incarceration, has technically abandoned his

infant children in that his imprisonment prevents him from providing for their care and support. Because abandonment can constitute neglect pursuant to the applicable statutory law, *see* W. Va. Code § 49-1-3(g)(1)(B) (1998) (Repl. Vol. 1998),[25] the DHHR maintains that Amos' incarceration effectively amounts to neglect so as to warrant the termination of his parental rights. Likewise, the DHHR avers that Tracy has neglected and abandoned Emily and A.J. by virtue of her ongoing substance abuse problems and her inability and/or unwillingness to provide for the children's care and support.

Responding to these contentions, Amos and Tracy dispute that they have ever abandoned their children so as to warrant the termination of their parental rights. Tracy contends that her conduct does not satisfy the six-month abandonment period contained in W. Va. Code § 48-4-3c(a)(2) (1997) (Repl. Vol. 1999).[26] Likewise, Amos contends that he did not abandon his children because when he was

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[25]*See supra* note 8 for the pertinent text of W. Va. Code § 49-1-3(g)(1)(B) (1998) (Repl. Vol. 1998).

[26]W. Va. Code § 48-4-3c(a) (1997) (Repl. Vol. 1999), which is contained in the body of statutes governing adoptions, provides, in pertinent part:

> (a) Abandonment of a child over the age of six months shall be presumed when the birth parent:
>
> (1) Fails to financially support the child within the means of the birth parent; and
>
> (2) Fails to visit or otherwise communicate with the child when he or she knows where the child resides, is physically and financially able to do so and is not prevented from doing so by the person or authorized agency having the care or custody of the child: *Provided, That such failure to act continues uninterrupted for a period of six months immediately preceding the filing of the adoption*

(continued...)

incarcerated, he entrusted Emily and A.J. to their mother's care. In addition, the respondent parents assert that neither the statutes governing abuse and neglect proceedings nor this Court's jurisprudence interpreting the same include incarceration as a factor upon which the termination of a parent's parental rights may be based. Accordingly, they urge that the fact that a parent is incarcerated does not, *per se*, warrant the termination of the imprisoned parent's parental rights. *See, e.g., In re Adoption of Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978); Hon. Jean M. Johnson & Christa N. Flowers, *You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List of Statutory Grounds for Termination of Parental Rights*, 25 Fla. St. U. L. Rev. 335 (1998). Finally, Tracy contends that if, apart from the fact of his incarceration, Amos is entitled to participate in an improvement period and/or retain his parental rights, then her parental rights should not be terminated because, in the words of the circuit court, "when a reunification plan is adopted as to one parent, termination of the other parent's parental rights normally serves no purpose."

Although the allegations of abuse and neglect lodged by the DHHR against the respondent parents warrant careful consideration, and a final resolution to these year-and-a-half long proceedings is imperative, we are left with the firm conviction that the final disposition of this abuse and neglect case is more appropriately decided, in the first instance, by the circuit court. Our reasons for this conclusion are two-fold. First, in the context of abuse and neglect proceedings, the circuit court is the entity charged with

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[26](...continued)
petition.

(Emphasis added).

weighing the credibility of witnesses and rendering findings of fact. Syl. pt. 1, in part, *In re Travis W.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26640 Dec. 7, 1999) ("[W]hen an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. . . ." (internal citations and quotations omitted)). This Court, therefore, cannot set aside a circuit court's factual determinations unless such findings are clearly erroneous. *Id.* In the instant appeal, the record presented for our appellate consideration does not adequately contain essential information necessary for this Court to review the circuit court's rulings under a clearly erroneous standard. Conspicuously absent from the appellate record are the transcripts of the various hearings held in the proceedings underlying this appeal. Also missing from the record presented for our consideration are the reasoned recommendations of the children's guardian ad litem as to the disposition most consistent with Emily's and A.J.'s welfare and best interests, the only indication of which is a solitary reference in the circuit court's dispositional order reflecting that "the Guardian Ad Litem is seeking termination of the respondent mother's rights only."[27] Both of these pieces of vital information have been omitted from the record presented for our consideration despite our clear and oft-repeated admonitions that parties appearing before this Court are responsible for designating the appellate record[28] and that guardians are duty-bound to provide guidance to the tribunal

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[27]Neither can we refer to the guardian's appellate brief for insight as to his recommendations as no such brief has been filed in this case.

[28]*See* Syl. pt. 6, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999) ("The responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court.").

charged with determining the subject child(ren)'s ultimate fate.[29]

Second, as we decided in the preceding section, *see supra* Section III.A., the circuit court erred by granting the parties a delayed improvement period as such a construct does not exist in either the statutory or jurisprudential law of this State. From those portions of the record that we do have at our disposal in the instant proceeding, however, it seems that the circuit court was very likely torn between the DHHR's allegations of abuse and neglect, on the one hand, and Amos' efforts to improve his parenting skills and continue his relationship with his children, on the other hand. While we do not profess to know

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[29]*See* Syl. pt. 5, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993) ("Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W. Va. Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII [current Rule 21.01] of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians *Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code*, the *West Virginia Rules for Trial Courts of Record*, and the *West Virginia Rules of Professional Conduct*, and provide attorneys who serve as guardians *ad litem* with direction as to their duties in representing the best interests of the children for whom they are appointed."). *See also* Syl. pt. 5, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home."); Syl. pt. 3, *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991) ("In a proceeding to terminate parental rights pursuant to *W. Va. Code*, 49-6-1 to 49-6-10, as amended, a guardian *ad litem*, appointed pursuant to *W. Va. Code*, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian *ad litem*, an appeal is necessary."). *See also* W. Va. R. P. for Child Abuse & Neglect Proceed. 52(g) (directing that "[t]he duties and responsibilities of a child's guardian ad litem shall continue until such child has a permanent placement, and the guardian ad litem should not be relieved of his responsibilities until such permanent placement has been achieved").

the innermost workings of the Circuit Court of Mercer County, particularly in light of the fact that the appellate record is completely devoid of any hearing transcripts reflecting the lower court's reasoning for its rulings, we nonetheless find that it is quite likely that the circuit court granted the respondent parents delayed improvement periods in lieu of considering the merits of the DHHR's motion to terminate their parental rights. In that we have thwarted the circuit court's attempted circumvention of a final disposition of this case at the present time, we conclude that it is proper to vacate the court's order insofar as it denied the DHHR's termination motion and to remand this case to permit the circuit court to reconsider, on the merits, the DHHR's motion to terminate Amos' and Tracy's parental rights. *See* Syl. pt. 7, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999) (""'In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.' Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103[, 181 S.E.2d 334] (1971)." Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978).' Syllabus point 3, *Voelker v. Frederick Business Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995).").

In spite of our conclusion that the circuit court is the better-equipped tribunal to render an initial disposition of this case, the parties' arguments nevertheless incorporate several important legal issues instructive to the circuit court's ultimate decision on remand. First, the respondent parents assert that incarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights. With

this statement of the applicable law, we readily agree.[30] As it has been duly noted, the Legislature has assumed the task of establishing a body of law to govern abuse and neglect proceedings. *See* W. Va. Code § 49-6-1, *et seq.* Within this statutory authority, however, the Legislature has not deemed it necessary to base the termination of an individual's parental rights solely upon the fact of his/her incarceration. *See* W. Va. Code § 49-6-5(a,b).[31]

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[30]We disagree, however, with the characterization of the applicable law advanced by Tracy and Amos. In their responsive briefs, they contend that a parent facing termination of his/her parental rights is entitled to provide the court with information demonstrating extenuating circumstances which have prevented him/her from caring for and supporting the child(ren) subject to such termination proceedings. *See* W. Va. Code § 48-4-3c(d) (allowing birth parent to overcome presumption of abandonment by providing that he/she "shall have the opportunity to demonstrate to the court the existence of compelling circumstances preventing said parent from supporting, visiting or otherwise communicating with the child: Provided, That in no event may incarceration provide such a compelling circumstance if the crime resulting in the incarceration involved a rape in which the child was conceived"). Furthermore, the respondent parents indicate that the circumstances under which a parent may explain his/her failure to care for or support his/her child specifically do not include incarceration arising from a sexual crime during which the subject child was conceived. *Id.* To this point, all of these statements accurately reflect the law of this State--as it pertains to termination of parental rights for purposes of *adoption*. These points of law do not, however, govern *abuse and neglect proceedings* such as the one underlying the instant appeal. *See* Syl. pt. 1, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962) ("In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety."). Rather, abuse and neglect proceedings are governed by the separate body of statutory law contained in W. Va. Code § 49-1-1, *et seq.*, concerning "Child Welfare." *See* W. Va. Code § 49-1-1(a)(8) (1998) (Repl. Vol. 1998) (enumerating goals of "Child Welfare" statutes, including to "[p]rovide for early identification of the problems of children and their families, and respond appropriately with measures and services to prevent *abuse and neglect*" (emphasis added)). *See also* W. Va. Code § 49-1-1(a)(8) (1999) (Repl. Vol. 1999) (same). Accordingly, in explaining why termination of parental rights generally cannot be based solely upon a parent's incarceration, we will refer to the pertinent authorities concerning abuse and neglect proceedings instead of those governing the adoption process.

[31]The applicable statutory law authorizes the termination of a parent's parental rights "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child . . . ." W. Va. Code § 49-6-5(a)(6). The phrase

(continued...)

[31](...continued)
"no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or

(6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render

(continued...)

Indeed, in our numerous cases applying the Legislature's edicts in this regard, we also have been reluctant to find that incarceration, *per se*, warrants the termination of an imprisoned parent's parental rights. *See, e.g., State v. Tammy R.*, 204 W. Va. 575, 577 n.4, 578 n.7, & 580 n.13, 514 S.E.2d 631, 633 n.4, 634 n.7, & 636 n.13 (1999) (per curiam) (limiting appellate review to issue of child's placement and declining to consider whether mother's incarceration amounted to abandonment so as to warrant termination of her parental rights); *West Virginia Dep't of Health & Human Resources ex rel. Wright v. Brenda C.*, 197 W. Va. 468, 479, 475 S.E.2d 560, 571 (1996) (per curiam) (Cleckley and Albright, JJ., concurring) (recognizing majority's failure to address impact of mother's incarceration upon circuit court's decision to terminate her parental rights); *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 712 n.2, 356 S.E.2d 464, 466 n.2 (1987) ("not[ing] that counsel for the appellant urges that Randolph W.'s prolonged incarceration constitutes willful abandonment of his child" and determining that, "[b]ecause of our holding in this case, we need not address the abandonment issue, which has far-reaching implications for any parent or guardian who may be incarcerated in a penal institution or becomes a patient in a mental institution"). Instead, we have cautiously acknowledged that while certain incidences of incarceration certainly are more egregious than others and should be considered when contemplating the

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[31](...continued)
such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

W. Va. Code § 49-6-5(b).

termination of parental rights,[32] "[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child *merely* by reason of having been convicted of one or more charges of criminal offenses." Syl. pt. 2, *State ex rel. Acton v. Flowers*, 154 W. Va. 209, 174 S.E.2d 742 (1970) (emphasis added).

Thus, while an individual's incarceration may be *a* criterion in determining whether his/her parental rights should be terminated, other factors and circumstances impacting his/her ability to remedy the conditions of abuse and neglect should also be considered when making such a disposition.[33] *See,*

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[32]*See* Syl. pt. 2, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987) ("A conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated."). *See also* Syl. pt. 2, *Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990) (per curiam) (same).

[33]We note that this approach is consistent with the practice followed by a number of our sister jurisdictions. *See, e.g., Ex parte D.O.G.*, ___ Ala. ___, ___ So. 2d ___ (No. 1990558 May 12, 2000) (certiorari denied without opinion) (Hooper, C.J., dissenting) (recognizing that father's parental rights were terminated based upon his incarceration and his behavior while in prison, his history of substance abuse, and the fact that his child support payments are in arrears); *In re Ronell A.*, 44 Cal. App. 4th 1352, 52 Cal. Rptr. 2d 474 (1996) (upholding termination of incarcerated mother's parental rights where mother refused to attend parenting and drug rehabilitation classes and requested social services agency to refrain from contacting her regarding abuse and neglect proceedings out of fear of retaliation by other inmates); *M.A.P. v. Department of Children & Families*, 739 So. 2d 1287 (Fla. Dist. Ct. App. 1999) (per curiam) (affirming termination of mother's parental rights based upon various factors, including her substance abuse problems, criminal history, failure to maintain stable employment or pay child support, and incarceration); *In re S.H.P.*, ___ Ga. App. ___, ___ S.E.2d ___ (No. A00A1064 Apr. 27, 2000) (determining that aggravating circumstances must accompany incarceration to provide grounds for termination of incarcerated parent's parental rights); *In re Maurice Jamel G.*, 267 A.D.2d 173, 700 N.Y.S.2d 452 (1999) (mem.) (finding abandonment sufficient to terminate parental rights where incarcerated father failed to communicate with his children and social services agency); *In re C.H.*, ___

(continued...)

e.g., In re Jamie Nicole H., 205 W. Va. 176, 180-81, 517 S.E.2d 41, 45-46 (1999) (affirming circuit court's order refusing to extend mother's improvement period based upon her inability to care for her children and her lack of employment and suitable housing, which presumably resulted, in part, from her repeated incarcerations during abuse and neglect proceedings); *Nancy Viola R.*, 177 W. Va. at 713-15, 356 S.E.2d at 467-69 (basing termination of father's parental rights upon his conviction of first degree murder of his child's mother; his prolonged period of imprisonment therefor; his history of habitual alcohol abuse; *and* his history of domestic violence towards his child's mother). For example, in the case *sub judice*, the circuit court may consider Amos' incarceration in deciding whether his parental rights should be terminated, but the court must also evaluate additional evidence relevant to his ability to parent his children, such as his history of substance abuse; the allegations of his past domestic violence towards Tracy; his participation in parenting classes during his incarceration; his regular visits with and telephone calls to his children during his imprisonment; his frequent inquiries as to the health and well being of his children during these proceedings; and any additional information which the lower court deems instructive to its decision.

Next, the respondent parents contend that Amos' parental rights should not be terminated because he has a strong emotional bond with Emily and A.J. fostered, in large part, by his regular visits with

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[33](...continued)
S.W.2d ___ (No. 08-98-00183-CV, Tex. App. Apr. 20, 2000) (basing decision to terminate incarcerated father's parental rights upon several factors, including incarceration and child's best interests); *Cain v. Virginia ex rel. Dep't of Soc. Servs. for City of Roanoke*, 12 Va. App. 42, 402 S.E.2d 682 (1991) (reversing termination of incarcerated mother's parental rights where termination was presumably based upon sole fact of mother's incarceration).

his children during his incarceration.[34] From the record in this case, it is apparent that this precise factual issue has not been finally resolved by the circuit court in that reports by the psychologist evaluating the children variously indicate that there does and there does not exist such a bond, and that, if such emotional ties do exist, they are not equally experienced by both children. Likewise, we can find no indication in the appellate record of the guardian ad litem's views on whether continued visitation between the children and their father would be in the youngsters' best interests or whether it would, in fact, be detrimental to them. On this factual issue, then, we defer to the circuit court's initial evaluation of the evidence. *See* Syl. pt. 1, *In re Travis W.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26640 Dec. 7, 1999). Once the lower court has properly considered this information, it may use such findings to instruct its final disposition of this case vis-a-vis the extent of, if any, parental contact Amos will be entitled to retain.

In other words, if the circuit court deems that there exists a sufficient emotional bond between the respondent father and his children, but also concludes that his parental rights should be terminated, that tribunal may grant Amos post-termination visitation with Emily and A.J., provided such a continued relationship is in the children's best interests and "would not unreasonably interfere with their permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996).

> "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best

[34]The parties represent that Amos visits with the children twice per month. *See supra* note 12.

> interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 8, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). *See also* Syl. pt. 11, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996) ("A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child."). We repeat our admonition, however, that in visitation matters, the best interests of the child(ren) are paramount. Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Lastly, Tracy contends that if Amos is permitted to retain his parental rights, hers need not be terminated. Instead, she claims that "[t]he Circuit Court can merely order the custodial parent to not allow the children involved to have contact with the non-custodial parent," and that allowance of parental rights would enable the collection of child support from the non-custodial parent. As we have previously discussed, the circuit court is the more appropriate tribunal to decide, in the first instance, whether the respondent parents' parental rights should, in fact, be terminated. However, we wish to clarify a few points of law implicated by Tracy's contentions on this point.

First, the argument advanced by Tracy in this respect fails to appreciate the fact that the termination of parental rights is not an all-or-nothing proposition. The statute governing terminations,

W. Va. Code § 49-6-5, permits the termination of one parent's parental rights while leaving the rights of the nonabusing parent completely intact, if the circumstances so warrant. The circuit court is authorized,

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, [to] terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and [to] commit the child *to the permanent sole custody of the nonabusing parent, if there be one*, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

W. Va. Code § 49-6-5(a)(6) (emphasis added). By the same token, simply because one parent has been found to be a fit and proper caretaker for his/her child does not automatically entitle the child's other parent to retain his/her parental rights if his/her conduct has endangered the child and such conditions of abuse and/or neglect are not expected to improve. *Id.*

Additionally, to retain her parental rights, Tracy must demonstrate that she is, in fact, able to properly care for Emily and A.J. As we noted with respect to Amos, the circuit court must consider all the circumstance influencing Tracy's parenting abilities in rendering such a decision, including her occasional visits with Emily and A.J.; her substance abuse problems; her maintenance of, or her inability to maintain, a suitable home and steady employment; and her disappearance from January, 1999, until August, 1999.

Finally, in rendering a final disposition of this matter, we urge the circuit court to consider all of the possible dispositions available in abuse and neglect proceedings, *see* W. Va. Code § 49-6-5, and the circumstances under which termination of parental rights is statutorily required, *see* W. Va. Code § 49-

6-5b (1998) (Repl. Vol. 1999).[35]

IV.

CONCLUSION

For the foregoing reasons, we reverse that portion of the September 15, 1999, order of the Circuit Court of Mercer County awarding Amos and Tracy delayed dispositional improvement periods. We further vacate the circuit court's denial of the DHHR's motion to terminate the respondent parents' parental rights, and remand this case to permit the circuit court to reconsider such motion and render a final disposition in these abuse and neglect proceedings.

Reversed, in part, Vacated, in part, and Remanded.

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[35]With the first enumerated factor of the required termination criteria we are particularly concerned as we have not been able to discern from the appellate record whether Emily and A.J.

> ha[ve] been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child[ren] [were] subjected to abuse or neglect or the date which is sixty days after the child[ren] [were] removed from the home[.]

W. Va. Code § 49-6-5b(a)(1) (1998) (Repl. Vol. 1999).

No. 26915 -- In re: Emily and Amos B.

FILED
July 20, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 21, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I write to say that I am troubled by the future implications of the majority's opinion. While I do concur with remanding this matter to the circuit court, I am uncertain as to the message we are sending.

The circuit judge in this case went to great lengths to protect the welfare of a very troubled family. The mother is a drug addict; the father committed a crime allegedly to "feed his family." The mother is in and out of rehab; the father is stuck in a federal prison until the end of the year. And in the middle, two young children are growing up very quickly.

In looking at the facts in this case the judge did the best he could with the situation as presented to the court. It appears that the mother is so wrapped up in her addiction that she does not provide care for the children. The father, however, seems to regret his actions and is struggling to maintain a relationship with the children. He regularly visits with the children in a prison visiting room, plays with them, talks, and inquires about their well-being. Beyond that, there isn't much he can do from the confines of prison except count the days.

The circuit judge placed the children in the legal custody of the Department of Health and Human Resources ("DHHR"), but provided both parents with an improvement period, with the father's to begin *after* he is released from prison.

This Court and the Legislature have repeatedly urged the DHHR to bring abuse and neglect cases to a quick conclusion, and I agree with this. But exactly how a prison sentence -- even a brief one --

fits into the concept of abandonment of children by a parent has never been considered by this Court. The DHHR is advocating for a clean, sharp rule: Because the father voluntarily committed a crime, he voluntarily "abandoned" the children. Because he abandoned the children, he fits within the abandonment portion of the abuse and neglect statutes, and should have his parental rights terminated. The DHHR basically argues that incarceration, *ipso facto*, requires a parent's rights to raise their children to be automatically terminated.

The Legislature has crafted broad guidelines for the DHHR and for the circuit courts to follow in deciding whether to terminate the "parental rights" of a parent. However, nowhere in these guidelines is "criminal incarceration" mentioned.

The majority opinion rightly rejects the DHHR's premise that incarceration of a parent should call for an automatic termination of parental rights. And I agree. The majority states that a parent's incarceration might be *a* factor to consider in deciding whether DHHR can take custody of a child, and even *a* factor in determining whether to entirely terminate any parental rights. But it cannot be *the sole* factor, as this case demonstrates.[1]

While a circuit court should not delay or drag out a parent's improvement period, the trial judge should not be stripped of the right to fashion a solution in these cases that addresses the ultimate best interests of a child -- even if it means waiting for a dad to conclude a brief prison stint.

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[1]Criminal defense attorneys should, hereafter, warn their clients of the holding in this case if they have young children. By pleading guilty to a crime, a defendant may not only be giving up his freedom, and maybe his right to vote, own a gun, get a hunting or fishing license, but a defendant now may also, in some circumstances, have their parental rights terminated and lose their right to parent his child.

I agree with the majority's returning of this case to the circuit court for final disposition. But I do not agree that we should dictate the outcome to the circuit judge. The circuit judge in this case has demonstrated a strong desire to protect the interests of both the children and the parents. The father has repeatedly indicated he is willing and able to parent his children -- his only impediment is a relatively short federal sentence. If the circuit judge believes that this parenting arrangement deserves a chance for the benefit of the children, this Court should not second guess the judge and arbitrarily say otherwise.

The goal of abuse and neglect proceedings is to protect children from severe physical and emotional trauma, and to provide every child with long-term stability. While we may not be able to provide every child with the perfect, white bread, cookie-cutter childhood replete with sitcom-like suburban experiences, the court system must fashion a solution that provides protection for children, with a reasonable opportunity to reach adulthood safely and in as good physical and mental health as practicable. And this opportunity may include permitting a father who has been incarcerated for a crime to continue to parent his children.

I am troubled that the majority's opinion might be read as giving direction to the circuit court to simply terminate both parents' rights. I would hope that the circuit judge in this case will again carefully examine the interests of the children and the parents, and again take whatever action he deems to be in the best interests of the children, even if it means repeating the court's ruling that the father's rights not be terminated. Termination of the rights of the parents should be the answer only when other alternatives have failed.

With this caution, I concur.

I am authorized to state that Justice McGraw joins in this concurrence.

224 W. Va. 390, 686 S.E.2d 41

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

No. 34752

FILED
October 29, 2009
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: EMILY G.

Appeal from the Circuit Court of Wood County
Honorable Jeffrey B. Reed, Judge
Juvenile Neglect and Abuse No. 08-JA-64

VACATED AND REMANDED WITH DIRECTIONS

Submitted: October 7, 2009
Filed: October 29, 2009

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Guardian ad Litem for the
Minor Child, Emily G.

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "In a child abuse and neglect [case], . . . a court . . . must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syllabus point 1, in part, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983).

3. "Where it appears from the record that the process established by the

Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order." Syllabus point 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

4. "[T]he Department of Health and Human Resources has a duty to . . . join or participate in proceedings to terminate parental rights . . . ." Syllabus point 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000).

5. "Each child in an abuse and neglect case is entitled to effective representation of counsel." Syllabus point 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).

6. "Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *incident to the filing of each abuse and neglect petition*. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should

be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law." Syllabus point 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995) (emphasis in original).

Per Curiam:

The petitioners herein, Donna and John M.[1] (hereinafter "Donna and John"), appeal from an order entered September 23, 2008, by the Circuit Court of Wood County. By that order, the circuit court denied the petition filed by Donna and John alleging that their granddaughter, the minor child at issue herein, Emily G. (hereinafter "Emily"), is "an abused and/or neglected child."[2] On appeal to this Court, Donna and John contend that the circuit court erred by refusing to adjudicate Emily as an abused and/or neglected child and that such ruling precludes the establishment of Emily's permanent placement. Upon a review of the parties' arguments, the record submitted for appellate consideration, and the pertinent authorities, we vacate the decision of the Wood County Circuit Court dismissing the abuse and/or neglect petition filed by Donna and John and reinstate said petition. Furthermore, we remand this case to permit the circuit court to hold a hearing on Donna and John's petition alleging that their granddaughter, Emily, is an abused and/or neglected child. Finally, we direct the circuit court to grant intervenor status to the Wood County Department of Health and Human Resources (hereinafter "DHHR") so that it may participate in the abuse and neglect proceedings on remand and to appoint counsel to represent Emily and her biological parents, Sylvia and Carl, during the remand

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[1]Due to the sensitive nature of the facts involved in this case, we will adhere to our practice in similar cases and refer to the parties by their last initials, rather than using their full names. *See, e.g., In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007).

[2]*See* note 9, *infra*.

proceedings.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying the instant proceeding are largely undisputed by the parties. Emily, the subject child of the case *sub judice*, was born on August 14, 2006. Sylvia, who is the daughter of Donna and the stepdaughter of John, is Emily's mother, and Carl is Emily's father.[3] At the time of Emily's birth, Sylvia was seventeen years old; Sylvia was residing with Donna and John; and she and Carl were not married to each other. When Emily was approximately two months old, Sylvia assigned temporary guardianship of Emily to Donna and John on October 25, 2006. Thereafter, Sylvia and Carl, by petition dated November 14, 2006, jointly attempted to regain Emily's custody.

During the next year and one-half, Sylvia and Carl continued their tumultuous relationship.[4] Sylvia and Carl were briefly married to each other,[5] and numerous domestic violence petitions were filed by each of them against the other before,

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[3]On August 27, 2007, following DNA testing, Carl was recognized as Emily's father. However, it is unclear from the record whether Carl voluntarily signed an affidavit of paternity or whether Carl was declared to be Emily's father by court order.

[4]Before Emily was born, Carl had filed a domestic violence petition against Sylvia, which petition Carl later requested be dismissed.

[5]Sylvia and Carl were married on July 10, 2007, and were divorced by order of the Wood County Family Court following its hearing of October 2, 2007.

during, and after their marriage.[6] The allegations of domestic violence range from physical attacks involving hitting, kicking, cutting, and choking, to non-physical attacks involving death threats, telephone harassment, and being held against the petitioner's will. These petitions alternately culminated in six-month protective orders or were dismissed at the petitioner's request.

Throughout this time, Emily's guardianship proceedings continued through the Wood County Family Court. On January 29, 2007, the family court upheld the temporary guardianship agreement by which Sylvia had assigned temporary custody of Emily to Donna and John and awarded Emily's temporary custody to Donna and John in accordance therewith. Carl continued to pursue custodial rights to Emily, and filed petitions for modification of Emily's custody on February 2, 2007, which petition the family court denied. Thereafter, on March 5, 2007, Carl filed another petition for modification of Emily's custody; additional proceedings were had on this petition in the family court. Following a hearing held on October 2, 2007, the family court granted Carl[7] supervised visitation with Emily for one hour every other week, which visitations were

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[6]During the oral arguments in this case, counsel for Donna and John represented that a total of ten domestic violence petitions have been filed regarding Sylvia and Carl's violence towards one another, including the most recent petition filed in January 2009. Some of these petitions culminated in criminal sanctions for violations of the resultant protective orders.

[7]It is not apparent from the record whether the family court also granted Sylvia supervised visitation with Emily.

later increased to one hour every week following the family court's February 4, 2008, hearing.

Subsequently, on July 8, 2008, the family court entered a final order awarding Emily's "sole care, custody and control" to Donna and John, as the child's "primary residential custodians . . . until further Order of the Court." The court additionally awarded supervised visitation to Sylvia and Carl for one hour every week, and permitted Carl's parents, Emily's paternal grandparents, to participate in these visits one time per month. Finally, the court adopted the recommendations of Emily's Guardian ad Litem (hereinafter "Guardian"), who suggested the family court impose various requirements on Sylvia and Carl with a view towards remedying their tendencies to commit domestic violence and providing a safe, nurturing, and violence-free environment for Emily.[8]

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[8]In his May 5, 2008, report, Emily's Guardian ad Litem recommended that,

> [t]o protect the parents [Sylvia and Carl] and the child [Emily], the following limiting factors should be imposed by the Court: 1) both parents should have only supervised visits with Emily until further order of the Court; 2) these visits should be supervised by Kid's First (at different times for each parent) until each parent has completed the programs of intervention recommended herein (upon a parent's completion of said programs that parent's visitation may be monitored by another responsible adult); 3) neither parent shall reside in or visit the same home where Emily resides when Emily is present until the parent has completed the programs of

(continued...)

Following the entry of the family court's order, Donna and John filed the instant abuse and/or neglect petition[9] in the Circuit Court of Wood County on September 8, 2008,[10] ostensibly in accordance with the Guardian ad Litem's recommendation that such a petition be filed if Sylvia and Carl cannot maintain an amicable, violence-free

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[8](...continued)
intervention recommended herein; 4) each parent shall actively participate in and complete the Batterer's Intervention Program at the Day Report Center; 5) each parent shall actively participate in and complete a program designed for victim's [sic] of domestic violence; 6) each parent shall actively participate in and complete parenting classes; 7) each parent shall demonstrate that [he/she] [is] able to maintain a home environment that is stable, safe, nurturing, free of domestic violence, and otherwise appropriate for a child of such tender years; 8) each parent shall abide completely with the protective violence orders in effect; 9) neither parent should seek to have said orders terminated prematurely; 10) the parents should not have any form of contact or communication with each other; and 11) Abuse and Neglect Proceedings should be commenced as soon as it becomes evident that either party is failing to comply fully with the conditions set forth herein so that parental rights can be terminated and visitation ended.

[9]Donna and John filed their petition alleging that Emily is an abused and/or neglected child pursuant to W. Va. Code § 49-6-1 (2005) (Supp. 2009). For further treatment of this statute, see Section III, *infra*.

[10]While it does not appear from the record in this case that Donna and John served their abuse and/or neglect petition upon the Wood County Department of Health and Human Resources (DHHR) or that they otherwise notified the DHHR of the petition's filing despite the statutory requirement to do so, their counsel stated during the oral arguments in this case that they had, in fact, served the Department with their petition. *See* W. Va. Code § 49-6-1(b) (requiring that "[n]otice [of the filing of an abuse and neglect petition] shall . . . be given to the department").

relationship with one another.[11] In their petition, Donna and John alleged Emily to be an abused and/or neglected child as a result of the ongoing domestic violence between her mother, Sylvia, and her father, Carl; sought to terminate the parental rights of Emily's parents, Sylvia and Carl; and indicated their willingness to provide permanence and stability to Emily by adopting her. By order entered September 23, 2008, the circuit court denied Donna and John's petition finding that it "does not allege sufficient facts to come within the statutory definition of abuse and neglect." The circuit court explained further that "there are no allegations that any of the acts of domestic violence occurred in the presence of the child." From this adverse ruling, Donna and John appeal to this Court.

II.

STANDARD OF REVIEW

On appeal to this Court, Donna and John seek review of the circuit court's order dismissing their abuse and/or neglect petition. In Syllabus point 1 of *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996), we explained the method by which we review circuit court rulings in abuse and neglect proceedings:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These

[11] *See* note 8, *supra*.

> findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Accord In re Elizabeth Jo H., 192 W. Va. 656, 659, 453 S.E.2d 639, 642 (1994) (per curiam) (commenting, in abuse and neglect case, that "[a]ppellate oversight is . . . deferential" and applying "clearly erroneous standard" of review"). We will consider the parties' arguments in light of this standard.

III.

DISCUSSION

During the proceedings underlying the instant appeal, the circuit court dismissed the petition filed by Donna and John alleging that their granddaughter, Emily, was an abused and/or neglected child. The circuit court rendered this ruling, without holding a hearing on said petition, based upon its belief that "the Petition does not allege sufficient facts to come within the statutory definition of abuse and neglect. For example, there are no allegations that any of the acts of domestic violence occurred in the presence of the child."

On appeal to this Court, Donna and John complain that the circuit court erred

by dismissing their petition and refusing to consider the evidence they presented in support of their allegations that Emily is an abused and/or neglected child. In this regard, Donna and John argue that the ongoing history of domestic violence between Sylvia and Carl supports a finding that Emily is an abused and/or neglected child. They contend that since the family court's final order, Sylvia and Carl have continued their tumultuous and violent relationship and that, other than attending supervised visitation with Emily, they have not satisfied any of the other conditions recommended by the Guardian ad Litem and adopted by the family court. In support of their allegations of abuse and/or neglect, Donna and John rely upon similar cases decided by this Court in which a finding of abuse and/or neglect was premised not upon direct violence towards the subject child but instead upon domestic violence in the home in which the child lived. *See In re Frances J.A.S.*, 213 W. Va. 636, 584 S.E.2d 492 (2003) (per curiam); *In re Brandon Lee B.*, 211 W. Va. 587, 567 S.E.2d 597 (2001) (per curiam). Donna and John further express concern that Emily's best interests require that she have stability and permanency in her life and that until the parental rights of Sylvia and Carl have been terminated, no such permanency can be achieved.

The Guardian ad Litem responds that although he was Emily's Guardian in the underlying custody proceedings, he was not a party to Donna and John's petition

alleging Emily to be an abused and/or neglect child[12] and does not have any information from which to conclude that Emily has been abused and/or neglected by Sylvia and Carl's failure to comply with his recommendations set forth in the family court's final order. While the Guardian has reservations about the ability of Emily's parents to care for her given their mental capacity, young age, and history of violence towards each other, he nevertheless requests that Emily be permitted to maintain the marginal relationship she currently has with her parents until such time as visitation with them becomes harmful to her. Moreover, the Guardian remains hopeful that Sylvia and Carl will be able to establish a more meaningful relationship with Emily in the future and that, for this reason, their legal rights to Emily should remain in place.

Finally, Carl responds to Donna and John's arguments by stating that he has complied with the Guardian's recommendations by attending supervised visitation with Emily and completing a parent education class. As he did repeatedly during the previous guardianship proceedings, Carl reiterates in the case *sub judice* his desire to be awarded custody of Emily and represents that he is currently in a stable relationship and lives in a peaceful household free from domestic violence.

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[12]While appearing before this Court during the oral arguments in this case, the Guardian ad Litem specifically stated that the circuit court had not appointed him to represent Emily in the instant abuse and neglect proceeding insofar as the court had dismissed said proceeding before a hearing had been held on the underlying abuse and neglect petition.

Having reviewed the parties' arguments and the governing law, we agree with Donna and John's assertions that the circuit court committed error in this case. However, we reach this conclusion not upon the credibility or substantiality of the allegations of abuse and/or neglect proffered by Donna and John, but rather based upon the statutory law that governs abuse and neglect petitions. Pursuant to this authority, the circuit court erred by dismissing Donna and John's abuse and/or neglect petition without holding a hearing thereon.

W. Va. Code § 49-6-1 (2005) (Supp. 2009) permits a petition to be filed when a child is believed to be abused and/or neglected, dictates the procedure for filing an abuse and neglect petition, and details the court's duties once such a petition has been filed:

> (a) If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or if the petition is being brought by the Department, in the county in which the custodial respondent or other named party abuser resides, or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no circumstance may a party file a petition in more than one county based on the same set of facts. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought. *Upon filing of the petition, the court shall set a time and place for a hearing and shall*

> *appoint counsel for the child.* When there is an order for temporary custody pursuant to section three [§ 49-6-3] of this article, the hearing shall be held within thirty days of the order, unless a continuance for a reasonable time is granted to a date certain, for good cause shown.
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> (b) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to the parents or custodian at least ten days' notice. *Notice shall also be given to the department,* any foster or preadoptive parent, and any relative providing care for the child. . . .
>
> (c) *At the time of the institution of any proceeding under this article, the department shall provide supportive services in an effort to remedy circumstances detrimental to a child.*

(Emphasis added). Pursuant to this statutory language, once a petition has been filed alleging a child to be abused and/or neglected, the court in which such petition is filed is required to "set a time and place for a hearing."[13] W. Va. Code § 49-6-1(a). This language is mandatory and absolutely requires a hearing to be held on said petition: "In a child abuse and neglect [case], . . . a court . . . must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. pt. 1, in part, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983). Here, the circuit court did not hold a hearing on the petition alleging Emily to be an abused and/or neglected child, but rather dismissed the petition without a hearing. Dismissal of the petition without a hearing is a direct violation of the statutory mandate to hold a hearing on abuse and/or neglect petitions. *See* W. Va.

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[13]The manner in which this hearing is conducted is set forth in W. Va. Code § 49-6-2 (2006) (Supp. 2009).

Code § 49-6-1(a).

When the requisite procedure is not followed in an abuse and neglect case, this Court has held that the order resulting from such deviation will be vacated and the case will be remanded for entry of an order that satisfies the procedural requirements:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children [alleged] to be abused or neglected has been substantially disregarded or frustrated, the resulting order . . . will be vacated and the case remanded for compliance with that process and entry of an appropriate . . . order.

Syl. pt. 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001). Because W. Va. Code § 49-6-1(a) requires a circuit court presented with an abuse and neglect petition to hold a hearing thereon, and because the circuit court did not hold a hearing on the petition filed by Donna and John alleging Emily to be an abused and/or neglected child, we vacate the order entered September 23, 2008, by the Wood County Circuit Court dismissing the petition and reinstate said petition. Furthermore, we remand this case to the circuit court so that a hearing may be had on Donna and John's petition.

On remand, the circuit court additionally should ensure that the other requirements of W. Va. Code § 49-6-1 have been complied with, particularly the statutory directives requiring participation by the Department of Health and Human Resources, *see*

W. Va. Code § 49-6-1(b), and the appointment of counsel for the subject child, *see* W. Va. Code § 49-6-1(a). Moreover, on remand, the circuit court also is directed to comply with the requirements of W. Va. Code § 49-6-2(a) (2006) (Supp. 2009), which provides, in pertinent part, that counsel should be appointed to represent the minor child's biological parents during the abuse and neglect proceedings. From the record before this Court, it does not appear that Donna and John served their abuse and neglect petition on the Wood County Department of Health and Human Resources or that the Department otherwise received notice of their petition.[14] Insofar as "[n]otice shall . . . be given to the department," W. Va. Code § 49-6-1(b), the Department should have been made a party to the circuit court proceedings below. Furthermore, we specifically have recognized that "the Department of Health and Human Resources has a duty to . . . join or participate in proceedings to terminate parental rights . . . ." Syl. pt. 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000). Accordingly, on remand, we direct the circuit court to grant intervenor status to the Wood County Department of Health and Human Resources to permit it to participate in the abuse and neglect proceedings concerning Emily. Inclusion of the Department also will enable it to fulfill its statutory duty to "provide supportive services in an effort to remedy circumstances detrimental to [the] child." W. Va. Code § 49-6-1(c).

[14]*See* note 10, *supra*.

Moreover, it has come to this Court's attention that no counsel has been appointed for Emily in the underlying abuse and neglect case. The Guardian ad Litem appointed for Emily in the preceding guardianship proceeding has appeared on her behalf in the case *sub judice*, but he has not been formally appointed to represent her in the instant proceeding. Pursuant to W. Va. Code § 49-6-1(a), "[u]pon filing of the petition [alleging a child to be abused and/or neglected], the court . . . shall appoint counsel for the child." Likewise, we have held that "[e]ach child in an abuse and neglect case is entitled to effective representation of counsel." Syl. pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993). Despite this requirement that counsel be appointed for the child subject to an abuse and neglect petition, though, no counsel has yet been appointed for Emily in this case.[15] Therefore, on remand, the circuit court is directed to appoint counsel to represent Emily in her abuse and neglect proceedings.

Finally, no counsel has been appointed to represent Emily's biological parents, Sylvia and Carl, in the underlying abuse and neglect proceedings. W. Va. Code § 49-6-2(a) specifically requires, in pertinent part, that,

> [i]n any proceeding under the provisions of this article, the child, his or her parents and his or her legally established

[15]Even though he has not been appointed to represent Emily in the case *sub judice*, we wish to take this opportunity to applaud the Guardian ad Litem who represented Emily in the previous guardianship proceedings and who has, nevertheless, continued his diligent representation of Emily by appearing on her behalf before this Court in the instant matter.

> custodian or other persons standing in loco parentis to him or her shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. . . . *Provided*, That such representation shall only continue after the first appearance if the parent or other persons standing in loco parentis cannot pay for the services of counsel. . . .

In recognition of this statutory requirement, we similarly have held that

> [c]ircuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *incident to the filing of each abuse and neglect petition*. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

Syl. pt. 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995) (emphasis in original). *See also* Syl. pt. 1, *State ex rel. LeMaster v. Oakley*, 157 W. Va. 590, 203 S.E.2d 140 (1974) ("In child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel because of the requirements of the Due Process clauses of the West Virginia and United States Constitutions."). Even though Sylvia and Carl are entitled to be represented by counsel during Emily's abuse and neglect proceedings, no counsel has been appointed for them. Thus, during the remand proceedings, the circuit court is

directed to appoint counsel to represent Sylvia and Carl in accordance with W. Va. Code § 49-6-2(a).

IV.

CONCLUSION

For the foregoing reasons, the September 23, 2008, order of the Circuit Court of Wood County dismissing the abuse and/or neglect petition filed by Donna and John is hereby vacated and the subject petition is reinstated. Furthermore, this case is remanded to the Wood County Circuit Court so that a hearing may be held on the aforementioned abuse and/or neglect petition. Finally, the Circuit Court of Wood County is directed to grant intervenor status to the Wood County Department of Health and Human Resources so that it may participate in the abuse and neglect proceedings on remand and to appoint counsel to represent Emily and her biological parents, Sylvia and Carl, during the remand proceedings.

Vacated and Remanded with Directions.

214 W. Va. 375, 589 S.E.2d 517

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

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

Nos. 31245 & 31246

IN RE: ERICA C., ASHLEY J. AND OAKIE LEE C.

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Judge
Civil Action No. 01JN-6

AFFIRMED

Submitted: September 24, 2003
Filed: November 5, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

3. "'[C]ourts are not required to exhaust every speculative possibility of

parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Mingo County entered on October 28, 2002. Pursuant to that order, the circuit court terminated the parental rights of the appellants and respondents below, Eric C.[1] and Phoebe C., to their children, Erica C., Ashley J., and Oakie Lee C., and further denied the appellants post-termination visitation with their children.

In this appeal, the appellants claim that they established that there was a reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future, and therefore, the circuit court erred by terminating their parental rights. They further contend that the circuit court erred by denying them post-termination visitation with their children based upon events which occurred after the dispositional hearing but prior to entry of the dispositional order.

This Court has before it the petition for appeal, the entire record, and the briefs of counsel. For the reasons set forth below, the circuit court's final order is affirmed.

[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

I.

FACTS

Eric C. is the biological father of Erica C., born on November 21, 2000, and the stepfather of Ashley J., born on May 1, 1995, and Oakie Lee C., born on August 11, 1996. Phoebe C. is the biological mother of all three children. The biological father of Ashley J. and Oakie Lee C. is deceased.

On June 18, 2001, the appellee and petitioner below, the West Virginia Department of Health and Human Services (hereinafter "DHHR"), sought and obtained emergency custody of the children after an incident wherein the appellants were cited for disorderly conduct and public intoxication[2] at a restaurant in Mingo County, West Virginia. At the time of the incident, Erica C. and Ashley J. were found in the appellants' car outside the restaurant next to the road. The vehicle was not running, and the windows were not rolled down. The children had been left in the vehicle at least an hour and perhaps as much as an hour and a half. Oakie Lee C. was not present. He was with his maternal aunt, Loretta C., with whom he had been residing for approximately four years.[3]

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[2]The appellants admitted that they had taken Xanax, a prescription drug.

[3]Oakie Lee C. was not removed from the physical custody of Loretta C. However, the court did grant the DHHR legal custody of him.

In the emergency petition, the DHHR indicated that it had first received a referral concerning the family on December 15, 2000. At that time, it was alleged that the appellants were neglecting the children and abusing controlled substances. These allegations were never substantiated, and the appellants were not cooperative. They moved several times and failed to take the requested drug screens or participate in the parenting classes offered them.

Based on the above, the children were removed from the appellants' custody and a preliminary hearing was scheduled for June 21, 2001. The preliminary hearing was continued until June 28, 2001, because the appellants were not properly served with the petition for emergency custody.[4] At the time the preliminary hearing was rescheduled, physical custody of all three children was granted to Loretta C., but the DHHR retained legal custody.

At an adjudicatory hearing on July 24, 2001, the court found that the children had been neglected. The appellants were granted a 90-day post-adjudicatory improvement period. The court ordered the DHHR to provide services, including random drug and alcohol screening.

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[4]Apparently, Eric C. was incarcerated at this time in Pike County, Kentucky, on a shoplifting charge. Phoebe C. had also been incarcerated, but was released on June 21, 2001.

After several continuances, a dispositional hearing was held on March 26, 2002. The final dispositional order was entered on June 21, 2002. In that order, the circuit court found that the DHHR had established by clear and convincing evidence that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected. Consequently, the appellants' parental rights were terminated. However, the court indicated that this might be a case where post-termination visitation would be appropriate, especially since the children were going to be permanently placed with their maternal aunt, Loretta C. Accordingly, the court ordered that the current visitation schedule continue until further order and review by the court.

A judicial review was conducted on September 18, 2002. At that hearing, the DHHR recommended that the appellants' visitation rights be terminated. The court directed the DHHR to file a written motion and scheduled an evidentiary hearing for October 4, 2002. At that hearing, the court terminated the appellants' visitation with their children. This appeal followed.

II.

STANDARD OF REVIEW

As set forth above, the appellants appeal the termination of their parental rights and visitation with their children. "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). As we explained in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996),

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

A. Termination of Parental Rights

The appellants first contend that they were able to show that there was a reasonable likelihood that the conditions of neglect and abuse suffered by their children could be substantially corrected in the near future, and therefore, the circuit court erred by terminating their parental rights. In making this argument, the appellants fail to point to any specific evidence to support their contention. Instead, they emphasize the fact that the children were not physically harmed as a result of being left alone in the car on June 18, 2001. They also say that the court focused on the limited cognitive functioning of Phoebe C. and failed to consider evidence indicating that her mental health problems could be treated.

As set forth above, the circuit court granted the appellants a 90-day post-adjudicatory improvement period. Thereafter, the court conducted the disposition hearing and found that the only alternative in this case was the termination of parental rights. In making that finding, the Court stated that Eric and Phoebe C.

> a) Have previously demonstrated no intention or desire to obtain and provide a clean, safe and stable home for the children and, to this date, does [sic] not have a permanent place of residence which meets with the approval of the Court;
>
> b) Have abused and/or are addicted to prescription medications and admit that they need more than prescription medication, contrary to their therapists opinions;
>
> c) Have been unwilling to cooperate in the development of or follow a reasonable family care plan designed to lead to

> the children's return to their care, custody and control;
>
> d) At no point throughout the course of these proceedings does it appear that the Respondent parents have made any concerted effort to cooperate in the best interests of their children, or even make the appropriate effort to attend visitation with their children.
>
> e) Missing a visitation because it is "check day" is simply an unacceptable excuse to give the caseworkers, [Loretta C.], or the Court in this case.[5]

(Footnote added).

In Syllabus Point 4 of *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989), this Court held that:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

This Court has further stated that:

> "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . ." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

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[5]Phoebe C. receives social security benefits, and the court is referring here to an instance when the appellants explained their absence at a scheduled visitation with their children by stating that it was "check day."

Syllabus Point 7, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). Based upon the above, as well as our review of the entire record in this case, it is clear that the appellants failed to present any evidence to show that there was a reasonable likelihood that the conditions of abuse and neglect suffered by their children could be substantially corrected in the near future.

These children were found to be neglected because the appellants abused prescription medications, had a history of domestic violence, and failed to provide the children with necessary supervision and care. In addition, they effectively abandoned Oakie Lee C. by leaving him with his maternal aunt since he was six months old. It was only after these proceedings began that the appellants sought to remove Oakie Lee from Loretta C.'s home. Although they were granted an improvement period, the appellants made no serious effort to change their behavior or provide a stable home for their children. The DHHR made several attempts to help the appellants regain custody of their children, but the appellants refused to cooperate and continued to abuse prescription drugs. Accordingly, the circuit court did not err in terminating the appellants' parental rights.

B. Termination of Visitation

The appellants also claim that the circuit court erred by terminating their post-termination visitation with their children based upon events that occurred after the

dispositional hearing, but before the final dispositional order was entered. Those events included the appellants missing two of five scheduled visits in April 2002. During the visits that did occur that month, the children did not recognize the appellants as their parents. Also, in April 2002, the appellants failed to submit to a random drug screen. In May 2002, the appellants separated and began visiting the children individually, which caused the children to become confused. Phoebe C. missed two visits in May 2002, and Eric C. had problems keeping all the children occupied at one time during his visits.

In Syllabus Point 5 of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court held that:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

As previously noted, the circuit court initially believed that continued contact between the appellants and their children would be appropriate in this case. However, following the failure of a strong effort to effect post-termination visitation by the DHHR and after a judicial review and hearing, the court determined that continued visitation was no longer in the children's best interest.

In this appeal, the appellants seek to reverse the court's decision terminating their visitation based on a procedural error, i.e., the court's failure to enter the dispositional order in a timely manner.[6] While the court should have entered the order in a timely fashion,[7] we are unable to conclude that the appellants were prejudiced by the late entry as they were allowed to continue to visit their children during that time. More importantly, "a mere procedural technicality does not take precedence over the best interests of the children." *In re: Tyler D.*, 213 W.Va. 149, —, 578 S.E.2d 343, 354 (2003). As this Court has said on numerous occasions, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989). *See also* Syllabus Point 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) ("'In a contest involving the custody of an infant the welfare of the

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[6]Pursuant to Rule 38 of the Rules of Procedure for Abuse and Neglect Proceedings, "[w]ithin ten (10) days of the conclusion of the [disposition] hearing, the court shall enter a final disposition order[.]"

[7]Almost three months elapsed between the dispositional hearing and entry of the dispositional order in this case. Such a delay is unconscionable, unacceptable, and unfair to the children. This Court has often stressed the necessity for rapid finality in abuse and neglect proceedings. Specifically, we have mandated that, "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syllabus Point 1, in part, *In the Interest of Carlita B.* In accordance with that directive, this Court adopted the Rules of Procedure for Child Abuse and Neglect Proceedings in 1996 to ensure that abuse and neglect cases are resolved in the most expeditious manner possible. *See* Rule 2 ("These rules are designed . . . [t]o reduce unnecessary delays in court proceedings through strengthened court case management."). With that said, we hereby advise all circuit judges that in the future unnecessary delays in abuse and neglect proceedings will be examined very closely, and this Court will take whatever action is required to guarantee the efficient and timely disposition of abuse and neglect cases.

child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302 [47 S.E.2d 221].").

In this case, it is now clear that continued visitation would be detrimental to the children. While the conduct of the appellants in April and May of 2002 was not satisfactory, their actions in August and September of 2002 were even more egregious. They were arrested on August 16, 2002, for domestic assault and domestic battery of each other. Also, on August 20, 2002, both appellants had positive drug screens for the drug Butalbital. Although Phoebe C. was able to produce a valid prescription to explain her positive drug screen, Eric C. was not. Finally, on September 2, 2002, Phoebe C. was arrested for two counts of destruction of property. She was under the influence of alcohol at the time of her arrest.

In sum, there was a considerable amount of evidence presented to the circuit court showing that the appellants continue to abuse prescription drugs and have significant family and other legal problems. Their relationship with each other is at best unstable and domestic violence between them is a frequent occurrence. In addition, the record indicates that the children no longer wish to have contact with the appellants. Consequently, continued visitation would not be in the children's best interest. Thus, the circuit court did not err by terminating the appellants' visitation with their children.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Mingo County entered on October 28, 2002, is affirmed.

Affirmed.

233 W. Va. 538, 759 S.E.2d 538

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0918

IN RE: F.S. AND Z.S.

Appeal from the Circuit Court of Wood County
The Honorable J.D. Beane, Judge
Abuse and Neglect Case Nos. 12-JA-68 and 12-JA-69

REVERSED AND REMANDED

Submitted: April 9, 2014
Filed: May 9, 2014

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "'"'W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990).' Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994)." Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This is an appeal filed on behalf of F.S. and Z.S.[1] by their guardian ad litem, Reggie R. Bailey (hereinafter referred to collectively as "the petitioners"), from a decision of the Circuit Court of Wood County dismissing a petition for abuse and neglect against their father, C.S. (hereinafter "the respondent" or "the father"). The underlying abuse and neglect petition was based upon allegations of sexual abuse by the father against F.S. The petitioners contend that the circuit court erred by failing to find that clear and convincing evidence of sexual abuse was presented. Based upon this Court's thorough review of the appendix record, arguments of counsel, and applicable precedent, we reverse the ruling of the circuit court and remand this case for further proceedings consistent with this opinion.

I. Factual and Procedural History

On May 23, 2012, the Department of Health and Human Resources (hereinafter "DHHR") filed a petition for abuse and neglect, alleging that the respondent father had

[1]The petitioners are siblings. F.S. is an eleven-year-old girl, and Z.S. is a fifteen-year-old boy. They currently reside with their mother. In accordance with the customary practice of this Court, we refer to children by their initials in cases involving sensitive facts. *See, e.g.*, *In re Michael Ray T.*, 206 W.Va. 434, 437 n.1, 525 S.E.2d 315, 318 n.1 (1999); *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 559 n.2, 490 S.E.2d 642, 646 n.2 (1997); *In re Tiffany Marie S.*, 196 W.Va. 223, 226 n.1, 470 S.E.2d 177, 180 n.1 (1996).

repeatedly sexually abused and assaulted F.S.[2] The petition asserted that the children had visited their father every other weekend subsequent to a 2006 divorce between the petitioners' parents. The father had remarried in 2009, and his current wife, L.S., has two daughters and one son. The three step-children also resided in the home when the petitioners visited. The petitioner, F.S., typically slept in a bedroom with L.S's daughters, sharing a top bunk with a step-sister.[3] Another step-sister slept in the bottom bunk in the same bedroom. The petitioner, Z.S. shared a bedroom with L.S.'s son.

The DHHR first learned of the alleged sexual abuse of F.S. in July 2011. The petitioners' mother, M.S. (hereinafter "the mother"), reported that F.S. said the respondent father had performed sexual acts on her. She was eight years old at the time of that report. Specifically, the mother indicated that F.S. stated that her father would get in bed with her

[2]On August 23, 2012, the DHHR filed an amended petition for abuse and neglect, adding the respondent's current wife, L.S., her ex-husband, W.S., and their children. The amended petition alleged failure to protect the step-children from the respondent.

[3]The step-sisters do not report any knowledge of the respondent entering the bedroom.

and "rub his wiener on her and pee on her."[4] In response to these allegations of abuse, Child Protective Services worker, Ms. Connie Carpenter, interviewed F.S. in August 2011. The child informed Ms. Carpenter that her father got in bed with her on several occasions and "wet" on her with his penis.[5]

Detective Shanna Modesitt of the Wood County Sheriff's Office also interviewed[6] F.S. in August 2011. F.S. told the detective that her father "wets" on her when he gets in bed with her. During adjudicatory hearings held in late 2012 and 2013, the circuit court reviewed a video recording of the child's interview with Detective Modesitt. According to the transcript of that video interview provided in the record to this Court, F.S. specifically informed Detective Modesitt that her father has gotten in bed with her several times when other family members were not home. She indicated that he placed his penis on

[4]A detailed recital of the graphic sexual allegations of this case is necessary because of the nature of the circuit court's order this Court is called upon to review. Our task is to determine whether, upon the facts available to it at the adjudicatory hearing, the circuit court erred in dismissing the petition for abuse and neglect filed against the father.

[5]Ms. Carpenter testified that F.S. described the "squishy" sounds made before her father would wet on her.

[6]Detective Modesitt had been certified to interview children concerning sexual abuse.

her legs and vaginal area, that it made "squishy noises," and that it felt "sticky."[7] The child also indicated that she sometimes slept on the bottom bunk if her step-sister was not at home.

She stated that her father pulled her pants down to her ankles and lifted her shirt to touch her chest. She believed that the last of these incidents occurred when she was in third grade, and she no longer had contact with her father by the time of the interview with Detective Modesitt.

During the adjudicatory hearings, the respondent testified and denied any sexual abuse of his daughter. He explained that the version of the alleged occurrences presented by F.S. lacked credibility because he could not have accessed her on the top bunk without awakening his step-daughters who also slept in the room. He also testified that he sleeps downstairs and other children were always present when F.S. was visiting. Although

[7]F.S. stated that her father "unzips and sometimes he wets on me." She said, "I pretend to go to the bathroom and I wipe it off." She also informed Detective Modesitt that it "smells disgusting." She stated that "he'll sometimes just unzip . . . and he'll sometimes pull down his underwear or he sometimes has a hole in his underwear." She indicated that "he just comes against me and stuff. He'll just grab it out and kind of pull it and kind of just rub it around me and rub it like right here . . ." on her vagina and buttocks. She explained that she had tried to scoot away from him in bed, but "[e]very time I try to scoot over he'll keep on scooting until I can't move anymore." She also stated that he sometimes placed his penis slightly into her vagina.

he acknowledged his failure[8] of a polygraph test, he alleged that the failure resulted from some "changed" questions by the administrator of the test.[9]

A clinical psychologist, Mary Longmore Gable, testified that she had conducted approximately thirty-five sessions of therapy with F.S. Ms. Gable explained that F.S. reported several issues regarding her father's sexual conduct toward her,[10] informing Ms. Gable that her father lingered near her private areas while bathing and drying her. F.S. also informed Ms. Gable that her father pulled down his "boy private parts" and would begin "rubbing them on top of her." F.S. reported specific details about how her legs were spread, how her father would unzip his pants, and how his penis felt "squishy like a blob of jelly." Ms. Gable also explained that F.S. told her that she sometimes pretended to be sleeping, in

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[8]Detective Modesitt testified that the father failed the portions of the lie detector test dealing with his sexual touching of F.S.

[9]During questioning regarding the father's failure of the polygraph test, the mother's attorney asked the respondent: "Well, did he rephrase questions, or - - I don't understand what you mean. Could you give an example." The respondent explained that "[i]t's been quite some time. I'd have to recall that information. If you would give me a few minutes, Mr. White. I just remember that the - - the question was different." The mother's attorney then inquired regarding whether the test administrator asked "you a question twice, one phrased differently than another?" The respondent replied, "I'm not sure. I just know it was different."

[10]Prior to starting therapy with Ms. Gable, F.S. had refused to speak of the abuse when interviewed by Magistrate Joyce Purkey and her assistant in conjunction with the mother's attempt to obtain a protective order against the respondent. At that time, F.S. denied any inappropriate acts by her father. The child also failed to make any disclosure of abuse to her brother's family therapist, Jennifer Cozart. She later explained to Detective Modesitt that she had refused to talk about the abuse when there was more than one other person present.

an effort to reduce the likelihood that her father would touch her. Ms. Gable testified that she believed F.S. had been sexually abused based on the consistency of the child's statements, the sensory details of the sexual events, her child-appropriate language, and the emotions she expressed concerning the alleged occurrences. Ms. Gable additionally noted that she had not detected any "red flags" indicating the F.S. had been coached or was fabricating the claims of sexual abuse.[11]

Dr. Fred J. Krieg, a forensic psychologist, was called by the respondent. Although Dr. Krieg had not personally interviewed F.S., he had reviewed all the records of her allegations and testified that he was unable to "say whether or not [the child] was sexually abused or not." In his review of F.S.'s revelations to Detective Modesitt, he found some indication that the child was attempting to determine whether her answers were pleasing to the interviewer and that she seemed susceptible to suggestibility.[12] Dr. Krieg also noted that there was no physical evidence of abuse and that the child had refused to discuss

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[11]Ms. Gable acknowledged F.S.'s reluctance to talk about the sexual abuse, testifying that the child did not initially "want to talk about it with me because she was afraid I wouldn't be her friend anymore." Ms. Gable explained that such reactions were common with children. Consistent with this emotional reaction, the child also informed Detective Modesitt that she "would only talk . . . if there's not two people."

[12]Dr. Krieg referenced F.S.'s statement at the conclusion of the interview with Detective Modesitt. F.S. was asked whether there was anything else she wanted to talk about with the detective, and she responded by saying, "It's hard to think of something unless because if you say it first and I'll remember what to say." Dr Krieg opined that this could be a "sign that somebody outside has said, 'These are the things you need to say.'"

the abuse when questioned in her father's criminal trial and with one of the therapists, Ms. Cozart.

On August 2, 2013, the circuit court dismissed the petition for abuse and neglect, finding that the facts presented did not constitute clear and convincing evidence of abuse by the respondent. In so ruling, the circuit court found inconsistencies in F.S.'s allegations, such as the fact that she indicated she was always asleep throughout these occurrences and said that she did not actually see her father performing the acts.[13] Moreover, the circuit court emphasized the fact that F.S. had refused to speak of the abuse and denied anything inappropriate when interviewed by Magistrate Joyce Purkey and made no disclosure of abuse to her brother's therapist, Ms. Cozart. F.S. further refused to discuss the abuse at the respondent's criminal trial in April 2013, and he was consequently acquitted.[14]

The circuit court also noted inconsistencies in the mother's statements with respect to how and when she learned of the alleged abuse. The mother had informed Ms.

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[13]Although F.S. stated, during parts of the interview with Detective Modesitt, that she did not see her father performing these sexual acts, she did describe seeing him standing in her room and lying down beside her when these sexual incidents occurred. F.S. also indicated that she sometimes pretended to be asleep in an attempt to prevent the inappropriate touching.

[14]As this Court recognized in *In re Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997), acquittal of criminal charges has no bearing on abuse and neglect cases. "[C]ivil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." *Id.* at 66, 491 S.E.2d at 613.

Carpenter and Ms. Cozart that her son, Z.S., told her of the abuse toward F.S. However, she told Detective Modesitt that F.S. made the original revelations of abuse. The circuit court also noted that the mother maintained a significant grudge against the father[15] and had exaggerated the effects of the alleged abuse when discussing difficulties in F.S.'s school performance. The principal of the school F.S. attended indicated that F.S. was progressing well in school and had not experienced any behavioral problems.

In addressing the testimony of the psychologist, Ms. Gable, the circuit court observed that she was not a forensic psychologist and had accepted F.S.'s statements as true, without any independent investigation of her credibility or other indicia of reliability of her claims. This Court's review of the record reveals that Ms. Gable was initially unaware of F.S.'s refusal to speak about the abuse to certain other individuals. The respondent's counsel questioned Ms. Gable during the adjudicatory hearing and informed her that the child had sometimes refused to speak of the abuse. Upon learning this, Ms. Gable clearly indicated that such knowledge would not necessarily alter her conclusion that F.S. had been abused. Ms. Gable explained that "it would depend on the change in consistency" and that she would still look "at the emotional response, the language, and all of those things in combination."

[15]The mother had made an allegation of sexual misconduct by the father in 2006. At that time, the mother had apparently indicated that the father had spent too much time bathing the child's private areas. That claim was found to be unsubstantiated and was not extensively developed in the record currently before this Court. The allegations which form the basis for the present issue occurred subsequent to that initial allegation.

Ms. Gable stated that F.S. "has too much that is consistent with children that are sexually abused."

The petitioners appeal the circuit court's adjudicatory order, contending that the circuit court erred in dismissing the petition for abuse and neglect. The petitioners argue that the facts presented constitute clear and convincing evidence of sexual abuse.

II. Standard of Review

This case is before this Court on appeal from the circuit court's order dismissing the abuse and neglect petition and finding that the facts presented did not constitute clear and convincing evidence of sexual abuse. Generally, this Court accords plenary review to a circuit court's resolution of questions of law, while factual determinations made by the circuit court are reversible only if clearly erroneous. In *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), this Court explained: "For appeals resulting from abuse and neglect proceedings, such as the case sub judice, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *Id*. at 332, 540 S.E.2d at 549. The concept of mixed questions of law and fact was addressed in *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995), and this Court explained that "[a]lthough factual findings are reviewed under the clearly erroneous standard, mixed questions of law and fact that

require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo*." *Id*. at 265, 460 S.E.2d at 266.

These standards were also expressed in syllabus point one of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

See also In re Samaria S., 347 S.W.3d 188, 200 (Tenn. Ct. App. 2011) ("Under this standard of proof, the appellate court must distinguish between the specific facts found by the trial court and the combined weight of those facts." (internal quotes and citations omitted)). This Court has also recognized that credibility determinations are uniquely within the province of a circuit court. This Court explained this concept in *Tiffany Marie S.*, as follows:

> [w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) [of the West Virginia Rules of Civil Procedure] demands even greater deference to the trial court's findings[.] . . . Deference is appropriate because the

> trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties.

196 W.Va. at 231, 470 S.E.2d at 185 (internal quotations and citations omitted). Guided by those standards of review, we address the petitioners' assignment of error.

III. Discussion

This Court has consistently recognized that a parent's right to the care and custody of his child is a firmly established liberty interest protected by the due process clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re Jeffrey R.L.*, 190 W.Va. 24, 32, 435 S.E.2d 162, 170 (1993). This Court in *Jeffrey R.L.* acknowledged the manner in which child abuse and neglect cases are addressed, specifically in conjunction with observance of the fundamental rights of a parent to the care and custody of his child.

> In the Court's analysis of child abuse and neglect cases, we must take into consideration the rights and interests of all of the parties in reaching an ultimate resolution of the issues before us. Although the rights of the natural parents to the custody of their child and the interests of the State as *parens patriae* merit significant consideration by this Court, the best interests of the child are paramount. Thus, as an initial matter, we emphasize that the health, safety, and welfare of [the child] must be our primary concern in analyzing the facts and issues before us.

Jeffrey R.L., 190 W.Va. at 32, 435 S.E.2d at 170.

As this Court stated in syllabus point three of *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996), "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Thus, while a parent's right is fundamental, it is certainly not absolute. A parent's right may be limited or ultimately terminated where it is relinquished, abandoned, or where the parent has engaged in conduct requiring restriction of parental rights.

A petition for abuse and neglect[16] may be filed in this state under the provisions of West Virginia Code § 49-6-2 (2009). That statute enunciates the manner of evaluation of such a case and directs the circuit court to make certain findings subsequent to an adjudicatory hearing, as follows:

> At the conclusion of the adjudicatory hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. . . . The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

W.Va. Code § 49-6-2(c). In syllabus point three of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court addressed this statute and observed:

> "'"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human

[16]An "[a]bused child" is defined in West Virginia Code § 49-1-3(a) (2009) as a "child whose health or welfare is harmed or threatened by . . . [s]exual abuse or sexual exploitation[.]"

> Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994).

In this Court's appellate review of the dismissal of petitions for abuse and neglect, we have evaluated the dispositive issue of whether clear and convincing evidence of abuse was established. For example, in *In re Tyler D.*, 213 W.Va. 149, 578 S.E.2d 343 (2003), the DHHR and the children's guardian ad litem appealed an order of the circuit court dismissing the petition for abuse and neglect. Upon review of the facts presented, this Court reversed the circuit court and found "clear and convincing evidence that Tyler D. was sexually abused." *Id.* at 156, 578 S.E.2d at 350. We reasoned as follows:

> While there was no physical evidence, three witnesses testified that Tyler D's reports of sexual abuse were credible. In particular, Mr. Mayfield, Tyler's psychotherapist, testified that he believed that Tyler was telling the truth about being sexually abused based upon the language he used, the consistency in his statements, and the details he provided. Likewise, Beverly Green, a child protective services investigator with the Allegheny County Department of Social Services in Maryland, testified that the consistency in Tyler's statements about the sexual abuse indicated that he was being truthful. Finally, Glenda Razo, a case manager for child abuse and neglect in Fort

> Knox, Kentucky, testified that Tyler's allegations of sexual abuse were credible. All three witnesses indicated that they have considerable experience in dealing with sexually abused children. This evidence cannot simply be ignored.

Id. at 156-57, 578 S.E.2d at 350-51. "Thus, given all of the above, we find that the circuit court erred by concluding that there was no clear and convincing evidence that these children were abused and neglected." *Id*. at 157, 578 S.E.2d at 351.

Similarly, this Court reversed a circuit court's dismissal of an abuse and neglect petition in *In re Katelyn T.*, 225 W.Va. 264, 692 S.E.2d 307 (2010). In that case, the guardian ad litem and DHHR appealed the circuit court's dismissal of an abuse and neglect petition alleging sexual abuse, and this Court found that the evidence presented below constituted clear and convincing evidence of the abuse. *Id*. at 278, 692 S.E.2d at 321.

In the present case, although there was no physical evidence of abuse, F.S.'s testimony, presented to the circuit court through the video recording of her interview with Detective Modesitt, provided explicit evidence of multiple episodes of sexual abuse. The child's statements to Ms. Carpenter and Ms. Gable also detailed the sexual abuse she suffered. Significantly, the circuit court did not find that F.S. fabricated the claims of sexual abuse. It appears that the circuit court dismissed the petition based upon particular elements of doubt or components of uncertainty revealed within F.S.'s testimony. For instance, the child referenced "sleeping" during the sexual abuse and stated, in at least one portion of her

questioning, that she did not "see" her father performing these acts. While these issues were quite reasonably included in the court's evaluation of the evidence and the child's credibility, those instances cannot be viewed in isolation from the extensive other evidence of sexual abuse. The child's testimony also revealed instances where she observed her father during the occurrences and was awake and aware of his actions.[17]

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[17]Likewise, the child's self-imposed rule of refusal to speak of the abuse where more than one person was present must be evaluated in terms of her age and maturity. The psychologist, Ms. Gable, testified that such emotional responses are common in children. While perhaps unconventional, these issues do not entirely undermine the child's credibility. In *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), this Court explained that cases involving child victims

> generally pit the child's credibility against an adult's credibility and often times an adult family member's credibility. Since sexual abuse committed against children is such an aberrant behavior, most people find it easier to dismiss the child's testimony as being coached or made up or conclude that any touching of a child's private parts by an adult must have been by accident. In addition, children often have greater difficulty than adults in establishing precise dates of incidents of sexual abuse, not only because small children don't possess the same grasp of time as adults, but because they obviously may not report acts of sexual abuse promptly, either because they are abused by a primary care-taker and authority figure and are therefore unaware such conduct is wrong, or because of threats of physical harm by one in almost total control of their life. In most cases of sexual abuse against children by a care-taker or relative, the acts of sexual abuse transpire over a substantial period of time, often several years.

Id. at 650-51, 398 S.E.2d 132-33 (footnote omitted).

Another element of uncertainty was created by the testimony of Dr. Krieg, indicating that he had discerned signs of suggestibility in the child during his review of the evidence. It is significant to note that Dr. Krieg never spoke directly with F.S.; nor did he testify that she had fabricated the sexual abuse allegations. He concluded, "My testimony is that in reviewing the documentation that led to this charge, that I don't find reliable evidence in the information to be able to tell us whether or not that child was sexually abused." Those individuals to whom F.S. spoke directly, however, painted a vastly different picture. Ms. Gable, Ms. Carpenter, and Detective Modesitt testified concerning the child's assertions and the distinct graphic sensory details she provided, as set forth above. Ms. Gable testified that F.S.'s language and emotional states were consistent with a child who has been sexually abused. Further, Ms. Gable found no signs that F.S. was lying or had been coached. Ms. Gable stated, "A few details may change, but overall the story does not."

This is a classic case of the inability of a trial court to ascertain, with complete certainty, the truth of the allegations of abuse. As indicated by the circuit court's adjudicatory order, one could quite effortlessly compile an inventory of doubts and skepticism based upon the evidence presented. The evidence is simply not crystal clear, beyond all doubt. However, that is not the standard to be employed in an abuse and neglect case. In reviewing the entirety of the evidence, this Court must adhere to the appellate standard of review set forth above, according significant weight to the circuit court's

credibility determinations while refusing to abdicate our responsibility to evaluate the evidence and determine whether an error has been committed.

It is imperative to note that the evidence in an abuse and neglect case does not have to satisfy the stringent standard of beyond a reasonable doubt; the evidence must establish abuse by clear and convincing evidence. This Court has explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Brown v. Gobble*, 196 W.Va. 559, 564, 474 S.E.2d 489, 494 (1996) (internal citations omitted). We have also stated that the clear and convincing standard is "intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cramer v. W. Va. Dept. of Highways*, 180 W.Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988); *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (holding that party with burden of persuasion may prevail only if he can "place in the ultimate factfinder an abiding conviction that the truth of [his] factual contentions are 'highly probable.'").

Reviewing the facts presented in the adjudicatory hearing to determine whether they constituted clear and convincing evidence of abuse and employing the standards set forth in *Tiffany Marie S.*, this Court is "left with the definite and firm conviction that a

mistake has been committed." Syl. Pt. 1, in part, *Tiffany Marie S.*, 196 W.Va. at 224, 470 S.E.2d at 178. We find that the evidence presented below constitutes clear and convincing evidence of sexual abuse by the respondent. Utilizing child-appropriate language and reiterating the sexually explicit details during multiple interviews, F.S. explained episodes during which her father got in bed with her, rubbed himself against her legs and vaginal area, and wet on her. She described the multitude of sensory aspects of those experiences, in vivid detail. These claims were investigated by the DHHR and the Wood County Sheriff's Office and discussed through the therapy of Ms. Gable. Based upon all the evidence presented on these allegations, we conclude that the circuit court erred in dismissing the petition and finding lack of clear and convincing evidence that the respondent abused his daughter.[18]

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[18]Having determined that the facts support a finding that clear and convincing evidence of abuse was presented, the petitioners should be adjudicated as abused children. In the abuse and neglect setting, this Court has recognized the rights of children residing in the home, such the respondent's son, Z.S., even where he was not alleged to have been a victim. In syllabus point two of *Christina L.*, this Court explained:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994).

194 W.Va. at 447, 460 S.E.2d at 693.

IV. Conclusion

For the foregoing reasons, the order of the Circuit Court of Wood County dismissing the petition for abuse and neglect is reversed.[19] Accordingly, this case is

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[19]Having completed the threshold adjudicatory phase with the finding of abuse, this case will proceed toward disposition in accordance with West Virginia Code § 49-6-5 (2009). The dispositional phase provides the circuit court with broad latitude to frame an appropriate resolution of the issues. As this Court has recognized, the abuse and neglect statutes do not authorize a court to intervene in the parent/child relationship until an adjudication of abuse has been made. "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983). If a court does not make that initial finding of abuse, no further action is permitted in the abuse and neglect realm. As Justice Workman suggested in a concurrence to *In re Kasey M.*, 228 W.Va. 221, 719 S.E.2d 389 (2010), an alternative at that juncture would be a request for modification of the custodial responsibility.

> Pursuant to W. Va. Code § 48-9-401 (2001) (Repl. Vol. 2009), a decision on a motion for modification of custody requires a determination of whether there has been a substantial change in the circumstances of the child or of one or both parents and whether a modification is necessary to serve the best interests of the child, obviously a completely different standard than a finding of abuse and neglect. The allegations of abuse and neglect certainly constituted a change in circumstances, and there were several other factors that indicated that it would be in C.C.'s best interests to be placed in the custody of his mother. Therefore, regardless of the outcome of the abuse and neglect case, it seems that the circumstances probably warranted a modification of custody pursuant to W. Va. Code § 48-9-401.

228 W.Va. at 226, 719 S.E.2d at 394 (Workman, J., concurring).

remanded to the circuit court for entry of an order adjudicating F.S. and Z.S. as abused children based upon the sexual abuse perpetrated upon F.S. by the respondent and for further proceedings consistent with this opinion.[20] The mandate of this Court shall issue contemporaneously herewith.

Reversed and Remanded.

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[20]This matter should be expedited. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). As the case proceeds in the dispositional phase, this Court does not in any manner limit the discretion of the circuit court as provided by statute; nor do we suggest any particular result. However, in the event the circuit court elects to consider an order of visitation, the court must remain mindful of the principles expressed in syllabus point three of *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996), as follows:

> Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

Id. at 241, 470 S.E.2d at 195.

226 W. Va. 188, 699 S.E.2d 730

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35452

IN RE: FAITH C., SOPHIA S. AND MADELYN S.

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action Nos. 08-JA-229, 08-JA-230 and 08-JA-231

AFFIRMED AND REMANDED WITH DIRECTIONS

Submitted: March 31, 2010
Filed: June 4, 2010

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Under W.Va.Code, 49-6-2(b) [(2006) (Repl. Vol. 2009)], when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 [(1998) (Repl. Vol. 2009)]." Syllabus Point 3, *State ex rel. W.VA. Dept. of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

3. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the

resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syllabus Point 4, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

4. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child[ren]." Syllabus Point 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Kanawha County entered on July 30, 2009, which granted a six-month dispositional improvement period to the appellee and respondent below, Sarah S.[1] in this abuse and neglect proceeding. In this appeal, the guardian ad litem for the children, Faith C., Sophia S., and Madelyn S.,[2] contends that the circuit court erred by granting the improvement period and not terminating Sarah S.'s parental rights. This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the order of the circuit court is affirmed, and this case is remanded to the circuit court with directions regarding the improvement period as set forth herein.[3]

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See, e.g., In the Matter of Jonathan P.*, 182 W. Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2]For ease of reading this opinion, the children will hereinafter be referred to by their first name only.

[3]The final order was stayed pending this appeal.

I.

FACTS

On September 15, 2008, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") filed an abuse and neglect petition alleging that Faith, Sophia, and Madelyn were abused and/or neglected by their parents. Sarah S. is the mother of all three children. Teddy C. is the father of Faith, and Benjamin S. is the father of Sophia and Madelyn.[4] In particular, the DHHR asserted that on September 12, 2008, Sophia, who was twenty-two months old, received second-degree burns to her legs and feet as a result of an intentional immersion in scalding water at her home. The DHHR maintained that the perpetrator of the alleged abuse was Sarah S., as there was no dispute that Benjamin S. was not at the residence at the time of the incident.[5] The only people present in the home at that time were Sophia, Madelyn, and Sarah S.[6]

As a result of her severe injuries, Sophia was first transported by helicopter to the Burn Center at Cabell Huntington Hospital in Huntington, West Virginia, and then transferred to the Nationwide Children's Hospital in Columbus, Ohio, a few days later. After

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[4]Sarah S. and Benjamin S. are married.

[5]Benjamin S. was working out of state and was in Tennessee when Sophia was injured.

[6]Faith was at school.

prolonged treatment which included surgery, Sophia's wounds healed. Although the police responded to the residence at the time of the incident,[7] no criminal charges were filed against Sarah S. She claimed that Sophia had climbed up onto the bathroom sink, turned on the hot water, and burned herself instantaneously. Sarah S. stated that she was outside of the family residence talking on a cell phone when the incident occurred.[8] She said she heard a child screaming and did not immediately respond because she thought the screams were coming from her youngest daughter, Madelyn, who needed a nap. When she did go into the residence, she said she found Sophia on top of the bathroom vanity already severely burned.

During the abuse and neglect proceedings below, the DHHR presented testimony from two experts, Eduardo Pino, M.D., and David Henchman, M.D., both doctors at the Burn Center at Cabell Huntington Hospital. They testified that the nature of Sophia's burns indicated that she had been immersed and held down in scalding water. According to these doctors, no other explanation of the child's injuries could be consistent with the type of burns she sustained. Specifically, Drs. Pino and Henchman testified that the "glove and stocking" circumferential burns encompassing the entire area around the child's legs could only lead to the singular conclusion that the child had been immersed in scalding water and

[7]Sarah S. called 911.

[8]Sarah S. indicated that she has to use her cell phone outside because she has poor reception inside her home.

held down. Dr. Pino opined that this was a "classic" example of an immersion burn. During his testimony, Dr. Pino stated:

> The nature of the burns being circumferential, particularly higher or one side then [sic] on the other, really to me signifies that this child was more or less dumped into hot water.
>
> . . . .
>
> . . . I don't know what the water temperature of the sink was. But the fact that both extremities are burned, nobody steps into a bathtub or sink or whatever, with both feet at the same time.
>
> The fact that it's circumferential means that it was just an immersion, just going like this. Certainly one foot versus the other is that one foot was probably picked up and so that's why it only burned to one leg, and the other one burned further down.

Similarly, Dr. Henchman testified that he could not imagine any other scenario to explain Sophia's injuries other than someone just holding her down in the water. He testified:

> I can't imagine another scenario that would give that result. I would think that anytime a child or anyone's foot touched hot water that much, instinctively pull it away. To put both feet inside up to the calf in scalding water, I can't imagine another scenario.

The DHHR also submitted into evidence a medical report from the Nationwide Children's Hospital which included the following statement from Gail E. Besner, M.D., the attending physician:

> Child Assessment Team was consulted and evaluation revealed bilateral circumferential burns to both feet extending to the mid calf on the right and to the ankle on the left (i.e. in an asymmetric stocking distribution). The mechanism of production of these burns was immersion into a scalding hot

> liquid. Child Assessment Team consultant indicated this pattern of burn injury was frequently inflicted. The patient also had an unexplained long linear bruise to the right thigh, which added concern for physical abuse . . . Child Assessment Team agreed with the filing of a report of suspected physical abuse to Children's Services.

In contrast to the evidence presented by the DHHR, Sarah S. offered the testimony of Gregory Porter, P.A., who indicated that he had participated in approximately twenty-five water submersion cases. Mr. Porter was qualified as an expert in emergency medicine, primary health care, and emergency medicine for children. Mr. Porter opined that Sophia's injuries were accidentally self-inflicted. He testified as follows in response to questions from counsel for Sarah S.:

> Q: Is a stocking glove appearance the only thing that you look at when you are trying to determine if one has had an immersion burn or not?
>
> A: Absolutely not.
>
> Q: What is a stocking glove appearance to a burn?
>
> A: Stocking glove, I mean if you think about it, has [sic] a female wearing knee highs, that sort of thing. Stocking glove usually refers to that. It is very, you know, clear from the foot all the way up to a level. It is sort of like a stocking.
>
> . . . .
>
> Q: But would that be dispositive that it's an immersion burn or would it be a possibility?
>
> A: It rises the–raises the suspicion for immersion burn.

Mr. Porter explained that in addition to the appearance of the burn, the depth of the burn had to be considered. He stated:

Q: Okay. Is there anything about them, the depth of an immersion burn that is important?

A: Absolutely.

Q: What is that?

A: During my research of the case, I think that's the most striking piece of evidence. If you are immersed in a body of water that is a consistent temperature say that this child, I think the water heater was 147, 150 degrees; if you take a child and you emerge [sic] in that water, you are going to have the same depth of burn everywhere that the water was. The only thing that would change that is the time of exposure. But so random, that you just draw a line and you stick them in the same amount of water you will have same thickness burn all the way from start to finish.

Q: Did this child have the same thickness burns?

A: No, they did not.

Q: Were her burns then mixed?

A: That's a good way to describe it, mixed depth.

Q: And if you would, talking about mixed depth, are you saying that the burns are different on her foot or top of the foot or back of her leg or what?

A: Yes. On different parts of her body are different depths.

Q: The medical records support mixed depth injuries?

A: The initial medical records did not. But in burn cases you really don't know what a burn looks like for several hours or even days after a burn. There is continued damage that goes on even after the burn. Both nerves vascularly and dermis.

A burn can look very bad initially, and as it starts to heal, the next couple of days you will see the true character of the burn.

It's worth mentioning that the burns from the mid-calf distally and spontaneously healed. It was a second degree burn that spontaneously healed. And this child unfortunately had to be grafted on the dorsal of the feet, the top of the feet.

Mr. Porter further explained that the fact that the burns on the top of Sophia's feet were deeper than her other burns was consistent with her standing in the sink, turning on the faucet, and allowing the hot water to hit the top of her feet. He testified:

> So to me if the story was she was in a basin and there was hot water running from above on top of the feet, that makes perfect sense in my opinion.
>
> Q: So there was mixed depth. And the place that had to be grafted was the top of the feet?
>
> A: Correct.
>
> Q: Did the bottom of the feet heal?
>
> A: Spontaneously.
>
> Q: Did the back of the leg heal?
>
> A: Spontaneously.
>
> Q: Did the front of the leg heal?
>
> A: Yes, spontaneously.

Mr. Porter also testified that "typically in burns that are of immersion only and forced immersion, that line is very straight, it would be more cross both sides." Referencing photographs of Sophia's injuries, he stated, "This one is a very irregular line. This one is not burned up very far, and also an irregular angle." He concluded:

> My opinion is an accidental burning. I think they–an adult was not around to supervise this child. I think this child, in my opinion, made it to the toilet, made it to the vanity, switched on the hot water. And then could not as the water rose–as I understand it, it's a slow draining vanity. As the water rose this child had nothing–nowhere to go. And I think she, you know, sustained the injuries that she sustained during that process.

Sarah S., Benjamin S., and Rosetta S., the paternal grandmother, all testified about Sophia's propensity to climb. Specifically, Benjamin S. stated that he had observed Sophia climb from the commode to the vanity just one month before she was injured.

Detective Snuffer, one of the investigating police officers, also testified. He stated that Sarah S. was cooperative during the investigation and firm in her resolve that she did not intentionally harm her child. According to the police report, the police officers found standing water in the vent in the bathroom floor where the injury occurred; water-soaked bathroom rugs in the bathroom floor where the injury occurred; dry bathtubs, kitchen sink and master bathroom sink; a rapidly filling and slow draining bathroom sink where the injury occurred; and no drain stopper in the bathroom sink where the injury occurred. The officers concluded that Sarah S.'s claim that there was no intentional wrongdoing on her part was consistent with the evidence they found during their investigation. As previously noted, no criminal charges were filed against Sarah S.

Full evidentiary adjudicatory hearings were held on March 5, 2009, and May 11, 2009. On June 24, 2009, the Court entered an adjudicatory order finding by clear and convincing evidence that Sarah S. did not intentionally inflict physical or emotional harm upon any of the minor children, particularly Sophia. The circuit court further found, however, that Sarah S. had neglected the children, particularly Sophia, by her own admission,

because she was outside the family home when Sophia was injured. Thus, the circuit court concluded that Sarah S. was an "abusing parent" within the meaning of W. Va. Code § 49-1-3(b) (2007) (Repl. Vol. 2009).[9]

The disposition hearing was held on June 24, 2009. Both the DHHR and the guardian ad litem moved for the termination of Sarah S.'s parental rights. Sarah S. requested an improvement period. The court concluded that there were no statutory grounds for terminating Sarah S.'s parental rights and that she "ha[d] demonstrated through her acceptance of responsibility for neglect of the minor child an adequate capacity to solve the problems of neglect with a reasonable likelihood that the conditions of neglect which led to the filing of the petition in this action can be corrected substantially in the near future." *See* W. Va. Code § 49-6-5 (2006) (Repl. Vol. 2009). The circuit court further found that Sarah S. had demonstrated, by clear and convincing evidence, that she is likely to fully participate in an improvement period. *See* W. Va. Code § 49-6-12(b)(2) (1996) (Repl. Vol. 2009). Accordingly, the court granted Sarah S. a six-month dispositional improvement period. The court directed the DHHR to develop a plan of improvement to begin reunification of the

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[9]W. Va. Code § 49-1-3(b) states:

> "Abusing parent" means a parent, guardian or other custodian, regardless of his or her age, whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to constitute child abuse or neglect.

minor children with their parents. The final order was entered on July 30, 2009, and this appeal followed.[10]

II.

STANDARD OF REVIEW

"For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000). In other words,

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's

[10]The DHHR did not file a brief in this appeal, but did submit a one-page letter stating that it supports the position and relief requested by the guardian ad litem. Teddy C. and Benjamin S. did not participate in this appeal.

> account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

With these standards in mind, the issue presented in this case will be considered.

III.

DISCUSSION

As noted above, the guardian ad litem contends in this appeal that the circuit court erred by not terminating Sarah S.'s parental rights. The guardian maintains that the evidence clearly establishes that Sophia sustained second-degree burns as a result of intentional immersion in scalding water. The guardian asserts that the expert testimony of the two physicians who treated Sophia at the Burn Center at the Cabell Huntington Hospital, as well as the medical records from Nationwide Children's Hospital, indicate that Sophia was held down in the water, but managed to lift one foot in her efforts to fight off the assault resulting in non-symmetrical, but circumferential, injuries to her legs–a "classic stocking and/or glove" severe burn injury. In addition, the experts testified that the fact that Sophia suffered very few burns to her upper legs and perineum area was consistent with the dunking or immersion of the child in the sink as there would be minimal splashing. Finally, the experts stated that the unexplained long linear bruise on Sophia's right thigh was consistent with the force necessary to hold down a child in the scalding water. The guardian argues that

the circuit court erred by ignoring this overwhelming medical evidence which established that Sophia's injuries were not the result of an accident and elevating the opinion of Mr. Porter, a physician assistant, over the well-reasoned opinions of highly trained medical doctors.

In response, Sarah S. argues that the circuit court did not err by concluding that she did not intentionally harm her child and refusing to terminate her parental rights. Sarah S. contends that the guardian's argument is based upon theories and scenarios of how Sophia was injured instead of actual evidence. Sarah S. maintains that the evidence shows that Sophia accidentally burned herself. In that regard, she first points out the Kanawha County Sheriff's Department conducted a thorough investigation and concluded that the evidence was consistent with her explanation of what happened to Sophia. The investigating officers took digital photographs of the interior and exterior of the residence. They checked all sinks and bathtubs. They turned on the hot water and let it run for a few seconds at which time the water became hot. They measured the temperature of the water with a thermometer. They noted that the bathtubs were dry. They measured the depth of the bathtub, the height of the vanity, the diameter of the sink, and checked the hot water tank, noting that it was covered with cobwebs indicative that it had not been disturbed. They also noted that the sink where the injury occurred filled rapidly, drained slowly, and had strong water pressure. The water

was unable to drain without filling the sink rapidly. The police concluded that Sarah S.'s statement that Sophia's injury was an accident was consistent with the evidence.

In addition to the police report, Sarah S. notes that the circuit court had evidence in the form of testimony from Rosetta S., the paternal grandmother, that Sophia had sat on her bathroom vanity just two weeks before the accident to wash her hands and asked to put her feet in the sink. In addition, Sophia's father, Benjamin S., testified that a month before the accident, he observed Sophia climbing onto the vanity where the accident occurred.

Finally, Sarah S. claims that the testimony provided by her medical expert, Mr. Porter, establishes that Sophia was not intentionally burned. She first points out that unlike DHHR's expert physcians who based their testimony solely upon their observations and treatment of Sophia S. at Cabell Huntington Hospital,[11] Mr. Porter reviewed Sophia's medical records from both hospitals. In addition, he consulted publications by the U.S. Department of Justice, as well as medical texts, regarding burn victims and classic findings in abuse and neglect cases. During his testimony, Mr. Porter provided a list of ten factors that are utilized by medical professionals to assess whether or not a burn injury is intentional

[11]Both Dr. Pino and Dr. Henchman testified that they had not reviewed Sophia's medical records from the Nationwide's Children Hospital in Columbus, Ohio.

or accidental. Those factors are as follows: the presence of glove and stocking appearance; the uniformity of depth of the burn; symmetry of the water line; the presence or absence of splash injuries; the sparing of skin; other injuries including bruises and old and new fractures; the ability of the child to climb; cognitive skills of the child; the location in the home where the injury occurred; and previous abuse and neglect of the child. When Mr. Porter considered the factors along with Sophia's medical records, he concluded that Sophia accidentally burned herself.

With regard to splash injuries, Mr. Porter testified that in the traditional abuse and neglect case where a child was forcibly held down in scalding water, there would be no splash injuries. He stated that Sophia's medical records showed that she had a few splash injuries on her upper legs, one in the perineum area, and one on her lower back. He testified that this evidence indicated that Sophia was trying to remove herself from the water and that she did not have any external force applied to her. He also opined that the linear bruise on one of Sophia's upper legs was most likely obtained by falling against a surface such as a straight edge. He explained that if a child is held down in water, there are typically hand or thumb prints on the child; Sophia had no such injuries, nor was there any evidence that she had ever been physically abused.

Sarah S. acknowledges that she was negligent in the supervision of her child. However, she maintains that the evidence outlined above shows that she did not intentionally harm Sophia. Therefore, she asserts that circuit court did not err by granting her a six-month improvement period and refusing to terminate her parental rights.

As noted in the preceding standard of review section of this opinion, this Court should not overturn the findings of the circuit court in an abuse and neglect proceeding "simply because [we] would have decided the case differently, and [we] must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *Tiffany Marie S., supra*. Under Rule 52(a) of the West Virginia Rules of Civil Procedure, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous[.]" Furthermore, "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." *Id.* Accordingly, this Court has observed that

> [w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings . . . . Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties.

Id. at 231, 470 S.E.2d at 185 (citation and internal quotation omitted). Finally, this Court has explained that

> [d]etermining whether a parent or guardian has neglected or abused his or her children, like most adversarial-oriented explorations, is a predominantly factbound enterprise. It follows that, absent a mistake of law, an appellate tribunal should disturb a circuit court's determination only if it is clearly erroneous. This means, of course, that if there are two or more plausible interpretations of the evidence, the circuit court's choice among them must hold sway.

Id. at 237, 470 S.E.2d at 191.

This is an extremely close and difficult case. The circuit court was presented with two plausible interpretations of the evidence and acting as the finder of fact, determined that Sarah S. "did not intentionally inflict physical or emotional harm upon any of the minor children and more specifically, the minor child, [Sophia]." The circuit court did find, however, that Sarah S. was negligent in failing to supervise Sophia resulting in her being physically injured and that such action constituted neglect warranting a six-month dispositional improvement period. Having carefully examined the record in this case, this Court does not find the circuit court's findings of fact to be clearly erroneous. The circuit court had before it sufficient evidence to support its determination, and this Court is not left with a definite and firm conviction that a mistake has been committed.

While this Court finds no clear error and affirms the decision of the circuit court, we once again believe it is necessary to stress the importance of a promptly prepared case plan aimed at providing a meaningful improvement period and reunification of the family. *See In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996). "Under W.Va.Code, 49-6-2(b) [(2006) (Repl. Vol. 2009)], when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 [(1998) (Repl. Vol. 2009)]." Syllabus Point 3, *State ex rel. W.VA. Dept. of Human Services v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987).

> In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Syllabus Point 4, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). This is especially important in a case such as this where ensuring a child's safety is so vital.

The record in this case indicates that the only service that the DHHR provided to Sarah S. during the course of the proceedings below was supervised visits.[12] Also, the

[12]Apparently, Sarah S. did participate in parenting classes provided by Children First, the agency that supervised her visits with her children. Two employees of the agency (continued...)

permanency plan filed by the DHHR prior to the disposition hearing contemplated termination of parental rights. Obviously, in light of our decision, the permanency plan must be revised and an improvement period plan formulated. At the outset of the improvement period, the circuit court has an obligation to facilitate communication between the parties to ensure Sarah S. and the DHHR are aware of what is expected during the improvement period. *Carlita B.*, 185 W. Va. at 625-26 n.15, 408 S.E.2d at 377-78 n.15. The parties should make the court aware of any foreseen obstacles that would prevent compliance with the parenting plan so that they may be resolved prior to commencement of the improvement period. *Id.* Most importantly, however, the court should make sure that the children have been informed of the changes that are about to occur in their lives[13] and that they are receiving counseling or any other services that are necessary to achieve stability in their lives. *Id.*

While the circuit court found that Sophia may not have been intentionally harmed, the fact remains that she suffered very serious injuries because a lack of parental supervision. Clearly, services should be devised to address the conditions of neglect that resulted in Sophia's injuries. Furthermore, during the improvement period, the circuit court

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[12](...continued)
testified during proceedings below that Sarah S. had been compliant with all services, demonstrated positive behaviors with her children, and applied the parenting suggestions learned in parenting classes during her supervised visits.

[13]The children have only had supervised visits with their mother for the past year and a half.

should monitor the status of the children and the progress of Sarah S. in satisfying the goals of the parenting plan on a monthly basis. *See Carlita B.*, 185 W. Va. 625, 408 S.E.2d 377 (establishing monthly reviews to monitor improvement periods).[14] At such monthly reviews, the parties, attorneys, and social workers should appear before the court so that Sarah S.'s progress can be closely monitored to ensure compliance with the conditions of the improvement period, and a record of such proceedings should be made and filed.

> At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child[ren].

Syllabus Point 6, *Carlita B.*

[14]As noted in *Carlita B.*, the circuit court should make sure that the parent has transportation to attend the monthly reviews and any program that is a condition of the improvements period, and if not, direct the DHHR to assist with transportation. Also, the monthly reviews and programs should be scheduled so that they do not interfere with the parent's employment. 185 W. Va. 625-26 n.15, 408 S.E.2d at 377-78 n.15.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Kanawha County entered on July 20, 2009, is affirmed, and this case is remanded to the circuit court with directions regarding the improvement period as set forth herein.

Affirmed and remanded with directions.

No. 35452 – *In re: Faith C., Sophia S. and Madelyn S.*

FILED
July 26, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting.

I dissent from the majority opinion. Based upon my review of the record, I conclude that the circuit court's findings were not supported by the credible evidence of record and that such findings were clearly erroneous when the record is viewed as a whole. It is not often that I do not defer to the trial court in such matters and these certainly are difficult cases, but here I believe the conclusion that this young child scalded herself is inconsistent with the facts of the record and the opinions of Sophia S.'s treating physicians. Sophia S. received second-degree scalding-type burns to her feet and legs. Her mother contended that these burns were the result of an accidental immersion, as opposed to an intentional act on the part of her mother.[1] On appeal, I believe my colleagues fail to give sufficient weight to the medical opinions of the two treating emergency room physicians as well as that from the medical personnel treating the child at a specialized out-of-state burn clinic which supported the conclusion that Sophia S.'s burns were the result of the mother's intentional act.

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[1] There is no dispute that the child's mother was the sole adult individual present at the time the child's feet and legs were burned. The mother presented a defense that the twenty-two month old child climbed up onto the bathroom sink, turned on the hot water and placed her feet and legs into the scalding water and held them there. The mother was on the phone at the time of this incident, immediately outside of the family's living quarters, where she had to go to get a usable signal on her cell phone.

The circuit court's findings of fact on this issue were based upon the opinion testimony of Greg Porter, a physician's assistant, who was hired by the mother to review medical records and to provide expert testimony. Mr. Porter was not involved in the treatment of this child. The State and the guardian *ad litem* relied upon the expert medical testimony of two treating physicians at the Cabell Huntington Hospital Burn Center, Eduardo Pino, M.D., and David Henchman, M.D. The State and the guardian *ad litem* also relied upon the medical opinion, by way of statement, of Gail E. Besner, M.D., Sophia S.'s treating physician at Nationwide Children's Hospital, a nationally-recognized children's medical facility in Columbus, Ohio. The combined expert opinions of Drs. Pino, Henchman and Besner concluded that Sophia S.'s immersion burns were the result of an intentional act by the mother. The opinions of these medical doctors was based upon years of experience with the treatment of burns on an emergency basis and upon their actual examination of Sophia S.

We have held that "[i]n determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications, (b) in a field that is relevant to the subject under investigation, and (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171

(1995). If one accepts for the moment that the physician's assistant was competent herein to give medical opinion testimony regarding causation,[2] the role of the circuit court as the fact-finder in this abuse and neglect proceeding was to assess and weigh the differences between the treating medical doctors' evidence and that of the retained physician's assistant. Based not only upon the overwhelming difference in expertise and experience of these witnesses, but also on the manner in which Sophie S. was burned, I believe that the circuit court failed to give sufficient weight to the opinions of the treating medical doctors. As the majority correctly notes, our standard of review of the findings and conclusions of the circuit court is deferential. Moreover, these are admittedly difficult cases for all involved. Here, however, when the record is reviewed as a whole, I believe the findings of the circuit court on the accidental nature of the child's burns to be clearly erroneous.

[2] I believe it appropriate at some point for this Court to visit the evidentiary issue of the minimum standards of competency which should be present where a given witness seeks to render opinion testimony of a certain nature. A physician assistant certainly has more training of a medical nature than does a laborer, yet that training and experience is far different from that of a medical doctor. At what point should our judicial system permit or prohibit non-physicians with some level of medical expertise (such as physician assistants, nurses, nurse practitioners, and emergency medical response personnel) from rendering opinion testimony of a medical causation nature? This question carries over to other areas of expertise. I believe it appropriate for us to revisit these basic gate-keeping matters.

216 W. Va. 420, 607 S.E.2d 526

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31720

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

BRIAN BUSH FERGUSON,
Defendant Below, Appellant

Appeal from the Circuit Court of Monongalia County
Hon. Robert B. Stone, Judge
Case No. 02-F-95

AFFIRMED

Submitted: November 9, 2004
Filed: December 3, 2004

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In order to qualify as an excited utterance under W.Va.R.Evid. 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition." Syllabus Point 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

2. "Within a W.Va.R.Evid. 803(2) analysis, to assist in answering whether a statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements." Syllabus Point 8, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d (1995).

3. " Under the Due Process Clause of the *West Virginia Constitution*, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

4. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Per Curiam:

In the instant case, we affirm a first degree murder conviction.

I.

The appellant, Brian Bush Ferguson, was convicted of first degree murder in November of 2002. The jury did not recommend mercy and on February 24, 2003, the appellant was sentenced to life imprisonment without the possibility of parole. We discuss the relevant facts of the case and the applicable standards of review *infra* as part of our consideration of the issues raised on appeal.

II.
A.

The appellant argues that the trial court erred by admitting hearsay evidence about an altercation between the appellant and the victim prior to the incident in which the victim died.

This evidence came from friends of the victim, who testified at trial that the victim had told the friends that the appellant had threatened the victim with a knife during a heated conversation about the appellant's girlfriend. The trial court admitted the testimony about the victim's statements under the "excited utterance" exception to the hearsay rule, *W.Va. Rules of Evidence* 803(2).

State v. Sutphin, 195 W.Va. 551, 466 S.E.2d (1995), Syllabus Points 7 and 8, states:

> 7. In order to qualify as an excited utterance under *W.Va.R.Evid.* 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.
>
> 8. Within a *W.Va.R.Evid*. 803(2) analysis, to assist in answering whether a statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements.

We have carefully reviewed the statements in question, which all of the evidence indicated were made by a person in an emotionally upset condition, just minutes after a frightening event. There was no evidence suggesting fabrication by the declarant. We agree with the trial court's conclusion that they were "excited utterances" and were admissible as such.

The appellant also argues that even if the victim's statements were "excited utterances," they were inadmissible as "testimonial hearsay," barred by the Confrontation Clause (*U.S. Constitution*, Amendment 6), as announced in the very recent case of *Crawford v. Washington*, 124 S.Ct. 1354, ___ U.S. ___, 158 L.Ed.2d 177 (2004). However, we do not perceive that *Crawford's* largely unexplored ban on "testimonial hearsay" that has not been tested by cross-examination extends to the statements to non-official and non-investigatorial

witnesses, made prior to and apart from any governmental investigation, that are issue in this case.

We therefore find no error in the circuit court's ruling on the admissibility of the hearsay statements about the knife incident.[1]

B.

The appellant's next assignment of error asserts that the trial court erred in allowing the prosecution to place before the jury testimony and argument that amounted to commenting on the appellant's exercise of his constitutional rights to remain silent and to have the advice of counsel.

This testimony and argument related to the fact that the appellant, prior to his arrest, ended a police questioning session by asserting his right to consult with an attorney. A police officer testified at trial that the appellant said that he was going to get in touch with an attorney and then make arrangements to come back and talk with the police, but that the appellant did not do so.

Presenting evidence, comment, or argument that in response to official questioning or accusation a defendant has exercised his or her right to be silent or to have an attorney is fraught with the undeniable and serious danger that the jury will make the powerful inference that "an innocent person would not do such a thing." Therefore, to give

[1]The appellant also references other testimony relating to statements by the victim about the appellant, arguing that this testimony should not have been admitted. We have reviewed this testimony and find that the court did not err in concluding that it met the criteria of applicable hearsay exceptions and did not offend *Crawford*.

teeth to these crucial constitutional protections, our jurisprudence mandates that such evidence, comment, or argument should be scrupulously avoided:

> Under the Due Process Clause of the *West Virginia Constitution*, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.

Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977)

However, if a defendant himself or herself clearly "opens the door" by presenting evidence or argument about such conduct by the defendant, the trial court may allow the prosecution to inquire or otherwise touch on this subject – if it is necessary in fairness to present the prosecution's perspective, keeping in mind the need to keep the jury as much as possible from improperly drawing inferences from the accused's exercise of his rights. *See, e.g., State v. Mills*, 211 W.Va. 532, 544, 566 S.E.2d 891, 903 (2002). This, we perceive, is what happened in the instant case.

Specifically, the appellant introduced into evidence at trial a video tape of the police interview in which the appellant broke off police questioning and asserted his right to counsel; and the appellant's counsel questioned the police officer at trial about the events shown on the tape. The decision by the appellant and his counsel to play the police interview tape for the jury was a reasonable weighing of the benefit to the appellant *versus* the possible inference the jury could take from the appellant's cutting the interview short in accordance

with his right to do so. Under these circumstances, it was not unfair for the trial court to allow the prosecution to also address, in a limited fashion, the events shown on the tape.

Moreover, after reviewing the more than 1,000 pages of transcript of the appellant's trial, we find that any evidence or comment referencing the appellant's asertion of his rights was marginal and beyond a reasonable doubt could not have had importance in the jury's decision. We find therefore find no merit in this assignment of error.

C.

The appellant's third assignment of error is that the trial court "warned" the appellant that cross-examination of a witness for the prosecution about his involvement in certain unrelated offenses might "open the door" for that witness testifying to the appellant's involvement in those offenses.

The record reflects that this issue arose in connection with the court's ruling on a prosecution motion *in limine*; and that the trial court's warning was cautionary in nature, directing both the prosecution and defense to be careful where their questions led to avoid bringing in prejudicial extraneous matters, and to come to the bench before going into uncertain areas. A complete review of this witness' testimony does not reveal any rulings by the trial court that constituted reversible error.

D.

The appellant also asserts error in the court's instructions. We conclude that even granting the remotest inferences to the appellant, the trial court had no evidentiary basis upon which to instruct the jury on voluntary manslaughter. The court's instructions did not

deviate from the standard of beyond a reasonable doubt for all elements of the offense, nor did the court err in instructing on the mercy issue. We find no instructional error.

E.

Finally, the appellant asserts that there was insufficient evidence for a conviction of first-degree murder.

There was evidence from which the jury could conclude that the appellant had harbored animosity toward the victim over a lengthy period of time and had made a threat of physical harm toward the victim at knife-point; that a subsequent encounter between the appellant and the victim further fueled the appellant's desire for retaliation against the victim, which the appellant expressed before the murder by stating that he would get the victim alone; and that the appellant had been "stalking" the victim by parking in the victim's parking lot just outside the victim's apartment in the weeks and days before the murder.

The jury also could find that appellant, whose physical appearance fit the descriptions of the shooter given by several witnesses, was known to be in the near vicinity of the shooting within minutes of the shooting; that the police subsequently obtained from the appellant's possession articles of clothing that were consistent with the description given by eyewitnesses to the shooting; that gunshot residue was found on those garments; that the appellant gave inconsistent and false statements to police in the early hours of the murder investigation; that the appellant's friend reported that approximately two weeks before the murder he had observed a large, stainless steel revolver in the appellant's apartment; that this

gun fit the description of the firearm observed by an eyewitness to the shooting; and that the victim was killed by a .44 caliber magnum bullet of the type shot from this gun.

The standard set forth in Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) is:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Applying this standard, the evidence for conviction was sufficient.

III.

This Court has carefully reviewed the entire record in the instant case. The appellant's trial counsel presented a strong challenge to every evidentiary aspect of the prosecution's case. The trial court made a number of evidentiary rulings that were favorable to the defense. The prosecution's witnesses were tested in extended and effective cross-examination. The appellant took the stand, and presented his version of events to the jury.

Upon our review of the record, we conclude that the appellant received a fair trial, and we therefore affirm the circuit court's order entering judgment of conviction.

Affirmed.

218 W. Va. 397, 624 S.E.2d 834

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

No. 32847

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner,

V.

THE HONORABLE FRED FOX,
JUDGE OF THE CIRCUIT COURT OF MARION COUNTY;
AND MIRANDA M. AND CHARLES M.,
Respondents.

Appeal from the Circuit Court of Marion County
Honorable Fred Fox, II, Judge
Civil Action No. 03-JA-18

WRIT OF PROHIBITION DENIED

Submitted: October 5, 2005
Filed: November 17, 2006

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICES STARCHER AND BENJAMIN concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "'"Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).' Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W. Va. 456, 475 S.E.2d 548 (1996)." Syllabus point 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

2. "'In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved

independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)." Syllabus point 2, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

3. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus point 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. "'Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).' Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)." Syllabus point 8, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

Per Curiam:

The West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") seeks a writ of prohibition to prevent the enforcement of an order of the Circuit Court of Marion County dated August 8, 2005, returning physical and legal custody of the infant child, Sean M. (hereinafter "Sean"),[1] to his parents. The WVDHHR argues that the father, Charles M. (hereinafter "Charles"), was responsible for the death of Dominic M. (hereinafter "Dominic"), the sibling of Sean; therefore, Sean should not be returned to the custody of his parents, Charles and Miranda M. (hereinafter "Miranda"). Based upon the parties' arguments, the record designated for our consideration, and the pertinent authorities, we deny the writ of prohibition.

I.

FACTUAL AND PROCEDURAL HISTORY

The matter before this Court deals only with abuse and neglect proceedings as they relate to Sean; however, it is necessary to discuss Dominic's case because of its significant impact on Sean's case. Sean was born on October 3, 1997, and his younger brother, Dominic, was born July 29, 2002. Dominic died on April 9, 2003, at the age of eight months, and the circumstances surrounding his death gave rise to the abuse and neglect

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

proceedings as they related to both Sean and Dominic.

On April 6, 2003, Miranda put Dominic to bed in the late evening. She left for work soon thereafter, leaving both Sean and Dominic in the care of their father, Charles. The next morning at 5:30 a.m., Dominic seemed congested, and within thirty minutes, he was not breathing. Charles called for emergency assistance, and Dominic was transported to Fairmont General Hospital and subsequently transferred to West Virginia University Hospitals in Morgantown, West Virginia. Dominic was in full cardiac arrest, and was unstable hemodynamically, cardiovascularly, and hematologically. He also had bilateral retinal hemorrhages and a left parietal subdural hematoma that appeared acute in nature with global edema. In lay terms, Dominic had a large brain bleed caused from head trauma. Surgery was performed to drain the blood, but Dominic remained on life support and was pronounced to be brain dead. The decision was made to remove life support, and Dominic died on April 9, 2003.

The WVDHHR was contacted by the hospital regarding Dominic's injuries. Child abuse and neglect proceedings were instituted on April 8, 2003, on behalf of Dominic and Sean.[2] The petition was based on reports from the treating doctors that opined that

[2]West Virginia law allows abuse and neglect proceedings to be instituted for children residing in the same home as a child who has been physically abused. While there was no evidence that Sean personally experienced abuse, he qualified as an abused child (continued...)

Dominic suffered from symptoms consistent with Shaken Baby Impact Syndrome (hereinafter "SBIS"), and that his injuries were consistent with a recent, non-accidental trauma. The petition sought immediate custody of both children.

On April 8, 2003, Sean was placed in the physical and legal custody of WVDHHR. Sean was placed in foster care, and was eventually located with his maternal grandparents in Maryland. It was alleged that the father, Charles, was responsible for the injury and subsequent death of Sean's younger brother, Dominic. In addition to the civil abuse and neglect proceedings to determine whether Sean should be removed from his parents' custody, criminal proceedings also were instituted against Charles.[3] On March 28, 2004, Charles was convicted by a jury of the crime of death of a child by a parent. However, the verdict was set aside on May 4, 2004, due to juror misconduct. Thereafter, instead of facing the expense of a second trial, Charles entered an Alford Plea[4] of guilty to the charge of involuntary manslaughter, and received two years of probation. In accepting the Alford

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[2](...continued)
because he lived in the same home as Dominic. For a discussion of the applicable law, see the Discussion section of this opinion, *infra*.

[3]The mother, Miranda, was not charged with a crime. She was at work when Dominic stopped breathing, and she submitted to and passed a polygraph test. Because Charles was already charged with criminal abuse and neglect, his lawyer advised against submission to a polygraph test.

[4]An Alford plea is a guilty plea by a defendant who continues to protest his or her innocence. *See State v. Lilly*, 194 W. Va. 595, 605 n.2, 461 S.E.2d 101, 111 n.2 (1995) (Cleckley, J., concurring).

Plea, the circuit court made the finding that "the record in this case supports the conclusion that there is a significant probability that a jury would convict this defendant of the charge contained in the indictment in this case. Whereupon, the Court accepted said Alford Plea of guilty to Involuntary Manslaughter[.]"[5]

In the corollary abuse and neglect proceedings, a preliminary hearing was held on April 22, 2003. The circuit court made the following findings:

> 1. The infant's brother, Dominic . . . suffered from symptoms consistent with Shaken Baby Impact Syndrome.
>
> 2. The parents have offered no explanation for how the symptoms occurred.
>
> 3. The infant, Sean . . . should not be returned to the custody of his parents at this time.

Adjudicatory hearings were held on July 13, 2004, and October 26, 2004. The circuit court never made a finding as to whether the parents were guilty of abuse in the death of Dominic, and therefore, never made the predicate determination of whether Sean was an abused child. As the hearings progressed, more medical evidence was presented contradicting Dominic's

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[5]We find it significant that the same circuit court judge presided over the criminal proceedings and the civil abuse and neglect proceedings. The judge was cognizant of the testimony adduced during both proceedings, and had the benefit of complete and full knowledge of the expert testimony for both sides when he ruled in the abuse and neglect action. Notice is also due of the professional background of the particular circuit judge who presided over these matters. Judge Fox is an experienced trial court judge with more than twenty-five years of legal experience, who has also served as a member of this Court.

diagnosis of SBIS. Thereafter, on April 18, 2005, the circuit court granted the parents a pre-adjudicatory improvement period.

The circuit court based its decision to grant a pre-adjudicatory improvement period, in part, on the reports submitted by the Guardian Ad Litem (hereinafter "GAL")[6] and the Court Appointed Special Advocate (hereinafter "CASA"). The GAL, as well as the CASA representative, held the opinion that Sean should be returned to the physical custody of his parents. This opinion was based on the fact that both parents had complied with all parameters of the pre-adjudicatory improvement period, and evidence that Sean would best be served by reunification with his parents. In addition to their compliance with the pre-adjudicatory improvement period and their cooperation with the authorities regarding the abuse and neglect investigation, the record further illustrated that Charles and Miranda had not been involved before with the WVDHHR. There were no allegations of any prior abuse or neglect, nor were there any allegations of drug or alcohol abuse. Both parents held steady employment and appeared to provide a loving and stable home for their children.

Moreover, in regard to the death of Dominic, evidence was introduced that his

[6] During the pendency of the civil abuse and neglect proceedings, a GAL was appointed to represent the best interests of the child, Sean. Not only did the GAL advocate to protect the best interests of Sean in the abuse and neglect proceeding, but she also attended the criminal trial of the father, Charles. Her knowledge and understanding of the medical evidence presented by both parties was instrumental in providing the court with the information needed to make a custody decision of this magnitude.

symptoms at death were more consistent with a subdural hematoma caused by a fall from bed[7] three weeks prior to his death, and were not consistent with shaken baby syndrome. Two experts testified regarding evidence of an old bleed in Dominic's head consistent with the timing of the fall, and they further testified that the death was caused by a slow bleed that worsened or that a re-bleed was triggered by slight movement on Dominic's part. Significantly, there was a lack of evidence to confirm shaken baby syndrome because the hallmark damage to the brain stem nerves was absent, as well as the absence of any neck tissue damage or rib bruising that is generally present in shaken baby syndrome. Based on this evidence, and based on the parents' compliance with the parameters set forth in the pre-adjudicatory improvement period, the circuit court[8] returned custody of Sean to his parents on July 19, 2005. The written order was entered August 8, 2005, and the WVDHHR filed a petition seeking a writ of prohibition to prevent the enforcement of this order. We issued a rule to show cause and now deny the petition.

II.

STANDARD FOR ISSUANCE OF WRIT

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[7]The record shows that about three weeks prior to his death, Dominic rolled off of a bed onto carpet at his maternal grandparents' house when his mother became ill and left him briefly. The grandparents both acknowledged that this incident occurred. Sean was placed with these grandparents during the pendency of the abuse and neglect proceeding.

[8]*See supra* note 5.

We begin by outlining the standard of review in civil abuse and neglect proceedings, which has been established as follows:

> "'Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W. Va. 456, 475 S.E.2d 548 (1996).

Syl. pt. 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

Because this case was filed as a writ of prohibition seeking to prevent the enforcement of the circuit court's order, resolution of this case also necessitates our examination of the applicable standard for writs of prohibition. A writ of prohibition is an appropriate remedy "when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1 (1923) (Repl. Vol. 2000). It is undisputed that the circuit court has jurisdiction over civil abuse and neglect proceedings; therefore,

> "[i]n determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

Syl. pt. 2, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997). *See also State ex rel. Chafin v. Halbritter*, 191 W. Va. 741, 743-44, 448 S.E.2d 428, 430-31 (1994) ("[P]rohibition may be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy.") (internal citations omitted). Mindful of these applicable standards, we now consider the parties' arguments.

III.

DISCUSSION

The primary issue presented for resolution by this Court is whether it was proper for the circuit court to return physical and legal custody of Sean to his parents. On appeal, the WVDHHR argues that Charles was responsible for the death of Dominic; therefore, Sean is not safe in the custody of Charles. A second issue raised by the WVDHHR

is that the circuit court erred by granting a pre-adjudicatory improvement period. Conversely, the GAL and Miranda and Charles argue that the medical evidence did not support a conclusion of shaken baby syndrome. They further argue that the medical evidence is consistent with a fall that occurred three weeks prior to Dominic's death.

Because of the ease in disposing of the second issue regarding the granting of a pre-adjudicatory improvement period, we will address it first. The WVDHHR argues that the trial court erred in granting a pre-adjudicatory improvement period because such motion is proper only if made prior to the final adjudication. In this case, the circuit court entered an order granting a pre-adjudicatory improvement period on April 18, 2005. The order makes it clear that "[t]he adult respondents have previously moved this Court to grant them a pre-adjudicatory improvement period." The order also makes it clear that due to the complexity of the issues and the need for consideration of conflicting expert testimony, the adjudication process was long. On the date that the court granted the pre-adjudicatory improvement period, the parties were present for the third day of hearings, and were scheduled for a fourth day of hearings. Based on medical reports, and the reports from both the GAL and CASA, the circuit court found that a pre-adjudicatory improvement period was in the best interest of Sean. Rule 23(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides: "At any time prior to the final adjudicatory hearing, including at the preliminary hearing or emergency custody proceedings, a respondent may move for a pre-adjudicatory improvement period in accordance with W. Va.

Code §§ 49-6-2(b) and 49-6-12(a)." The record demonstrates that the parties had already requested a pre-adjudicatory improvement period. Therefore, because it was prior to the final adjudication, the circuit court was within its authority to grant a pre-adjudicatory improvement period.

We will now turn to the primary issue in this case regarding whether it was error to return Sean to his parents' custody. We have previously indicated that:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). Notwithstanding this Court's recognition of the constitutional rights afforded a natural parent to the custody of his or her child, we have also recognized that such a right is not absolute when we stated "[t]hough constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care." Syl. pt. 5, *id.*

The WVDHHR sought custody of Sean pursuant to W. Va. Code § 49-1-3(e) (1999) (Repl. Vol. 2004), which states:

> "Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of

> the child is threatened. Such emergency situation exists when there is . . . reasonable cause to believe that the following conditions threaten the health or life of any child in the home: (1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a babysitter or other caretaker[.]

While there has been no specific finding that Sean was the personal victim of abuse, we have previously recognized that

> "'[w]here there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).' Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)."

Syl. pt. 8, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997). Therefore, if Dominic was abused, then Sean also qualifies as an abused child[9] because he resided in the same home where the alleged abuse occurred.

The circuit court concluded that there was no evidence that Sean had ever been the victim of abuse and returned him to his parents' custody on July 19, 2005. In determining whether the circuit court's conclusion was clearly wrong, we are guided by the proposition that

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[9]W. Va. Code § 49-1-3(a) (1999) (Repl. Vol. 2004), in pertinent part, states that an "'[a]bused child' means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]"

> "'"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' . . . . Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W. Va. 656, 453 S.E.2d 639 (1994).

Syl. pt. 3, in part, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

In examining the record, we first note that there is no evidence to support a finding that Sean was ever personally a victim of direct child abuse. Therefore, we look to the evidence surrounding Dominic's death to see if Sean lived in the home with an abused child, and, therefore, also qualifies as an abused child. While medical evidence was submitted that Dominic suffered from SBIS, evidence was also submitted to the contrary. The treating doctors diagnosed Dominic with SBIS; however, we find it significant that the fall from bed was never mentioned as a possible cause of Dominic's problems. It appears that, upon presentation to the hospital, no other option besides SBIS was considered as a possible source of Dominic's problems.[10] As the abuse and neglect case progressed and the GAL became involved, medical evidence was introduced by experts who examined

[10]Even though Dominic was documented high on admission testing for having a clotting abnormality, the treating physicians did not perform any screenings for blood disorders. Also, despite evidence of old blood being present on the CT scan, an MRI was not performed.

Dominic's medical records and autopsy slides.[11] These experts opined that Dominic actually suffered from a head injury that was about fifteen days old, and that his death was caused by a re-bleed[12] of the injured area. Importantly, the timing of this old injury correlates with Dominic's fall from bed onto carpet while visiting at his grandparents' house. The defense experts also explained that Dominic suffered from a coagulation disorder, and this defect would have contributed to the likelihood of a slight fall causing a subdural hematoma, and would further contribute to its likelihood to re-bleed with any trivial movement. In light of the medical evidence, it is impossible to definitively state that Dominic was the victim of SBIS. Substantial evidence suggests Dominic fell from bed and that a chronic subdural hematoma formed that re-bled and caused his death.

In view of the facts presented, the evidence did not establish by clear and convincing proof that Charles abused Dominic. Therefore, there is no basis to find that Sean was an abused child as there is no allegation that he was the direct victim of abuse, and there is an absence of evidence showing that he lived in the same residence as another abused child. Therefore, the circuit court did not clearly err when it returned physical and legal custody of Sean to his parents, Charles and Miranda.

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[11]Notably, these experts have refused remuneration for their time and services.

[12]The medical experts also opined that the slightest movement of Dominic could have triggered the re-bleed, the subdural hematoma that caused his death.

IV.

CONCLUSION

For the foregoing reasons, we deny the writ of prohibition and affirm the trial court's decision in its August 8, 2005, order returning custody of Sean to his parents.

Writ of Prohibition Denied.

No. 32847 **State of West Virginia ex rel. The West Virginia Department of Health and Human Resources v. The Honorable Fred Fox, Judge of the Circuit Court of Marion County; and Miranda M. and Charles M.**

FILED
December 20, 2005
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring:

I commend my fellow justices for their effort and care in the thorough review of the record in this difficult case and their dedication to justice for this family. That there may be disagreement in the outcome of this case is, in my opinion, less a matter of legal dissension than it is an endeavor by each justice to provide for Sean M.'s best interests.

I concur with the majority opinion not only because it is legally sound, but also because I believe that the result reached below, and affirmed by this Court, was necessitated by the particular facts of this case. While I appreciate and agree with the dissent's concerns, I write separately to express my disagreement with the view set out in the dissenting opinion. The dissent reasons that the medical evidence proved that Dominic M. suffered from shaken baby syndrome, and that his father, Charles M., entered a guilty plea to the charge of involuntary manslaughter for Dominic's death. Based on these two factors, the dissent avers that it was error to reunite Sean M. with his family because he is in danger in the presence of his father. Based upon a complete review of the unique and specific facts of this case, especially the ultimate medical conclusions regarding the probable circumstances of

Dominic's death, I must disagree.

First, the trial court looked closely at all of the medical record, not just preliminary medical records. This complete medical record is, I believe, of great importance to the determination of whether this family should be reunited or should remain separated. It is understandable why the dissent, as well as many of the initial care givers involved in this case, felt that Dominic died from shaken baby syndrome. When Dominic first presented for treatment, shaken baby syndrome was the only practical option considered as a possible diagnosis. However, as the case progressed and further medical evidence was produced which contradicted the previous diagnosis, it soon became apparent that everyone involved needed to take a very close look at the entirety of the medical facts. When Dominic arrived at the hospital, he suffered from a "large brain bleed" caused from head trauma. His parents, Charles and Miranda, were questioned and were unable to explain their son's injuries. Because of their lack of an explanation, it was assumed that the child had been physically abused and the West Virginia Department of Health and Human Resources ("WVDHHR") was contacted. To be clear, I do not fault the hospital's decision to contact the agency, nor do I fault the WVDHHR's vigorous prosecution of the child abuse and neglect proceedings.

As the investigation continued and a guardian *ad litem* became involved on Sean's behalf, and the corollary criminal trial of Charles ensued, more evidence was developed and a different explanation for Dominic's injuries began to emerge. It became

apparent that Dominic did not suffer from shaken baby syndrome. Not only were the normal signs of shaken baby syndrome absent, but it also became apparent that Dominic suffered from a subdural hematoma and that there was evidence of an "old bleed" in his brain. Much of this evidence was learned after the autopsy, which is significant because it is critical evidence that the initial treating doctors did not have available to them before making a diagnosis of shaken baby syndrome. The experts' testimony regarding the timing of this bleed correlated with the timing of a fall off of a bed at the home of Dominic's grandparents three weeks prior to his death. There was also evidence presented regarding the possibility of Dominic having a clotting disorder. Again, this information was learned post-autopsy and was not available to the treating physicians prior to their provisional diagnosis.

Once all of the evidence was gathered and the experts convened, a very different picture appeared from what was initially thought at the outset of the case. The trial judge initially found that "Dominic . . . suffered from symptoms consistent with Shaken Baby Impact Syndrome," and found that "[t]he infant, Sean . . . should not be returned to the custody of his parents[.]" However, after hearing all of the evidence and hearing the experts' explanation, this same trial judge changed his mind and found that there was no evidence that Sean had ever been the victim of abuse. Sean was ordered returned to the custody of his parents. I am also impressed by the fact that the experts on the behalf of the father felt so strongly about the plight of the father that they refused any payment for their time or travel associated with their review of this case. Also, the Court-Appointed Special Advocate,

whose job it is to advocate on behalf of children, supported the position of the parents in this case, and even drove to Charleston, West Virginia, to be present in person to show that support when this case was argued before us. In summary, the overall picture revealed a very different portrayal of Dominic's death than what was initially suggested.

I also cannot agree with the dissent's reliance on the father's entry of an *Alford* plea to bolster the belief that Sean should not be returned to the custody of his parents. At oral argument before this Court, counsel for the father made it very clear why Charles entered an *Alford* plea. The family was already deeply in debt from the first criminal trial that was set aside due to juror misconduct. Subsequent to this first trial, new evidence and new experts were found who explained the reality of what happened to Dominic. Counsel for Charles stated at oral argument that the family was facing at least another $100,000.00 in trial expenses to proceed with a second trial, on top of the debt accumulated from the first trial. We were also informed that other family members were putting themselves in debt to support Charles and Miranda in their legal battle. Tragically, Sean has already lost his brother. Then, he was separated from his parents. In the absence of evidence proving that Dominic suffered from shaken baby impact syndrome and the compelling evidence that shows he died of an accidental fall, I cannot fault the circuit court's decision to reunite Sean with his family.

In view of the foregoing, I concur.

No. 32847 – *State of West Virginia ex rel. The West Virginia Department of Health and Human Resources v. The Honorable Fred Fox, Judge of the Circuit Court of Marion County; and Miranda M. and Charles M.*

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December 15, 2005
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I join this Court's majority opinion and write separately to note my strong agreement with the ruling of the distinguished circuit judge, the Honorable Fred Fox, whose ruling the DHHR challenged in the instant case.

To review the facts: this father was first convicted of manslaughter, based on highly-disputed circumstantial evidence – in a trial in which juror misconduct was so severe that Judge Fox found it necessary to set aside the verdict. That does not happen every day.

Shortly before the second trial, the prosecution offered to let the father enter a plea without admitting guilt and be sentenced to probation only. This also is a rare, rare event.

Facing staggering expert witness costs, and just coming out of a trial where the jury was clearly swayed by emotional issues, the father faced a terrible choice. Do I go to trial again, and risk prison and the near-certainty of losing my only living child? Or do I enter a plea, knowing that I will have a fighting chance to regain my family?

I admire this father's choice. Unlike my dissenting colleague, I think that this father's love for his living child was shown in his decision to take the *Alford* plea.

I know Judge Fox, and he is one of the most strict judges on child welfare and

criminal sentencing in this State. Judge Fox is also the most senior sitting judge in our State. It is simply wrong to suggest, as the dissent does, that Judge Fox would put an innocent child at risk.

Accordingly, I concur with the majority opinion.

No. 32847 – State of West Virginia ex rel. The West Virginia Department of Health and Human Resources v. The Honorable Fred Fox, Judge of the Circuit Court of Marion County; and Miranda M. and Charles M.

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December 2, 2005
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

By upholding the circuit court's decision to return Sean to his father Charles, I fear that this Court has placed Sean in grave danger.

I believe there is clear and convincing evidence that the father's conduct resulted in the death of eight-month-old Dominic. It is significant that Dominic was found to have symptoms consistent with "shaken baby syndrome" when he was taken to the hospital. Qualified doctors from a prominent hospital within our State found that Dominic's injuries were non-accidental. Furthermore, Child Protective Service workers, who are trained in child abuse investigation and detection, concluded that Dominic was the victim of physical abuse, and his father was the most likely suspect.

In addition to the physical evidence of abuse, the father's Alford Plea of guilt to involuntary Manslaughter also indicates that he injured Dominic. I agree with the West Virginia Department of Health and Human Resources that eight-year-old child Sean has no place in a home with a father who pled guilty to involuntary manslaughter in causing the death of his own son. Even though Charles did not technically admit guilt in the plea, the

trial court found that "the record in this case supports the conclusion that there is a significant probability that a jury would convict this defendant of the charge contained in the indictment in this case." This indicates to me that the evidence is strong enough to convince a jury beyond a reasonable doubt that Charles is responsible for the death of his son. Moreover, it does not seem logical that a loving father would plead guilty and be forever labeled a child killer if he bore no responsibility for Dominic's death. The burden of the stigma that will now follow Charles for life significantly outweighs the burden of any trial that he would have faced.

Given this compelling evidence, I firmly believe that Sean should never be returned to his father. No child should have to suffer the brutal injuries endured by Dominic. Head trauma of this magnitude caused Dominic more pain than most adults will experience in their lifetime. Then, after an unsuccessful surgery, Dominic died after his life support was removed. In my estimation, returning Sean to his father offers too great a risk that Sean may suffer the same fate as his younger brother. Accordingly, I must dissent to the majority opinion.

213 W. Va. 636, 584 S.E.2d 492

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

Nos. 30909 and 30910

FILED
June 18, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: FRANCES J.A.S., DARYL JEAN S., CYRSTAL NICOLE S., AND DAVID ALLEN R., JR.

Appeal from the Circuit Court of Preston County
The Honorable Lawrance S. Miller, Jr., Judge
Juvenile Case Nos. 01-JA-1, 01-J-2, 01-JA-3, and 01-JA-4

REVERSED AND REMANDED

Submitted: March 11, 2003
Filed: June 18, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *McCormick v. Allstate Insurance Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

3. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948)

4. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

5. "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." Syl. Pt. 2, *Cloud v. Cloud*, 161 W. Va. 45, 239 S.E.2d 669 (1977).

6. "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Per Curiam:

This is an appeal by Darrell S., biological father of Frances S. and Daryl Jean S., from a July 26, 2002, order of the Circuit Court of Preston County placing Frances and Daryl Jean in the custody of their mother and step-father, Melissa S. R. and David R., during a dispositional improvement period.[1] Melinda Russell, guardian ad litem for Frances and Daryl Jean, is also an Appellant in this action, maintaining that Frances and Daryl Jean should not have been returned to their mother's custody during the dispositional improvement period. Upon thorough review of this matter, we reverse and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Subsequent to a divorce between the Appellant Darrell S. and Melissa S., Melissa S. was granted custody of the parties' two daughters, Frances and Daryl Jean.[2] On January 1, 1998, Melissa S. gave birth to Crystal S. whose putative father is not a party to this matter. On September 29, 1999, Melissa S. R. gave birth to David R., Jr., whose father

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[1] We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W. Va. 400, 484 S.E.2d 909 (1996); *In re: Katie S. and David S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

[2]Frances was born March 16, 1989, and is currently fourteen years of age. Daryl Jean was born July 10, 1990, and is currently twelve years of age.

is David R., a party to this action.[3] The Appellant, a resident of Colorado, maintained contact with his two daughters, Frances and Daryl Jean, while they resided with their mother and step-father in Preston County, West Virginia.

On January 17, 2001, the Department of Health and Human Resources (hereinafter "DHHR") filed a child abuse and neglect petition against Melissa S. R. and David R. based upon allegations of domestic violence and alcohol abuse which affected their parenting abilities.[4] In addition to the allegations contained in the petition, further investigation revealed that David R. had pled no contest in 1991 to the charge of sexual abuse of his biological fifteen-year-old daughter, not a party to this action.[5] Information

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[3]Melinda Russell also serves as guardian ad litem for Crystal S. and David R., Jr., but she does not assign error to their placement with Melissa and David R. She does, however, assert that her petition for appeal "is also on behalf of all four child respondents in the instant case, regarding the circuit court's improperly giving weight to a psychological test purporting to differentiate between child molesters and non-child molesters."

[4]The petition was premised upon several instances of alleged domestic violence and child neglect, including a referral in November 1999 regarding several police calls to the Melissa S. R. and David R. residence due to instances of domestic violence; a February 2000 referral revealing that the children, including four-month-old David, Jr., had been left at home with the ten-year-old Frances while the parents went out drinking; and a May 2000 incident of domestic violence between David and Melissa in which Melissa had suffered bruises and abrasions on her neck. During that incident, David R. had been armed and had secluded himself in a nearby wooded area. Police helicopters searched the wooded area, and the children fled the house by climbing out a window. The DHHR offered services to the family but encountered lack of cooperation by David and Melissa R. Wellsprings Family Services terminated its assistance to the home due to non-compliance.

[5]Melissa and David R. contend that David R.'s daughter had fabricated the

(continued...)

gathered during investigation of this petition in West Virginia also revealed that Melissa S. R. had relinquished her parental rights to her first three children in Ohio after she had left those children in the care of her mother and they had been sexually abused by relatives.

Subsequent to a stipulated adjudication in this matter, all four children of Melissa S. R. were placed in foster homes, and Melissa and David R. were granted a six-month post-adjudicatory improvement period. During that post-adjudicatory improvement period, Frances and Daryl Jean were placed in the temporary physical custody of their father, Appellant Darrell S., in Colorado.[6] The girls were transported to Colorado on July 12, 2001. A Colorado child protective services evaluation found that the home of Darrell S. and his wife, Ivy S., was an alcohol-free, safe environment for Frances and Daryl Jean.

During a multi-disciplinary team meeting in August 2001, marital difficulties between David and Melissa R. were revealed, and Melissa thereafter lived in a local Rape and Domestic Violence Shelter from August 22, 2001, to October 3, 2001. In October 2001,

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[5](...continued)
allegations of abuse after she had been placed in the custody of her father pursuant to a juvenile delinquency proceeding. Her infant son lived with her mother, and David R. believes that she formulated the sexual abuse story to allow her to return to her mother's home. David R. contends that he pled no contest to the charge to prevent his daughter from being involved in a trial. The daughter later recanted the sexual abuse allegations.

[6]Although Darrell S. previously experienced alcohol-related difficulties, including several DUI convictions and two years in jail, the evidence revealed that he has maintained sobriety since 1993.

the DHHR requested that the lower court find that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future and recommended that the parental rights of Melissa and David R. be terminated with respect to all four children.[7]

At the conclusion of the post-adjudicatory improvement period, the lower court conducted a dispositional hearing over the course of seventeen days from November 13, 2001, to April 18, 2002. The lower court essentially conducted this extended hearing for the dual purpose of determining the extent to which Melissa and David R. had complied with the requirements of the post-adjudicatory improvement period and deciding the permanent placements for the four children during the dispositional improvement period. Counsel for Appellant Darrell S. was present at the hearings, but was not permitted to participate.[8]

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[7]This position by the DHHR was based upon the results of psychological evaluations of David and Melissa R. conducted by Dr. Charles William Hewitt and distributed to counsel on September 12, 2001. Dr. Hewitt opined that Melissa and David R. both suffered from severe personality disorders and were unfit parents incapable of participating in any rehabilitative services.

[8]While counsel for Appellant Darrell S. was present at the hearings, he was excluded from participation and appeared only as an observer. On two occasions, the lower court informed counsel for Darrell S. that he was excluded from the hearings and that he was only present by the consent of the other parties. The lower court specifically informed counsel for Darrell S. that placement of the children was not at issue.

The lower court received evidence from DHHR caseworker Jack Wood. Mr. Wood testified that Melissa and David R. had complied with every aspect of their improvement period and had shown significant progress. However, Mr. Wood further explained that the DHHR's recommendation of termination of parental rights had been based upon Dr. Hewitt's psychological assessments conducted in March 2001, before the improvement period began. Dr. Thomas Adamski, a forensic psychiatrist, disagreed with Dr. Hewitt's assessment and concluded that the current behavior of Melissa R. contradicted Dr. Hewitt's conclusions that she was incapable of improvement. Richard Chamberlain, a marriage counselor, testified that Melissa and David R. had participated fully in his counseling program and were genuine in their desire to improve their relationship and parenting skills. Representatives from Burlington United Methodist Family Services also testified that Melissa and David R. were appropriate in their visitation with the children in foster care.

Based upon evidence of improvement by David and Melissa R., the guardian ad litem recommended that Crystal and David, Jr., be returned to Melissa and David R. The guardian ad litem also recommended that Frances and Daryl Jean remain in their father's care in Colorado during the dispositional improvement period.

On May 6, 2002, the lower court issued an opinion letter containing its findings of fact and conclusions of law. The letter included no explicit findings regarding the best

interests of the children. In accordance with the opinion letter, the lower court entered an order dated May 15, 2002, granting a six-month dispositional improvement period to Melissa and David R., pursuant to West Virginia Code § 49-6-12(c). Once again, the order failed to include explicit findings regarding the best interests of the children. The lower court noted that Melissa and David R. were receiving sexual offender education and that they appeared motivated to remain sober and free of domestic violence. By the time of the entry of the Mary 15, 2002, order, Frances and Daryl Jean had been living in their father's care in Colorado for an entire school year.

On May 17, 2002, Appellant Darrell S. filed a motion for stay of execution, objecting to the placement of his daughters with their mother and step-father. On May 20, 2002, guardian ad litem Melinda Russell filed a motion for a stay of execution, also objecting to the lower court's placement of Frances and Daryl Jean with Melissa and David. R. during the dispositional improvement period. On May 21, 2002, the DHHR filed a motion for stay of execution, arguing that the four children should not be placed with Melissa and David R.[9]

[9]The DHHR subsequently withdrew its request for a stay of the proceedings and indicated its intent not to contest the lower court's order returning the children to Melissa and David R. The DHHR informed this Court, via letter, that it had chosen not to petition for appeal in this matter. The DHHR specified that it does not oppose the relief sought by Darrell S. and the guardian ad litem regarding the placement of Frances and Daryl Jean in the custody of Darrell S. Thus, despite original challenges to the lower court's determination of placement of Crystal and David, Jr., with their mother, the placement of those children is not presented or briefed as an appellate issue before this Court. Therefore, we do not address the placement of the younger children.

In response to the motions for stay, the lower court issued a May 28, 2002, order articulating its acknowledgment that the best interests of Frances and Daryl Jean should be considered in formulating the dispositional improvement period. Thus, the lower court conducted placement reconsideration hearings on June 25, 2002; July 3, 2002; and July 18, 2002. Appellant Darrell S. traveled from Colorado to participate in the hearings. Daryl Jean specifically testified that she wished to remain with her father in Colorado. Frances also testified, but did not wish to express a preference.[10] Through telephone conferencing, the lower court heard the testimony of Valerie White of Boulder County Social Services in Colorado. Ms. White had conducted a home study of the residence of Darrell S. and his wife and had continued to monitor the girls while they lived in Colorado. Ms. White testified that the girls were well-adjusted with their father in Colorado and should remain there. The lower court also heard the testimony of Ms. Dianne Eraker, a counselor for the girls in Colorado. She recommended that the girls remain in Colorado with their father, recognizing the need for stability during this critical stage of adolescence. DHHR caseworker Jack Wood testified that the best interests of the girls would be served by allowing them to remain with their father during their mother's dispositional improvement period. David Walker, a parenting trainer, testified that he wanted to observe the interaction between the girls and Melissa and David R. during his parenting classes.

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[10]The July 26, 2002, order recited Frances' testimony, explaining that Frances "was reluctant to express her wishes with respect to where she would prefer to reside, stating instead that she would prefer to 'just leave it up to dad.'"

By order dated July 26, 2002, the lower court found that Frances and Daryl Jean[11] should be returned to the custody of Melissa and David R. during the dispositional improvement period. The court found that "[n]either the Petitioner [DHHR], the Guardian Ad Litem, nor Mr. [S.] offered sufficient evidence compelling enough to justify this Court changing its previous order returning the children to Melissa [R.]." The court did not include explicit findings regarding the best interests of the children and specifically stated that a successful completion of the dispositional improvement period would be required "before making any final decisions regarding placement of the children."

On August 13 and 16, 2002, petitions for appeal to this Court were filed by Darrell S. and guardian ad litem Melinda Russell. Frances and Daryl Jean were returned to West Virginia and have remained in the custody of Melissa and David R. since October 25, 2002. The dispositional improvement period concluded on December 5, 2002, and the lower court granted an additional three-month extension, ending on March 5, 2003.

In this appeal, guardian ad litem Melinda Russell assigns the following errors: (1) abuse of discretion in disrupting the stable lives of Frances and Daryl Jean to return them to the custody of Melissa and David R.; (2) abuse of discretion by rigidly imposing the same

[11]Crystal and David Jr. were also returned to the custody of Melissa and David R. during the dispositional improvement period. The July 26, 2002, order specifies that there was no opposition to the return of custody of these two children to Melissa and David R.

disposition on two different sets of half-siblings where different permanency plans were available; and (3) error in giving weight to a sexual offender evaluation of David R. which did not meet the *Daubert*[12] test for scientific evidence.

Appellant Darrell S. assigns the following assignments of error: (1) error in excluding him from participation[13] in the original hearings; (2) abuse of discretion in failing to consider issues of child custody when deciding residential placement during the dispositional improvement period; (3) error in failing to find that placement of Frances and Daryl Jean with their father was in their best interests.

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[12]*See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). This assignment of error is premised upon a conclusion reached by licensed psychologist Terry Laurita regarding the issue of whether David R. might engage in child sexual abuse. Ms. Laurita had subjected David R. to a sexual offender evaluation and had concluded that he posed a low risk of sexually offending any child in his care. The evaluation techniques utilized by Ms. Laurita became the subject of debate in this case based upon the Appellant's contention that evidence revealed through such evaluative tool should have been excluded from testimony due to the contention that it did not meet the *Daubert* test for scientific reliability. The Abel Assessment for Sexual Interest is purported to be an objective test designed to differentiate between child molesters and non-molesters. Our review of Ms. Laurita's conclusions reveals that her assessment of David R. was premised upon several evaluative techniques and was not based exclusively upon the results of any particular questioning tool. We find no error in the presentation of Ms. Laurita's opinion testimony to the lower court.

[13]While Darrell S. was not permitted to participate in the original hearings regarding the results of the improvement period granted to Melissa and David R., it is the opinion of this Court that the lower court remedied any resulting prejudice by permitting Darrell S. to participate fully in the reconsideration hearings. Darrell S. testified and presented the testimony of a Colorado social services worker and a counselor. He was also permitted to introduce evidence regarding the children's academic accomplishments, their activities, pictures of his home, and his monetary income.

II. Standard of Review

This Court has consistently articulated that the two-pronged standard of review set forth in syllabus point one of *McCormick v. Allstate Insurance Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996) should be employed in child abuse and neglect cases. That syllabus point provides as follows:

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

See also In re Brandon Lee B., 211 W. Va. 587, 567 S.E.2d 597 (2001), cert. denied, 536 U.S. 942 (2002); *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998); *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998). The following guidance is also provided in syllabus point one of *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's

> account of the evidence is plausible in light of the record viewed in its entirety.

In the review requested in the case sub judice, it is the lower court's ultimate determination of the custody of Frances and Daryl Jean during the dispositional improvement period that has been challenged. We consequently review that determination under an abuse of discretion standard.

III. Discussion

This Court has historically emphasized that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948); *see also Holstein v. Holstein* 152 W. Va. 119, 160 S.E.2d 177 (1968). In *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), this Court stated that "[c]hild neglect and abuse procedures that include the custodian of the children in all the proceedings are calculated to achieve a valuable social goal. Their motivating factor is the often stated standard of the 'best interests of the child.'" 174 W. Va. at 186, 324 S.E.2d at 147. This Court has not deviated from that principle, and it has become the ultimate benchmark by which all custody decisions are appraised. While this Court has also observed that the rights of the parents are entitled to respect and protection , the rights of the children are paramount, as accentuated in syllabus point three of *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996): "Although parents have substantial rights that must be protected, the primary goal

in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."[14]

Rule 38 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, regarding hearings subsequent to improvement periods and final disposition, also recognizes the importance of the best interests of the child in this context, providing in pertinent part as follows:

> No later than sixty (60) days after the end of the alternative disposition improvement period, the court shall hold a hearing to determine the final disposition of the case, including whether the conditions of abuse and/or neglect have been adequately improved in accordance with W. Va. Code § 49-6-5(c). The court also shall determine the necessary disposition consistent with the best interests of the child. . . .

Particularly crucial to this Court's evaluation of this custody issue is the testimony of one of the children, twelve-year-old Daryl Jean. During her testimony, she

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[14]The polar star guidance is particularly applicable in the abuse and neglect context, as we recognized in syllabus point eight of *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973):

> Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in nature and wisdom, will be respected unless they have been transferred or abandoned.

explicitly stated that she preferred to remain living with her father in Colorado. As this Court has repeatedly recognized, children over the age of fourteen are capable of deciding custody issues for themselves, and the opinions of children approaching that age must also be earnestly considered. As this Court explained in *David M. v. Margaret M.*, 182 W. Va. 57, 385 S.E.2d 912 (1989).

> In the child custody context, children fall into one of three groups, depending on their age. Children under six years of age are called "children of tender years": They are the most dependent on their parents, but they usually cannot articulate an intelligent opinion about their custody. Children between six and fourteen are also dependent on their parents, but they can usually articulate a preference regarding custody arrangements and explain their reasons. By the age of fourteen a child takes on many of the qualities of an adult; in most cases, unless geography interferes, a child over fourteen will decide for himself or herself the parent with whom he or she wants to live, regardless of what a court says.

182 W. Va. at 64, 385 S.E.2d at 919-20 (footnotes omitted). This Court's observations regarding a child's contribution to the custody determination are based upon concepts contained in West Virginia Code § 44-10-4 (1923) (Repl. Vol. 1997), regarding the right of a minor to nominate his or her guardian.

> If the minor is above the age of fourteen years, he may in the presence of the county court, or in writing acknowledged before any officer authorized to take the acknowledgment of a deed, nominate his own guardian, who, if approved by the court, shall be appointed accordingly; and if the guardian nominated by such minor shall not be appointed by the court, or if the minor shall reside without the State, or if, after being summoned, he shall neglect to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years.

In *Rose v. Rose*, 176 W. Va. 18, 340 S.E.2d 176 (1986), this Court discussed the issue of consulting children regarding custody selections and explained that the child's preference is not "binding on the trial court" and the parties may "introduce evidence to rebut the child's testimony." *Id.* at 179 n. 3, 340 S.E.2d at 178 n. 3. The *Rose* Court also emphasized as follows:

> [A]n inquiry should be made into the child's intelligence and maturity to see if the child's choice was intelligently made. Equally important, however, is the child's rationale for his decision. In order to be accorded weight, a child's preference for one parent over the other ought to be based on good reason.

Id. at 21 n. 4, 340 S.E.2d at 179 n.4. The *Rose* Court stated that "[i]n making its examination of the child, the trial court should try to explore several aspects of the child's decision." *Id.* at 21 n. 4, 340 S.E.2d at 179 n. 4. Guidelines were offered regarding the lower court's determination, as follows:

> 1. The trial court should give greater weight to the wishes of a child which are expressed with strength, clearness, or with great sincerity. . . .
>
> 2. A child's preference should be given less weight where it appears that the preference is based on a desire for less rigid discipline or restraint. . . .
>
> 3. The trial court should investigate whether the statement of preference by the child was induced by the party in whose favor the preference was expressed. If so, said statement of preference should be accorded little, if any, weight. . . .
>
> 4. Where an otherwise intelligent child makes an illogical decision based on unimportant factors, the trial court may disregard the child's statement of preference. . . .

Id. at 21 n. 4, 340 S.E.2d at 179 n.4.

In *Judith R. v. Hey*, 185 W. Va. 117, 405 S.E.2d 447 (1990), this Court observed that the child in question was over the age of fourteen years and recognized that "the legislature of this state has granted her the right to nominate her own guardian." *Id.* at 120, 405 S.E.2d at 450. The Court explained: "While W.Va.Code § 44-10-4 (1982) applies to circumstances where a guardian is to be appointed in lieu of a natural parent, we have previously found the statute to be 'evidence of the legislature's conclusion concerning the age at which an adolescent should be given some substantial say in his own affairs.' *S.H. v. R.L.H.*, 169 W. Va. 550, 555, 289 S.E.2d 186, 189 (1982)." *Id.*

Analyses of the best interests of a child and assessments of the child's own preferences for placement are necessarily fraught with uncertainties and speculation regarding the most appropriate custody resolution. This Court has repeatedly encountered child custody battles in which neither parent presents a commendable record of stellar parenting skills. Alcohol abuse, prior criminal convictions, and allegations of prior sexual misconduct are unfortunate realities in these conflicts we seek to resolve. Courts are often faced with the difficult task of choosing between the lesser of two evils and placing the child in the environment which appears to present the fewest risks. As Justice Starcher observed in his concurrence to in *In re Emily*, 208 W. Va. 325, 540 S.E.2d 542 (2000),

> While we may not be able to provide every child with the perfect, white bread, cookie-cutter childhood replete with sitcom-like suburban experiences, the court system must fashion a solution that provides protection for children, with a reasonable opportunity to reach adulthood safely and in as good physical and mental health as practicable.

208 W. Va. at 345, 540 S.E.2d at 562 (Starcher, J., concurring).

Given the circumstances with which the lower court was presented in the present case, we conclude that the lower court abused its discretion by ordering the transfer of custody of Frances and Daryl Jean from Darrell S. to Melissa and David R. during the dispositional improvement period. The lower court was presented with the direct testimony of Daryl Jean that she preferred to live with her father in Colorado. Further, the Colorado home study report indicated that the living environment was appropriate, and the therapist who had counseled Frances and Daryl Jean in Colorado testified that it would be within Frances and Daryl Jean's best interests to remain with their father. Due to the passage of time, however, placement during the dispositional improvement period is no longer an issue. That improvement period has concluded, and the lower court must now determine the permanent placement of the children.[15]

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[15]In *Israel by Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989), this Court examined the circumstances under which technically moot issues would still require the attention of this Court. Syllabus point one provides as follows:

> Three factors to be considered in deciding whether to

(continued...)

This Court has explained that "[t]o justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." Syl. Pt. 2, *Cloud v. Cloud*, 161 W. Va. 45, 239 S.E.2d 669 (1977). While we understand the lower court's reluctance to remove Frances and Daryl Jean from the custody of their mother, the best interests of the children must be fully evaluated and Daryl Jean's stated preference must be recognized. In order to facilitate a thorough evaluation of those issues, the lower court should conduct a hearing upon remand which specifically addresses the preferences of Frances and Daryl Jean and fully explores issues surrounding their best interests. The lower court should provide the biological father and the biological mother with meaningful opportunity to be heard, including the right to

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[15](...continued)
address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

In the present case, the lower court's determinations regarding custody during the dispositional improvement period reflected inadequate consideration of the best interests of Frances and Daryl Jean and the explicit testimony of Daryl Jean regarding her preference for custody. These precise issues will have to be developed and evaluated during the lower court's determination of the permanent custody issues; we consequently find that "sufficient collateral consequences will result" from this Court's determinations in this case "so as to justify relief." *Israel*, 182 W. Va. at 455, 388 S.E.2d at 481, syl. pt. 1.

testify and to present and cross-examine witnesses. In all custody matters, "we have traditionally held paramount the best interests of the child." Syl. Pt. 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

"Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." *In re Brian D.*, 194 W. Va. 623, 636, 461 S.E.2d 129, 142 (1995). The question at the dispositional phase of a child abuse and neglect proceeding is not simply whether the parent has successfully completed his or her assigned tasks during the improvement period. Rather, the pivotal question is what disposition is consistent with the best interests of the child. In the present case, the lives of Frances and Daryl Jean have been severely uprooted during the legal processes of this abuse and neglect proceeding. Despite the efforts of the Melissa and David R. to rectify their deficiencies, simple reunification may not be in the best interests of Frances and Daryl Jean, and the lower court's evaluation on remand must fully address those best interests in determining a disposition which most effectively serves the children.

Reversed and Remanded with Directions.

199 W. Va. 269, 483 S.E.2d 852

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA EX REL. GEORGE B. W., Petitioner

v.

HONORABLE TOD J. KAUFMAN, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, and SHARON B. W.,Respondents

No. 23927

Submitted: January 15, 1997

Filed: March 3, 1997

SYLLABUS BY THE COURT

1. Although a court may enter an emergency order transferring custody where there are allegations of abuse or neglect without notice and full hearing if the court deems such an order necessary for the immediate protection of the child(ren), such order should be of limited duration, should set a prompt and full hearing on the allegations, and should apprise both parties of the scope of the hearing. In the event such emergency change is found to be warranted, the court should immediately appoint a guardian ad litem for the child.

2. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979).

3. "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996).

4. "Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true." Syl. Pt. 3, Carter v.

Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996).

5. "Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court." Syl. Pt. 3, Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

6. "Prior to ordering supervised visitation pursuant to W.Va.Code, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child**.** A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child**.** Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion." Syl. Pt. 2, Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

7. "In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the

examination to the alleged criminal act; and (6) the evidence already available for the defendant's use." Syl. Pt. 3, State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992).

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Workman, Justice:
In this petition for a writ of prohibition and emergency stay of an order of the Circuit Court of Kanawha County, we grant the writ as molded and direct that a hearing be held within ten days on the issues of visitation and whether additional examinations should be conducted on the subject child. See footnote 1

I. Factual Background

Subsequent to the Respondent Sharon B. W.'s (hereinafter "Respondent"), August 1995 petition for divorce from Petitioner George B. W. (hereinafter "Petitioner"), temporary custody of the parties' only child, four-year-old Ben W. (hereinafter "the child"), was granted to the Respondent. During visitation with the Petitioner in the summer of 1996, the child allegedly accused his mother's boyfriend of sexual abuse, See footnote 2 and the Petitioner immediately retained the services of Dr. Timothy Freeman. See footnote 3 Dr. Freeman interviewed the child and summarized the allegations of abuse in a document which was presented to the lower court on August 16, 1996. The Petitioner requested an emergency order relieving him of the obligation to return the child to the Respondent, and based upon the allegations of sexual abuse, the lower court entered an emergency order

providing that the Petitioner should temporarily retain custody of the child. See footnote 4 On August 19, 1997, Dr. Freeman wrote to the Respondent's attorney, informing him of Dr. Freeman's recommendation that the child should not be in the company of his mother until "a point in . . .[his] therapy warrants his ability to sustain such visit without psychological discomfort."

Both parties thereafter moved for the appointment of a guardian ad litem for the child, and the matter was assigned to Family Law Master Charles Phalen, Jr. During a September 11, 1996, hearing, the family law master and the parties' attorneys discussed issues of the appointment of a guardian ad litem, the arrangements for psychiatric examination of the parents and the child, and the equitable distribution and alimony issues which had been pending prior to the allegations of sexual abuse. The only testimony taken was from the Petitioner and the Respondent for the purpose of establishing the jurisdictional information sufficient to grant a divorce. Subsequent to that hearing, the family law master directed as follows:

> Both parties and the minor child s hall be made available for evaluation by an expert or experts concerning issues of custody, visitation, and allegat ions of sexu al abuse. The parties m ay select their own experts, or they may jointly select one expert, for purposes of evaluati on. Any s ession with the parties or the minor child conducted as part of s uch evaluation shall be audio and video taped. The professional conducting the evaluation may elect to have present at any session suc h ot her persons, including but not lim ited to the parties and t he m inor c hild, as the pr ofessional m ay consider appropriate for purposes of the evaluation process.

Pursuant to the discussions between the parties' attorneys and the family law master during the September 11, 1996, hearing, attorney Beverly Selby was appointed as guardian ad litem for the child by order dated September 19, 1996. In her interim report dated September 26, 1996, Ms. Selby discussed the child's fear of his mother and discomfort with the thought of seeing her. Ms. Selby also indicated that she had spoken with Katheryne Smith of Directional Analysis, Incorporated, regarding her willingness to supervise the visitation.

By letter dated October 3, 1996, Dr. Freeman informed Family Law Master Phalen of the deleterious effects of supervised visitation or even telephone contact with the mother upon the child's therapy regarding the sexual abuse. Dr. Freeman's letter also addressed the child's opposition to any telephone or personal contact. By letter dated November 6, 1996, guardian ad litem Beverly Selby apprised family law master Phalen of her position that telephone calls with the Respondent,

even if supervised, were not in the best interests of the child. Her conclusions in this regard were apparently premised upon Dr. Freeman's recommendation and the wishes of the child.

On November 7, 1996, Family Law Master Phalen ordered Directional Analysis, the neutral expert suggested by the guardian ad litem, to facilitate supervised telephone visitation between the child and the Respondent. By letter to Family Law Master Phalen dated November 18, 1996, Katheryne Smith of Directional Analysis expressed her concern that supervised visitation may be harmful to the child at this stage and requested additional time to investigate the case.

On December 15, 1996, the Respondent appeared at a Charleston restaurant at which the child and the Petitioner were dining. The Respondent allegedly began yelling the child's name and creating a disturbance before the Petitioner was able to remove the child from the restaurant. On December 16, 1996, the Respondent filed a motion in the lower court to compel the Petitioner to present the child for a psychological evaluation by Dr. Richard Gardner, a clinical child psychiatrist from New York, in which the mother would potentially be present, at the discretion of Dr. Gardner. See footnote 5 The lower court granted that motion by order entered on December 18, 1996, without a hearing or consultation with the guardian ad litem, the family law master, or the court-assigned supervisor, Ms. Smith of Directional Analysis. See footnote 6 The lower court stated that the family law master had unequivocally expressed his position on the issues. The Petitioner was given one of three days in December 1996 to produce the child for evaluation by Dr. Gardner.

By letter dated December 19, 1996, Dr. Freeman informed the lower court of the potential harm to the child from being subjected to another interview and recitation of the details of the sexual abuse. Ms. Smith also advised the lower court, by letter dated December 19, 1996, of her concerns regarding the appropriateness of evaluation and/or visitation.

The Petitioner contends that the lower court's entry of the order requiring evaluation constitutes an abuse of discretion and seeks a writ of prohibition against the lower court, an order requiring a hearing on the matter, and such other relief as may be required. Pursuant to Rule 14(b) of the West Virginia Rules of Appellate Procedure, See footnote 7 the proceedings below were automatically stayed upon this Court's issuance of a rule to show cause on December 20, 1996.

II. Change of Custody

It appears from the record that the lower court, by order dated August 16, 1996, entered an ex parte emergency order which temporarily altered the custody arrangements based on the document prepared by Dr. Freeman. It is of concern

that no petition for modification and no hearing on that issue was held or apparently even scheduled. Although a court may enter an emergency order transferring custody where there are allegations of abuse or neglect without notice and full hearing if the court deems such an order necessary for the immediate protection of the child(ren), such order should be of limited duration, should set a prompt and full hearing on the allegations, and should apprise both parties of the scope of the hearing. In the event such emergency change is found to be warranted, the court should immediately appoint a guardian ad litem for the child.

III. Criteria for Awarding a Writ of Prohibition

In syllabus point one of Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979), we addressed the appropriate use of a writ of prohibition, and observed:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.
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> Id. at 112, 262 S.E.2d at 745.

IV. Visitation

The right to contact by a parent with his or her child is an important one, not easily removed. Certainly, a non-offending parent has a clear right to custody or visitation with his or her child. As we explained in syllabus point two of Hammack v. Wise, 158 W.Va. 343, 211 S.E.2d 118 (1975), and have consistently maintained,

"A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts."

Id. at 343, 211 S.E.2d at 119 (quoting Syllabus, State ex rel. Kiger v. Hancock, 153 W. Va. 404 [,] 168 S.E.2d [798] (1969)). Even where there are allegations of abuse and/or neglect, parents whose rights have not been terminated generally

have a right to continued contact with the child, although such visitation may be supervised for the protection of the child. See footnote 8

In syllabus point five of Carter v. Carter, 196 W.Va. 239, 470 S.E.2d 193 (1996), for instance, we explained: "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Id. at 241, 470 S.E.2d at 195. We emphasized that "[t]he best interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed." 196 W.Va. at 246, 470 S.E.2d at 200. In syllabus point three of Carter, we reasoned:

> Because of the extraord inary nature of supervised vis itation, such visitation should be ordered w hen necessary to protect the best interests of the children. In dete rmining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the ris k of harm of supervis ed visitation or the de privation of any visita tion t o t he parent w ho allegedl y committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.
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> 196 W. Va. at 241, 470 S.E.2d at 195.

We have also held that the nature of supervision must be designed for the child's protection, both physical and emotional. In Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992), we encountered a situation in which the allegedly abusive father had been tried on charges of sexual abuse and acquitted. We noted, however, that "being found 'not guilty' under the criminal standard of 'beyond a reasonable doubt' will not necessarily ease the emotional and psychological trauma, if any, suffered by the children if visitation, even if supervised, were to continue." 190 W. Va. at 347, 438 S.E.2d at 527. Chief Justice McHugh enumerated specific guidelines for the development of a safe and secure atmosphere in which supervised visitation, where appropriate, may be exercised.

Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Syl. Pt. 3, 190 W.Va. at 343, 438 S.E.2d at 523. In syllabus point two of Mary D., we addressed the circumstances under which a circuit court could consider an award of visitation rights to an alleged sexual offender:

> Prior to ordering supervised visitation pursuant to W.Va.Code, 48-2-15(b)(1) [1991], **if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child.** A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. **Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child.** Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion
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> 190 W.Va. at 342-43, 438 S.E.2d at 522-23 (emphasis supplied).

We recognized in Mary Ann P. v. William R.P., Jr., 197 W. Va. 1, 475 S.E.2d 1 (1996), that under some circumstances visitation could be totally suspended, at least until the family underwent therapy. In Mary Ann P., we determined that the record before us was "clear that forced visitation at this time would be detrimental to the children and futile on the defendant's behalf without professional intervention." 197 W. Va . at __, 475 S.E.2d at 8; see also Ledsome v. Ledsome, 171 W.Va. 602, 301 S.E.2d 475 (1983); Lufft v. Lufft, 188 W.Va. 339, 343, 424 S.E.2d 266, 270 (1992) (explaining that the right to visitation is determined by considering the child's welfare). In Mary Ann P., we also clothed the circuit court with the responsibility of determining when supervised visitation should resume

and to "set forth a specific visitation schedule that takes into account the best interest of the children and the defendant's interest in attaining a close relationship with his sons." 197 W. Va. at ___, 475 S.E.2d at 8 (citing Weber v. Weber, 193 W.Va. 551, 457 S.E.2d 488 (1995); W. Va. Code, 48-2-15(b)(1993)). We also ordered the circuit court to determine whether the parties could agree on counseling or therapy for the children and their father. If no agreement could be reached, we instructed the lower court to "take any additional evidence needed and direct the participation in such counseling as a condition of the continuation of the plan for restoring visitation." Mary Ann P., 197 W. Va. at ___, 475 S.E.2d at 8.

As recognized in the concurrence to Mary Ann P., "[w]hen . . . there is credible evidence of sexual abuse, the risk of harm to the child weighs heavily in this balance, and courts should err on the side of caution if necessary to protect children at risk of possible abuse." 197 W. Va. at ___, 475 S.E.2d at 10. We emphasized in In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991):

> In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the paramount and controlling factor must be the child's welfare. "[A]ll parental rights in child custody matters," we have stressed, "are subordinate to the interests of the innocent child." David M. [v. Margaret M.], [182 W.Va. 57, 60,] 385 S.E.2d [912] at 916 [(1989)].
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> 185 W. Va. at 629, 408 S.E.2d at 381.

Commentators on the issue of appropriate limitation or termination of visitation have recognized that: "Sexual abuse of a child by a parent or by others while the child is under the parent's care or control may result in termination or restriction of visitation rights. In some circumstances, the court will terminate or deny visitation entirely." John P. McCahey et al., Child Custody & Visitation Law and Practice 16.10[1] (1996).

It is a rare instance in which a parent should be denied all contact with a child. An essential element of our cases involving allegations of abuse by a parent is the necessity for the family law master or circuit court to hold hearings to ascertain the most viable approach to the resolution of the difficult issues which will inevitably be inherent in such matters. In the instant case, it is of great concern that no hearings were held on the sexual abuse or the visitation issues. It is also of great concern that a parent's right to all contact with a very young child was extinguished without any meaningful hearing on the issue.

The Petitioner suggests the child has been abused and that his mother, at a minimum, failed to protect him. The Respondent suggests that the Petitioner has manipulated the child into creating the sexual abuse allegations in order to accomplish this result, and suggests that the extinguishment of all communications with the mother allows total manipulation of this very young child. Whether any of these allegations have merit, we do not know. We do know, however, that these issues certainly merit prompt and full hearing below and not the entry of orders upon mere allegations.

V. Additional Evaluation of the Child

In State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992), we were confronted with the issue of multiple physical and psychological evaluations for seven- and eight-year-old victims. 187 W. Va. at 215-17, 417 S.E.2d at 906-08. In syllabus point three of that opinion, we enumerated the following factors for consideration: In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

187 W.Va. at 213, 417 S.E.2d at 904.

Presented with a request for additional evaluation, the lower court in Delaney had concluded that additional inquiries were not necessary. 187 W. Va. at 216, 417 S.E.2d at 907. We agreed with the lower court's determination, reasoning that "[g]iven the effect of a probing mental interrogation on children of their tender years, . . .the probative value to the appellant was outweighed by the trauma and intrusiveness to the victims. . . .Since we cannot find that the appellant's need is greater or more compelling than the burden it would impose on the victims, the trial court did not abuse its discretion in denying the appellant's request." Id. at 217, 417 S.E.2d at 908 (footnote omitted); see also State v. Miller, 195 W. Va. 656, 466 S.E.2d 507 (1995).

In a criminal context, West Virginia Code 61-8B-14 (1992) dictates that "the court may provide by rule for reasonable limits on the number of interviews to which a victim who is a child who is eleven years old or less must submit for law enforcement or discovery purposes." In Burdette v. Lobban, 174 W.Va. 120, 323

S.E.2d 601 (1984), we recognized the necessity of providing protection for the child victim:

> A parent accused of sexual a buse by his minor child has a constitutional right to know of what his child accuses him in order to prepare his defense. B ut certainly the child victim has a conc urrent right t o be protected against un restrained private examination by adverse interests. Child victim s of sexual abuse doubtless have undergone a horrifying experience.

174 W. Va. at 121-22, 323 S.E.2d at 603; see generally, Alison R. McBurney, Note, Bitter Battles: The Use of Psychological Evaluations in Child Custody Disputes in West Virginia, 97 W. Va. L. Rev. 773 (1995).

With regard to the civil context, Rule 35(a) of the West Virginia Rules of Civil Procedure provides as follows:

> (a) Order for Examination .--When the mental or physical condition (including the blo od group) of a part y, or of a person in the custody or under t he legal control of a pa rty, is in c ontroversy, the c ourt i n which the action is pendi ng m ay or der the party to subm it to a physical or m ental exam ination by a physician or other qualified expert or t o pr oduce for exam ination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the tim e, place, manner, conditions, and scope of the examination and the pers on or persons by whom it is to be made.

W. Va. R. Civ. P. 35(a). While Delaney was decided in the context of a criminal investigation of alleged abuse, the principles regarding additional evaluations of the victim are equally applicable in the civil context.

Based upon the foregoing, the writ of prohibition is granted as molded with respect to the issue of the additional evaluation, and this case is remanded to the Circuit Court of Kanawha County for further proceedings on the issues of modification of custody; supervised visitation, if merited; and expert evaluation of the child. The exploration of the expert evaluation issue on remand must include consideration of the factors enumerated in Delaney, and any order entered in connection with this matter should include findings of fact and conclusions of law in relation thereto. It appears that the lower court attempted to afford the Respondent mother visitation and contact in a manner that would protect the child from actual harm. The chief shortcoming of the supervised visitation order is that it was entered without benefit of a hearing, both as to whether it provided adequate

contact for the parent and child to sustain a relationship and whether the child was adequately protected from emotional harm. The court should hold a full hearing on the visitation issue within ten days unless otherwise agreed upon by the parties, and the court should fashion a plan for temporary visitation and for custody.

Writ granted as moulded.

Footnote: 1 The hearing shall be held before Judge Tod Kaufman of the Circuit Court of Kanawha County within ten days of the filing date of this opinion, unless otherwise agreed upon by counsel for the parties and the guardian ad litem for the child.

Footnote: 2 The child allegedly indicated to his father that, while residing in Tennessee with his mother, her boyfriend, and the boyfriend's eleven-year-old daughter, the following activities occurred: the boyfriend masturbated in front of the child; the boyfriend placed his hand in the child's pocket and touched the child's penis; the boyfriend's penis was called a "whip" because the child would be whipped with it as it became larger; the boyfriend would pinch the child's penis; and "white stuff" would come out of the boyfriend's penis. These activities allegedly occurred in the presence of the child's mother. In the mother's response to the petition for writ of prohibition, she denies she ever sexually abused the child or permitted such abuse, and denies that she ever resided with the man in question, who she characterizes as a "former boyfriend."

Footnote: 3 Dr. Freeman is a Ph.D. child clinical psychologist practicing with Process Strategies Institute in Charleston, West Virginia.

Footnote: 4 A criminal investigation was apparently instituted in Memphis, Tennessee, the location of the alleged abuse. That investigation has been closed without the filing of charges.

Footnote: 5 The philosophies espoused by Dr. Gardner have apparently been the subject of some debate. In an article entitled, "Gardner's Law; A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse 'Hysteria,'" the author discussed Dr. Gardner's frequent appearance as an expert witness and media commentator representing the view that the United States is in a state of child-abuse hysteria. The article referenced Dr. Gardner's "Parental Alienation Syndrome," holding that some parents, afraid of losing custody, actively disparage the other parent and indoctrinate the child that abuse has occurred. Critics maintain that there is scant empirical evidence supporting many of Dr. Gardner's theories. See Rorie Sherman, Gardner's Law; A Controversial Psychiatrist and Influential Witness Leads the Backlash Against Child Sex Abuse 'Hysteria,'" Nat'l L. J., August 16, 1993 at 1.

Footnote: 6 With no inquiry regarding her availability, Judge Kaufman's order directed that Ms. Smith be involved with visitation on specified dates. Ms. Smith's schedule, however, would not permit her to assist with visitation on the dates selected by the circuit court.

Footnote: 7 Rule 14(b) provides, in pertinent part, that "[u]nless otherwise provided, the issuance of a rule to show cause in prohibition stays all further proceedings in the underlying action for which an award of a writ of prohibition is sought."

Footnote: 8 We have acknowledged a child's right to continued association with those with whom he has formed an emotional bond, In re Danielle T., 195 W. Va. 530, 466 S.E.2d 189 (1995); In re Christina L., 194 W. Va. 446, 460, S.E.2d 692 (1995); James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991); Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989), and have recognized that even where there is a termination of parental rights, a child may under some circumstances still have a right to continued contact with a parent whose rights have been terminated. See In re Christina L., 194 W. Va. at 454, 460 S.E.2d at 700.

205 W. Va. 435, 518 S.E.2d 863

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1999 Term

No. 26202

IN THE MATTER OF GEORGE GLEN B., JR.

Appeal from the Circuit Court of Grant County
Honorable Andrew N. Frye, Jr., Judge
Civil Action No. 99-JA-1
REVERSED AND REMANDED

Submitted: June 29, 1999
Filed: July 12, 1999

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The Opinion of the Court was delivered by Justice Workman.

SYLLABUS BY THE COURT

1. “Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.

3. "Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W. Va. R. Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court." Syl. Pt. 8, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

4. When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49- 6-5b(a)(3)(1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

5. Where an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions, and the court may direct the Department of Health and Human Resources to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied.

6. "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49-6-5, it must hold a hearing under W.Va.Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. Pt. 1, State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983).

7. "The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991).

Workman, Justice:

This case is before the Court upon the appeal of the West Virginia Department of Health and Human Resources ("DHHR"), as well as the appeal[See footnote 1] of the Guardian ad Litem on behalf of the infant, George Glen B., Jr.,[See footnote 2] from the March 12, 1999, order entered by the Circuit Court of Grant County, West Virginia, returning physical and legal custody of the infant child to the Appellee mother, Waneta J. H. The Appellants argue that the lower court erred: 1) in ordering the return of physical and legal custody of the infant child to the Appellee mother, because statutory law mandates that the DHHR pursue termination of parental rights where the Appellee mother previously had parental rights terminated to a sibling of the infant child;[See footnote 3] 2) in failing to set a preliminary hearing within the mandatory time frame of ten days as set forth in West Virginia Code § 49-6-3(a) (1998); 3) in making various factual findings;[See footnote 4] and 4) in granting visitation to the Appellee mother,[See footnote 5] because the DHHR is not required to make reasonable efforts to preserve the family unit in this case.[See footnote 6]

Based upon a review of the record, the parties' respective briefs and all other matters submitted before this Court, we reverse the lower court's decision and remand this case for further proceedings consistent with this opinion.

I. FACTS

George Glen B., Jr., was born on January 20, 1999, at Grant Memorial Hospital in Petersburg, West Virginia. George is the second child born to Waneta J. H. and George Glen B.,[See footnote 7] both of whom reside in Dorcas, Grant County, West Virginia. George Glen B., Jr., is the Appellee mother's third child.

On January 20, 1999, the DHHR filed a petition requesting emergency and extended custody of the infant child, as well as seeking termination of the parental rights of the Appellee mother and the Appellee father. The petition was based upon two prior cases of abuse and neglect against the Appellee mother[See footnote 8] which had been brought in Hardy County and which resulted in an involuntary termination of parental rights in one case[See footnote 9] and a voluntary relinquishment of both of the Appellees' parental rights in the other case.[See footnote 10] The DHHR removed the child from the Appellee mother's custody on January 22, 1999. The infant child was placed in a foster home with the other children of the Appellee mother, who are George Glen B., Jr.'s full and half siblings.

On January 25, 1999, the circuit court conducted a hearing to consider the merit of the DHHR's taking emergency custody of the infant child. By order dated January 28, 1999, the circuit court stated that custody of the infant child was to remain with the DHHR, "[p]ending the Court's decision," and "[t]hat the Court . . . [would] render a decision . . . within the next forty-eight hours." Even though the Court stated at the hearing on January 25, 1999, that "[w]e need to have a preliminary hearing in ten days . . . [,]" no other hearing regarding the petition filed by DHHR occurred until March 11, 1999.

At the March 11, 1999, hearing, Mr. Dennis V. Di Benedetto, the Prosecuting Attorney for Grant County and the DHHR's attorney in this matter, informed the lower court that it had never set a preliminary hearing date, and, thus far, the only evidence which had been presented in the case was in support of the emergency taking. Mr. Di Benedetto further told the court that the DHHR had not "present[ed] any extensive evidence of a preliminary hearing nature."

By order entered March 12, 1999, the circuit court made specific findings that there had been two prior cases involving abuse and neglect allegations brought by the DHHR against the Appellee mother in the first instance and both the Appellees in the second instance. The circuit court also found that "[i]n both previous cases, neither parent was capable of minimum acceptable parenting skills." The circuit court further found, however, that "[t]he fact that the Respondent, Waneta J. W[][.] H[][.], has had her parental rights terminated to two previous children, and the father George Glen B[][.] Sr., has had his rights terminated to one previous child, is not sufficient evidence, absent no showing of abuse or neglect to George Glen B[][.] Jr., the current child." The court also found that the prior termination was not sufficient to terminate parental rights. Finally, the court found "no evidence of abuse or neglect of the infant child, George Glen B[][.] Jr., by the mother, . . . or the biological father, . . . as the child was removed from the hospital after birth." Based upon these findings, the lower court ordered legal and physical custody of the infant child be returned to the Appellee mother[See footnote 11] and then dismissed the action court's docket.

II. STANDARD OF REVIEW

The standard of review used by this Court when reviewing circuit court rulings in abuse and neglect cases is as follows:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996). It is with the above-mentioned standard of review in mind, that we now review the circuit court's order.

Because our decision turns on the legal conclusions made by the circuit court, our review is de novo. See id.

III. ISSUES

The crucial issue we address is whether the circuit court erred in returning the infant child to the Appellee mother and in dismissing the action, without first permitting an exposition of the evidence to determine whether this was the proper action. The DHHR argues that because the Appellee mother's parental rights to a sibling have previously been terminated, statutory law mandates that the DHHR undertake efforts to terminate the Appellee mother's parental rights to the newest child, in this case George Glen B., Jr. See W. Va. Code §49-6-5b (1998). Moreover, the lower court's failure to conduct a preliminary hearing pursuant to the statutorily-mandatedSee footnote 12 time frame of ten days denied the DHHR, as well as the Appellees, the opportunity to submit before the lower court evidence supportive of the parties' respective positions. The Appellees maintain that it is constitutionally impermissible to apply a presumption that the prior involuntary termination of the mother's parental rights to another child or the prior voluntary relinquishment of both parents' rights to another child proves imminent danger to the child, proves abuse or neglect of the child, or requires termination of the parental rights of the parents to the child.See footnote 13 The Appellees further maintain that the DHHR did not show the existence of imminent danger to the physical well-being of George Glen B., Jr., and the request for emergency and extended custody of this child was properly dismissed. Finally, the Appellees assert that the DHHR did not show abuse or neglect as required by statute in order to seek termination of parental rights as a dispositional alternative for this child and the request for termination of parental rights was properly dismissed.

A. DISMISSAL OF PETITION

It is axiomatic that West Virginia Code § 49-6-5b(a)(3) compels the DHHR to file a petition seeking termination of parental rights where, as in the instant matter, parental rights involving a sibling have previously been involuntarily terminated. West Virginia Code § 49-6-5b(a)(3) provides, in relevant part, that "[e]xcept as provided in subsection (b) of this section,See footnote 14 the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights: . . . (3) . . . [where] the parental rights of the parent to a sibling have been terminated involuntarily."See footnote 15 Id. Quite clearly, the statute contemplates that a prior termination of parental rights to a sibling is, at least, some evidence of a child being threatened with abuse and neglect. The legislature has clearly determined that where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the

minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) is present.

Moreover, this Court previously addressed the importance of prior acts of violence, physical abuse, and/or emotional abuse in the context of abuse and neglect proceedings in held in In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991) . In syllabus point eight of Carlita B., we held that "[p]rior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W. Va. R. Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court."See footnote 16 185 W. Va. at 616, 408 S.E.2d at 368.

Therefore, we hold that when an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s). Where an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions,See footnote 17 and the court may direct the DHHR to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied. Where there was aggravated abuse, however, such as the murder or serious injury of a sibling, the court may be justified in ordering termination without the use of intervening less restrictive alternatives. See Syl. Pt. 2, In re R.M.J., 164 W. Va. 496, 266 S.E.2d 114 (1980).

In the instant case, the lower court erred in dismissing the abuse and neglect petition outright, without first allowing the development of evidence regarding the prior terminations at issue and whether the parents had taken steps to remedy the circumstances which caused their ability to parent to be so deficient as to have had their rights to prior children permanently terminated.

B. FAILURE TO CONDUCT HEARINGS

Prior to the order returning custody to the Appellee mother, which in effect made a disposition of the case pursuant to West Virginia Code § 49-6-5 (1998), the lower court not only failed to conduct the mandatedSee footnote 18 preliminary hearing See footnote 19 set forth in Rule 22 of the West Virginia Rules of Procedure for Child Abuse and NeglectSee footnote 20 and West Virginia Code § 49-6-3 (a),See footnote 21 but also failed to conduct an adjudicatory hearing as set forth in Rule 25 of the West

Virginia Rules of Procedure for Child Abuse and NeglectSee footnote 22 and West Virginia Code § 49-6-2 (1998).See footnote 23

In syllabus point one of State v. T.C., 172 W. Va. 47, 303 S.E.2d 685 (1983), this Court held that

[i]n a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49-6-5, it must hold a hearing under W.Va.Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case.

172 W. Va. at 48, 303 S.E.2d at 686.

It is clear from the minuscule record in this case that the lower court's consideration of the abuse and neglect proceeding was inadequate. Mandated hearings did not occur, evidence was not taken, yet a determination to dismiss the petition and return custody to the Appellee mother was made. Thus, the lower court's action in this case was not in compliance with pertinent statutes, rules, and case law. As this Court has previously stated on numerous occasions:

The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

Syl. Pt. 5, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991). Subsequent to the initial hearing in this case, almost two months passed before another hearing occurred, and even that hearing was not the preliminary hearing. According to the statute and the rule, a preliminary hearing should have occurred within ten days from the January 25, 1999, hearing. See W. Va. Code § 49-6-3(a) and W. Va. R. P. Child Abuse & Neglect Pro. 22. The parties to an abuse and neglect proceeding must be given a meaningful opportunity to introduce substantive evidence in support of their respective positions, before a circuit court makes its final dispositional decision, and the guiding force behind such decision must be what was in the best interests of the child. See Michael K.T. v. Tina L.T., 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children.").

IV. CONCLUSION

Accordingly, based on the foregoing, we conclude that the lower court erred not only in dismissing the abuse and neglect petition and returning custody outright to the Appellee mother, but also in failing to conduct mandated hearings. We, therefore, reverse and remand this case to the circuit court. We direct the circuit court to reinstate the abuse and neglect petition. We further order the lower court to conduct a preliminary hearing within ten days of receipt of this opinion. All other necessary hearings shall also be conducted on an expedited basis and should provide a meaningful opportunity to the

parties to produce evidence of the circumstances involved in the instant case. After hearing the pertinent evidence, the court should make specific findings of fact relating to the prior terminations and the current parenting abilities of the mother and father. Even if the court determines, upon appropriate motion, to grant an improvement period with appropriate conditions, concurrent planningSee footnote 24 should begin for the child's permanent placement in the event that efforts at reunification fail. Finally, any decision rendered by the lower court should encompass the parental rights of both the Appellee mother and the Appellee father.

Reversed and remanded with directions.

Footnote: 1 The Guardian ad Litem's brief is virtually identical to the brief submitted by the DHHR. Consequently, for purposes of this opinion, we refer to both appealing parties collectively as the Appellants.

Footnote: 2 Consistent with our practice in cases concerning juveniles, we use only the initial of the juvenile's last name. See Benjamin R. v. Orkin Exterminating Co., 182 W.Va. 615, 390 S.E.2d 814 n. 1 (1990) (citing In re Johnathan P., 182 W.Va. 302, 303, 387 S.E.2d 537, 538 n. 1 (1989)); State v. Murray, 180 W.Va. 41, 44, 375 S.E.2d 405, 408 n. 1 (1988).

Footnote: 3 We note at the outset that in the petition brought by the DHHR, termination of the parental rights of the Appellee father was also sought. It is clear that the Appellee father did not have a prior involuntary termination, only a prior voluntary relinquishment of parental rights. Thus, there was no statutorily-mandated filing requirement with regard to the DHHR's seeking termination of the Appellee father's parental rights. See W. Va. Code § 49- 6-5b(a)(3)(1998) and Section III(A) of this opinion infra. The lower court, on remand, however, should also clarify the status of the Appellee father's parental rights.

Footnote: 4 Because we are reversing the lower court's decision and remanding the case so that the petition can be reinstated and the necessary hearings can be held, we decline to address the alleged factual error raised by the DHHR.

Footnote: 5 The Appellants also contest the lower court's order, entered March 26, 1999. That order granted supervised visitation to the Appellee mother during the pendency of the sixty- day stay, which was also granted by the lower court pursuant to the DHHR's motion that the lower court stay its decision returning physical and legal custody of the infant child to the Appellee mother pending appeal. The lower court, in granting supervised visitation to the Appellee mother, directed that physical custody of the infant child remain with the DHHR for the period of the stay. Because the stay was for the sixty-day period beginning March 12, 1999, this Court, on May 11, 1999, continued the stay until June 15, 1999. In that order, this Court also ordered that visitation by the Appellee mother continue pursuant to the conditions outlined in the

March 26, 1999, order. Based on our decision regarding the dismissal of the action, and because the visitation was only for the limited period of the stay, we need not address the visitation issue.

Footnote: 6 The DHHR relies upon West Virginia Code § 49-6-5(a)(7)(C)(1998) and § 49-6- 3(d)(3) (1998) as support for this position. West Virginia Code § 49-6-5 (a)(7) provides:

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to the provisions of this subsection the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(B) The parent has:

(i) Committed murder of another child of the parent;

(ii) Committed voluntary manslaughter of another child of the parent;

(iii) Attempted or conspired to commit such a murder or voluntary manslaughter or been an accessory before or after the fact to either such crime; or

(iv) Committed a felonious assault that results in serious bodily injury to the child or to another child of the parent;

(C) The parental rights of the parent to a sibling have been terminated involuntarily.

Id. Similarly, West Virginia Code § 49-6-3(d) is virtually identical to the provisions of West Virginia Code § 49-6-5 (a)(7)(C), but governs the circuit court's consideration of temporary custody. West Virginia Code § 49-6-3(d)(3), in relevant part, provides that for the purposes of the trial court's consideration of temporary custody, the DHHR need not make reasonable efforts to preserve family unit where the court determines that prior involuntary termination of parental rights to sibling has occurred. Id.

Footnote: 7 The Appellee mother and the Appellee father have married since the institution of this action.

Footnote: 8 Only one of these prior cases actually involved the Appellee father, George Glen B. The Appellee mother's first child, Daisy, was fathered by another individual who is not a party to this action.

Footnote: 9 On September 18, 1995, the Circuit Court of Hardy County terminated the parental rights of the Appellee mother and father with regard to the infant child, Daisy, after almost a year of services and proceedings before the lower court. The circuit court found that the parents had "demonstrated inadequate capacities to solve problems of abuse and neglect on their own or with assistance; and . . . incurred mental deficiency of such duration and nature as to render them incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills." The DHHR initially took custody of Daisy when she was eleven weeks old. While the record in the instant

case is devoid of the grounds behind the abuse and neglect petition regarding Daisy, the DHHR's petition for appeal indicates that

[s]ome of the Respondent's conduct resulting in the imminent danger petition included the mother yelling and screaming at the child because she had vomited, picking the child up by her clothing, leaving her unattended on a dryer, table and the floor, grabbing her by the arms and smacking her on the legs.

Footnote: 10 The DHHR took custody of the Appellees' infant child, Monica, when that child was only ten days old. The child was born on January 16, 1997. Again, the record in the instant case is devoid as to what abuse and neglect allegations necessitated the DHHR's intervention regarding Monica. The DHHR's petition of appeal provides that the Department took emergency custody of the child based in part on the involuntary termination of the mother's parental rights to Daisy. . . . The petition alleged that the Respondent mother became intoxicated and involved in an altercation with her own mother and her mother's boyfriend which put the child in physical danger and left them without a place to live, that the Respondent yelled and swore at the child for crying because she needed to be fed and changed, that the Respondent moved the child to a place where living conditions were deplorable, that the Respondent's mother threatened to leave the county with the child, and, that the Respondent, in the opinion of a medical professional, did not possess the mental capability to properly care for Monica.

That proceeding resulted in both of the Appellees voluntarily relinquishing their respective parental rights to the child. The Appellee father, however, was granted a three-month preadjudicatory improvement period on or about the time of his preliminary hearing. Further, parenting services were also put into place for the Appellee father, including anger control counseling. The Appellee father, nevertheless, ultimately voluntarily relinquished his parental rights, when the infant child was eight months old. Further, the DHHR notes that termination of parental rights appeared to be impending with regard to both parents prior to their voluntary relinquishments of custody to the DHHR.

Footnote: 11 The Court made no reference to the custodial rights of the Appellee father.

Footnote: 12 See W. Va. Code § 49-6-3(a) and Rule 22 of the West Virginia Rules of Procedure for Child Abuse and Neglect.

Footnote: 13 The Appellees assert a constitutional attack on the validity of the West Virginia Code § 49-6-5b(a)(3) for the first time on appeal. The Appellees never objected or brought to the lower court's attention any argument concerning the constitutional validity of the relevant statute. Because we are ordering further proceedings in this matter, we decline to address this argument at this time. See Cochran v. Appalachian Power Co., 162 W.Va. 86, 93, 246 S.E.2d 624, 628 (1978) ("The almost universal rule is that an appellate court need not consider grounds of [an] objection not presented to the trial court."). Finally, we note that the DHHR has never argued that the pertinent statutory provision mandating that the petition be filed relieves the DHHR of its burden

of proving the abuse and neglect averments contained within the petition by "clear and convincing" evidence. W. Va. Code § 49-6-2(c) (1998). The DHHR does argue that this Court has upheld termination of parental rights without the need for reunification services or other less restrictive alternatives when it is found that there is no reasonable likelihood under West Virginia Code § 49-6-5(b) that the conditions of abuse and neglect can be substantially corrected based upon the evidence before the court that the abusing adults have demonstrated an inadequate capacity to solve the problems of abuse and neglect with or without help. See Syl. Pt. 2, In re R.M.J., 164 W. Va. 496, 266 S.E.2d 114 (1980) ("Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected."); see also In re Danielle T., 195 W. Va. 530, 466 S.E.2d 189 (1995); In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993). The DHHR, however, further argues that "[t]he lack of the preliminary hearing in this action deprived the Department of its ability to place complete evidence on the record regarding the danger to George Jr.'s health, safety, and welfare based upon the parents' past behavior."

Footnote: 14 West Virginia Code § 49-6-5b(a) dictates when efforts to terminate parental rights are required by the DHHR. Subsection (b) of that statute sets forth the following three exceptions to the mandatory requirement that the DHHR seek termination in certain instances:

(b) The department may determine not to file a petition to terminate parental rights when:

(1) At the option of the department, the child has been placed with a relative;

(2) The department has documented in the case plan made available for court review a compelling reason, including, but not limited to, the child's age and preference regarding termination or the child's placement in custody of the department based on any proceedings initiated under article five [§ 49-5-1 et seq.] [concerning juvenile proceedings] of this chapter, that filing the petition would not be in the best interests of the child; or

(3) The department has not provided, when reasonable efforts to return a child to the family are required, the services to the child's family as the department deems necessary for the safe return of the child to the home.

W. Va. Code § 49-6-5b(b). When an exception exists, however, only the mandatory filing requirement of an abuse and neglect petition is eliminated as the DHHR still retains the discretion to file an abuse and neglect petition. Id. None of the exceptions apply to the instant case.

Footnote: 15 The other instances wherein the DHHR is required to seek termination of parental rights are as follows:

(1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child

is subjected to abuse or neglect or the date which is sixty days after the child is removed from the home;

(2) If a court has determined the child is abandoned; or

(3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or children . . . .

Id.

Footnote: 16 *See W. Va. Code § 49-6-3 (a) (providing that "[i]n a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of such child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal"); see also supra n.6.*

Footnote: 17 *See W. Va. § 49-6-12 (1998) (regarding improvement periods in cases of child neglect or abuse).*

Footnote: 18 *The Appellees argue that the DHHR failed to comply with the minimum five days actual notice requirement prior to the January 25, 1999, hearing. See W. Va. R. P. Child Abuse & Neglect Pro. 20. Rule 20 provides for actual notice of "at least five (5) days" prior to the preliminary hearing. Id. The January 25, 1999, hearing, however, was not the preliminary hearing in this case. Rather, that hearing was conducted in accordance with West Virginia Code § 49-6-3(c), so that the circuit court could enter an order confirming the emergency custody decision made by the magistrate and entered on January 22, 1999.*

Footnote: 19 *Contrary to the Appellees' position, the lower court did initially make the determination that the DHHR was justified in taking emergency custody of the infant child. This is evinced by the lower court's January 28, 1999, order directing that custody of the infant child remain with the DHHR. It was this decision which triggered other statutorily- mandated hearings and time-frames.*

Footnote: 20 *Rule 22 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides, in pertinent part, that "[i]f at the time the petition was filed, the court placed or continued the child in the emergency custody of the Department . . . , a preliminary hearing on emergency custody shall be initiated within ten (10) days after the continuation or transfer of custody is ordered as required by W. Va. Code § 49-6-3(a)." W. Va. R. P. Child Abuse & Neglect Pro. 22.*

Footnote: 21 *West Virginia Code § 49-6-3 (a) provides, in pertinent part, that "[u]pon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department . . . pending a preliminary hearing . . . ." Id.*

Footnote: 22 *Rule 25 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides, in pertinent part, that*

[w]hen a child is placed in the temporary custody of the Department . . . pursuant to W. Va. Code § 49-6-3(a), the final adjudicatory hearing shall commence within thirty (30) days of temporary custody order entered following the preliminary hearing and must be given priority on the docket unless a preadjudicatory improvement period has been ordered.

W. Va. R. P. Child Abuse & Neglect Pro. 25.

Footnote: 23 *West Virginia Code § 49-6-2 (c) provides:*

In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. . . . At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. . . .
Id.

Footnote: 24 *Rule 28 of the Rules of Abuse and Neglect Proceedings requires the DHHR to prepare the child's case plan. The following information should comprise a part of that case plan:*

(c) When the Department's recommendation includes placement of the child away from home, whether temporarily or permanently, the report also shall include:

(1) An explanation why the child cannot be protected from the identified problems in the home even with the provision of service or why placement in the home is not in the best interest of the child;

(2) Identification of relatives or friends who were contacted about providing a suitable and safe permanent placement for the child;

(3) A description of the recommended placement or type of home or institutional placement in which the child is to be placed, including its distance from the child's home and whether or not it is the least restrictive (most family-like) one available and including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent's(s')/respondent's('s) home, facilitate return of the child to his or her own home, or the permanent placement of the child;

(4) A suggested visitation plan including an explanation of any conditions be placed on the visits;

(5) A statement of the child's special needs and the ways they should be met while in placement;

(6) The location of any siblings and, if siblings are separated, a statement of the reasons for the separation and the steps required to unite them as quickly as possible and to maintain regular contact during the separation if it is in the child's best interest . . . .

W. Va. R. P. Abuse & Neglect Pro. 28(c). See In re Micah Alyn R., 202 W. Va. 400, 409, 504 S.E.2d 635, 644 (1998)(Workman, J., concurring)("concurrent planning for permanency should occur even where parental rights are not terminated. This should be the practice in all abuse and neglect cases, so that there is a permanency plan for children where family reconciliation efforts are not successful for whatever reason").

207 W. Va. 346, 532 S.E.2d 64

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26742

IN RE: GEORGE GLEN B., JR.

Appeal from the Circuit Court of Grant County
Honorable Andrew N. Frye, Jr., Judge
Case No. 99-JA-1

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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JUSTICE STARCHER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. When the parental rights of a parent to a child have been involuntarily terminated, *W.Va. Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

2. While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W.Va. Code*, 49-6-5b(a)(3) [1998], the Department must still comply with the evidentiary standards established by the Legislature in *W.Va. Code*, 49-6-2 [1996] before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W.Va. Code*, 49-6-3 [1998] before a court may grant the Department the authority to take emergency, temporary custody of a child.

3. "Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syllabus Point 2, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

4. "When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syllabus Point 4, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).

5. The presence of one of the factors outlined in *W.Va. Code*, 49-6-5b(a)(3) [1998] merely lowers the threshold of evidence necessary for the termination of parental rights. *W.Va. Code*, 49-6-5b(a)(3) [1998] does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W.Va. Code*, 49-6-2 [1996].

6. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

7. When a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren).

Starcher, Justice:

This appeal from the Circuit Court of Grant County raises the question of whether a circuit court may terminate parental rights to a child solely on the basis that, several years prior to the child's birth, the parental rights to siblings of the child had been terminated. We also consider whether it is mandatory that the Department file a petition to terminate the current parental rights of a parent who has previously had parental rights to another child terminated by the court. We hold that while the Department does have a mandatory duty to file a petition, a circuit court may not terminate parental rights without additional evidence of abuse or neglect of the current child.

I.
Factual Background

George Glen B., Jr. was born on January 20, 1999. George is the second child born to appellees Waneta B. and George Glen B., Sr.; he is the third child born to Waneta B.

The day after George was born, the Department filed a petition in the Circuit Court of Grant County requesting emergency custody of the child, as well as seeking to terminate the parental rights of the appellee mother and appellee father. The petition was filed on the basis of two previous cases of abuse and neglect filed regarding siblings of George against the appellee mother. In the first case, filed in 1994, 13 weeks after a sibling was born, the appellee mother's parental rights were involuntarily terminated. In the second case, filed in 1996, the Department took custody of a sibling 10 days after her birth; the appellee mother and appellee father later voluntarily agreed to relinquish their parental rights to

the child. In the instant case, relying upon a "temporary custody" order, the Department removed George from the hospital on January 22, 1999.

On January 25, 1999, the circuit court conducted a hearing to consider the merit of the Department's taking emergency custody of George. By order dated January 28, 1999, the circuit court stated that custody of the child was to remain with the Department, "[p]ending the Court's decision," and "[t]hat the Court . . . [would] render a decision . . . within the next forty-eight hours." Unfortunately, no additional orders were issued, and no other hearings occurred until a brief hearing was held on March 11, 1999.

By an order dated March 12, 1999, the circuit court made specific findings that there had been two prior cases involving allegations of abuse and neglect brought by the Department against the appellee mother in the first instance, and against both appellees in the second instance. The circuit court also found that "[i]n both previous cases, neither parent was capable of minimum acceptable parenting skills," and that both cases were resolved with the termination of the appellees' parental rights.

However, the circuit court declined to terminate the appellees' parental rights or proceed any further on the petition, concluding that a prior termination of parental rights, without more, was not a sufficient ground to terminate parental rights. The court found that:

> The fact that the Respondent, Waneta [B.] . . . , has had her parental rights terminated to two previous children, and the father George Glen B[][.] Sr., has had his rights terminated to one previous child, is not sufficient evidence, absent no showing of abuse or neglect to George Glen B[][.] Jr., the current child.

The circuit court concluded that it would be improper "to terminate parental rights of the mother and father absent any showing of abuse or neglect of this child." Based upon these findings, the circuit court dismissed

the abuse and neglect petition, and ordered the Department to return George to the custody of the appellees "in a manner that is in the best interests of the infant child."

The Department appealed the circuit court's March 12, 1999 order to this Court. In an opinion issued on July 12, 1999, we reversed the circuit court's order and remanded the case for further hearings. We held that the circuit court had erred in dismissing the abuse and neglect petition outright without allowing the Department an opportunity to present evidence regarding the circumstances surrounding the prior terminations of parental rights, and without allowing the parties to develop evidence concerning whether the appellee parents had taken steps to remedy the circumstances which resulted in the prior abuse and neglect petitions. *See In re George Glen B.*, 205 W.Va. 435, 443, 518 S.E.2d 863, 871 (1999). We also directed the circuit court to hold its future hearings pursuant to the procedures contained in the *West Virginia Rules of Procedure for Child Abuse and Neglect* and *W.Va. Code*, 49-6-2 [1998]. 205 W.Va. at 444-45, 518 S.E.2d at 871-72.

Upon remand, the circuit court conducted hearings on July 28 and 29, 1999, and allowed the parties to present a total of over 9 hours of testimony and argument. From this testimony as well as several hundred pages of exhibits, the circuit court issued two orders dated August 5, 1999 and August 30, 1999.

In its orders, the circuit court concluded that "there is no neglect or abuse of George Glen B[][.] Jr. by anyone, now or has there ever been." Accordingly, the court held that the Department had failed to show abuse or neglect by the appellee parents sufficient to warrant the termination of their parental rights.

In its findings, the circuit court found that the appellees had "substantially remedied the circumstances surrounding the prior terminations" of their parental rights.[1] The circuit court also found that the Department "has become so emotionally involved in this case that they cannot be objective," noting that the Department provided the appellee parents with no services, including visitation with George, without being ordered to do so by the court. In sum, the circuit court's order chastised the Department for only seeking termination and not considering other alternatives.

However, the circuit court concluded that George "may be at risk if he is returned to the [appellees] without appropriate supervision." The circuit court therefore ordered that while the Department would technically retain physical custody of George, a private company, Action Youth Care, was ordered to provide supervision for a gradual transition to ensure an appropriate transfer of George to the custody of his parents. The court placed full responsibility and authority for the transition and its timing on Action Youth Care:

> The primary responsibility of Action Youth Care is to ensure the safety of George Glen B[][.] Jr. Overnight visitation shall begin as soon as Action Youth Care determines it is in the best interests of the child. Action Youth

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[1]The circuit court's order states, in pertinent part:

> [T]he Court finds that Waneta H[][.] B[][.] and George Glen B[][.] have established a stable home which provides appropriate shelter and environment for George Glen B[][.] Jr.; that Waneta H[][.] B[][.] and George Glen B[][.] have established their ability to work together as a married couple to provide appropriate parenting for George Glen B[][.] Jr., including the ability to perform basic parenting needs such as feeding and diapering, and to provide nurturing suitable for his development; that Respondents have voluntarily sought parenting education which has resulted in learning and application of appropriate parenting skills; and that Respondents are actively addressing their needs to control anger and depression.

> Care may remove the child from the custody of his parents without further Order of this Court if they determine it necessary for his protection.
>
> In the event the efforts at reunification should fail, Action Youth Care shall notify the Court and the Court will take such action . . . as may be appropriate.

The Department now appeals the circuit court's August 5 and August 30, 1999 orders.

II.
Standard of Review

The standard of review used by this Court when reviewing circuit court rulings in abuse and neglect cases is as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). It is with the above-mentioned standard of review in mind that we now review the circuit court's orders.

III.
Discussion
A.

The Duties Imposed by W.Va. Code, 49-6-5b

The Department contends that *W.Va. Code*, 49-6-5b(a)(3) [1998] mandates that the Department file a petition to terminate parental rights where there has been an involuntary termination of parental rights to a sibling in a prior proceeding. *W.Va. Code*, 49-6-5b(a)(3) states, in pertinent part and with emphasis added:

> (a) . . . [T]he department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:
>
> . . .
>
> (3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children; or *the parental rights of the parent to a sibling have been terminated involuntarily.*

The Department further argues that the circuit court erred in finding that the Department was required to use *W.Va. Code*, 49-6-5b(a)(3) with "sound discretion," and, in essence, erred in concluding that the Department abused its discretion by pursuing termination of the appellees' parental rights in this case.

The appellees, however, contend that if the Court adopts the Department's reading of *W.Va. Code*, 49-6-5b(a)(3), then the Department will be allowed to take temporary custody of a child and demand the termination of an individual's parental rights by showing that there has been a prior involuntary termination of parental rights -- and without a showing of actual or imminent abuse or neglect of the current child. The appellees argue that the abuse and neglect statutes must be read together, and that to allow the Department to take emergency custody of a child and to seek the termination of parental rights without showing any abuse and neglect of the child would be constitutionally impermissible.

A reading of the plain language of the statute indicates that the Legislature intended to impose a mandatory duty upon the Department to initiate or join termination proceedings when certain circumstances exist. The application of the statute in situations such as the instant case is clear: When the parental rights of a parent to a child have been involuntarily terminated, *W.Va. Code*, 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

The Legislature has created procedures and levels of proof that the Department must follow in every abuse and neglect case. When the Department files a petition with a court alleging that a parent is abusing or neglecting a child, *W.Va. Code*, 49-6-2(c) [1996] imposes upon the Department the duty to prove its case by "clear and convincing proof" and "based upon conditions existing at the time of the filing of the petition."[2] If the Department seeks to take temporary custody of a child upon the filing of a

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[2]*W.Va. Code*, 49-6-2(c) [1996] states:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

petition on an "emergency" basis, without giving the parent the opportunity to be heard, *W.Va. Code*, 49-6-3(a) [1998] requires the Department to show that there exists an "imminent danger to the physical well-being of the child," and that there are no reasonably available alternatives to removing the child from the parent's custody.[3]

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[3]*W.Va. Code*, 49-6-3(a) [1998] states:

> Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible person found by the court to be a fit and proper person for the temporary care of the child pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child; and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody: Provided, That where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in said home unless the alleged abusing person is or has been precluded from visiting or residing in said home by judicial order. In a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of such child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such child or children to the department or a responsible relative which may include any parent, guardian, or other custodian. The court order shall state: (1) That continuation in the home is contrary to the best interests of the child and why; and (2) whether or not the department made reasonable efforts to preserve the family and

(continued...)

These procedural statutes must be read *in pari materia* with *W.Va. Code*, 49-6-5b(a)(3). So, while the Department has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W.Va. Code*, 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in *W.Va. Code*, 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W.Va. Code*, 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.

In our earlier opinion in this case, we stated that when a prior involuntary termination of parental rights to a sibling has occurred, the Department's "minimum threshold of evidence necessary for termination" is reduced. We held, in Syllabus Point 2 of *In re: George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999):

> Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.

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[3](...continued)

> prevent the placement or that the emergency situation made such efforts unreasonable or impossible. The order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.

Furthermore, we also held in our prior decision in this case that, when the Department brings a petition to terminate parental rights based solely upon the prior involuntary termination of parental rights of a sibling, the circuit court must allow the parties to develop any evidence regarding the actions taken by the parent or parents to alleviate the conditions surrounding the prior termination. We stated, at Syllabus Point 4:

> When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

Having closely examined the language used by the Legislature in *W.Va. Code*, 49-6-5b(a)(3), we do not believe that the Legislature intended to eliminate the Department's burden of proving the presence of current or imminent abuse or neglect of a child when the parental rights to a sibling have been previously involuntarily terminated, and our previous holding in *George Glen B.* should not be construed as eliminating the Department's burden of proof. We also do not believe that the Legislature intended to eliminate the circuit court's discretion over whether or not to terminate a party's parental rights. The presence of one of the factors outlined in *W.Va. Code*, 49-6-5b(a)(3) merely lowers the threshold of evidence necessary for the termination of parental rights. *W.Va. Code*, 49-6-5b(a)(3) does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W.Va. Code*, 49-6-2.

Having carefully examined the extensive record and testimony in this case, we conclude that the Department properly filed the instant action to investigate and develop evidence regarding whether

the appellee parents had alleviated the conditions surrounding the prior terminations of their parental rights to George's siblings. However, we also find substantial evidence that the appellees have remedied the circumstances which prompted the filing of the previous two abuse and neglect petitions. We therefore conclude that the circuit court did not err in finding that the appellees had corrected the conditions leading to the prior terminations of parental rights. The circuit court was therefore correct in holding that, because of the absence of any evidence of current or threatened abuse or neglect, George should be returned to his parents' custody.

B.
Delegation of Duties to a Private Agency

In its orders, the circuit court concluded that the Department "has become so emotionally involved in this case that they cannot be objective," and criticized the Department for "want[ing] to terminate parental rights or do nothing." To address this problem, the circuit court delegated responsibility to a private agency, Action Youth Care, to establish and carry out a plan for reunifying George with the appellee parents.[4]

The Department appeals the circuit court's orders contending that our abuse and neglect statutes, *W.Va. Code*, 49-6-1, *et seq.*, place any decisions about the safety of at-risk children solely

[4]As the circuit court stated in its August 30, 1999 order:

> Action Youth Care shall be the controlling agency in carrying out the transition of the infant from DHHR custody to the parents' custody. If there are any difference of opinion or disagreement as to appropriate treatment of the infant between DHHR and Action Youth Care, the Action Youth Care's position shall prevail.

within the discretion of the circuit court once a petition has been filed. The Department argues that the circuit court cannot delegate that authority to another agency, particularly a private company. We agree.

This Court has repeatedly stated that when a petition alleging abuse and neglect has been filed, a circuit court has a duty to safeguard the child and provide for his or her best interests. *See, e.g., State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 257-58, 496 S.E.2d 198, 207-8 (1997) (circuit courts have an obligation to consider the "best interests of the child [as] paramount," and a circuit court "cannot ... ignore its parens patriae duty to protect the best interests of [the child]."). Furthermore, circuit courts are statutorily charged with promptly ruling upon the merits of an abuse and neglect petition, *W.Va. Code*, 49-6-2 [1996], and if abuse or neglect is found, crafting a disposition to achieve an appropriate placement of an abused and/or neglected child. *W.Va. Code*, 49-6-5 [1998].

In the instant case, the circuit court concluded that George could be at risk if quickly returned to the custody of his parents, and determined that a gradual transition period was needed to give George, and the appellees, a sufficient "adjustment" period. We have previously approved of gradual changes in the custody of children. For example, in *Honaker v. Burnside*, 182 W.Va. 448, 450-51, 388 S.E.2d 322, 324 (1989), a case where there were no allegations of abuse or neglect, we approved of a gradual, 6-month transition of custody of a child between her step-father and natural father when the child's natural mother had died.

Similarly, in *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), we required the circuit court to establish a plan for the gradual shift of custody for children found to be abused and neglected to their natural father. We held, at Syllabus Point 3, that:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

Explicit in both *Honaker v. Burnside* and *James M. v. Maynard* is the principle that the circuit court, and not the Department or a private agency, bears the burden of crafting a plan for the gradual transition of custody.

We therefore hold that when a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren).[5]

Accordingly, we find that the circuit court erred in delegating to Action Youth Care all responsibility regarding the reunification of George with his parents, and reverse the circuit court's orders on this point. On remand, the circuit court must establish a concrete transition plan for reunification, and must oversee the execution of that plan.[6]

C.
Procedural Questions

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[5]Nothing prevents a circuit court from requiring an agency to submit a proposed reunification plan for the circuit court's consideration. However, the circuit court is charged with adopting and monitoring the implementation of such a proposed plan.

[6]We conclude, however, that the circuit court retains discretion in establishing how the plan will be carried out, and what agencies will act as intermediaries.

The Department argues that the circuit court erred in finding that the Department was prejudiced against the parents, and argues that the Department, and not a private agency, should retain the authority to oversee any reunification efforts. However, after examining the record, we cannot conclude that the circuit court abused its discretion in removing the Department from the oversight of George's welfare.

The Department challenges the circuit court's *de facto* granting of an improvement period to the appellee parents, arguing that an improvement period may be granted only after a party makes a motion for an improvement period. *See W.Va. Code*, 49-6-2(b) [1996]. The Department contends that the appellees never asked for an improvement period. Furthermore, the Department contends that the *de facto* improvement period is not being conducted in accordance with a family case plan[7] developed by the Department, because none was created.

In our examination of *W.Va. Code*, 49-6-5 [1998], we find that the right of a parent to an improvement period, and the Department's duty to create a case plan governing that improvement period, only arises *after* the circuit court has determined that a child has been abused or neglected. *W.Va. Code*, 49-6-5(a) states, in pertinent part:

> Following a determination . . . wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term case plan means a written document that includes, where applicable, the requirements of the family case plan . . . .

In the instant case, the circuit court specifically found no evidence of abuse or neglect by the appellees against George. Accordingly, there was no need for the creation of a case plan by the Department, nor a need for a formal improvement period. We therefore find no error on this point by the circuit court. However, as we previously discussed, the circuit court properly acted within its discretion

[7]A family case plan provides the parties with an organized, realistic means of identifying family problems and the steps to be used in resolving or lessening the problems. The Department creates a family case plan only after the circuit court grants the parent(s) an improvement period. *See, e.g., W.Va. Code*, 49-6-5 [1998]; *State ex rel. DHHR v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

in allowing for a gradual transition of custody and reunification of George with his parents. *See* Syllabus Point 3, *James M. v. Maynard*, discussed *supra*.

The Department also challenges the circuit court's failure to hold a final adjudicatory hearing within 30 days of the July 28-29, 1999 preliminary hearing.

Rule 25 of the *Rules of Procedure for Child Abuse and Neglect* [1997] requires circuit courts to hold an adjudicatory hearing within 30 days of any temporary custody order entered following the preliminary hearing. The rule states, in pertinent part:

> When a child is placed in the temporary custody of the Department or a responsible person . . . the final adjudicatory hearing shall commence within thirty (30) days of the temporary custody order entered following the preliminary hearing and must be given priority on the docket unless a preadjudicatory improvement period has been ordered. . . .

In the instant case, the circuit court entered orders on August 5 and August 30, 1999 placing George in the temporary custody of the Department (but, as previously mentioned, gave Action Youth Care complete authority over George's reunification with his parents). Rule 25 of the *Rules of Procedure for Child Abuse and Neglect* mandates that a hearing should have occurred no later than 30 days after the August 30, 1999 order. However, the circuit court stated, in its orders, that it would "set an adjudicatory hearing within 90 days to determine what future proceedings are needed." This ruling, as well as the circuit court's failure to hold an adjudicatory hearing by September 30, 1999, was in error.

Accordingly, we reverse the circuit court's finding that it was authorized to schedule a hearing 90 days after its order upon the preliminary hearing, and remand the case for further proceedings. We direct that, on remand, the circuit court is to act immediately to develop and oversee a plan for the expeditious reunification of George with his parents.

IV.
Conclusion

As set forth above, we affirm in part and reverse in part the circuit court's August 5 and August 30, 1999 orders. On remand, we direct that the circuit court act immediately to develop and oversee a concrete plan for the expeditious reunification of George with his parents.

Affirmed in part, Reversed in part, and Remanded.

208 W. Va. 463, 541 S.E.2d 341

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

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No. 27459

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November 8, 2000
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

RICHARD LEE GRAHAM,
Defendant Below, Appellant

Appeal from the Circuit Court of Mercer County
Honorable David W. Knight, Judge
Criminal Action No. 99-F-121-K

AFFIRMED

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CHIEF JUSTICE MAYNARD delivered the Opinion of the Court.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syllabus Point 1, *State v. Crockett*, 164 W.Va. 435, 265 S.E.2d 268 (1979).

2. "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

3. "The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syllabus Point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

4. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Syllabus Point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

5. "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), *modified*, Syllabus Point 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

6. "When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

7. "Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, [176] W.Va. [688], 347 S.E.2d 208 (1986), it is overruled." Syllabus Point 2, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

8. Omissions from a trial transcript warrant a new trial only if the missing portion of the transcript specifically prejudices a defendant's appeal.

Maynard, Chief Justice:

The defendant below, appellant, Richard Lee Graham, was charged with sexual abuse in the first degree of A.W.,[1] an eleven-year-old female, in violation of W.Va. Code § 61-8B-7 (1984).[2] Following a jury trial on December 10, 1998 in the Circuit Court of Mercer County, the defendant was found guilty. On appeal to this Court, he assigns several errors seeking reversal of his conviction. For the reasons that follow, we affirm.

I.

FACTS

A thumbnail sketch of the relevant facts is as follows. At trial, eleven-year-old A.W. testified that on March 27, 1998, she had disembarked the school bus and was walking the long drive way to her hilltop house when her neighbor, twenty-two-year-old Richard Lee Graham,[3] grabbed her from behind, pushed her against him, and rubbed her buttocks with his erect penis through their clothing. A.W. screamed, broke loose, and ran home. The defendant retreated toward his house at the bottom of the hill.

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[1]Consistent with our practice in cases involving sensitive matters, we use the victim's initials. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990).

[2]W.Va. Code § 61-8B-7 (1984) states in pertinent part that "[a] person is guilty of sexual abuse in the first degree when . . . [s]uch person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less."

[3]The defendant is mentally retarded and lives with his mother and siblings.

The victim's mother, Yvette G., testified concerning the events following the incident including her daughter's fear of men as a result of the attack. The investigating officer, Detective Sergeant Darrell Bailey of the Mercer County Sheriff's Department, testified that the defendant was convicted of first degree sexual abuse for an incident in 1994 in which he fondled and kissed the breasts, and maybe the vaginal area, of another 11-year-old girl.[4]

The defendant offered the testimony of his younger brother and mother that he had been at home when the incident occurred. Several friends of the defendant's family corroborated this testimony or rebutted the victim's testimony concerning what the defendant was wearing on the day of the attack.

Upon his conviction for sexual abuse in the first degree, the defendant was sentenced to one to five years in the penitentiary. The sentence was suspended, and the defendant was placed on probation for a period of five years with the conditions that he serve ninety days in the Southern Regional Jail and, upon release from jail, be placed in a residential treatment center for the treatment of his "mental and sexual deviations and that he remain in such placement until it is determined that he can return to society."

II.

DISCUSSION

[4]The defendant served time in the penitentiary for the 1995 conviction and was released on September 5, 1997.

First, the defendant avers that the circuit court erred in precluding his cross-examination of Yvette G., the victim's mother, concerning domestic violence petitions she filed against her husband, the victim's stepfather, to rebut the inference that the victim was afraid of men because of the defendant's attack.[5] Specifically, the defendant sought to cross-examine the victim's mother concerning several instances from 1996 through 1998 in which her husband, Doug G., verbally and physically abused her and made threats against her and her children. The defendant argues, *inter alia*, that the preclusion of this evidence deprived him of his right to introduce rebuttal evidence and to challenge the credibility of the witness.

This Court has stated that "[a] defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syllabus Point 1, *State v. Crockett*, 164 W.Va. 435, 265 S.E.2d 268 (1979). However, this right is not unbridled.

> Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

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[5]In July 1996 and July 1998, the victim's mother filed family violence petitions against her husband, Doug G., the victim's stepfather, in which she alleged verbal and physical abuse. At trial, the victim's mother testified that she is now separated from her husband and that divorce proceedings are pending.

Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).[6] We have opined that the trial court's decision to exclude or permit questions on cross-examination "is not reviewable except in case of manifest abuse or injustice." Syllabus Point 4, in part, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956). With these standards to guide us, we now review the first issue raised by the defendant.

On direct examination, Yvette G., A.W.'s mother, testified that since the incident with the defendant, A.W. is "terrified of men." Specifically, the victim avoids men when possible and she is withdrawn in their company. Yvette G. testified on cross-examination that she is now separated from A.W.'s stepfather, but prior to the separation A.W. was comfortable around her stepfather. At that point, defendant's counsel sought to question Yvette G. concerning domestic disputes between her and her estranged husband and was precluded from doing so by the trial court.

We find that the circuit court did not err in precluding this cross-examination. First, it seems clear that the victim's fear of men is collateral to the main issues surrounding the defendant's culpability. This evidence concerns the victim's response to the sexual abuse and is not a matter that directly weighs upon the guilt or innocence of the defendant. In other words, even if the defendant established that A.W. feared men prior to the incident of sexual abuse by the defendant, this would not have changed the defendant's guilt or innocence. Second, the domestic violence petitions filed by Yvette G. do not contradict

[6]In accord, Rule 611(b)(1) of the West Virginia Rules of Evidence states that the cross-examination of non-party witnesses "should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness."

her testimony on direct examination. The record reveals that on several instances in 1996 and 1998, A.W.'s stepfather allegedly verbally and physically abused A.W.'s mother, sometimes in front of A.W. and her siblings. From these petitions, however, it cannot be discerned whether the victim did or did not fear men as a result of her stepfather's alleged conduct. Also, nothing in these petitions directly refutes Yvette G.'s testimony on cross-examination that A.W. was comfortable around her stepfather when he lived with the family. Finally, the defendant was not completely precluded from questioning Yvette G. concerning A.W.'s relationship with her stepfather. Accordingly, we conclude that the circuit court's preclusion of the cross-examination of the victim's mother concerning domestic violence does not amount to manifest abuse or injustice.

As his second assignment of error, the defendant contends that the circuit court erred in allowing the prosecutor to argue in closing that A.W. is afraid of men because of the defendant's attack, after denying the defendant the opportunity to cross-examine Yvette G. concerning the domestic violence petitions.

In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that "[c]ounsel necessarily have great latitude in the argument of a case," *State v. Clifford*, 58 W.Va. 681, 687, 52 S.E. 864, 866 (1906) (citation omitted), and that "[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury." *State v. Davis*, 139 W.Va. 645, 653, 81 S.E.2d 95, 101 (1954), *overruled, in part, on other grounds, State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955). Accordingly, "[t]he discretion of the trial court in ruling on the

propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syllabus Point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

At the close of the trial, the prosecutor argued in support of the reliability of the victim's testimony and stated,

> Why would an eleven year old make this up and how would she know how to act after something like this happened if she had made it up? . . . How reliable is it that she did this for days. That she clung to her mother. She wouldn't go out on the porch. That she was afraid of men after that.

The defendant argues that this was unfairly prejudicial because the prosecutor remarked on the defendant's failure to challenge Yvette G.'s testimony concerning A.W.'s fear of men. According to the defendant, the prosecutor also unfairly stated that the only reason for A.W.'s fear of men is the defendant's sexual abuse of the victim.

"A prosecutor may argue all reasonable inferences from the evidence in the record." Syllabus Point 7, in part, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988). It is clear that the comments at issue constitute a reasonable inference from the evidence adduced from the testimony of Yvette G. Also, a prosecutor is not prohibited from commenting on the credibility of witnesses.[7] *See State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988). Finally, this Court has carefully read the prosecutor's closing argument and we find no references to the defendant's failure to challenge Yvette G.'s

[7]It is improper, however, for a prosecutor to assert his personal opinion as to the credibility of a witness. Syllabus Point 8, *State v. England*, *supra*.

testimony concerning A.W.'s fear of men, nor do we find the statement that there could be no other reason for the victim's fear but the defendant's sexual abuse. Accordingly, we believe that the prosecutor's comments do not result in prejudice or manifest injustice to the defendant. We conclude, therefore, that the circuit court did not abuse its discretion in allowing the comments.

Next, the defendant complains that the circuit court erred in precluding the defendant from cross-examining Detective Bailey concerning his lack of investigation in order to show bias, presumption of guilt, and lack of any attempt to corroborate the victim's allegation.

A review of the trial transcript reveals that defense counsel questioned Detective Bailey at length concerning the manner in which he conducted his investigation including Detective Bailey's failure to examine the place where the sexual abuse occurred, the fact that he did not ask the victim to identity the defendant from a photo array, his failure to determine whether there were any other witnesses at the defendant's residence at the time of the offense, and his failure to ask the defendant's mother if she had been at the house during the time period in which the sexual abuse occurred. In light of this, we find no merit to this assignment of error.

The fourth issue raised by the defendant is whether the circuit court improperly allowed evidence of the defendant's prior conviction. The record reveals that in a pre-trial conference order dated June 15, 1998, the circuit court set the trial date for September 9, 1998, and ordered the State to file

requests, pre-trial motions, and notices by June 29, 1998. On August 26, 1998, the State filed its notice of intent,

> to use evidence of Defendant's prior conviction on January 6, 1995 in State of West Virginia v. Richard Graham, Case Number 94-F-172 and the circumstances attendant to that conviction, pursuant to Rule 404(b) . . . to prove Defendant's lustful disposition to children, his motive, opportunity, intent, preparation, plan, knowledge, identity, and/or absence of mistake or accident.

On August 27, 1998, the defendant filed an objection to the use of this evidence because of the untimeliness of the notice, the State's previous failure to notify the defendant of the use of the evidence in response to the defendant's motion for discovery and inspection, and the State's failure to state witnesses, facts, or evidence relative to this evidence. The trial was ultimately continued until December 10, 1998. On the morning of the trial, both sides argued the issue, and the circuit court admitted the evidence for the purpose of showing the defendant's lustful disposition.

This Court has stated:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va. R.Evid. 404(b).

Syllabus Point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) [of the West Virginia Rules of Evidence] involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is

> sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W.Va. 294, 310-311, 470 S.E.2d 613, 629-630 (1996) (footnote and citations omitted).

First, we address the timeliness of the State's disclosure of its intent to use the Rule 404(b) evidence.

> When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), *modified*, Syllabus Point 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).[8] The instant case does not concern non-disclosure but rather disclosure outside the original time frame mandated by the circuit court. Despite this untimeliness, the defendant still received notice of the State's intent to use the evidence approximately three months and fourteen days prior to trial. Further, the defendant fails to explain how he was prejudiced by

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[8]"Although *Grimm* was written prior to the adoption of the West Virginia Rules of Criminal Procedure, the standard for determining whether failure to comply with court-ordered discovery is fatal remains the same as that which we announced in *Grimm*." *State v. Gary F.*, 189 W.Va. 523, 527 n. 4, 432 S.E.2d 793, 797 n. 4 (1993). "The modification [of *Grimm*] . . . does not affect the substance of the standard; merely its form." *Id.*

the untimely disclosure of the evidence. Therefore, we conclude that the notice was sufficiently timely to prevent surprise and to give the defendant the opportunity to prepare his defense.

Concerning the sufficiency of the notice, this Court has said:

> When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994). The text of the notice specifically contains the style, the date, and the case number of the defendant's prior conviction. It also states that the purpose of the evidence is, *inter alia*, to prove the defendant's lustful disposition toward children. This was sufficient to give the defendant notice of both the nature and the purpose of the Rule 404(b) evidence.

As for the admission of the evidence, it is clear that there is sufficient evidence to show the other acts occurred. Also, we believe the trial court correctly found the evidence admissible for a legitimate purpose. In Syllabus Point 2 of *State v. Edward Charles L.*, *supra*, we stated:

> Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to

> specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, [176] W.Va. [688], 347 S.E.2d 208 (1986), it is overruled.

Finally, we find that the circuit court did not abuse its discretion in concluding that the other acts evidence is more probative than prejudicial under Rule 403.

Next, the defendant claims that the record does not reflect that a proper limiting instruction was given concerning the admission of the Rule 404(b) evidence.[9] We disagree. The trial transcript shows that the circuit court gave the following instruction when the Rule 404(b) evidence was admitted.

> I'm going to give you what is called precautionary instructions that tell you how to treat the evidence you've just received. The Court instructs the jury that it has heard evidence that the Defendant was previously convicted of sexual abuse in the 1st degree against an 11 year old girl under somewhat similar circumstances. Such evidence of a collateral crime is not to be considered as proof of the Defendant's guilt on the present part but may be considered in deciding whether the Defendant had a (unclear) disposition for children and that his actions were intentional and were done (unclear).

In the jury charge contained in the record, the above instruction is recorded in its entirety. In place of the first "unclear" is the phrase "lustful disposition toward children." The second "unclear" is replaced with the phrase, "for his sexual gratification." Superimposed on this typed instruction is the trial judge's handwriting which states that the instruction was "[r]ead to Jury at 1:28 p.m. on 12/10/98 in trial of State v. Richard

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[9]The defendant's brief is inconsistent on this point. On the previous page the defendant states that "[c]ounsel believes the Court probably did give an adequate instruction."

Graham 98-FE 121 1C." This notation is followed by the trial judge's signature. We conclude from this that the circuit court gave an adequate limiting instruction.

Last, the defendant asserts that the trial transcript is so incomplete as to deny him a record for his appeal. Specifically, the defendant complains of the numerous times in which the trial transcript contains the word "unclear" in place of what was actually said at trial. The State agrees that the transcript contains a disturbing number of unclear passages,[10] but avers that there is no identifiable error or prejudice shown by the defendant requiring reversal of his conviction. We agree.

Although we have not specifically addressed this issue, other courts have held that "omissions from a trial transcript only warrant a new trial if 'the missing portion of the transcript specifically prejudices [a defendant's] appeal.'" *U.S. v. Brown*, 202 F.3d 691, 696 (4th Cir. 2000), *quoting United States v. Gillis*, 773 F.2d 549, 554 (4th Cir. 1985); *United States v. Huggins*, 191 F.3d 532, 536 (4th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1968, 146 L.Ed.2d 799 (2000). *See also State v. Clark*, 644 So.2d 1130, 1131 (La.App. 4 Cir. 1994), *writ denied*, 651 So.2d 287 (La. 1995) ("a defendant is not necessarily entitled to have his conviction reversed just because there is no trial transcript available for review . . . . [but] where a defendant's right of review was prejudiced . . . the defendant was given relief"). This is in accord with our own law. In *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987), the defendant claimed that his due process rights were violated because more than two years elapsed before his transcript was supplied to him so that he could complete his appeal. This Court

[10]According to the State's brief, the 105 page trial transcript contains 123 unclear passages.

disagreed, explaining that "we have allowed him his appeal, and he has shown no prejudice by the delay of two years." *Mayle,* 178 W.Va. at 30, 357 S.E.2d at 223. Despite the regrettable number of unclear passages, we believe that the transcript in no way prejudices the defendant's right to a meaningful appeal. This Court had no difficulty in assessing the defendant's alleged errors in light of the record.

III.

CONCLUSION

For the foregoing reasons, we find no merit in the assignments of error raised by the defendant. Accordingly, the judgment of the Circuit Court of Mercer County is affirmed.

Affirmed.

No. 27459 - State of West Virginia v. Richard Lee Graham

FILED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur because the evidence is strong that this defendant has serious physical and psychological problems and needs care and intensive treatment -- both to protect society, and to protect the defendant. The circuit judge's commendable creative sentence is a serious and appropriate step in this direction, and I simply would not tamper with that sentence.

However, in considering the trial that led to the defendant's appropriate sentence, I write separately to note my continuing dismay at the erosion of the integrity of our criminal processes, an erosion that the majority blindly approves.

In a criminal trial, evidence of "prior bad acts" is usually so unfairly prejudicial that we don't let it go before the jury, unless there's a special reason for its admission under *W.Va. Rule of Evidence* 404(b) -- for example, to show plan or motive, etc. As I stated in my dissent in *State v. McIntosh*, ___ W.Va. ___, ___ S.E.2d ___, No. 26849, 2000 WL 966149, July 14, 2000:

> Where a defendant *admits* touching a child on their sexual areas, but *denies* that the touching was for a sexual purpose, other instances of clearly non-accidental sexual touching might be admissible under 404(b) -- to show the defendant's actual plan or motive. That appears to be the case in the *Yager* case cited by the majority, where the court held that such evidence was admissible "to establish that it was no accident that [the defendant] touched the victim's penis." But in the instant case, the defendant *denied* all touching, so his motive was not a separate issue. Under these circumstances "other crimes" evidence should not be admissible under 404(b).

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> One could write a dissertation on how Rule 404(b), *McGinnis* [193 W.Va. 147, 455 S.E.2d 516 (1994)], and now *Edward Charles L.* [183 W.Va. 641, 398 S.E.2d 123 (1990)] have become a "runaway train" in some of our courts, when judges are tempted to abandon their proper gatekeeper role by over-zealous prosecutors. We have moved far away from the original purpose for permitting such evidence. The standard now seems to be: Will it help the prosecutor?

In most cases, as soon as a jury hears about a defendant's prior sex offense, a defendant is dead meat. Why even have a trial? I await the day when this Court can stops this runaway train. We can and will apply common sense to this currently confused area of law. When that happens, criminal trials in sex offense cases will be conducted fairly and in accord with the rules of evidence.

231 W. Va. 38, 743 S.E.2d 346

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 12-0046

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE GRANDPARENT VISITATION OF A.P.

Appeal from the Circuit Court of Hancock County
The Honorable James P. Mazzone, Judge
Civil Action No. 10-D-161

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: April 10, 2013
Filed: May 20, 2013

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

3. "The Grandparent Visitation Act, *W.Va.Code* § 48–10–101 *et seq*. [2001], is the exclusive means through which a grandparent may seek visitation with a grandchild." Syl. Pt. 1, *In re Hunter H.*, No. 12-0173, ___ W.Va. ___, ___ S.E.2d ___, 2013 WL 1113367 (W.Va. filed March 14, 2013).

4. "The best interests of the child are expressly incorporated into the Grandparent Visitation Act in *W.Va. Code* §§ 48-10-101, 48-10-501, and 48-10-502 [2001]."

Syl. Pt. 2, *In re Hunter H.*, No. 12-0173, ___ W.Va. ___, ___ S.E.2d ___, 2013 WL 1113367 (W.Va. filed March 14, 2013).

5. "A trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to W.Va. Code, 48-2-15(b)(1) [1986] or W.Va. Code, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syl. Pt. 1, *In re Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987).

Per Curiam:

This is an appeal by J.P. (hereinafter "the petitioner")[1] from a final order of the Circuit Court of Hancock County, West Virginia, awarding grandparent visitation to S.R. (hereinafter "the respondent"). The petitioner contends that the circuit court erred in awarding grandparent visitation rights to the respondent. Upon thorough review of the appendix record, briefs, arguments of counsel, and applicable precedent, this Court reverses the decision of the lower court and remands this matter for entry of an order denying grandparent visitation rights to the respondent.

I. Factual and Procedural History

The petitioner's daughter, A.P., was born on May 8, 2009.[2] For the first two and one-half months of A.P.'s life, she and the petitioner lived with the petitioner's mother, the respondent S.R. During that portion of A.P.'s infancy, the respondent interacted with A.P. on a daily basis and provided extensive childcare.[3] On July 23, 2009, the petitioner and the child moved out of the respondent's home, and the child and the respondent continued

[1]Due to the sensitive nature of this case, this Court uses only the initials of the affected parties. *See In re D.P.*, 230 W.Va. 254, 737 S.E.2d 282 (2012).

[2]The petitioner is unmarried. The record indicates that the child's father lives in Florida and has minimal contact with the child, with no court-ordered visitation.

[3]The respondent was employed as a teacher; thus, she was able to provide childcare to A.P. during her vacation time in the summer of 2009.

to have several visits per week and multiple overnight visits between July 2009 and December 2009. The relationship between the petitioner and the respondent deteriorated by December 2009, and visitation gradually decreased thereafter. In April 2010, the petitioner prohibited further visitation between the child and the respondent.

The respondent filed a petition for grandparent visitation on June 23, 2010. Subsequent to a hearing, the family court directed the petitioner and the respondent to meet for lunch on certain days each month. The family court held another hearing on January 25, 2011, and entered an August 4, 2011, order awarding grandparent visitation to S.R. In that order, the family court found that the respondent had been a significant caretaker for the first several months of the child's life and had formed a bond with the child. Further, the family court found that the best interests of the child would be served by a continuation of the relationship with the respondent. The family court ordered visitation as follows: once a month for five hours; a period of time on Easter weekend; four hours of visitation the day before Thanksgiving; four hours every December 23; and three hours near the child's birthday.

The family court, acknowledging concerns the petitioner had raised regarding the respondent's negativity and general disparaging comments,[4] ordered the respondent to refrain from making any negative comments within the hearing distance of the child. The family court also held that the petitioner had the right to be present during all periods of visitation. The petitioner appealed that family court's decision to the circuit court, which affirmed the family court's order on December 6, 2011. The petitioner now appeals to this Court.

II. Standard of Review

This Court's standard of review for appeals arising from family court decisions is as follows:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004). In syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), this Court also

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[4]The family court noted that the petitioner and the respondent disagreed over the petitioner's significant other and that the respondent had made disparaging comments in the presence of the child. In weighing the opposing interests, the family court observed that the respondent had spent every day with the child while the petitioner and the child resided with the respondent. The family court also noted that family members had testified that the respondent had formed a bond with the child and had provided significant childcare.

stated that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."

III. Discussion

This Court has specified that "[t]he Grandparent Visitation Act, W.Va. Code § 48-10-101 et seq. [2001], is the exclusive means through which a grandparent may seek visitation with a grandchild." Syl. Pt. 1, *In re Hunter H.*, No. 12-0173 ___ W.Va. ___, ___ S.E.2d ___, 2013 WL 1113367 (W.Va. filed March 14, 2013). In syllabus point two of *Hunter*, this Court held that "[t]he best interests of the child are expressly incorporated into the Grandparent Visitation Act in W.Va. Code §§ 48-10-101, 48-10-501, and 48-10-502 [2001]." Moreover, this Court has explained that paramount consideration shall be accorded to the best interests of the child in an analysis of a grandparent visitation request. This Court identified that concern in syllabus point one of *Petition of Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987), as follows: "A trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to W.Va. Code, 48-2-15(b)(1) [1986] or W.Va. Code, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved."

The statutory foundation for evaluation of grandparent visitation petitions is enunciated in West Virginia Code § 48-10-501 (2009). That statute provides that "[t]he

circuit court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship." Factors to be considered in making a decision regarding grandparent visitation are listed in West Virginia Code § 48-10-502 (2009), as follows:

> (1) The age of the child;
>
> (2) The relationship between the child and the grandparent;
>
> (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
>
> (4) The time which has elapsed since the child last had contact with the grandparent;
>
> (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
>
> (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
>
> (8) The good faith of the grandparent in filing the motion or petition;
>
> (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;

> (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents;
>
> (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence;
>
> (12) The preference of the parents with regard to the requested visitation; and
>
> (13) Any other factor relevant to the best interests of the child.

West Virginia Code § 48-10-702(b) (2009) creates a rebuttable presumption that a grandparent, filing a petition pursuant to West Virginia Code § 48-10-402 (2009),[5] is not entitled to court-ordered visitation privileges where the parent through whom the grandparent is related to the grandchild has custody of the child. Specifically, West Virginia Code § 48-10-702(b) provides as follows:

> If a petition is filed pursuant to section 10-402 [§ 48-10-402], there is a presumption that visitation privileges need not be extended to the grandparent if the parent through whom the grandparent is related to the grandchild has custody of the child, shares custody of the child, or exercises visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose. This presumption may be rebutted by clear and convincing evidence that an award of grandparent visitation is in the best interest of the child.

[5]West Virginia Code § 48-10-402 applies, as in the present case, when a proceeding for divorce, custody, legal separation, annulment, or establishment of paternity is not pending.

In reconciling the valid competing interests ensconced within a grandparent visitation determination, significant weight must be accorded to a fit parent's wishes. This principle is encompassed within West Virginia Code § 48-10-702(b), as quoted above, and is premised upon the recognition that a fit parent having custody of a child possesses distinct rights regarding the selection of individuals with whom that child may be affiliated. This principle was the determining factor in *Troxel v. Granville*, 530 U.S. 57 (2000), in which the United States Supreme Court held that a Washington state statute violated the substantive due process rights[6] of a parent by allowing visitation rights, over parental objection, even where such visitation served the best interests of the child. *Id.* at 61. The Supreme Court held that the Washington statute unconstitutionally infringed upon a parent's rights by failing to accord appropriate deference to "a parent's decision that visitation would not be in the child's best interest." *Id*. at 67. The *Troxel* Court further explained that

> so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

[6]The *Troxel* Court stated that "[t]he liberty interest at issue in this case - the interest of parents in the care, custody and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65.

Id. at 68-69. The *Troxel* Court, with Justice O'Connor writing for the plurality, held that some "special weight"[7] must be accorded to the parents' wishes concerning visitation, reasoning as follows:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Id. at 70.

In discussing the rationale of *Troxel,* this Court has observed that the Supreme Court "instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis." *Cathy L.M. v. Mark Brent R.,* 217 W.Va. 319, 327-28, 617 S.E.2d 866, 874-75 (2005) Rather, the evaluating court "must also consider and give significant weight to the parents' preference,

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[7]Although *Troxel* does not define "special weight," state courts attempting to interpret and apply *Troxel* have reasoned that "special weight" indicates considerable deference. In *In re M.W.*, 292 P.3d 1158 (Colo. App. 2012), for instance, the Colorado Court of Appeals explained that "[g]iving special weight means that the presumption favoring the parent's decision can be rebutted only by clear and convincing evidence that granting parental responsibilities to the nonparent is in the child's best interests." *Id*. at 1161. Interestingly, that is the same standard statutorily mandated by this state in West Virginia Code § 48-10-702(b). As the Court of Appeals of Wisconsin aptly noted, creating such a rebuttable presumption is "the legal means" of according special weight to the parent's wishes. *In re Nicholas L.*, 731 N.W.2d 288, 293 (Wis. Ct. App. 2007).

thus precluding a court from intervening in a fit parent's decision making on a best interests basis." *Id.*

In *State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 551 S.E.2d 674 (2001), this Court indicated that it was not identifying "the amount of weight that should attach to the factor of parental preference. . . ." *Id*. at 763, 551 S.E.2d at 685. The *Brandon* Court noted, however, that "in light of the *Troxel* decision it is clear that 'the court must accord at least some special weight to the parent's own determination' provided that the parent has not been shown to be unfit." *Id.* (quoting *Troxel*, 530 U.S. at 70).

In the present case, the petitioner contends that the family court and circuit court erred in failing to properly consider specific statutorily-prescribed factors relevant to this case, including the young age[8] of the child; the significance of the limited time the child lived with the respondent; and the extent of the child's relationship[9] with the respondent. The petitioner further asserts that the lower tribunals erred by finding that the respondent had

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[8]*See Cathy L.M.* 217 W.Va. at 326, 617 S.E.2d at 873 (stating that "young age militates against the requested visitation").

[9]*See In re Alyssa W. and Sierra H.*, 217 W.Va. 707, 711, 619 S.E.2d 220, 224 (2005) (finding that "a close emotional bond generally takes several years to develop").

rebutted the statutory presumption against awarding visitation privileges and argues that proper weight was not accorded to her wishes, as a fit parent.[10]

This Court has recognized that "[t]he profound benefits of a child's relationship with grandparents have been deservedly acclaimed." *Cathy L.M.*, 217 W.Va. at 327, 617 S.E.2d at 874. In that vein, this Court explained as follows in *Nearhoof*:

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

178 W.Va. at 364, 359 S.E.2d at 592 (quoting *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199, 204-05 (1975)).

Perhaps in recognition of these immeasurable benefits flowing from a grandparent/grandchild relationship, the family court in the present case attempted to

[10]It is uncontested that the petitioner is a fit parent.

structure a schedule of visitation which would foster reconciliation between the petitioner and the respondent. These attempts were regrettably unsuccessful, and this Court is now presented with the question of whether the lower tribunals erred in analyzing the statutory factors, applying the statutory presumption against grandparent visitation, and according appropriate weight to the fervent wishes of the fit parent in this case. The petitioner testified extensively regarding her concerns that the respondent's negativity will have an adverse impact upon her daughter. She expressed her strong opposition to subjecting her child to those detrimental influences. While this Court acknowledges that a judicial tribunal cannot, with absolute certainly, assess the degree to which the petitioner's concerns may be unwarranted, the petitioner's status as a fit parent is uncontested, and her expressed preferences regarding visitation must consequently be accorded special weight in the determination of the appropriateness of court-ordered grandparent visitation.[11]

The respondent contends that the petitioner's wishes were given appropriate weight, according to the requirements of *Troxel*. She further contends that she successfully rebutted the statutory presumption against an award of grandparent visitation rights by presenting clear and convincing evidence that visitation was in the best interests of the child, based upon the substantial relationship she had developed with the child. Additionally, the

[11]"Despite the recognition of the importance of relationships between children and grandparents and continuity of relationships generally, the constitutional admonitions of *Troxel* must be observed." *Cathy L.M.*, 217 W.Va. at 327, 617 S.E.2d at 874.

respondent argues that the lower tribunals properly weighed the young age of the child and that such consideration was the basis for the court's decision to grant limited visitation to her.

This Court's resolution of the matter must be premised upon the directives of *Troxel*, the statutory presumption against grandparent visitation, and the factors enumerated for consideration in grandparent visitation matters. The mandates of *Troxel* require that the wishes of the petitioner, as a fit parent presumed capable of rational choices concerning the relationships to be enjoyed by her child, be accorded special weight.[12] As the Supreme Court stated in *Troxel*, there is "a presumption that fit parents act in the best interest of their children." 530 U.S. at 69.

Moreover, West Virginia Code § 48-10-702(b) creates a presumption against grandparent visitation under the circumstances of the present case, rebuttable only upon a

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[12]This Court is mindful that conflicts do occasionally arise among family members. As the Supreme Court of Illinois concisely stated in *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002), however, "this human conflict has no place in the courtroom." *Id*. at 8. "Parents have the constitutionally protected latitude to raise their children as they decide, even if these decisions are perceived by some to be for arbitrary or wrong reasons." *Id.* This liberty interest "mandates that parents - not judges - should be the ones to decide with whom their children will and will not associate." *Id.* In this vein, we must acknowledge *Troxel's* admonition that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73. There is often a wide chasm between what a court might perceive as morally right and what the law permits that court to compel.

demonstration by clear and convincing evidence that visitation is in the best interests of the child. The best interests factor is also included in the factors enumerated in West Virginia Code § 48-10-502. The parties introduced evidence regarding the factors most relevant to this case. Those included the young age of the child; the relationship between the child and the respondent; the relationship between the petitioner and the respondent; the parental preference; the respondent's prior duties as a caretaker for the child; and the period of time the child and the petitioner resided with the respondent.

It is apparent that the young age of the child and the brevity of the period in which the child resided in the respondent's home militate against a finding that visitation is to be mandated. Although the petitioner and A.P. spent a significant portion of A.P.'s first year of life with the respondent, the petitioner moved out of the respondent's home when A.P. was two and one-half months old. The respondent and A.P. continued to maintain a substantial relationship until the petitioner decided to terminate further visitation privileges when the child was approximately eleven months old. The respondent presented testimony regarding the substantial relationship she had enjoyed with the child, including such things as general childcare, play, and reading. However, considering the statutory factors, the statutory presumption against grandparent visitation, and the requirements of *Troxel*, this Court concludes that the lower tribunals erred in finding that the respondent rebutted the

presumption by clear and convincing evidence that an award of grandparent visitation is in the best interest of the child

Based upon the foregoing, this Court reverses the order of the lower court and remands this matter for entry of an order denying grandparent visitation rights to the respondent.

Reversed and remanded, with directions.

217 W. Va. 319, 617 S.E.2d 866

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

No. 31864

FILED
May 11, 2005
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: GRANDPARENT VISITATION OF
CATHY L. (R.) M.,
Petitioner Below, Appellee,

v.

MARK BRENT R. AND CARLA ANN R.,
Respondents Below, Appellants

Appeal from the Circuit Court of Harrison County
The Honorable Thomas A. Bedell, Judge
Case No. 03-D-187-4

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: March 23, 2005
Filed: May 11, 2005

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "A trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to *W.Va.Code*, 48-2-15(b)(1) [1986] or *W.Va.Code*, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syl. Pt. 1, *Petition of Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987).

3. "A court, in defining a parent's right to visitation, is charged with giving paramount consideration to the welfare of the child involved." Syl. Pt. 1, *Ledsome v. Ledsome*, 171 W.Va. 602, 301 S.E.2d 475 (1983).

4. "'The Legislature, when it enacts legislation, is presumed to know its prior enactments.' Syllabus Point 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)." Syl. Pt. 5, *Pullano v. City of Bluefield*, 176 W.Va. 198, 342 S.E.2d 164 (1986).

5. "As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature." Syl. Pt. 2, *State ex rel. Dept. of Health and Human Resources v. West Virginia Pub. Employees Ret. Sys.*, 183 W.Va. 39, 393 S.E.2d 677 (1990).

6. "The West Virginia Grandparent Visitation Act, West Virginia Code §§ 48-2B-1 to -12 (1998) (Repl. Vol. 1999), by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control over his/her child[ren] without undue interference from the state." Syl. Pt. 3, *State ex rel. Brandon L. v. Moats,* 209 W.Va. 752, 551 S.E.2d 674 (2001).

Per Curiam:

This is an appeal by Mark and Carla R.[1] (hereinafter "Appellants") from an order of the Circuit Court of Harrison County granting grandparent visitation rights to Cathy R. M. (hereinafter "Appellee") and her husband, Robert M. The lower court held that grandparent visitation would not substantially interfere with the parent-child relationship and would serve the best interests of the child, Cassidy R. The Appellants, as the adoptive parents of Cassidy R., appeal the lower court's decision, contending that grandparent visitation was erroneously granted and that the best interests of Cassidy R. are not served by visitation with Cassidy's biological grandmother, Appellee Cathy R. M. Upon thorough review of the record, briefs, arguments of counsel, and applicable precedent, this Court reverses the decision of the lower court and remands this matter for entry of an order denying grandparent visitation rights to the Appellee and her husband.

I. Factual and Procedural History

Cassidy R. was born on February 13, 1999, to biological parents Jasper R. and Shanna R. Cassidy's biological father, Jasper R., is the Appellee's son. The record reflects

[1]As in all sensitive matters involving the rights of children, we use only initials in reference to the last names of the individuals involved. *See In the Matter of Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

that the Appellee frequently visited with Cassidy during the first two and one-half years of Cassidy's life, and Cassidy resided with the Appellee during many weekends and holidays during that period of time. In September 2001, Jasper R. and Shanna R., as biological parents, consented to the adoption of Cassidy by the Appellants. Appellant Mark R. is the biological uncle of Jasper R. and the biological great-uncle of Cassidy.[2] The decree of adoption was entered by the Circuit Court of Harrison County on May 23, 2002. While the adoption was pending, the Appellants apparently determined that it was not in Cassidy's best interests to continue a relationship with the Appellee. Thus, the Appellants did not permit the Appellee to have any contact with Cassidy after April 2002.

In April 2003, the Appellee filed a petition with the Family Court of Harrison County seeking grandparent visitation based upon her biological relationship to Cassidy, the fact that she had been a significant care giver to Cassidy prior to the adoption proceedings, and the assertion that it would be in Cassidy's best interests to restore a relationship with the Appellee. Guardian ad litem Ashley A. Lawson was appointed on October 21, 2003, and she submitted her report on December 4, 2003. In that report, Ms. Lawson recommended that the Appellants, as adoptive parents, should "have the sole determination of who [the adopted child] may spend time with. . . ." Ms. Lawson recommended that grandparent visitation rights be denied.

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[2]Jasper R.'s father, Bob R., is Mark R.'s brother. Appellee Cathy R. M. (Jasper's mother) is no longer married to Bob R. and is now married to Robert M.

On January 20, 2004, the Family Court Judge entered an order granting grandparent visitation rights to the Appellee. The Appellants appealed this ruling to the lower court, and that appeal was denied without hearing on February 17, 2004.[3] They now appeal to this Court, contending that the family court erred in finding that visitation was in the best interests of Cassidy; that the family court unjustly interfered with the rights of the adoptive parents in ordering visitation over their objection; that the family court failed to apply the presumption that visitation privileges need not be granted; that the family court abused its discretion by failing to follow the guardian ad litem's recommendations; and that the Appellee failed to justify grandparent visitation.

II. Standard of Review

This Court's review of the issues presented is *de novo*. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

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[3]Guardian ad litem Ashley Lawson relocated her legal practice to the state of Kentucky, and Guardian ad litem D. Andrew McMunn was thereafter appointed. Mr. McMunn has filed a brief with this Court, asserting one assignment of error. Mr. McMunn asserts that the family court abused its discretion "by awarding grandparent visitation to Appellee when, pursuant to the factors set forth in W. Va. Code §48-10-502, the visitation was not in the best interests of [Cassidy]."

III. Discussion

At common law, "grandparents possessed no legal right to custody or visitation of a grandchild over the parent's objection. Syl. pt. 1, *Brotherton v. Boothe*, 161 W.Va. 691, 250 S.E.2d 36 (1978); *Jeffries v. Jeffries*, 162 W.Va. 905, 907, 253 S.E.2d 689, 691 (1979)." *Petition of Nearhoof*, 178 W.Va. 359, 361-62, 359 S.E.2d 587, 589-90 (1987) (footnote omitted). In 1980, the West Virginia Legislature enacted West Virginia Code § 48-2B-1 (1980) (Repl. Vol. 1992), the precursor to the statute which provides guidance in the present case. The 1980 grandparent visitation statute provided for grandparent visitation with the child of a deceased child of such grandparent. The *Nearhoof* Court recognized that this statute "change[d] the common law rule in West Virginia as to the right of grandparents' visitation." 178 W.Va. at 362, 359 S.E.2d at 590.

This Court explained as follows in syllabus point one of *Nearhoof*: "A trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to *W.Va. Code*, 48-2-15(b)(1) [1986] or *W.Va. Code*, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved." This requirement has been sustained through all subsequent alterations to the grandparent visitation statute and is predicated upon the guiding principle that "[a] court, in defining a parent's right to visitation, is charged with giving paramount consideration to the welfare of the child involved." Syl. Pt. 1, *Ledsome v. Ledsome*, 171 W.Va. 602, 301 S.E.2d 475 (1983).

In *Nearhoof*, this Court encountered the issue of whether the grandparent visitation act, as written at that time, conflicted with the adoption statutes. The *Nearhoof* Court found that the principles expressed in the adoption and visitation statutes were not at variance with one another and, in so holding, observed that "had the legislature intended the adoption statute to limit the statute providing for grandparents' visitation, the statutes could have reflected that intention." 178 W.Va. at 364, 359 S.E.2d at 592 (citation omitted).

In addressing the parameters of the statutory authority granted by the grandparent visitation statute in *Elmer Jimmy S. v. Kenneth B.*, 199 W.Va. 263, 483 S.E.2d 846 (1997), this Court found that despite the Legislature's failure to include any reference to a situation in which a grandparent seeks visitation rights subsequent to the termination of parental rights, the statute afforded circuit courts jurisdiction to consider such grandparent visitation requests. This Court stated:

> While W. Va.Code § 48-2B-1 *et seq*. is designated as the exclusive provision for grandparent visitation, it is silent with regard to grandparent visitation when the parental rights of the grandparent's child (the parent of the grandchild) have been terminated. In addition, we are not aware of any statute expressly prohibiting grandparent visitation under such circumstances. Thus, following the Court's reasoning in *Nearhoof*, we believe that had the legislature intended the termination of parental rights to affect the visitation rights of the corresponding grandparent, the statute could have reflected that intention.

199 W.Va. at 266-67, 483 S.E.2d at 849-50 (citation omitted).

This Court again emphasized the best interests analysis in *Mary Jean H. v. Pamela Kay R.*, 198 W.Va. 690, 482 S.E.2d 675 (1996). This Court explained that "while the statute affords certain protections to the grandparent, it is in no measure a guarantee of the right to visitation." 198 W.Va. at 693, 482 S.E.2d at 678. "The best interests of the child must be given greatest priority, and the rights of the child are superior to those of the grandparent seeking visitation." *Id.* at 693, 482 S.E.2d at 678.

The grandparent visitation act was substantially enhanced in 2001, and it is that most recent version of the statute that applies in the present case. The best interests of the child issue is addressed in West Virginia Code § 48-10-101 (2001) (Repl. Vol. 2004), providing as follows:

> The Legislature finds that circumstances arise where it is appropriate for circuit courts of this state to order that grandparents of minor children may exercise visitation with their grandchildren. The Legislature further finds that in such situations, as in all situations involving children, the best interests of the child or children are the paramount consideration.

Further, in § 48-10-102 (2001) (Repl. Vol. 2004), the Legislature explicitly states: "It is the express intent of the Legislature that the provisions for grandparent visitation that are set forth in this article are exclusive." Section 48-10-203 (2001) (Repl. Vol. 2004) thereafter defines grandparent as follows: "'Grandparent' means a biological grandparent, a person married or previously married to a biological grandparent, or a person who has previously been granted custody of the parent of a minor child with whom visitation is sought."

West Virginia Code § 48-10-501 (2001) (Repl. Vol. 2004) provides that "[t]he circuit could shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship." Factors to be considered in making a determination regarding grandparent visitation are listed in West Virginia Code § 48-10-502 (2001) (Repl. Vol. 2004), as follows:

> (1) The age of the child;
>
> (2) The relationship between the child and the grandparent;
>
> (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
>
> (4) The time which has elapsed since the child last had contact with the grandparent;
>
> (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
>
> (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
>
> (8) The good faith of the grandparent in filing the motion or petition;

> (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;
>
> (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents;
>
> (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence;
>
> (12) The preference of the parents with regard to the requested visitation; and
>
> (13) Any other factor relevant to the best interests of the child.

West Virginia Code § 48-10-702 (2001) (Repl. Vol. 2004) provides guidance regarding the level of proof required in a case such as the present one, in which an action is not pending for divorce, custody, legal separation, annulment, or the establishment of paternity. That statute provides as follows:

> (a) If a petition is filed pursuant to section 10-402 [§ 48-10-402] when the parent through whom the grandparent is related to the grandchild does not: (1) Have custody of the child; (2) share custody of the child; or (3) exercise visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose, the grandparent shall be granted visitation if a preponderance of the evidence shows that visitation is in the best interest of the child.
>
> (b) If a petition is filed pursuant to section 10-402 [§ 48-10-402], there is a presumption that visitation privileges need not be extended to the grandparent if the parent through whom the grandparent is related to the grandchild has custody of the child, shares custody of the child, or exercises visitation privileges with the child that would allow participation in the

> visitation by the grandparent if the parent so chose. This presumption may be rebutted by clear and convincing evidence that an award of grandparent visitation is in the best interest of the child.

The Appellants in the present case did not challenge the underlying decision on the issue of the standing of a biological grandmother to seek grandparent visitation rights with a biological grandchild who has been adopted. In their appeal, the Appellants state: "In this case the natural Grandmother filed a Petition for Visitation with the adopted child, which appears to be within the statutory guidelines." This Court addressed this issue of grandparents' standing to seek visitation under this state's statutory scheme in *State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 551 S.E.2d 674 (2001). In that case, this Court evaluated the rights of paternal grandparents to visit a biological grandchild subsequent to adoption by the child's step-father and held that "there are no limitations on when a petition may be filed by a grandparent . . ." and that "the act does not proscribe consideration of petitions seeking visitation to only pre-adoption situations." 209 W.Va. at 756, 551 S.E.2d at 678 (footnote omitted). The Court found that the adoption statutes did not negate the visitation rights granted in the grandparent visitation statute, recognizing this Court's prior decision in *Nearhoof* regarding the potential conflict between adoption and visitation statutes and also acknowledging the Legislature's specifically articulated intention that the "grandparent Act, by its own express declaration, is the exclusive statutory scheme for resolving issues of grandparent visitation." 209 W.Va. at 755, 551 S.E.2d at 677.

Significantly, it is well established that "[t]he Legislature, when it enacts legislation, is presumed to know its prior enactments.' Syllabus Point 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)." Syl. Pt. 5, *Pullano v. City of Bluefield*, 176 W.Va. 198, 342 S.E.2d 164 (1986). "As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature." Syl. Pt. 2, *State ex rel. Dept. of Health and Human Resources v. West Virginia Pub. Employees Ret. Sys.*, 183 W.Va. 39, 393 S.E.2d 677 (1990).

Further, the inclusion of West Virginia Code § 48-10-902 (2001) (Repl. Vol. 2004) within the grandparent visitation statutory structure indicates that the Legislature distinguishes between adoptions occurring within the family and those occurring outside the family with respect to the appropriateness of continued visitation between a grandparent and a grandchild who has been adopted.[4] In that section, the Legislature specified as follows: "If a child who is subject to a grandparent visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child."

[4]As observed by the *Brandon* Court, the inclusion of this provision "makes clear that the Legislature both contemplated and approved the continuation of visitation rights following an adoption in those instances where the adoption occurs within the immediate family, as opposed to outside the family." 209 W.Va. at 757, 551 S.E.2d at 679.

While the child in the present case was not subject to a grandparent visitation order prior to her adoption, and therefore the statute does not definitively resolve this issue, the statute does provides guidance regarding the legislative conception regarding the circumstances under which adoption should sever all visitation between adopted children and their biological grandparents. Cassidy was adopted by her great-uncle in the present case; thus, if a grandparent visitation order had been in place prior to Cassidy's adoption by her great-uncle, the visitation order would not have been automatically vacated pursuant to the provisions of West Virginia Code § 48-10-902.

It is also of significance that despite vigorous debate, evident within the majority and dissenting opinions in *Brandon* as well as this Court's earlier opinion in *Nearhoof*, regarding the interplay between adoption statutes and visitation statutes, the Legislature has not altered or enhanced the grandparent visitation statute to more clearly express its intentions since the *Nearhoof* and *Brandon* opinions were issued in 1987 and 2001, respectively. Other states' grandparent visitation statutes include more detailed guidance regarding the effect of adoption upon the rights of a biological grandparent. In North Carolina, for instance, North Carolina General Statutes § 50-13.2A (1985) (Repl. Vol. 2001) contains the following detailed explanation:

> A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child

> adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.

The West Virginia Legislature has not provided such additional direction regarding this issue since this Court's decisions in *Nearhoof* and *Brandon*. In *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 511 N.E.2d 1116 (N.Y. 1987), the court observed as follows:

> [I]t is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained (*Matter of Curtin v. City of New York*, 287 N.Y. 338, 342, 39 N.E.2d 903; *Matter of Gilmore v. Preferred Acc. Ins. Co.*, 283 N.Y. 92, 97, 27 N.E.2d 515; *Transit Commn. v. Long Is. R.R. Co.*, 253 N.Y. 345, 354-355, 171 N.E. 565).

511 N.E.2d at 1119.[5]

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[5]*See also Ex parte HealthSouth Corp.*, 851 So.2d 33, 41-42 (Ala. 2002) ("Presumably, when the Legislature reenacts or amends a statute without altering language that has been judicially interpreted, it adopts a particular judicial construction"); *Smith v. Detroit*, 202 N.W.2d 300, 304 (Mich. 1972) ("'*Even more persuasive is the rule that where the basic provisions of a statute have been construed by the courts and these provisions are subsequently reenacted by the legislature, it may be assumed that the legislature acted with knowledge . . . and . . . intended the re-enacted statute to carry the Court's interpretation*. . . .'") (emphasis in original) (citations omitted); *Krehlik v. Moore*, 542 N.W.2d 443, 446 (N.D. 1996) (approving theory of legislative acquiescence); *Eklund v. Eklund*, 538 N.W.2d 182, 188 (N.D. 1995) (holding that Legislature is presumed to know how its statutes have been construed and acquiesces in that construction if it fails to offer any amendments); *Zimmerman v. Wisconsin Electric Power Co.*, 157 N.W.2d 648, 651 (Wis. 1968) ("[W]hen

(continued...)

Syllabus point three of *Brandon*[6] concluded as follows:

> The West Virginia Grandparent Visitation Act, West Virginia Code §§ 48-2B-1 to -12 (1998) (Repl. Vol. 1999), by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control over his/her child[ren] without undue interference from the state.

209 W. Va. at 753, 551 S.E.2d at 675. Having so concluded, however, this Court in *Brando*n cautioned that "a grandparent who seeks to avail him or herself of this statutorily-granted mechanism for seeking visitation must be able to demonstrate that the visitation being sought will be in the best interest of the child[ren] and will not substantially interfere with the parent-child relationship." *Id*. at 765, 551 S.E.2d at 687. "This will be very difficult to do in cases where adoptions have preceded the petitions seeking visitation unless the petitioning grandparent[s] can demonstrate . . . that such visitation is likely to be a positive factor in the child's life and will not unduly disrupt the child's relationship with his/her parent(s)." *Id*. at 765, 551 S.E.2d at 687.

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[5](...continued)
the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct"); *contra Harris v. Capital Growth Investors XIV*, 805 P.2d 873, 880 (Cal. 1991) ("The presumption of legislative acquiescence in prior judicial decisions is not conclusive in determining legislative intent"); *Amerada Hess Corp. v. Director, Div. of Taxation*, 526 A.2d 1029, 1037 (N.J. 1987), *aff'd*, 490 U.S. 66 (1989) (holding that legislative inaction is "a weak reed upon which to lean") (citations omitted).

[6]West Virginia Code §§ 48-2B-1 to -12 (1998) (Repl. Vol. 1999), as referenced in *Brandon*, are now codified at West Virginia Code §§ 48-10-101 to -1201 (2001) (Repl. Vol. 2004).

Thus, as recognized in *Brandon*, a grandparent such as the Appellee in the present case faces a substantial challenge in attempting to demonstrate the grandparent visitation should be ordered. The Appellants in the present case allege that the lower court erred in its analysis of the § 48-10-502 statutory factors to be considered in this case. Specifically, the Appellants assert that the lower court failed to accord proper weight to the parents' wishes regarding visitation. In *Brandon*, this Court specified that it was not assessing "the amount of weight that should attach to the factor of parental preference. . . ." 209 W.Va. at 763, 551 S.E.2d at 685. However, "in light of the *Troxel* decision it is clear that 'the court must accord at least some special weight to the parent's own determination' provided that the parent has not been shown to be unfit." *Id*. at 763, 551 S.E.2d at 685 (quoting *Troxel v. Granville*, 530 U.S. 57, 70 (2000)).

The parents and the guardian ad litem in the present case[7] contend that the best interests of Cassidy are not served by permitting visitation with the Appellee. In their respective briefs, the parties and the guardian ad litem analyzed each of the factors enumerated in West Virginia Code § 48-10-502 applicable to the present case. Evaluating each of these arguments regarding these numerous factors, this Court first finds that Cassidy's young age mitigates against the requested visitation. The Appellee had not had visitation with Cassidy since she was three years old. Visitation was ordered to resume[8] near Cassidy's fifth birthday. Second, the relationship between the Appellee and Cassidy has been limited. While the Appellee cared for Cassidy every weekend during the first two and one-half years of Cassidy's life, their association since the adoption was pending has been

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[7]Although this Court agrees with the Appellants' ultimate contentions regarding the best interests analysis, the Appellants' arguments relating to the application of West Virginia Code § 48-10-702 are without merit. The Appellants contend that subsection (b) of the act applies, presenting a presumption that visitation privileges need not be extended to the grandparent and permitting rebuttal of such presumption only by clear and convincing evidence presented by the grandparent that an award of visitation is in the best interests of the child. The Appellants maintain that subsection (b) applies because the statutory phrase "parent through whom the grandparent is related to the grandchild" refers to the adoptive father, Mark R., and the Appellee is related to Mark R. as a former sister-in-law. A careful reading of that statute, however, reveals that the reference to "the parent through whom the grandparent is related to the grandchild" is designed to ascertain whether the grandparent's child (parent of grandchild) has custody, shares custody, or exercises visitation privileges. Thus, it is Jasper R. through whom the Appellee (Jasper's mother) is related to Cassidy. Because Jasper R. does not have custody, share custody, or exercise visitation privileges, subsection (a) of the statute applies, providing that the Appellee "shall be granted visitation if a preponderance of the evidence shows that visitation is in the best interest of the child." W. Va. Code § 48-10-702(a).

[8]The visitation order entered by the lower court has not been stayed and, to the best of this Court's knowledge, visitation has continued during the pendency of this appeal.

very infrequent. Third, the relationship between the Appellants and the Appellee also mitigates against visitation. The Appellants do not want Cassidy to continue a relationship with the Appellee, preferring to raise Cassidy without intervention from the Appellee.

With regard to the fourth statutory consideration, we find that extensive time has elapsed between Cassidy's regular visitation with the Appellee in the first two and one-half years of her life and the imposition of the visitation order when Cassidy was almost five. The fifth statutory factor involves whether the visitation with the Appellee would be likely to adversely affect the relationship between Cassidy and the Appellants. There does not appear to be any credible evidence that the Appellee's visitation with Cassidy would affect Cassidy's relationship with her parents.

The sixth factor of the statutory list of considerations, dealing with divorce of the parents, is not applicable to this case. Regarding the time available to Cassidy and the Appellants, as referenced in the seventh factor, we find no credible evidence that time is limited or that visitation would be problematic for the Appellants' schedule. The eighth factor, assessing the good faith of the grandparent seeking visitation, mitigates in favor of the Appellee. The record reveals that she and her husband, Robert M., have demonstrated their good faith and commendable intentions during these proceedings. The ninth factor, regarding history of abuse or neglect, is inapplicable. The tenth and eleventh factors, regarding prior time residing with the grandparent, are in the Appellee's favor. The

Appellee cared for Cassidy during significant portions of Cassidy's first two and one-half years.

The twelfth factor is the preference of the parents. Based upon the recognition by the United States Supreme Court in *Troxel*, as referenced above, and by this Court in *Brandon* that the parental preference should be given "some special weight," this Court must recognize the Appellants' fervent desire to prevent visitation between the Appellee and Cassidy. *Troxel*, 530 U.S. at 70. The Appellants have indicated that they do not want Cassidy's true parentage revealed to her at these early stages of her life. Additionally, they do not want to risk involvement with Jasper R., Cassidy's biological father, and they fear that visitation with the Appellee, Jasper's mother, would be detrimental to these goals. The lower court was presented with these considerations and found that the Appellants' concerns about the Appellee's involvement in Cassidy's life were "unwarranted and unfounded."

The profound benefits of a child's relationship with grandparents have been deservedly acclaimed. As observed by this Court in *Nearhoof*,

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their

> grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

178 W.Va. at 364, 359 S.E.2d at 592 (quoting *Mimkon v. Ford*, 332 A.2d 199, 204-05 (N.J. 1975)).

Despite the recognition of the importance of relationships between children and grandparents and continuity of relationships generally, the constitutional admonitions of *Troxel* must be observed. In *Troxel*, the United States Supreme Court held that a Washington state statute providing that any person could petition for visitation at any time, allowing the court to order visitation rights for any person when visitation served the best interests of the child, violated the substantive due process rights of the child's mother. The mother had objected to the court's order permitting paternal grandparents to exercise visitation rights, following the death of the children's father. 530 U.S. at 61. The United States Supreme Court observed that the Washington statute did not accord proper deference to "a parent's decision that visitation would not be in the child's best interest." *Id*. at 67. "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." *Id*. at 69. Thus, *Troxel* instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests

of the child analysis. It must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis.

Devoting appropriate weight to the Appellants' preferences in this very difficult case and based upon our review of statutory authority and applicable precedent, we find that grandparent visitation should not have been granted in this case. The preferences of the parents were not adequately considered by the family court, and proper weight was not given to those preferences. The concerns of the parents appear to have been considered and dismissed by the family court, primarily upon the basis of the court's disagreement with the parents regarding the degree of family strain to be occasioned by visitation and the court's perception that visitation would not seriously undermine any plans the parents envisioned for Cassidy or her familial associations. This is precisely the type of situation outlined by the United States Supreme Court in *Troxel*, as it invalidated the Washington statute: "[T]he Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails." 530 U.S. at 67.

While we emphasize that the objection of a parent would not serve to defeat a grandparent's attempt to seek visitation in every instance,[9] the preponderance of the evidence in the present case, when the parents' wishes are properly incorporated in the analysis, does not indicate that visitation is in the best interests of Cassidy. We consequently reverse the order of the lower court and remand this matter for entry of an order denying grandparent visitation rights to the Appellee and her husband.

Reversed and Remanded with Directions

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[9]As recognized in *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985),

> It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family.

493 A.2d at 481.

No. 31864 In re: Grandparent Visitation of Cathy L. (R.) M. v. Mark Brent R. and Carla Ann R.

FILED
July 8, 2005
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

I fully concur with the majority's Opinion in this case. Nevertheless, I feel compelled to write separately to reiterate my concern enunciated in my dissent in *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 766, 551 S.E.2d 674, 688 (2001) (Davis, J., dissenting), that, once a child has been adopted, such adoption severs all ties between the child and the child's biological and/or former adoptive relatives[1] so as to foreclose the right to grandparent visitation otherwise permitted by statute. *See* W. Va. Code § 48-10-902 (2001) (Repl. Vol. 2004) ("If a child who is subject to a grandparent visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child."). In short, I wish to repeat my earlier admonition that the central aim of adoption is finality, finality in the severance of pre-existing relationships and finality

[1]Except, of course, in the case of stepparent adoption wherein the spouse of the stepparent, who is also the child's biological or adoptive parent, retains his/her relationship with the child as do the parents of that parent. *See* W. Va. Code § 48-22-703(a) (2001) (Repl. Vol. 2004) (stating that, "[u]pon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, *except any such person or parent who is the husband or wife of the petitioner for adoption*, shall be divested of all legal rights . . . " (emphasis added)).

in the creation of new adoptive relationships, which breeds certainty for adopted children and their adoptive parents, alike, in their new adoptive relationship. *See Brandon L.*, 209 W. Va. at 766, 551 S.E.2d at 688 (Davis, J., dissenting) ("'Finality is of the utmost importance in an adoption.'" (quoting *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 266, 418 S.E.2d 575, 580 (1992))).

Moreover, I applaud the majority's recognition and application of these principles in the case *sub judice*, and encourage my brethren to continue to proceed with caution where claims for grandparent visitation have been tainted by the subject child's adoption and the grandparents' resultant divestiture of their grandparental status and attendant standing to seek visitation in such capacity.

For the foregoing reasons, I respectfully concur with the Opinion of the Court.

198 W. Va. 487, 481 S.E.2d 793

Supreme Court Of West Virginia

TERESA LYNN DODD HALLER (NOW HALE), Plaintiff Below, Appellee,

v.

KURT MATHEW HALLER, Defendant Below, Appellant

No. 23472

Submitted: September 18, 1996

Filed: December 19, 1996

SYLLABUS BY THE COURT

1. "In reviewing challenges to findings made by a family law master that were also adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretation are subject to a de novo review." Syl. Pt. 1, Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995).

2. "When serious allegations of child abuse or neglect are made in a custody case, the family law master and circuit judge should direct the Department of Health and Human Resources to intervene and conduct home studies and the court should make full inquiry into these allegations. Furthermore, where serious allegations of abuse and neglect arise, the protections afforded children under abuse and neglect law should apply." Syl. Pt. 2, Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993).

3. "W. Va. Code 48-2-15 (1993) grants the circuit court in a divorce proceeding plenary power to order and enforce a noncustodial parent's visitation rights with his or her children. W. Va. Code 48-2-15(b)(1)(1993), the subsection specifically dealing with visitation, provides, in pertinent part:

The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent...."

Syl. Pt. 2, Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996).

4. "Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly

committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true." Syl. Pt. 3, Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996).

5. "If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without 'credible evidence' (Mary D. v. Watt, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed." Syl. Pt. 4, Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996).

6. "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996).

7. "Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." Syl. Pt. 3, Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841 (1995).

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Per Curiam:
Appellant Kurt Mathew Haller seeks a reversal of an order entered by the Circuit Court of Summers County on November 16, 1995, which modified a prior custody order by terminating Appellant's visitation rights and continuing custody of the parties' minor children with Appellee Theresa Dodd Hale. Arguing that the circuit court failed to give full faith and credit to a Louisiana decree that modified the West Virginia custody decree and that his visitation rights were wrongly terminated, Appellant seeks a reversal of the circuit court's ruling. Upon consideration of the issues raised in conjunction with the record in this case, we See footnote 1 find that the West Virginia court did have jurisdiction and remand

this case for further development regarding whether a guardian ad litem should be appointed; whether an independent investigation of child abuse charges should be ordered; whether family counseling should be ordered; and whether supervised visitation should be ordered.

I.
FACTS AND PROCEDURAL BACKGROUND

The parties were married on October 20, 1984. At the time they entered into a separation agreement on August 11, 1990, both of the parties were enlisted in the Air Force. The terms of the separation agreement provided for Appellee to have custody of the parties' daughters, Elizabeth, born January 6, 1986, and Kala, born August 26, 1988. The agreement further provided that the parties were to "use their utmost effort to insure" that Appellant would have "as much visitation with the children born of the marriage as possible."

In November 1990, Appellee brought criminal charges through the military court martial system, alleging that Appellant had engaged in sexual misconduct with Elizabeth. See footnote 2 Before the court martial proceeding was completed, the parties were divorced by order of the Circuit Court of Summers County, entered on December 3, 1990. At the time the divorce was granted, both of the parties were stationed in Louisiana. See footnote 3 Although the criminal allegations were still pending in Louisiana, the order of divorce made no reference to that issue. Appellee was awarded custody of both children and Appellant was awarded reasonable rights of visitation. The court expressly incorporated the separation agreement into the final divorce decree.

Alleging denial of visitation, Appellant initiated a contempt proceeding against Appellee in March of 1991 in Louisiana. Through this same proceeding, Appellant sought to modify the West Virginia divorce decree with regard to child support obligations, custody, and visitation. During the pendency of the Louisiana court proceedings, the court martial proceeding ended on May 30, 1991, with a finding of not guilty regarding the allegations that Appellant had abused his daughter, Elizabeth. By order entered December 22, 1992, the Louisiana trial court modified the West Virginia divorce decree by changing the custody award to joint custody with Appellee declared as the domiciliary parent. The Louisiana court granted Appellant reasonable visitation rights, but required his visitations to be supervised by his mother, brother, sister-in-law, sister, or brother-in-law. The Louisiana order incorporated a "joint custody plan" that specifically provides that Appellant "is not to be left alone with the children at any time." An additional visitation restriction included in the joint custody plan required that Charles Yoder, the maternal grandfather, was limited to supervised visits with the girls and was prohibited from having overnight visitation. See footnote 4 Appellant states that the visitation limitations included in the Louisiana order resulted from an agreement between

the parties, rather than from a court finding of abuse. See footnote 5

The children had an extended visitation with their father from June 15 to July 15, 1993, at his residence in Michigan. See footnote 6 Upon returning home to her mother, Elizabeth allegedly complained again to Appellee that Appellant had hurt her. Appellee responded to her daughter's complaint by filing a sexual abuse report with the Louisiana Child Protective Services, alleging that Appellant had committed sexual abuse against his daughter. See footnote 7 In August of 1993, Appellee moved with the girls to West Virginia See footnote 8 without providing notice to Appellant. See footnote 9

The West Virginia Department of Health and Human Resources ("DHHR") received a referral in August 1993, indicating that the parties' children were being abused by Charles Yoder. See footnote 10 Mary Treece, the DHHR worker who interviewed the children, concluded that Elizabeth had been sexually molested and recommended that Appellant be prohibited from further contact with the children pending completion of sexual offender treatment. See footnote 11

On November 19, 1993, Appellee filed a petition for modification in the Circuit Court of Summers County, alleging that "a repeated incident of sexual conduct occurred with both children" during a visitation with their father in the summer of 1993. Through her petition, Appellee requested that a social service representative be present during any visitation between Appellant and his children pending a determination regarding the allegations of sexual abuse. In response to Appellee's petition, Appellant denied the allegations of misconduct, requested court-ordered psychological evaluations of the parties and the children, See footnote 12 and moved to dismiss the petition claiming that West Virginia did not have jurisdiction.

Appellee obtained an ex parte family violence protective order from the Summers County Magistrate in March of 1994 by citing allegations of sexual abuse that occurred in July 1993. Appellee sought the order to prevent Appellant from having visitation with the girls during the summer of 1994.See footnote 13 Appellant filed a petition for appeal of the family violence protective order in April 1994, alleging that venue was improper. See footnote 14

The Summers County Circuit Court determined that it had jurisdiction of the issue of petition for modification, by order dated April 11, 1994, and referred the case to a family law master. The order reflects that Judge Irons had communicated with Judge Burchett, Jr., of Louisiana, and that the Louisiana judge concurred that West Virginia was the proper forum based on the residence of the children and one parent in West Virginia since June 1993; the presence of substantial evidence in West Virginia regarding the matter; and the residence of all the available witnesses

in either West Virginia or Michigan. The West Virginia court concluded that it had jurisdiction over the matter pursuant to West Virginia Code § 48-10-3(a)(2)(1996).See footnote 15

Appellant responded to the Appellee's petition for modification by filing a counter- petition on September 9, 1994, in which he sought a change of custody. On October 14, 1994, the family law master, Edwin Wiley, heard evidence regarding the issues raised in the petition and counterpetition. In his recommended decision, the family law master found that West Virginia had jurisdiction to modify and that the Louisiana modification proceeding was not res judicata as to the issues currently before the Summers County Circuit Court. Regarding the charges of child abuse, the family law master determined that "there has been credible expert testimony from two persons practicing in the field[.]" Despite the fact that the expert testimony was "somewhat rebutted by the testimony of the sister of the . . . [Appellant]," the family law master stated that the expert testimony could not be "arbitrarily rejected" and concluded that child abuse had occurred. The family law master recommended a denial of Appellant's request for custody and denied any visitation to Appellant "[s]ince credible expert evidence exists that one instance of abuse occurred during a period of visitation supervised by members of his [Appellant's] family."

After hearing argument regarding the parties' exceptions to the family law master's report, the circuit court entered its order on November 16, 1995, adopting the findings of the family law master. Indicating that it conferred with the Louisiana court regarding the Louisiana tribunal's decision not to take jurisdiction of this proceeding, the Summers County Circuit Court stated that West Virginia has jurisdiction over this proceeding based on its continuing jurisdiction to modify prior custody decrees. The circuit court expressly recognized that the evidence was controverted regarding the allegations of child abuse, but deferred to the credibility determinations made by the law master. Finding that "there is substantial evidence to support this finding of child abuse;" the circuit court adopted the family law master's recommendation that Appellant be denied any visitation based on the finding of child abuse.

II.
DISCUSSION
A. Standard of Review and Jurisdiction

The standard of review applicable to this case was established in syllabus point one of Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995):

> In reviewing challenges to findings made by a family law master that were also adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable

> distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretation are subject to a de novo review.

Appellant attempts to frame this matter as one involving issues of full faith and credit. However, this was not a proceeding initiated in West Virginia to enforce the order entered by the Louisiana court, and principles of full faith and credit are therefore not dispositive regarding the issue of the circuit court's jurisdiction. See footnote 16 See 28 U.S.C. § 1738A (1995) (applying full faith and credit principles to child custody determinations); see also Sheila L. v. Ronald P.M., 195 W. Va. 210, 465 S.E.2d 210 (1995) (discussing applicability of full faith and credit doctrine). In this case, the circuit court, as discussed above, immediately conferred with the Louisiana court to determine whether the West Virginia proceeding should continue since an issue, pertaining exclusively to child support, was then currently pending in Louisiana. The conference between the West Virginia and Louisiana judges apparently resulted in the following conclusions: (a) since Louisiana was not currently entertaining issues specifically pertaining to the custody dispute, a jurisdictional conflict under the Uniform Child Custody Jurisdiction Act did not exist; See footnote 17 and (b) West Virginia was the proper forum for resolution of the modification of custody issues due to the significant contacts of Appellee and the parties' two children with this State.

Thus, the justification for West Virginia's jurisdiction was deemed two-fold. First, the circuit court properly assumed jurisdiction pursuant to the UCCJA based on the availability of evidence and witnesses, and a consideration of the best interests of the children involved. See W. Va. Code § 48-10-3(a)(2). Second, the circuit court's assumption of jurisdiction is properly premised upon principles of continuing jurisdiction over custody issues, based on its initial ruling of custody in this case. See W. Va. Code § 48-2-15(c) (1996). We find no error with regard to the circuit court's determination that West Virginia had jurisdiction over this matter, and note, in any event, that Louisiana essentially declined jurisdiction over the custody matter and deferred to West Virginia. See footnote 18

Neither the family law master's recommended decision nor the circuit court's order adopting the findings of the law master make any reference whatsoever to the modification ruling entered by the Louisiana court. See footnote 19 Because we determine that the Summers County Circuit Court did have jurisdiction to modify, the circuit court's failure to specifically reference the Louisiana decree does not warrant a reversal of the ruling issued below. See footnote 20

Upon remand, the circuit court should clarify its ruling regarding custody. The custody order, as currently

written, addresses the custody issue only in terms of the denial of Appellant's request for custody. An affirmative statement that custody remains with or is granted to Appellee is conspicuously absent. While this Court can only surmise that the circuit court was operating under the assumption that Appellee would retain custody based upon the original divorce decree, the lack of a specific statement on this crucial matter creates substantial confusion and irresolution. On remand, the circuit court should acknowledge the existence of the Louisiana decree and expressly state that West Virginia has properly assumed jurisdiction to modify that prior joint custody award.

B. Lack of Guardian Appointment

This Court has stated in syllabus point two of Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993) that:

> When serious allegations of child abuse or neglect are made in a custody case, the family law master and circuit judge should direct the Department of Health and Human Resources to intervene and conduct home studies and the court should make full inquiry into these allegations. Furthermore, where serious allegations of abuse and neglect arise, the protections afforded children under abuse and neglect law should apply.

One of those protections afforded children in abuse and neglect proceedings is the appointment of a guardian ad litem. See W. Va. Code § 49-6-2(a) (1996); Syl. Pt. 5, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993) (stating trial court rule requiring guardian ad litem participation and adopting Guidelines For Guardians Ad Litem in Abuse and Neglect Cases). We are seriously troubled by the fact that a guardian ad litem was never appointed to represent the interests of the children involved in this case. Since the allegations of sexual abuse were the essence of the custody dispute, this Court's holding in Boarman required the appointment of a guardian ad litem and consideration of the need for a referral to the DHHR. See 190 W. Va. at 537, 438 S.E.2d at 880-81. The record reveals that Appellant, in his response to Appellee's petition for modification, expressly requested that the circuit court involve the DHHR. See footnote 21 Yet, the circuit court refused to act upon both Appellant's request and this Court's mandate in Boarman that such procedure be followed. See id. Upon remand, the circuit court must address the appointment of a guardian ad litem as well as the possible need for an independent investigation of the sexual abuse charges. This seems especially important where, as here, more than one relative has been accused of sexual abuse, necessitating close examination of the need for additional measures specifically designed to protect the children.

C. Visitation Rights

Based upon the family law master's conclusion that there was credible evidence of sexual abuse during supervised visitation and that supervised visitation thus could not eliminate the possibility of future acts of abuse, the circuit court agreed with the law master's recommendation that Appellant should be stripped of his visitation rights. Appellant argues that the termination of his visitation rights was the equivalent of a termination of his parental rights. See footnote 22 While this Court has upheld the complete termination of parental rights in specified instances, a review of the record presented in this case raises several serious concerns with regard to the circuit court's total denial of visitation. See, e.g., Jeffrey R.L., 190 W. Va. at 35, 435 S.E.2d at 173 (approving termination of parental rights upon clear and convincing proof of abuse combined with finding of no reasonable likelihood of correcting conditions of abuse).

With regard to the circuit court's power to formulate the visitation arrangements for a noncustodial parent, we recently explained as follows in syllabus point two of Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996):

> W. Va.Code 48-2-15 (1993) grants the circuit court in a divorce proceeding plenary power to order and enforce a noncustodial parent's visitation rights with his or her children. W. Va.Code 48-2-15(b)(1)(1993), the subsection specifically dealing with visitation, provides, in pertinent part:
>
> The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent....

In syllabus point three of Carter, we continued:

> Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.
> 196 W. Va. at __, 470 S.E.2d at 195.

Regarding the gradual elimination of supervised visitation and the implementation of standard visitation, we explained the following in syllabus point four of Carter:

> If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "credible evidence " (Mary D. v. Watt, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

196 W. Va. at __, 470 S.E.2d at 195. Finally, in syllabus point five, we reiterated our longstanding guiding principle that "[i]n visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Id. at __, 470 S.E.2d at 195.

The denial of visitation in the present case was expressly predicated on the finding of sexual abuse. Appellant contends that the family law master erred in reaching its finding of sexual abuse based, in part, on the law master's admission that the alleged abuse had been "somewhat rebutted by the testimony of the sister of the Defendant [Appellant.]" The law master continued, however, to reason:

> If this court must make a mistake in regard to child visitation such an error should be made on the side of seeking safety and security for the infant children. The testimony of the sister is insufficient to allow the Court to ignore such expert testimony and accordingly the charges of child abuse are found to have merit.
>
> The mere fact that the family law master referred to Appellant's sister's testimony as "somewhat rebutt[ing]" the allegations of abuse does not invalidate the law master's ultimate conclusion that abuse had occurred. This reference simply indicates that contradictory evidence was offered. As the family law master states in his recommended decision, the sister's testimony, while contradictory, "[wa]s insufficient to allow the Court to ignore such expert testimony." Like all triers of fact, the family law master had to balance conflicting evidence and make his ruling based on a weighing of the evidence, which necessarily involved credibility determinations.

As the circuit court properly stated in its order addressing Appellant's objections to the family law master's findings, the reviewing circuit court must review a family law master's findings subject to the following standard: "Under the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make different findings or draw contrary inferences." Syl. Pt. 3, Stephen L.H. v. Sherry L.H., 195 W. Va. 384, 465 S.E.2d 841 (1995). The circuit court concluded that the law master's finding of sexual abuse was supported by substantial evidence.

The evidence that the family law master found to be credible on the issue of sexual abuse appears to be that of Dr. William Grant, a forensic psychiatrist, who testified as Appellee's expert witness and Mary Treece, a DHHR protective service worker. See footnote 23 Appellant argues that the only relevant sexual abuse testimony is that which pertained to the abuse that allegedly occurred in the summer of 1993. Although the testimony of Ms. Treece clearly pertained to the allegations of abuse made subsequent to the summer 1993 visitation, Dr. Grant testified at the hearing before the family law master that he had not examined Elizabeth since the court martial proceeding was undertaken in 1990. Thus, his testimony was clearly related to a period of time prior to the allegations of abuse that prompted this modification proceeding. Although such evidence, in and of itself, obviously could not have been the basis for a finding of a change of circumstance since it related to a period prior to the Louisiana custody order, it could provide a factual backdrop to the more recent allegations that were alleged to constitute a change of circumstances.

Although we give deference to the family law master's finding that there was credible evidence of sexual abuse, we question whether the circuit court was correct in denying any visitation rights to Appellant. We have previously held that supervised visitation can be ordered following a finding of sexual abuse. Mary D., 190 W. Va. at 342, 438 S.E.2d at 522, Syl. Pt. 2, in part. Although the supervised visitation previously arranged in this matter was ultimately unsuccessful, the lower court should proceed with a reexamination of the nature of the supervised visitation and an evaluation of other types of supervised visitation which may potentially prove more appropriate for this unique situation. Perhaps, for instance, Appellee's suggestion of using a social services agent for the purpose of supervision could be considered.

We also explained in Mary D. that "[t]he family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment." Id. In this case, the circuit court's determination that supervised visitation was not

appropriate was premised upon the occurrence of sexual abuse during a period of supervised visitation. Thus, subsequent to the lower court's reevaluation regarding the appropriateness of supervised visitation and the manner in which it should be exercised, the possibility of conditioning the visitation upon the father's submission to treatment should be explored.

Even if Appellant contends that he should not be required to participate in sexual offender treatment due to his continued assertion of innocence, another alternative that can be considered on remand is family counseling. As we explained in Mary Ann P. v. William R.P., Jr., __ W. Va. __ , 475 S.E.2d 1 (1996),

> When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such counseling and may in its discretion determine how the cost of such counseling shall be paid.
> Id. at __, 475 S.E.2d at 8.

Based on the foregoing, we remand this case to the Circuit Court of Summers County for further development regarding whether a guardian ad litem should be appointed; whether an independent investigation of child abuse charges should be ordered; whether family counseling and/or sexual offender treatment should be ordered; whether supervised visitation should be ordered; and whether any additional measures should be put in place to protect the children from abuse by other potential perpetrators, including their grandfather.

Remanded with directions.

Footnote: 1 The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996, and continuing until further order of this Court.

Footnote: 2 The incident alleged to have prompted the filing of the charges was Elizabeth's complaint to her mother in November 1990 that her bottom hurt. During this time, Appellee was attending college classes, and Appellant picked up

the children at day care and took care of them over night. Appellee took Elizabeth to a pediatrician when her child's complaints about spending time with her father became more frequent. The child allegedly informed the pediatrician that Appellant had kissed her and caused her bottom to hurt.

Footnote: 3 Both parties were discharged from the military on February 29, 1992.

Footnote: 4 Charles Yoder testified at the hearing before the family law master that he had been convicted of sexual abuse "of some children."

Footnote: 5 The Louisiana court order that modified the West Virginia divorce decree does not identify any reasons for awarding the custody modification. The order, which is essentially a one-page document, incorporates an attached nine-page "Joint Custody Plan." Whether the custody plan was a document drafted solely by counsel for the parties, or whether the Louisiana trial court was involved in preparing the subject document, is unclear.

Footnote: 6 The Louisiana court order, through the joint custody plan, expressly provided that Appellant could exercise his visitation rights in Michigan or Florida.

Footnote: 7 Appellee testified before the family law master that in response to this complaint, Louisiana Child Protective Services interviewed both of her daughters, her current husband, and herself. While the record is devoid of any additional information regarding this complaint, Appellee's testimony that she moved to West Virginia with her daughters within three weeks after filing the complaint suggests a probable explanation for the absence of any apparent follow-up to the complaint.

Footnote: 8 While Appellee states in a brief that she moved to West Virginia in February 1992 upon being discharged, the record indicates that her move occurred in the summer of 1993.

Footnote: 9 The Louisiana order expressly required, through the Joint Custody Plan, that both parties were required to give each other a minimum of thirty days advance notice regarding any intended relocations.

Footnote: 10 There is a suggestion made that Appellant may have been the party who made the referral.

Footnote: 11 Appellant has refused to participate in a sexual offender treatment program.

Footnote: 12 The circuit court apparently did not order the psychological reports requested by Appellant.

Footnote: 13 Appellant's counsel represented during oral argument that he had not had visitation with his two daughters since the summer of 1993.

Footnote: 14 The West Virginia family law master notes that the record is devoid of any record regarding the disposition of Appellant's petition seeking to set aside the family violence protective order.

Footnote: 15 This provision of the Uniform Child Custody Jurisdiction Act states that:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

. . . .

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training and personal relationships[.]
W. Va. Code § 48-10-3(a)(2).

Some degree of confusion may result from references to two different proceedings in Louisiana. The first Louisiana proceeding altered West Virginia's custody determination and granted joint custody. That custody matter was no longer pending during these proceedings. At the time the circuit judges from West Virginia and Louisiana discussed the issue of which state should assume jurisdiction, a peripheral matter was pending in Lousiana involving the payment of child support.

Footnote: 16 Appellant's failure to plead the existence of the Louisiana decree in either his response to Appellee's petition to modify or in his counter petition suggests that Appellant did not seek to enforce the Louisiana modification decree in this State.

Footnote: 17 As we recently discussed in Rock v. Rock, __ W. Va. __, 475 S.E.2d 540 (1996), the Uniform Child Custody Jurisdiction Act requires a state to stay its exercise of jurisdiction

if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this article, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

Id. at __, 475 S.E.2d at 545 (quoting West Virginia Code § 48-10-6). Since the proceeding pending in Louisiana apparently pertained to child support and definitely did not involve a custody determination, the provisions quoted above pertaining to simultaneous proceedings do not apply.

Footnote: 18 The UCCJA encourages discussion and collaboration between the judges in the courts which could potentially assume jurisdiction over the matter, as evidenced by its provisions regarding inconvenient forums and simultaneous proceedings in other states. West Virginia Code § 48-10-7(d) provides that a court, prior to determining whether to retain jurisdiction, "may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties." West Virginia Code § 48-10-6(c) specifies that if a court discovers, during the pendency of its own proceeding, the antecedent existence of a proceeding concerning custody in another state, "it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections nineteen, twenty, twenty-one and twenty-two [§§ 48-10-19, 48-10-20, 48-10-21 and 48-10-22] of this article."

Footnote: 19 While Appellant argues that the circuit court, in its order denying Appellant's objections to the family law master's recommended decision, found that Louisiana did not have jurisdiction to modify the West Virginia decree and therefore refused to recognize the Louisiana decree, the record does not support this contention. Rather than denying that Louisiana had jurisdiction to modify a West Virginia decree, the circuit court avoided the issue by stating that "[t]he Court feels that jurisdiction in child custody proceedings is continuing, and the Court always has the inherent power to modify prior custody decrees."

Footnote: 20 The Louisiana decree was issued in accordance with West Virginia Code § 48-10-14 (1996) and is therefore subject to recognition by this State's courts. West Virginia Code § 48-10-14 provides that "[t]he courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this article or which was made under factual circumstances meeting the jurisdictional standards of this article. . . ." The Louisiana court complied with the jurisdictional requirements of West Virginia Code § 48-10-14 by virtue of the fact that Louisiana had been the home state of the children for more than six months before that proceeding had been initiated. See W. Va. Code § 48-10-3(a)(1) (1996); see also Sheila L., 195 W. Va. at __, 465 S.E.2d at 217-18 (discussing UCCJA provision regarding enforcement of out-of-state decrees).

Footnote: 21 In his prayer, Appellant asked "that the Department of Health and Human Resources be ordered to further investigate all of the circumstances regarding these allegations[.]"

Footnote: 22 The family law master's recommended order did grant to Appellant the non- custodial rights of notification regarding illnesses, medical emergencies, and grade notification as provided for by West Virginia Code § 48-2-13(h)(1)(A)-(F) (1996).

Footnote: 23 The family law master, in his recommended decision, refers to "credible expert testimony from two persons practicing in the field." From this reference, we conclude that he was referring to Dr. William Grant and Mary Treece.

203 W. Va. 594, 509 S.E.2d 875

SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: HARLEY C.

No. 25160
Submitted: September 9, 1998
Filed: November 23, 1998

SYLLABUS BY THE COURT

1. Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.

2. "Implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syllabus Point 1, *W.Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

3. "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syllabus Point 3, *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997).

4. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

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Maynard, Justice:
Appellants, Keith and Kathleen St. Clair, as foster parents of the infant Harley C., appeal the order of the Circuit Court of Harrison County, West Virginia, which dismissed the petition filed in this matter and returned the infant to his biological parents. The St. Clairs contend the circuit court erred in failing to adjudicate Harley C. as an abused child; in failing to terminate the parental rights of the biological parents; and in failing to revoke the pre-adjudicatory improvement period. Upon a thorough review of this matter, we believe Harley C. is an abused child and the circuit court erred in failing to terminate parental rights. The circuit court's order which restored permanent custody to the biological parents is reversed.

Harley C. was born prematurely by caesarean section on February 8, 1997 and spent the first month of his life in the hospital. Due to concerns about bonding, especially with his mother, and the health and safety of the child, social services were provided to the parents, some of which continued until the date of the injury described below. Home health nursing services and basic parenting services, such as bathing, diaper changing, and feeding schedules, had also been provided to the parents.

Harley C. was injured on July 9, 1997, when he was five months old. Harley was taken to Ruby Memorial Hospital where he was diagnosed with a rotational fracture of the femur. He underwent a full skeletal x-ray, known as a "baby gram," which revealed a healing broken eighth rib and possibly a healing broken ninth rib on the right side. The infant was placed in a body cast. A referral was made to the Department of Health and Human Resources (DHHR) for suspected child abuse.

Harrison County Deputy Sheriff Albert Marano, with the assistance of Jennifer Gray, a child protective service worker for DHHR, took a statement from Mary C., Harley's mother. In her statement, Mary C. denied Harley had been injured in the past. Her only explanation for the broken rib(s) was that the fracture(s) might have occurred during birth. When questioned about the fracture to his leg, Mary C. reported that the infant had been lying on the couch with pillows above his head and below his feet when she left the living room to go to the bathroom. She stated that she heard Harley scream, and when she went to investigate, he was lying on the floor on his right side. See footnote 1 She also stated the couch that Harley fell from was about eighteen inches high, and the fall caused the fracture to his leg. Mary C. said she and her mother took Harley to the doctor in Bridgeport who told them Harley would have to go to the hospital in Morgantown. Kenneth L., Harley's father, was working that day. On the way to Morgantown, Mary C. and her mother stopped to pick up Kenneth L., so he could travel to Morgantown with them.

Kenneth L. also gave a statement to Deputy Marano and Jennifer Gray. He stated he was not home when Harley was injured. However, he supported Mary C.'s version of events. Kenneth L. denied that Harley had been hurt before.

The Ruby Memorial Hospital Emergency Department Record lists the diagnostic impression of Harley as: "(1) Right femur fracture; (2) Suspicion of child abuse; (3) Diaper rash." Dr. Murphy, a radiologist, was consulted by the Pediatrics Department concerning Harley's fracture. Dr. Murphy characterized the fracture as a "rotational injury" and added, "The issue of abuse in such a fracture must be addressed. . . .I would place child in protective custody until issue resolved."

Harley improved and was discharged from the hospital on July 11, 1997. However, based on the information provided to DHHR regarding Harley's injury, on July 15, 1997, DHHR filed a petition in circuit court alleging Harley was an abused child. Harley was immediately removed from his parents' home and placed in foster care with the St. Clairs, the appellants in this case.

The court held a preliminary hearing on July 25, 1997. Jennifer Gray and several doctors who had treated Harley testified at the hearing. Dr. Cathy Jones, Harley's pediatrician, testified that she saw Harley in her office on July 3, 1997. At that time she was concerned about bonding and growth issues. She testified that she called Child Protective Services (CPS) to express her concerns and to inquire as to whether Harley was being followed by the agency. She was assured Harley was being actively followed. Dr. Jones testified that the child was next seen in her office by her partner, Dr. Cogar, on July 9, 1997, the day Harley's leg was fractured. The parents were told their child could not be treated in the office and they opted to take Harley to Ruby Memorial Hospital in Morgantown. Dr. Jones

testified that Dr. Cogar was suspicious of abuse and called DHHR to report her concerns. On cross-examination, Dr. Jones testified that the radiologist who reviewed Harley's x-ray called to inform her the x-ray indicated a rotational fracture. Dr. Jones stated that this immobile five-month old had his leg twisted until it broke. She explained that her recommendation was not to send the child home because he would be at greater risk now. He was in a cast from his waist to his toes with a femur fracture, he would not feel well and would cry, and she already had reservations about Harley's growth and the parenting skills of the biological parents.

Dr. Leah Rene Urbanosky, a resident in orthopedic surgery at Ruby Memorial Hospital, also testified at the preliminary hearing. Dr. Urbanosky testified that Harley was admitted to the hospital with a femur fracture of the right leg. The child was placed in a cast in the operating room under anesthesia. Dr. Urbanosky stated that Harley underwent a baby gram or full skeletal x-ray which showed an old healing fracture of the eighth rib and possibly the ninth rib on the right side. She stated that rib fractures during birth are uncommon, "probably one of the least common things because of the chest, the rib cage is so mobile." She also testified that if Harley suffered from an abnormality which caused his bones to break more easily than a normal child, the abnormality probably would have been diagnosed at birth. When asked if children of this age commonly suffer femur fractures, Dr. Urbanosky replied that "at least fifty percent of the time when a child this age presents with femur fracture of any sort, there is child abuse involved[.]"

Dr. Urbanosky was asked on cross-examination if she was aware of whether the hospital had an x-ray of Harley's chest on file which had been taken during his initial stay at Ruby Memorial Hospital. The doctor replied that she did not know because that was not part of her care of the child; there may have been because he was born premature with respiratory difficulties.

At the close of testimony, the circuit court expressed disbelief regarding whether the baby's leg could have been fractured according to the parents' explanation. The court was also concerned about the rib fractures, inadequate parenting skills, bonding, and the growth issue. These concerns were expressed in the court's order, which placed legal and physical custody of Harley with DHHR.

An adjudicatory hearing was scheduled for August 26, 1997. This hearing was continued with the caveat that an adjudicatory hearing would be held in two to four weeks or an agreed order granting a pre-adjudicatory improvement period would be submitted to the court. The parents requested a pre-adjudicatory improvement period. The motion was joined by DHHR and the guardian ad litem. The court entered an order on September 16, 1997, which granted a three-month pre-adjudicatory improvement period to both parents. The court reasoned the

parents would likely fully participate in an improvement period because they had previously attended a multidisciplinary team meeting, had voluntarily underwent psychological evaluations, and had completed financial disclosure documents provided by DHHR. The court ordered DHHR to prepare and submit an individualized family case plan and, within sixty days, a progress report. A quarterly review hearing was held on December 19, 1997, wherein the court reviewed the progress reports and the status of the case and ordered the treatment team providers to submit biquarterly written reports to the case manager. These reports were to "include, but not be limited to, services provided and progress achieved during the preceding period."

Prior to the quarterly review hearing, on December 15, 1997, DHHR moved to revoke the improvement period of both parents. A hearing date was set for January 16, 1998. However, the motion was discussed at the status hearing held on January 14, 1998. The motion was therefore not brought before the court and an order was not entered; the parties and the guardian ad litem agreed it was unnecessary to conduct a hearing regarding revocation of the improvement period due to the fact that it had automatically expired. It was decided the case would proceed to adjudication and, if necessary, disposition. The court ordered increased visitation between Harley and his biological parents and scheduled the adjudicatory hearing and the dispositional hearing.

The adjudicatory hearing was held on March 11, 1998. Mary C. and Kenneth L. admitted neglect. Both denied abusing the child and stated they did not know who inflicted the physical abuse. The court found that Harley C. is a neglected child within the meaning of W. Va. Code § 49-1-3(h)(1) and that Mary C. and Kenneth L. are neglecting parents. The dispositional hearing was scheduled for April 7, 1998.

DHHR informed the court at the dispositional hearing that the department's position had changed; instead of recommending reunification of the family, the department was now seeking termination of parental rights. The stated reason for the change in position was that no explanation had been given for the injuries that had been inflicted upon Harley. In other words, no perpetrator had been identified. The psychologist who had been counseling the parents testified during cross-examination that he had been given no indication, during counseling sessions, as to who might have inflicted the injuries. At the close of testimony, DHHR made a motion to terminate the rights of the parents. This motion was made because the individual who caused Harley's injuries had not been identified, despite compliance with the family case plan. The motion was opposed by the parents and the guardian ad litem.

In its dispositional hearing order, the court stated that it "found that there was no evidence as a whole in this case to support a termination of the parental rights of the respondents[.]" The court ordered reunification of the child with his natural parents; ordered that Mary C. and Kenneth L. be referred to a community agency for assistance; and dismissed the petition. Counsel for DHHR then asked the court to stay the ruling pending appeal to this Court. The motion was denied.

The foster parents moved to intervene in the proceedings. The lower court ordered intervention and granted the foster parents the right to submit evidence in accordance with the rule set forth in *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996). However, the court denied the foster parents access to the court file. The foster parents then requested that this Court grant an emergency stay and access to the court file.
We stayed execution of the circuit court's order, ordered that Harley be returned immediately to the care and custody of the foster parents, allowed the biological parents to seek an order permitting supervised visitation, and allowed the foster parents "full and complete access to the official record on file in this case[.]" The foster parents now appeal the circuit court's dispositional order.

Preliminarily, we note that Mary C. and Kenneth L. and the guardian ad litem argue the foster parents have no standing to bring this appeal. They argue the foster parents are not parties to the action. Only DHHR or the guardian ad litem has standing to seek an appeal of the circuit court's decision. We disagree. This Court previously recognized the right of foster parents to bring an appeal of a circuit court's decision to return a foster child to the child's biological parents. *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996). In *Jonathan G.*, the circuit court granted standing to the Stems, the foster parents of Jonathan G., and allowed them to intervene in the proceedings "in order to present another perspective on the best interests of the minor." *Id.* at 723, 482 S.E.2d at 900. Because the Stems were recognized as intervenors below, their right to seek an appeal of the lower court's order was not questioned. Their appeal was granted and their concerns were addressed by this Court.

In its April 28, 1998 order, the circuit court in the case *sub judice* unequivocally ordered that the St. Clairs "have standing to intervene in this matter[.]"

> By the very definition of intervention the intervenor is a party to the action. After intervention, he or she is as much a party to the action as the original parties, and renders himself vulnerable to complete adjudication of the issues in litigation between himself and the adverse party. To make his rights effectual he must necessarily have the same power as the original parties, subject to the authority of the court reasonably to control the proceedings in the case.

59 Am. Jur. 2d *Parties* § 170 (1987). As intervenors, the St. Clairs are parties to the action. They have all the rights and responsibilities of any other party to the action, including the right to appeal to this Court. We therefore hold that foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.See footnote 2

I.
Standard of Review

In this appeal, we are asked to reverse an order of the circuit court which found that Harley C. was a neglected child, but failed to find that he was an abused child within the meaning of the statute and prior opinions of this Court. We are asked to reverse the circuit court's ruling which reunited Harley with his biological parents instead of terminating their parental rights. The standard of review in such cases is succinctly stated in *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syllabus Point 1, *id.*

After thoroughly reviewing the briefs and the record submitted in this case, we are "left with the definite and firm conviction that a mistake has been committed."

II.
Adjudication of Abuse and Neglect

The St. Clairs argue on appeal that the circuit court erred in not adjudicating Harley C. as an abused child. In support of this alleged error, the St. Clairs point to the testimony of Dr. Jones, Dr. Urbanosky, and Dr. Murphy as evidence that Harley C. was abused. A review of this evidence and a close look at the statutory definitions of "abused" and "neglected" leads us to conclude that Harley C. has indeed been abused. A neglected child is defined by W.Va. Code § 49-1-3(h)(1)(A) (1998) as a child [w]hose physical or mental health is harmed or

threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]

In contrast, an abused child is defined as "a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" W.Va. Code § 49-1-3(a)(1) (1998). This Court has enlarged this definition by stating that "[i]mplicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syllabus Point 1, *W. Va. Dept. of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). Furthermore,

> [t]he term 'knowingly' as used in West Virginia Code § 49-1-3(a)(1) (1995) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

Syllabus Point 7, *id.* When presented with the medical testimony regarding Harley's injuries, we believe the parents should have known their child was abused and should have put forth a concerted effort to identify the abuser.

The medical evidence includes the testimony of Harley's pediatrician, Dr. Cathy Jones, who testified at the preliminary hearing that she was concerned about bonding and growth issues and had referred Harley to Child Protective Services even before the fracture injuries occurred. In fact, Dr. Jones testified that she was so concerned about Harley's failure to gain weight that she was going to admit him to the hospital to determine if he suffered from a complication such as reflux if he was not "showing better catch up growth at [his] next visit[.]" CPS was already actively following Harley at the time Dr. Jones contacted the agency.

Dr. Cogar, Dr. Jones' partner, examined Harley the day his leg was injured. Dr. Cogar was suspicious of abuse, and she reported her suspicions to DHHR. Dr. Murphy, a radiologist in Clarksburg who reviewed the x-ray of Harley's leg, called Dr. Jones to ask if Harley's case had been reported because he thought "this injury could be indicative of abuse and must be evaluated." Dr. Murphy believed that because of the rotation and nature of the injury, Harley's leg had been twisted until

it broke. Due to the type of injury, Dr. Jones testified that she was "very concerned" about the child. When asked how the leg might have gotten twisted to the point that it broke, Dr. Jones answered one of the more common causes is that it is "inflicted;" grabbing the baby's leg and wrenching it would be consistent with a rotational injury. The doctor testified that theoretically, this type of injury rarely might possibly happen when a child falls off a couch. When questioned further regarding the possibility of the child getting his leg stuck between the cushions and falling off the couch, the doctor answered that one would still raise the issue of why the child was left on the couch unattended. Dr. Jones believes that femur fractures in five-month old children are very rare and are always suspicious.

Dr. Urbanosky, a resident in orthopedic surgery at Ruby Memorial Hospital, also testified at the preliminary hearing. Dr. Urbanosky stated that it is very unusual for a child of this age to suffer from a femur fracture, and, at least fifty percent of these injuries involve child abuse. See footnote 3 The doctor explained that these types of fractures generally occur in children who are involved in high energy types of activities, such as jumping, bouncing, or climbing. A child three months old, which would have been Harley's age at the time of the leg injury discounting for his premature birth, generally cannot roll over, scoot, or even sit up unattended. Consequently, the mother's explanation that Harley rolled over by himself and fell off the couch resulting in a rotational-type leg fracture greatly concerned Dr. Urbanosky.

Dr. Urbanosky also testified the baby gram revealed that Harley was suffering from one or more broken ribs. The only explanation the parents offered for the broken ribs was that perhaps the fracture(s) occurred during birth. Dr. Urbanosky testified that rib fractures are uncommon during birth as the chest is very mobile and soft. Furthermore, Harley was delivered by cesarean section, which Dr. Urbanosky testified is much more controlled than a vaginal delivery. Also, Harley's records did not indicate he had been injured at the time he was born.

Jennifer Gray testified that Harley was referred to her because of the fractured femur. She testified that she interviewed the parents in an effort to determine how the leg was broken. Mary C. said she left Harley on the couch, went to the bathroom, heard Harley crying, went back to the living room and Harley was on the floor. Kenneth L. was not home, but stated that Mary C. had related the same story to him. Ms. Gray reported that the seat of the couch is 18 to 20 inches off the floor, and the floor is carpeted.

Ms. Gray testified that from the time Harley was born, various services had been made available to the parents. These services were made available because Harley was premature and the hospital nurses identified bonding problems and limited knowledge of parenting. A home health nurse was assigned to the parents to

provide services following Harley's initial release from the hospital. Right From the Start provided basic parenting training. The parents were also referred to the Early Intervention Program through the United Summit Center. Even though several appointments were made through the early intervention program, the parents attended only one session.

When questioned by the guardian ad litem as to whether Ms. Gray's position was that Harley was abused as opposed to neglected, Ms. Gray answered, "Since we are not positive that the fall from the couch is what caused his broken leg, then we feel that it is more an issue of abuse during - relating to that specific injury." Ms. Gray believed the explanation of falling from the couch was not consistent with the type of injury Harley suffered.

At the close of testimony, the judge stated that the broken leg, the growth issue, the bonding issues, and the rib fractures concerned him. He stated that he did not believe any of these problems individually would rise to the level of abuse; however, he also did not believe the rotational fracture was caused by the child falling off the couch. The fractures coupled with bonding and growth issues caused the judge to find that Harley was abused or neglected and to continue him in foster care.

The parties agreed that Mary C. and Kenneth L. should receive a three- month pre-adjudicatory improvement period. Close to the end of the improvement period, DHHR filed a motion to revoke the improvement period for lack of meaningful participation. The Department believed the parents could not identify and meet Harley's needs. The court determined the improvement period lapsed on its own terms and the parties should proceed to adjudication.

At the adjudication hearing, Mary C. and Kenneth L. admitted Harley received extensive injuries while in their custody and that a failure to protect constituted neglect. In its order, the court found the parents "were willing to admit that medical evidence showed that the above-named infant child had suffered physical abuse while in their custody as his parents, even though they denied abusing the child and did not know who inflicted the physical abuse." The court concluded that Harley was a neglected child and the parents were neglecting parents because the "infant child is harmed or threatened by a present failure or inability of the above-named infant child's parents to supply the child with necessary supervision, when such failure or inability is not due primarily to a lack of financial means on the part of the parents." Even though the parents admitted the child was abused while in their custody, the court failed to inquire into who inflicted the abuse and whether the parents made any effort to identify the abuser.

We are clearly convinced somebody severely injured this small child on two separate occasions. Injured him badly enough to break his bones. Even though this immobile child was constantly under adult supervision, no one seems to know who inflicted the abuse. In their briefs to this Court, the parents say they attempted to identify the abuser. However, both parents merely offer blanket conclusions; neither offers an explanation of the efforts he or she undertook to attempt to identify the perpetrator. The record contains no showing of any effort undertaken by either parent in an attempt to determine who inflicted this abuse on their child.

This Court has previously said: "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syl. pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syllabus Point 3, *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997). Once again we reiterate that "[i]mplicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syllabus Point 1, *W.Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). As failure to attempt to identify the abuser is contained in the definition of "abuse," we believe the circuit court erred in determining Harley was neglected rather than abused. We also believe this child remains at risk if returned to the home of his parents.

III.
Disposition

The dispositional hearing was held on April 7, 1998. Between the time the adjudication and the dispositional hearings were held, the Court Appointed Special Advocate (CASA) appointed to serve on this case wrote a letter to the court expressing serious concerns about Harley's safety. Specifically, she wrote:

> It is also a concern that these injuries have been more or less ignored throughout these proceedings. We are very pleased that the parents have done so well in addressing the neglect issues in their improvement period, but it has been as if the injuries never happened. Has it been forgotten that the reason this child was removed was because of the injures--serious ones??

At the dispositional hearing, the Department moved for termination of parental rights due to the fact that the abuser or perpetrator had not been identified. Counsel for the mother stated that he believed it was "highly unlikely that either of these individuals [Mary C. or Kenneth L.] had any direct involvement with the injures." He went on to state that, "Notwithstanding we have no other viable explanation for how they may have occurred and notwithstanding also that none of

the medical evidence that we have seen but not heard in the context of formal testimony under oath that would support really any other theory but that some active type of abuse was perpetrated upon the child." Nonetheless, counsel for Mary C. moved that custody be returned to these parents. Counsel for Kenneth L. and guardian ad litem also sought reunification.

The court determined there was no evidence to support termination even though he acknowledged he was probably the most skeptical person in this room when we saw pictures of the couch at the preliminary hearing and their surmising or suggesting that he fell and twisted and those sorts of things was the cause of the injury. There wasn't anybody that believed that less than I did and there isn't anybody including [the CASA's] worry on this that worries more about this than I do. . . . [B]ut it seems to me that there is no evidence that the court is aware of, looking at the record as a whole and I guess I am not limiting myself to what was produced today, nor has the State proffered any and I didn't ask for a proffer but it seems to me that there is no evidence that would substantiate a termination of these parents' rights[.]

The court ordered that Harley be returned to the physical and legal custody of Mary C. and Kenneth L.

The St. Clairs maintain the lower court erred in not terminating the parental rights of Mary C. and Kenneth L. We agree. This Court has said:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). The parents admit Harley suffered extensive physical abuse while in their custody. There is no evidence either one of them seriously attempted to identify the abuser. The evidence presented as to how the injuries may have occurred conflicts with the medical evidence.

Thus, the court erred in reuniting this child with his parents rather than terminating Mary C.'s and Kenneth L.'s parental rights.

IV.
Conclusion

For the foregoing reasons, we find the Circuit Court of Harrison County erred in not adjudicating Harley C. an abused child and in failing to terminate the parental rights of Mary C. and Kenneth L. The ruling of the circuit court is reversed and remanded to enter an order consistent with this opinion.

Reversed and remanded.

Footnote: 1 *We note that interestingly enough, the excuses offered for the injuries in this case are the very excuses offered by the parents in Matter of Taylor B., 201 W.Va. 60, 491 S.E.2d 607 (1997).*

Footnote: 2 *For guidelines regarding the role of foster parents at termination proceedings, see In re Jonathan G., 198 W.Va. 716, 726-29, 482 S.E.2d 893, 903-06 (1996).*

Footnote: 3 *Dr. Eric Jones, the treating staff orthopedist, conveyed to Dr. Urbanosky that child abuse is involved in "greater than equal to fifty percent for this agent injury."*

231 W. Va. 494, 745 S.E.2d 532

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 12-1242

FILED
June 18, 2013
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: Haylea G.

Appeal from the Circuit Court of Fayette County
The Honorable John W. Hatcher Jr., Judge
Civil Action No. 08-CIGR-5-H

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED WITH DIRECTIONS

Submitted: June 4, 2013
Filed: June 18, 2013

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE KETCHUM concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A psychological parent is person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of In the interest of Brandon L. E., 183 W. Va. 113, 394 S.E.2d 515 (1999) that case is expressly modified." Syl. pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

2. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. pt. *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996):

3. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant

child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syl., *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960).

5. "While courts always look to the best interests of the child in controversies concerning his or her custody, custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syl. pt. 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).

Per Curiam:

This case arises from a guardianship proceeding in the Circuit Court of Fayette County. The petitioner, Sybil J.[1], is the court-appointed guardian of Haylea G., who is eight years old. The respondents are Amber B. and Justin G., Haylea G.'s biological parents. By order entered September 21, 2012, the Circuit Court of Fayette County terminated the infant guardianship between Sybil J. and Haylea G. The circuit court also ordered Sybil J. to return certain funds paid to her by the Social Security Administration on behalf of Haylea G. and imposed a monetary sanction for each day the funds were not returned. After a careful review of the pleadings and record designated for review, the briefs and oral arguments of the parties, and for the reasons stated herein, we affirm the order as it relates to the termination of Sybil J.'s guardianship of Haylea G. We reverse the circuit court insofar as it ordered the return of funds and imposed a monetary sanction against Sybil J.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Haylea G. is the now eight-year-old child of Amber B. and Justin G. Since Haylea G. was two years old and until the entry of the order being appealed she resided in the home of the petitioner, Sybil J., pursuant to an infant guardianship entered by the

[1] We follow our traditional practice of protecting the identity of juveniles and their family members by using initials for their surnames.

circuit court on May 1, 2008. The guardianship was established shortly before Amber B., the child's mother, went to prison for fraudulent use of a credit card and related misdemeanors.[2] Sybil J. was a friend of Amber B.'s family. At all times Justin G., the father of Haylea G. agreed that Sybil J. was an appropriate caregiver and guardian for his child. Amber B. objected to the establishment of the guardianship and requested that the child be placed with Justin G.'s mother. Despite this objection, the circuit court found that Sybil J. was a fit and proper person to perform the duties of guardian for Haylea G.

In 2010, in a related but separate proceeding, the Family Court of Fayette County ordered Amber B. to pay child support to Sybil J. for Haylea G. No child support award was entered against Justin G., but in May of 2012, the Social Security Administration ("SSA"), on behalf of Haylea G., awarded to Sybil J. monthly benefits derived from Haylea G.'s father's disability award.[3] In addition, SSA awarded back benefits in the approximate amount of $9,000.00 to Haylea G. Because Haylea G. was a minor, the SSA designated Sybil J. as the child's payee for past and future benefits.[4]

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[2] Amber B.'s original sentence was suspended and she was placed on probation pursuant to a plea agreement. While on probation, however, she violated the special conditions of her sentence by possessing controlled substances. As a result, her probation was revoked and a prison sentence was imposed.

[3] Social Security benefits are payable to dependent children of persons eligible for disability insurance. 42 U.S.C.A. § 423 (2004).

[4] The procedure for appointing a representative payee is contained in 42 U.S.C.A. 405(7)(A) (2010).

Sybil J. testified that she used part of this money to repay a personal loan and placed the rest of the funds in a checking account in Sybil J.'s name.

In February of 2011 Amber B. was discharged from parole supervision. At that time Haylea G. was still residing with Sybil J. In November of 2011 Amber B. filed a handwritten letter with the court, seeking a termination of the guardianship of Sybil J. over Haylea G. In her letter, Amber B. stated as follows:

> I Amber B[.] am requesting custody back of my daughter Haylea J[.] G[.] who is in Sybil J[.]'s custody and has been since June 2008. I have been home from incarceration since January of 2010 & have completed my parole with no violations or incidents. In the time that I have been home my two older children Michael A[.] W[.] & Ashlea R[.] G[.] who are still in Tammy G[.]'s custody, but Ashlea now lives with me and Michael is with me every weekend & lived with me over the summer of 2011. I have only got to see Haylea very few times since I have been home, it seems that everytime I try to see her Sybil J[.] has given excuses for me not to see her. All I want is to be back in Haylea's life & to be in her brother & sister's life because Haylea doesn't ever get to see them either and I believe it's only right for us to be a family again. I am very capable of taking care of my children & providing for them with any of their needs. Please take this into consideration and grant me custody of my child, Haylea J[.] G[.]

A hearing was held in March of 2012, at which time Sybil J. objected to the return of the child to Amber B., arguing that Amber B. had not addressed the problems, including her continued use of drugs, which led to the need for the establishment of the guardianship. The circuit court took testimony and found that Amber B. was working,

was participating in drug rehabilitation and also other counseling, including the use of Suboxone under medical supervision for the treatment of her drug addiction. The circuit court found that Amber B. had been living with her nine-year-old daughter as well as Amber B.'s mother in Fayetteville since January of 2010. The circuit court further found that Amber B.'s 11-year-old son stayed with his mother, grandmother and sister on weekends. [5] The court found that Amber B. earned money by babysitting for a friend. The court further ordered that the Department perform a study of Amber B.'s home.[6] The hearing was continued. On April 23, 2012, a guardian ad litem was appointed to protect Haylea G.'s interests.

The circuit court reconvened this hearing in June of 2012, at which time Sybil J. argued that Amber B. had not really improved her lifestyle and living conditions. Sybil J. proffered the testimony of three witnesses, including two of Haylea G.'s teachers and a friend of the Sybil J. These witnesses would have testified that the child was doing

[5] At a later hearing the Court heard testimony that Amber B. had regained custody of both of Haylea G.'s siblings.

[6] The order also contains findings regarding the testimony of an employee of the Department, who need not be identified for the purposes of this opinion, who appeared at the hearing in a seemingly official capacity and sat with Sybil J. during the hearing. The court appeared to have been acquainted with this person. When the court questioned this person about her involvement in this case, she revealed that she was a relative of Sybil J. and appearing not in her official capacity as a worker for the Department, but in a supportive role. The court found that it was "extraordinarily inappropriate, unprofessional and misleading" for this relative to speak favorably about the condition of Sybil J.'s home.

well in school and that Sybil J. was better able to care for, and provide for, Haylea G. The court assumed that the child was doing well and remarked that some of the witnesses' testimony about how Haylea G. was doing in the home of Sybil J. would be deemed cumulative.

The guardian ad litem filed a detailed report of his investigation. He found that Sybil J. became involved in Haylea G.'s life when the child was only three months old. Her care for the child increased and included overnight care. The guardian ad litem found that in January of 2007, Haylea G. began living primarily with Sybil J. The guardian ad litem reported that Amber B. had completed her parole, but that prior to being discharged from supervision, she relapsed into drug use. The guardian ad litem reviewed records from Amber B.'s medically supervised drug rehabilitation and reported that she did not appear at present to be using controlled substances. The guardian ad litem interviewed acquaintances of Amber B. who likewise believed that she was no longer using controlled substances. The guardian ad litem found no problems with Amber B.'s residence.

In terms of the relationship between Amber B. and Sybil J., the guardian ad litem reported that Sybil J. had placed conditions on Amber B.'s contact with Haylea G., including requiring that visitations occur at Sybil J.'s residence and involve no other persons, including Haylea G.'s siblings. As a result, contact between Amber B. and Haylea G. was infrequent.

The guardian ad litem reviewed medical records regarding the child's psychological treatment. He also interviewed the child, whom he deemed to be bright, intelligent, well-spoken, polite and mature for her age. He reported that the child enjoyed living with Sybil J. and wanted to remain in her care. He expressed "great concern" in his report to the court when he asked Haylea G. about her mother. He found that Haylea G.'s answers to the questions appeared to have been coached. The child told the guardian ad litem that she knew her mother used drugs and was trying to take her away from Sybil J. The child stated that she did not want to live with her mother because she smoked. Haylea G. admitted that Sybil J. was the source of her information about her mother.

The guardian ad litem recommended that the guardianship continue, as Sybil J. and Haylea G. had an established bond. He opined that it was in the best interests of the child to remain with Sybil J. and recommended that the guardianship be continued, but that a specific visitation scheduled should be created for Amber B. and Haylea G.

A caseworker for the Department performed a study of Amber B.'s home, and found it to be an appropriate placement for Haylea G. The home was found to be clean, in good repair and a suitable place for Haylea G., her siblings and her mother to live. She also testified that there had been no reports of child neglect or abuse involving Amber B. since she received custody of Haylea G.'s siblings. This caseworker testified

that she believed in some respects it was apparent that Haylea G. had been prepared to speak to the caseworker. She reported that the child told of two incidents involving abuse at the hands of Amber B., but gave them little credibility.[7] This witness testified that while it was apparent that the child was well cared for by Sybil J., she saw no problems in the home of Amber B. or in her ability to care for Haylea G.

By order dated September 21, 2012, the circuit court found that Amber B. had corrected the problems that created the need for the guardianship in this case. The court found that Amber B. was now a fit and proper person to care for her child, and thus, was an appropriate caregiver. The court found that it was in Haylea G.'s best interests to be raised in a home with her siblings, by her mother, and the court terminated Sybil J.'s guardianship of the child. The circuit court concluded that in matters of appointing guardians for minor children, the parents of those children should be given priority. The circuit court further concluded that the right of a natural parent to custody of his or her child is paramount to any other person's right. While the order acknowledged that Sybil J. may well be perceived to be a psychological parent to Haylea G. as the term is defined by this Court,[8] the circuit court concluded that this did not extinguish the paramount right

[7] The caseworker believed that these events, if true, would have happened well before the child went to live with Sybil G. at a very young age.

[8] We have defined the phrase "psychological parent" as follows:

> A psychological parent is person who, on a continuing day-to-day basis, through interaction, companionship, interplay,

(continued . . .)

of Amber B. to raise her daughter. The order further detailed a schedule of visitation between Amber B. and the child and a plan for reunification of Haylea G. into Amber B.'s home. In addition, the order was stayed by the circuit court until December 21, 2012, so that appellate review could be taken. This stay was modified by order entered November 5, 2012, such that the stay would remain in effect until the present appeal was concluded. The visitation components of the earlier orders remained in full force and effect.

The court also addressed the Social Security disability benefits for Haylea G., including the award of back benefits. The court found that Sybil J.'s "receipt, banking and expenditure of her ward's recent Social Security Administration award of approximately $9,000.00, or more, was shocking, if not criminal." The court criticized Sybil J.'s commingling of these funds with her personal money and Sybil J.'s use of the

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> and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In the interest of Brandon L. E.*, 183 W. Va. 113, 394 S.E.2d 515 (1999) that case is expressly modified.

Syl. pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

funds to repay a loan used to retain an attorney to defend Amber B.'s request for termination of the guardianship. The court ordered that Sybil J. pay to the guardian ad litem by the court all monies she received, and continued to receive on behalf of Haylea G., including the lump sum back pay award.

From this order Sybil J. pursues this appeal.[9]

II.

STANDARD OF REVIEW

In *In Re: Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998), this Court indicated that in a child abuse and neglect case the Court employs the two-pronged standard of review set forth in Syl. pt. of *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard,

[9] Subsequent to the entry of the order on appeal, the circuit court held another hearing on January 11, 2013, to address the repayment of the Social Security benefits. At this time Sybil J. was found in contempt for her failure to provide the approximately $9,000.00 in Social Security proceeds to the child's guardian ad litem. She was assessed a $100 per day monetary penalty for each day she failed to turn over the funds. That order is not directly on appeal to this Court but our ultimate conclusion of the present appeal renders the subsequent order moot.

> and we review the circuit court's underlying factual findings under a clearly erroneous standard.

With this standard of review in mind, we turn to the assigned errors.

III.

ANALYSIS

The petitioner assigns three grounds for error in these proceedings. First, the petitioner argues that the circuit court abused its discretion by terminating the guardianship. She argues that during the over five years the guardianship was in existence, she and Haylea G. developed a significant psychological bond. She also argues that it was an abuse of discretion for the circuit court to go against the stated recommendation of the guardian ad litem in maintaining this guardianship, that the best interests of the child mandated a continuation of the guardianship and that the circuit court failed to give her a meaningful opportunity to be heard.

Secondly, the petitioner argues that the court improperly found that she was not entitled to receive Social Security benefits, including a back pay award, for the child. The third assignment of error is that the circuit lacked subject matter jurisdiction to consider the reimbursement of the Social Security award. For the purposes of this opinion the second and third assignments of error are consolidated.

While the court found in 2008 that the guardianship was necessary and furthered the best interests of Haylea G., that order is subject to modification. W. Va. Code § 44-10-3(c) (2006) states,

> The court, the guardian or the minor may revoke or terminate the guardianship appointment when:
>
> (1) The minor reaches the age of eighteen and executes a release stating that the guardian estate was properly administered and that the minor has received the assets of the estate from the guardian;
>
> (2) The guardian or the minor dies;
>
> (3) The guardian petitions the court to resign and the court enters an order approving the resignation; or
>
> (4) A petition is filed by the guardian, the minor, an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian.[10]

(Footnote added). The circuit court treated Amber B.'s handwritten letter as a petition by "another interested person" for termination of the guardianship because there was no longer a need for the guardianship to continue, pursuant to W. Va. Code § 44-10-3(c)(4) (1999).

The petitioner argues that the circuit court wrongfully ignored the bond established since 2008 between Haylea G. and Sybil J. and elevated the rights of Amber

[10] The language of this statute is substantially similar to Rule 15 of the Rules of Practice and Procedure for Minor Guardianship Proceedings.

G. over those of the child. We disagree. In all instances the right of a fit parent to raise his or her children is a superior right to any other person's claim.

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). Furthermore,

> A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.

Syl., *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960). Therefore, the court had the authority to modify the guardianship upon sufficient proof.

The record clearly reflects that under Sybil J.'s guardianship, Haylea G. flourished. The issue before the circuit court was whether Amber B. had made the necessary changes so that the guardianship of Sybil J. was no longer necessary. The guardian ad litem and Sybil J. both argue that it is in the child's best interest to remain in the guardianship of Sybil J., because of how well the child is doing and because of the bond established between the two. The circuit court recognized and found, however, that

the ability for another person to provide for a child does not thereby render a parent unfit to raise her child. We have held,

> While courts always look to the best interests of the child in controversies concerning his or her custody, custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care.

Syl. pt. 3, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).

We find no clear error in the circuit court's findings of fact in this case. The circuit court clearly recognized the superior right of Amber B., as the child's mother, to custody of her child. We find that the circuit court appropriately applied the applicable law to the facts of this case, without an abuse of its discretion, as it relates to the termination of the guardianship. We therefore affirm the order of the circuit on the issue of the guardianship.

We next turn to the portion of the order that dealt with the Social Security monies. The order mandated the return of $9,000.00 Sybil J. received from Social Security on behalf of Haylea G. The circuit court ordered that the entire amount be transferred to the child's guardian ad litem, pending further action by the court.

Sybil J. asserts that the circuit court is devoid of subject matter jurisdiction to address child support in this matter, citing *Allen v. Allen*, 226 W. Va. 384, 701 S.E.2d 106 (2009), for the premise that the family court has "original and continuing

jurisdictions over matters of child support in domestic relations actions." *Allen*, 226 W. Va. 384 at ___, 701 S.E.2d 106 at ___.

However, this is not an instance where the circuit court was asked to establish, modify or enforce child support, all matters clearly within the specifically delegated jurisdiction of the family court and the concurrent jurisdiction of the circuit courts. Instead, the question deals with the use of funds awarded to Sybil J. on behalf of Haylea G. by a federal agency. The award was based upon existing federal statutes as well as federal administrative rules and regulations. Likewise, the use of the funds by Sybil J., as the representative payee for Haylea G., is based upon federal statutes and administrative rules and regulations.

The duties and responsibilities of the representative payee are contained in 20 C.F.R. § 404.2035 (2006). This section states,

> A representative payee has a responsibility to--
>
> (a) Use the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in your best interests;
>
> (b) Keep any benefits received on your behalf separate from his or her own funds and show your ownership of these benefits unless he or she is your spouse or natural or adoptive parent or stepparent and lives in the same household with you

> or is a State or local government agency for whom we have granted an exception to this requirement;
>
> (c) Treat any interest earned on the benefits as your property;
>
> (d) Notify us of any event or change in your circumstances that will affect the amount of benefits you receive, your right to receive benefits, or how you receive them;
>
> (e) Submit to us, upon our request, a written report accounting for the benefits received on your behalf, and make all supporting records available for review if requested by us; and
>
> (f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities.

Failure of the representative payee to properly handle the benefits received may lead to monetary sanction, criminal prosecution or both, according to 42 U.S.C. § 408(a)(5) (2006): "Whoever— . . . having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; . . . shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both."

We share the circuit court's concerns with the guardian's stated use of and accounting for Haylea G.'s benefits. These actions, as noted by the circuit court, may

have criminal or civil implications; however, we believe the circuit court acted outside of its jurisdiction when it determined that Sybil J. had wrongfully appropriated monies awarded to her by the SSA on behalf of Haylea G., and thus required the funds to be turned over to the guardian ad litem for further distribution by the circuit court. It is clear from the U.S.C. and the C.F.R. that the SSA is in the proper position to address this situation, either administratively or by referral to the appropriate authorities for prosecution under United States Code. The circuit court lacks jurisdiction to order that the funds be returned, or to mandate where they are to be distributed. As such, we reverse the portion of the circuit court's order that required Sybil J. to turn over the Social Security proceeds to the guardian ad litem. Although the subsequent order of the circuit court assessing a monetary penalty for each day that Sybil J. failed to give the funds to the guardian ad litem is not directly before us, we find that the order is moot in light of our reversal of the underlying requirement to return the funds.

IV.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court of Fayette County entered September 21, 2012, is affirmed, insofar as the order terminated Sybil J.'s guardianship of Haylea G. The portions of the order requiring Sybil J. to turn over the proceeds of the Social Security award made to her on behalf of Haylea G. are reversed. We remand this case with directions to the Circuit Court to ensure that a reasonable

reunification and transition for Haylea G. is made from the home of Sybil J. to her mother's residence.

Affirmed, in part, and reversed, in part, and remanded with directions.

No. 12-1242 – *In Re: Haylea G.*

FILED
June 18, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Justice Ketchum, concurring, in part, and dissenting, in part:

I agree with the majority decision to terminate the guardianship of Sybil J. and return the child to her mother.

I disagree with the majority's conclusion that the circuit court did not have jurisdiction over the child's Social Security benefits that may have been improperly used by Sybil J.

Sybil J. was the child's payee for her monthly Social Security check. The circuit judge became concerned that the funds were being improperly handled and/or spent. Therefore, the court ordered that the funds be transferred to the guardian ad litem until a further hearing by the court.

I understand these were federal funds issued by the Social Security Administration for the benefit of the child in Fayette County, West Virginia. If it is found that another person used the funds for matters not relating to the child then the circuit court has the absolute right (jurisdiction) to put the remaining funds in trust and conduct hearings to determine if there was wrongdoing.

Just because bank robbers steal *federal* currency (paper money) does not preempt our *state* court's jurisdiction to prosecute the criminals committing such crimes.

212 W. Va. 698, 575 S.E.2d 308

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

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December 3, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30621

RELEASED
December 4, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLES WILLIAM HEWITT, Ph.D.,
Petitioner Below, Appellee

v.

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondent Below, Appellant

Appeal from the Circuit Court of Ohio County
The Honorable Arthur M. Recht, Judge
Civil Action No. 01-P-41

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Submitted: November 13, 2002
Filed: December 3, 2002

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICES STARCHER and MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS

1. "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

2. In recognition of the lack of an express funding obligation provided for expert fees in juvenile delinquency cases and pursuant to our inherent authority to manage the courts of this state, this Court will assume financial responsibility in matters arising under this state's juvenile delinquency laws for the fees properly charged by expert witnesses appointed by the trial courts and subsequently approved for payment.

Albright, Justice:

The West Virginia Department of Health and Human Resources ("DHHR" or the "Department") appeals from the order of the Circuit Court of Ohio County entered on August 16, 2001, directing DHHR to pay Appellee William Hewitt, Ph.D., previously-awarded fees plus interest in connection with Dr. Hewitt's appointment by the trial court to perform psychological services in various juvenile delinquency and child abuse and/or neglect cases. DHHR challenges the underlying individual orders awarding fees to Dr. Hewitt on the grounds that the fees exceeded the rate established by Medicaid for the payment of such services. With regard to those payment orders pertaining to juvenile delinquency matters, DHHR asserts that there is no obligation, statutory or otherwise, requiring it to be responsible for the services performed by Dr. Hewitt. Upon our review of this matter, we determine that all orders approving and awarding payment for services performed by Dr. Hewitt in abuse and/or neglect cases that were entered prior to June 7, 2002, the effective date of West Virginia Code § 49-7-33 (2002),[1] shall be paid by DHHR at the rate approved by the trial court. Any payment orders pertaining to abuse and/or neglect matters entered following the effective date of West Virginia Code § 49-7-33, shall be paid by DHHR at the rate established by Medicaid and adopted by DHHR for such services. With regard to fees ordered in connection with juvenile

[1]This statutory provision expressly grants authority to DHHR to set the rate for psychological evaluations and other types of services provided by a health care professional pursuant to the Medicaid-established rate, provided that such a rate exists. *See* W.Va. Code § 49-7-33 (*see* text *infra* at pp. 7-8) .

delinquency cases, we determine that the lower court was without authority to require DHHR to be responsible for those costs.

I. Factual and Procedural Background

On April 10, 2001, Dr. Hewitt filed a petition in the circuit court seeking a rule to show cause as to why DHHR should not be held in contempt for non-payment of previously approved fee orders, which covered services performed by Dr. Hewitt beginning in the Fall of 1996 through March 2001. As support for his contempt petition, Dr. Hewitt cited Rule 27 of the West Virginia Trial Court Rules, arguing that the Court expressly adopted this rule to provide for public funding of expert assistance in child abuse and neglect cases. Observing that Trial Court Rule 27 does not reference payment of fees pursuant to a Medicaid-established rate, Dr. Hewitt further noted that DHHR never filed any objections to the payment orders he submitted for services rendered.

DHHR, in response to the circuit court's issuance of a rule to show cause,[2] moved to vacate the underlying payment orders on the grounds that, with respect to the payment orders arising from abuse and neglect proceedings, Dr. Hewitt failed to comply with the requirements of Trial Court Rule 27 concerning advance approval and determination of expert fees. As to juvenile delinquency cases, DHHR contends that it has no obligation to pay

[2]The rule to show cause was issued on April 11, 2001.

expert witness fees in such cases, citing the limited responsibility imposed upon the Department by Trial Court Rule 35.05.[3]

The circuit court conducted two evidentiary hearings[4] with regard to payment of Dr. Hewitt's outstanding expert witness fees. During a third hearing that took place on August 2, 2001, the circuit court announced that it was converting the contempt petition into a request for mandamus relief and that it was ruling in favor of Dr. Hewitt. An order granting the relief requested by Dr. Hewitt was entered on August 16, 2001, awarding the principal sum of $71,211.40, as well as interest payments totaling $6,584.36 for a cumulative award of $77,795.76. The trial court denied Dr. Hewitt's request for attorney's fees in connection with the contempt petition.

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[3]Trial Court Rule 35.05 provides for the compensation of experts in general and provides for only two areas in which DHHR is responsible for the payment of expert witnesses: evaluations performed pursuant to West Virginia Code § 27-6A-1(a)-(e) (1983) (Repl. Vol. 2001) (governing determination of competency of defendant to stand trial and criminal responsibility) and those conducted under authority of West Virginia Code § 62-12-2(e) (1999) (Repl. Vol. 2000) (addressing eligibility of certain defendants for probation). In the other instances delineated by the rule, either the county prosecuting attorney's office; the Supreme Court's administrative office; or the Public Defender's office is responsible for the expert witness fees.

[4]The hearings were held on May 2 and 4, 2001.

Through this appeal,[5] DHHR seeks relief from the August 16, 2001, order that directed it to pay the referenced fees to Dr. Hewitt pursuant to a writ of mandamus.

II. Standard of Review

Because we are reviewing the lower court's issuance of a writ of mandamus, our review is governed by the axiomatic standard that we apply to the issuance of such writs:

"A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). We proceed to determine whether the lower court erred in issuing a writ of mandamus under the facts of this particular case.

III. Discussion

We note at the outset of our discussion that budgetary concerns underlie the DHHR's actions concerning non-payment of fees in this matter. DHHR submitted an affidavit to this Court in support of its appeal, wherein the Department indicated that a ninety million dollar deficit is projected for fiscal year 2003. Against this background of looming financial

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[5]This Court refused DHHR's first petition for appeal on February 7, 2002. We granted a second petition for appeal on June 4, 2002, allowing DHHR to file the same out of time.

shortages, DHHR informed the Court that during fiscal year 2001 it paid approximately 1.6 million dollars for court-ordered payments, "of which approximately 75% was for treatment, counseling and evaluations." While the Court is not unappreciative of the budgetary constraints facing DHHR, we cannot resolve the issues presented here based on the operating costs of a state agency. Our decision must be grounded in the law, rather than a response to a specific agency's financial woes.

A. Authority To Establish Fees

DHHR argues that the circuit court was without authority to direct it to pay Dr. Hewitt at a rate higher than it pays other providers of similar services. Since July 1998, DHHR has had in place a policy of paying its medical services providers fees that are consistent with Medicaid-established rates.[6] The Medicaid-approved rate for psychological evaluation services is $182.20. In the subject payment orders at issue, the fee submitted by Dr. Hewitt, and approved by the circuit court, was either $550 or $750, depending on when the services were performed.[7] Although Dr. Hewitt withdrew from being a Medicaid provider in 1997, DHHR contends that it mistakenly believed that he was still a Medicaid provider and thus only

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[6]The Department acknowledges, however, that "there has [not] been 100% compliance with this payment policy," attributing such non-compliance to instances of court-ordered payments.

[7]Whereas the current rate charged by Dr. Hewitt for performing court-appointed psychological evaluations is $750, it was previously $550.

entitled to the set fee of $182.20.[8] DHHR states additionally that its reason for not paying the court-ordered fees prior to the filing of the contempt petition "is simply because he [Dr. Hewitt] has billed a higher rate rather than [sic] the Department believes is reasonable under the circumstances compared to what other similarly situated psychologists are paid."

When the initial psychological services were performed by Dr. Hewitt that are the subject of this appeal, the sole authority for awarding expert witness fees in abuse and neglect cases was found in West Virginia Code § 49-6-4 (1984) (Repl. Vol. 2001). That statutory provision provides, in pertinent part:

> At any time during proceedings under this article the court may, upon its own motion or upon motion of the child or other parties, order the child or other parties to be examined by a physician, psychologist or psychiatrist, and may require testimony from such expert, subject to cross-examination and the rules of evidence. . . . *The court by order shall provide for the payment of all such expert witnesses.* If the child, parent or custodian is indigent, such witnesses shall be compensated out of the treasury of the State. . . .

Id. (emphasis supplied). Under a separate statutory provision, which the State concedes is in need of amending due to the antiquated fixed fee, the State is limited to paying only ten dollars for mental and physical examinations performed on juveniles. *See* W.Va. Code § 49-5-4 (1998) (Repl. Vol. 2001).

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[8]Dr. Hewitt notes, however, that the record contains a letter from DHHR dated May 29, 1997, indicating that Dr. Hewitt was not on the State Medicaid rolls as a provider.

With the adoption by this Court of certain trial court rules effective July 1, 1999, a rule was added that specifically addresses the issue of public funding for experts in child abuse and neglect cases. Trial Court Rule 27.02 provides that:

> The court shall by order establish in advance the reasonable fees and expenses to be paid to an expert. Payment shall be as follows: Upon completion of services by an expert, the court shall, by order, direct the State Department of Health and Human Resources to pay for the expert's evaluation, report writing, consultation, or other preparation; and the court shall, by order, direct payment by the Supreme Court's Administrative Office for the expert's fee and expenses entailed in appearing to testify as a witness.

Under this rule, there is a split of payment responsibility for evaluative services and testimonial services, with the Court being responsible for the latter and DHHR, the former.

Through the efforts of DHHR, a recent statutory enactment -- West Virginia Code § 49-7-33 -- gives DHHR authority to establish the fee schedule for paying health care professionals who provide services in connection with proceedings brought pursuant to article 49, chapters five and six of the West Virginia Code. That provision, which went into effect on June 7, 2002, states as follows:

> At any time during any proceedings brought pursuant to articles five [§§ 49-5-2 et seq.] and six [§§ 49-6-1 et seq.] of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia department of health and human resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation

> and preparation of expert testimony. The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every such psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the West Virginia department of health and human resources upon completion of services and submission of a final report or other information and documentation as required by the policies and procedures implemented by the West Virginia department of health and human resources.

W.Va. Code § 49-7-33.

Based on the enactment of West Virginia Code § 49-7-33, DHHR argues that the circuit court's entry of the August 16, 2001, order constitutes a separation of powers issue in that the order disregards the agency's authority to establish the rate for expert fee payments consistent with the Medicaid rate for such services. This argument does not withstand scrutiny because West Virginia Code § 49-7-33 did not go into effect until almost ten months after the entry of the lower court's order. Consequently, all of the individual payment orders that are the collective subject of the August 16, 2001, order were entered well in advance of the effective date of the legislation at issue. Because the underlying matter began as a contempt proceeding, we cannot disregard the fact that the multiple payment orders that underlie the August 16, 2001, order are the orders for which enforcement was initially sought and thus, are the actual orders at issue in the case *sub judice*.

A significant and lingering issue, which cannot be resolved today, arises from the conflicting statutory provisions now in effect that address the award of expert fees in abuse and neglect cases. Notwithstanding the enactment of West Virginia Code § 49-7-33 and its grant of authority to DHHR to set rates for expert witnesses, previously established authority still exists for circuit courts to "provide for the payment of all such expert witnesses" in abuse and neglect proceedings. W.Va. Code § 49-6-4. As a result of this continuing authority in the circuit courts, we do not accept the position of DHHR that it has exclusive authority for the payment of expert fees in abuse and neglect cases under the provisions of West Virginia Code § 49-7-33.[9] Clearly, that provision, when properly invoked,[10] enables the Department to use Medicaid-established rates for the provision of health care services as required under chapter 49, articles five and six, where such rates are available.[11] Critically, however, a circuit court

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[9]DHHR argues that "it has the right as an Executive Branch Agency to determine what its payment obligations are." While we appreciate the Department's contention that it is entitled to control over its monetary obligations, this statement does not realistically reflect the situation presented by the necessary interworkings of the judicial branch and the executive branch in instances of cases involving children who require the services of this state. If DHHR is suggesting that the judicial branch has no right in any instance to set expert fees or to approve such fees, we cannot agree with this proposition.

[10]The provisions of West Virginia Code § 49-7-33 do not limit the fees charged by expert witnesses where such witnesses are retained privately. Those statutory provisions only operate as a restriction on the amount that can be charged when DHHR is ordered by the trial court to pay for health care services in connection with matters arising under articles five and six of chapter 49.

[11]While one reading of the statute suggests that DHHR may use a "customary rate" where a Medicaid rate is not available, the statute arguably gives the agency the discretion to choose between the Medicaid rate and the "customary rate," due to its use of a disjunctive connective. *See* W.Va. Code § 49-7-33.

still retains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect matters. *See* W.Va. Code § 49-6-4.

B. Authority to Require Payment of Expert Fees

Returning to the issue of the enforceability of the orders that are the subject of the August 16, 2001, order, we find that because the payment orders were all for services that preceded the June 7, 2002, effective date of West Virginia Code §49-7-33 and because the actual payment orders relative to those services were entered before that date, there is no statutory impediment to payment of those orders at the rates provided for in the respective orders. However, all payment orders submitted for services within the scope of West Virginia Code § 49-7-33 that were performed after the statute's effective date, or that were approved for payment after June 7, 2002, are subject to the payment provisions provided therein.

Besides challenging the payment orders on the grounds that such payments exceed the amounts authorized by West Virginia Code § 49-7-33, DHHR raises additional objections to those orders stemming from the preapproval procedure established in Trial Court Rule 27.02. While the parties did not provide us with specifics, some of the underlying payment orders at issue were not preapproved by the trial court regarding the amount of the expert witness fee to be awarded for the evaluative services to be performed by Dr. Hewitt.[12]

[12]While the State quantifies the number of non-complying payment orders as (continued...)

However, by failing to appeal any of the underlying orders that collectively comprise the subject of the August 16, 2001, order, DHHR has waived its right to challenge the enforceability of those orders. *See* Syl. Pt. 3, *State v. Asbury*, 187 W. Va. 87, 415 S.E.2d 891 (1992) (holding that "[f]ailure to make timely and proper objection . . . constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court"); *see also Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 62, 475 S.E.2d 55, 62 (1996) (observing that "Appellant's failure to appeal the final judgment order entered by the circuit court brought finality to that judgment, thereby ending any controversy or adverseness between the parties"); *Ward v. Ward's Heirs*, 50 W.Va. 517, 519, 40 S.E. 472, 473 (1901) ("'Where a party by his acts or express agreement releases appealable error, he waives all right of appeal'") (*quoting* 2 Ency. Pl. & Prac. 174, note; 7 Ency. Pl. & Prac. 870). Given the clear failure of the State to challenge the underlying payment orders through means of an appeal, we cannot entertain any non-jurisdictional based challenges to those orders at this time. *See Whitlow v. Board of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (recognizing general rule that failure to raise nonjurisdictional issues below precludes appellate consideration of such issues).

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[12](...continued)
"significant," Dr. Hewitt disputes that there are numerous such orders and further indicates that "nearly all" of the orders entered after July 1, 1999, (effective date of Trial Court Rule 27) "were 'pre-approved' by separate order as was the procedure that was used from the Fall of 2000 to date." Because the State failed to assert any objection at the time the orders were submitted for approval based on failure to adhere to trial court rule procedures and because the State also failed to appeal from the entry of any such payment orders on those or other grounds, we find that such objections have been waived.

While we find no impediment to enforcement of the underlying payment orders that are the subject of the August 16, 2001, order which arose in connection with abuse and/or neglect proceedings, we do not find the same to be true with regard to those orders stemming from juvenile delinquency matters. *See* W.Va. Code § 49-6-4. Unlike the authority reposed in the circuit courts by West Virginia Code § 49-6-4 to award expert fees in abuse and neglect proceedings, there is no similar grant of authority to circuit courts for setting expert fees in juvenile delinquency cases. *Cf*. W.Va. Code § 49-5-4 (limiting examining fee in juvenile matters to $10). Accordingly, we cannot uphold the lower court's imposition of payment responsibility on the Department with regard to those expert witness fees submitted by Dr. Hewitt in cases that arose under this state's juvenile delinquency laws.

In recognition of the lack of an express funding obligation provided for expert fees in juvenile delinquency cases and pursuant to our inherent authority to manage the courts of this state, this Court will assume financial responsibility in matters arising under this state's juvenile delinquency laws for the fees properly charged by expert witnesses appointed by the trial courts and subsequently approved for payment. Accordingly, the lower court on remand shall identify which of those cases included in the August 16, 2001, order were juvenile delinquency cases[13] and deduct from its award such amounts that are attributable to Dr.

[13]According to exhibit number three that DHHR attached to its second petition for appeal, there appear to be twelve juvenile delinquency matters included in the August 16, 2001, order.

Hewitt's approved fees relative to those cases. The payment orders pertaining to those juvenile delinquency cases should then be submitted to this Court's administrative office for purposes of payment.

While our decision to assume responsibility for the expert witness fees in juvenile delinquency matters arises in part due to this Court's recognition that Trial Court Rule 27 is limited in its application to abuse and neglect matters, we wish to address the requirement imposed under Trial Court Rule 27 for advance approval of expert fees. Because the issue of establishing the fees to be charged in advance serves several laudatory purposes, we encourage the trial courts to extend the preapproval requirement imposed by Trial Court Rule 27 to juvenile delinquency matters also. In this fashion, all of the parties will be fully apprised at an early stage of the litigation concerning the fee amount and there should be a consequent reduction in challenges to expert fee awards. Furthermore, we urge the trial courts to be diligent in applying the preapproval requirement of Trial Court Rule 27.02 to both child abuse and neglect matters and to juvenile delinquency matters.[14]

[14]We wish to emphasize that, by refusing to set aside those payment orders where preapproval was not obtained, we do not imply any reduced significance to this requirement of securing advance approval of expert fees. Our refusal to permit this requirement to serve as a means of preventing the enforcement of the underlying payment orders was due to the constraints of the appellate process, rather than being based upon a view that this requirement of approving expert fees in advance is a matter of minor significance, or undeserving of enforcement. *See supra* note 12.

C. Relief to be Awarded

Because we conclude that the circuit court was acting within its authority in approving the payment orders concerning abuse and/or neglect matters that precede the effective date of West Virginia Code § 49-7-33 and because we find that DHHR has a duty to make those payments, we affirm the lower court's issuance of the writ of mandamus as to all those underlying payment orders arising in abuse and/or neglect matters for services provided by Dr. Hewitt that preceded June 7, 2002, provided such orders were entered on or before June 7, 2002. As to any payment orders arising in connection with abuse and/or neglect matters that pertain to services performed by Dr. Hewitt following June 7, 2002, or where such orders were not entered before June 7, 2002, the provisions of West Virginia Code § 49-7-33 are controlling. Based on our conclusion that no authority exists for requiring DHHR to be responsible for the expert fees associated with juvenile delinquency cases, we reverse the lower court's issuance of the writ of mandamus as to all those underlying payment orders arising in connection with juvenile delinquency matters. Those payment orders, as discussed above, shall be forwarded to this Court for payment.

Based on the foregoing, the decision of the Circuit Court of Ohio County entered on August 16, 2001, is affirmed, in part; reversed, in part; and remanded for further proceedings consistent with this opinion.

Affirmed, in part;
Reversed, in part;
and Remanded.

No. 30621 - Charles William Hewitt, Ph.D. v. State of West Virginia Department of Health and Human Resources

FILED
December 10, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
December 11, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring, in part, and dissenting, in part:

The basic issue in this case, as posed by the DHHR, is whether as a matter of law Dr. Hewitt should be compensated more than other psychologists throughout West Virginia for the court-ordered services that he renders. An ancillary issue is whether the Department of Health and Human Services may budget for such services based upon its medicaid reimbursement rate, or based on figures in whatever amount that may be established by a circuit court, without reference to any statewide controlling guidelines.

I am sympathetic to the DHHR's position on these issues. That is why I am pleased that this Court's opinion recognizes the DHHR's looming financial shortages, and establishes an important limitation on the DHHR's duty to pay expert witness fees in juvenile delinquency cases. And I am also pleased that the pre-approval requirement is strongly recognized in the Court's opinion; this process should prevent many future problems.

The decentralized nature of our circuit court system is excellent for certain purposes, but it can come into strong tension with the cost of managing what are in most respects social work and public health matters.

Thus, we have recently gotten away from allowing circuit judges *carte blanche* to require costly, often out-of-state placements for children in crisis. Moreover, courts simply cannot be a rubber-stamp for "have invoice, will travel" experts.

I would therefore find that the lack of fee pre-approval in Dr. Hewitt's cases was a jurisdictional defect that made the orders void, even if they were not immediately appealed.

I am authorized to state that Justice Maynard joins in this separate opinion.

164 W. Va. 112, 262 S.E.2d 744

Supreme Court of Appeals of West Virginia

Linda L. HINKLE, Exrs., etc. et al.

v.

The Hon. Donald F. BLACK, etc. et al.

No. 14617.

Dec. 18, 1979.

SYLLABUS BY THE COURT

1. In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

2. W.Va.Code, 56-9-1 (1939) which provides that a circuit court in which a proceeding has been filed may transfer the proceeding to another circuit for good cause is not inconsistent with Rule 42b, W.Va. RCP which provides that the court in which the first of two or more related actions arising out of the same transaction is pending may order all actions transferred to it.

3. Where a trial court does not abuse its discretion in transferring cases under W.Va.Code, 56-9-1 (1939) this Court will not prohibit such transfer.

Sterl F. Shinaberry, Hostler & Shinaberry, Charleston, for petitioners.

John R. Hoblitzell, Kay, Casto & Chaney, Charleston, for Cross Concrete.

Herbert G. Underwood, James M. Wilson, Steptoe & Johnson, Clarksburg, for Research-Cottrell.

Diana Everett, Cather & Renner, Parkersburg, for United.

John B. Garden, R. Noel Foreman, Bachmann, Hess, Bachmann & Garden, Wheeling, for Allegheny, Monongahela and Potomac-Edison.

Spilman, Thomas, Battle & Klostermeyer, David B. Shapiro, John H. Tinney, Charleston, McQuire, Woods & Battle, Murray H. Wright, Richmond, Va., for Pittsburgh Testing.

NEELY, Justice:
On 27 April 1978 the collapse of a cooling tower then under construction at the Pleasants Power Station, Willow Island, Pleasants County, West Virginia, resulted in the deaths of fifty-one men. As a consequence of certain of those deaths, as of 18 June 1979, there were pending in the Circuit Court of Pleasants County twenty civil actions which sought damages for wrongful death from various defendants who were involved in the construction or ownership of the collapsed tower.

On 16 May 1979 seven civil actions seeking damages for the alleged wrongful deaths of persons killed in the same collapse were filed in the Circuit Court of Wood County. Before the filing of the seven civil actions in Wood County, the Circuit Court of Pleasants County had consolidated all of the then pending Willow Island cases for discovery purposes and ordered all cases arising out of the cooling tower disaster which would subsequently be filed in Pleasants County to be likewise consolidated, subject to plaintiffs' objection, and ordered that the law firm of Preiser & Wilson be appointed "to serve as lead counsel for the purpose of supervising, coordinating, and initiating pretrial discovery on behalf of all plaintiffs in such actions consolidated herewith."

The seven civil actions filed in Wood County were distributed among the three judges of that court, and on 18 June 1979 Research-Cottrell, which was a defendant in each of the wrongful death actions, moved the Circuit Court of Wood County to remove the civil actions filed in that circuit to the Circuit Court of Pleasants County pursuant to W.Va.Code, 56-9-1 (1939). See footnote 1

The motion to transfer the actions to Pleasants County was resisted by the plaintiffs in the Wood County litigation and after briefs and argument the respondent, Donald F. Black, Chief Judge of the Circuit Court of Wood County, granted the motion and directed that an order effecting that decision be prepared for entry. Included in Judge Black's findings were his conclusions that:

> all Twenty-Seven (27) Civil Actions Seven (7) pending in the Circuit Court of Wood County, West Virginia, a nd the Twenty (20) pending in the Circuit Court of Pleasants County, West Virginia, involved com mon questions of both law and fact, and that they can be consolidated for the purposes of discovery and trial, and the issues of liability and all other matters other than the quantum of damages. If said Civil Actions are consolidated for the determination of all issues other than dam ages, they will save all parties litigant to all Tw enty-Seven (27) Ci vil Actions much time and m oney. Such consolidati on would avoid (1) duplication of discovery, (2) the duplication of the tria l of the issues of liability, and (3) duplication as to other issues. Such consolidation would avoid possible

contradictory rulings on the part of th e separate circuit courts trying the same.

The plaintiffs in the Wood County action then came to this Court seeking a writ of prohibition and we granted a rule to show cause why the Circuit Court of Wood County had not exceeded its legitimate powers in transferring the civil actions to Pleasants County. We conclude that the Circuit Court of Wood County had jurisdiction to transfer the cases and that in so doing the court did not abuse its discretion; consequently, the writ of prohibition prayed for is denied.

I

The threshold question presented in this case is whether an issue of this type may be reached by a writ of prohibition. This case presents an opportunity to address a subject which has not recently been adequately considered, namely when a litigant can successfully seek a writ of prohibition to serve the office of an interlocutory appeal. In general there is an Embarras de richesses of creative mandates emanating from actions in prohibition See footnote 2 and an utter paucity of cogent analysis of the criteria which motivate this court to entertain a proceeding in prohibition. In general judges cringe at the bare mention of an "interlocutory appeal" because it conjures the specter of clogged dockets, interminable delays while minor procedural points are shunted from trial court to appellate court and back, and the piecemeal adjudication of causes which could be satisfactorily resolved exclusively in the lower court. To the extent that all of these fears are justified we are adamantly opposed to being in the interlocutory appeals business.

Nonetheless, the classic formulation that a writ of prohibition will issue "in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers," W.Va.Code, 53-1-1 (1923) hardly illuminates the variety of circumstances where this Court will grant a rule in prohibition. See footnote 3 "(T)here is no sharp line between a court acting in error under substantive or procedural law and a court acting in excess of its powers if only because every act without jurisdiction or in excess of its powers in a proceeding over which it has jurisdiction of necessity involves an 'error of law.' " La Rocca v. Lane, 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606 (1975),Cert. denied, 424 U.S. 968, 96 S.Ct. 1464, 47 L.Ed.2d 734 (1976).

We have recognized the simple truth of the La Rocca, supra, pronouncement in the variety of circumstances where we have issued writs of prohibition because a court "exceeded its legitimate powers," See footnote 4 but we have been unable to articulate functional rules which instruct the bar when their attempts to invoke this Court's discretionary jurisdiction will meet with success. It is to this undertaking that we shall now proceed with some trepidation.

Since the key word in any analysis of prohibition must be "discretionary" unless this Court is to take on the character of an appellate squire's court, we are confounded for that reason by insurmountable conceptual hurdles to constructing iron-clad rules about when prohibition will issue. We can initially, however, perform one service for litigants and the bar, namely explain that once a rule to show cause in prohibition has issued it is unnecessary to brief the procedural question of whether prohibition is the appropriate remedy under prior case law. This Court is sufficiently familiar with all the law surrounding the writ of prohibition that three or four pages of brief dedicated to a repetition of rules about prohibition lying only when a trial court has "exceeded its legitimate powers" is a waste of litigant money and lawyer and court time. It shall be sufficient hereafter in prohibition cases to state the simple proposition that prohibition is not the appropriate remedy arguing the functional criteria of this case or alternatively that prohibition is the appropriate remedy using the same criteria.

When then will prohibition be considered the appropriate remedy and a rule to show cause issue? At the heart of the matter are two functional criteria: first, the adequacy of another remedy such as appeal; second, economy of effort among litigants, lawyers and courts. See footnote 5Furthermore, there is a gloss which surrounds both previous criteria, namely a question of good faith. Whenever the Court believes that a prohibition petition is interposed for the purpose of delay or to confuse and confound the legitimate workings of the criminal or civil process in the lower courts, a rule will be denied. In this regard it should be noted that in the last ten years we are unable to find any prohibition cases arising during a trial.

Obviously there are prohibition proceedings which come squarely within the classic definition of "when the inferior court has no jurisdiction of the subject matter in controversy" Code, 53-1-1 (1923) as when, for example, a magistrate court undertakes to try title to real estate or a circuit court undertakes to adjudicate the rights of nonresidents who have not properly been served with process. See footnote 6 Many cases, however, are entertained under the catch-all "exceeds its legitimate powers" Code, 53-1-1 (1923) and there the operative thought process of this Court in granting a rule involves a weighing of the gravity of the harm to be caused by pre-trial error versus the efficacy of an alternative remedy. See "The Writ of Prohibition in New York Attempt to Circumscribe an Elusive Concept," 50 St. John's Law Review 76 (1976).

In the case before us we had an excellent Prima facie showing of grounds for relief in prohibition at the time the rule issued; while we have concluded after looking at the merits that the trial court acted properly, that is a determination on the merits and not on the appropriateness of the prohibition remedy. If the trial court had acted improperly in this case there would have been no Effective remedy by appeal. The petitioners alleged that they were entitled to a jury trial in the forum of their choice and that the Parkersburg forum would give them a jury with a substantially higher likelihood of a generous award.

Had they been correct, yet been forced to trial in Pleasants County, they might have received a generous award, but arguably not as generous as they would have received in Wood County. What would they then be able to do? Appeal a verdict for half a million dollars in the hopes of getting a new trial with a larger award? Few plaintiffs' lawyers will trade good awards for the hope of excellent awards when there is a risk of losing all.

Consequently, in the case before us the adequacy of a remedy by appeal was wholly theoretical and not at all practical. The same applies in criminal cases where the issue is double jeopardy; a defendant may be put to $25,000 worth of legal fees, months of agony (possibly in jail) and a year in prison or the county jail while this Court considers a full appeal. That is hardly adequate! Furthermore, in terms of judicial economy it is far more efficient for this Court to prohibit a trial when the defendant presents a good double jeopardy plea than it is to have the lower court spend court time, jury fees, witness fees, transcript expenses, and prosecutor resources only to discover two years later that the trial was a nullity. The cases where double jeopardy has not been found a good ground are seldom reported because this Court does not issue the rule in the first place. This Court's time is not so valuable that we cannot spend ten man hours (staff included) to save three hundred man hours below and $30,000 in expense. The reported cases generally reveal at least one rule, namely, that whenever lawyers feel that they have been outrageously abused by incorrect trial court rulings they come to this Court seeking justice and this Court has frequently responded. See footnote 7 The salutary restraints upon excessive attempts to invoke prohibition are two: first, a recognition on the part of the bar that frivolous cases will fall upon deaf ears; second, a recognition of the expense and time involved in going through an essentially vain process.

In most of the cases where a rule has been issued the question has been exclusively legal and not a mixed question of fact and law. This Court is not engineered to be as efficient a finder of fact as a trial court because of the cumbersome procedures for taking depositions. When, however, there is a clear legal question it is often efficient to come in prohibition. Furthermore, a remedy by appeal of a crucial but erroneous legal ruling is frequently quite inadequate, particularly if we are realistic in our definition of "adequacy" and recognize that part of adequacy has to do with expense and time. However, where the proper resolution of the legal question first depends upon a proper finding of disputed facts, then the efficiency of prohibition disappears because of mechanical problems in fact finding inherent in multimember courts. In that event, surely, the relative adequacy of a remedy by appeal becomes correspondingly enhanced.

We fear that prohibition may become a dragnet by means of which questions appropriate for the trial court will erroneously be brought before our Court; nonetheless, this Court invites opportunities to correct substantial, clear-cut, legal errors where there is the high probability that the trial will be completely reversed if the error is not corrected in advance. Examples of this type of error have been: proceedings predicated on

unconstitutional statutes; See footnote 8 improper joinder of parties defendant; See footnote 9 awards of alimony in favor of a guilty party against whom a divorce has been granted; See footnote 10 proceedings in direct contravention of a clear, positive command of the State or Federal constitutions; See footnote 11 proceedings in contravention of a clear, positive command of a statute; See footnote 12Et hoc genus omne.

Consequently, when litigants apply for a writ of prohibition they should concisely set forth their reasons for believing that the particular action of the trial court of which they complain creates grave harm and the reasons that alternative remedies fail to provide adequate relief. In this regard the word "adequate" must subsume in its definition such considerations as speed, cost, and the difficulty of separating issues on appeal. The purpose of this analysis of prohibition is not to expand the use of the writ beyond our current practice, but rather to explain the thought process which the Court appears to be employing so that litigants can respond more effectively. In addition we help shorten the gap between experienced West Virginia practitioners and out-of-state or inexperienced, young lawyers who must instruct themselves through written opinions rather than informal lore at the bar.

II

The petitioners in the case before us assert that the provisions of W.Va.Code, 56-9-1 (1939) have been superseded by Rule 42b, W.Va.RCP. We agree that to the extent that statutes relating to pleading, practice and procedure are inconsistent with or repugnant to the Rules of Civil Procedure they are no longer in force and effect as mandated by W.Va.Code, 51-1-4 (1935). However, we find no inconsistency between the statute which provides that a party may move a circuit court in which an action is pending to transfer it to any other circuit if good cause is shown and Rule 42b which allows the court in which the first of two or more related actions is pending to order all actions transferred to it. The statute and the Rule are opposite sides of the same coin; the first permits one circuit judge to transfer a case to another circuit for good cause and the second permits a judge to summon cases to his circuit when his court was the first in which one of related actions was filed. Both statute and Rule are designed to accomplish one goal, namely provide for a system which will give consistent economical, and efficient relief. Accordingly, since there is no inconsistency between the statute and the rule, we hold that the respondent judge of Wood County had jurisdiction under the statute to order the cases transferred.

III

Petitioners further allege that even if the respondent judge had jurisdiction to transfer the cases he abused his discretion in so doing since the plaintiffs were entitled to a jury trial in any forum of their choice with proper jurisdiction and venue. This confronts us with the need to reconcile conflicting public policies: the first is to "secure the just, speedy,

and inexpensive determination of every action" Rule 1, W.Va.RCP ; the second is to assure that a plaintiff may choose the forum which is most convenient for him. See footnote 13 The respondent Criss Concrete Company filed a number of exhibits in this prohibition proceeding, among which were included 286 pages of depositions already taken along with over 200 printed pages of interrogatory questions. One can imagine the volume of the answers which will be submitted in response! There are nine corporate defendants and 27 individual plaintiffs in these actions. Furthermore, it appears that the suit will focus upon enormously complex factual questions involving principles of engineering which will be intertwined with equally complex legal issues concerning workmen's compensation immunity, warranty, products liability, negligence, and comparative negligence. The petitioners assert that since Wood County is an urban county, the potential jury award would be higher because urban juries tend to be more generous than rural juries. A look at the State map, however, demonstrates that Pleasants County is directly adjacent to Wood County and it is obvious that the residents of Pleasants County enjoy a general participation in the business, industry, and commerce of the Parkersburg area. As this Court indicated in State ex rel. Whitman v. Fox, W.Va., 236 S.E.2d 565 (1977) the consideration of judicial economy cannot outweigh injury to the litigants in a circumstance where the economical procedure is at direct odds with overall fairness or equity; however, the Court concludes that in light of community of interest between Wood County and Pleasants County the disadvantage to the plaintiffs is speculative at best while the advantages of consolidation in terms of both economy and consistency are quite real and substantial. Furthermore we find that Pleasants County is as convenient a forum for the plaintiffs as Wood County and that they are not put to any significant increased expense or aggravation in prosecuting their claim in Pleasants County.

Accordingly for the reasons set forth above the writ of prohibition is denied.

Writ denied.

Footnote: 1 W.Va.Code, 56-9-1 (1939) provides:
A circuit court, or any court of limited jurisdiction established pursuant to the provisions of section 1, article VIII of the Constitution of this State, wherein an action, suit, motion or other civil proceeding is pending, or the judge thereof in vacation, may on the motion of any party, after ten days' notice to the adverse party or his attorney, and for good cause shown, order such action, suit, motion or other civil proceeding to be removed, if pending in a circuit court, to any other circuit court, and if pending in any court of limited jurisdiction hereinbefore mentioned to the circuit court of that county: Provided, that the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so.

Footnote: 2 *One of the best examples of creative prohibitionship is State ex rel. Knight v. Public Service Commission, W.Va., 245 S.E.2d 144 (1978) where this Court said: "This action arises in prohibition but we are not quite certain what it is that the relator would have us prohibit, as the statutory scheme in West Virginia permits proposed rate increases to go into effect after one hundred and fifty days Absent any action by the Public Service Commission. We shall assume Arguendo, however, for the purposes of this case, that if the challenged statute were unconstitutional some exercise in judicial imagination would permit us to reach the issue on prohibition."*

Footnote: 3 *For many years finality was jealously guarded in the Federal system and was "departed from only when observance of it would practically defeat the right to any review at all." Cobbledick v. United States, 309 U.S. 323, 324-25, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). Since the advent of "supervisory mandamus" which was embraced by a bare majority in La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the reluctance to issue extraordinary writs under the venerable All Writs Act, 28 U.S.C. s 1651 has diminished greatly. In La Buy the United States Supreme Court held that a writ of mandamus (which in West Virginia practice would be a writ of prohibition since we still observe the common law, historical distinction between administrative officers and judicial officers, See Beard v. Worrell, W.Va., 212 S.E.2d 598 (1974)) was properly issued to prohibit a district court judge from transferring a complicated anti-trust case to a master after a significant amount of the litigation had already been completed. The Court admonished that this presented "exceptional conditions" where the Court had "exceeded or refused to exercise its functions." 352 U.S. at 257, 77 S.Ct. at 314. The Court also included the obligatory phrase that the decision was not opening the floodgates to interlocutory review and that it did not intend "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders." 352 U.S. at 255, 77 S.Ct. at 313. The dissent was more realistic and prescient in recognizing the "encouragement to interlocutory appeals offered by this decision" 352 U.S. at 268, 77 S.Ct. at 320 (Brennan, J., dissenting). Since La Buy "(i)t is beyond question that the supervisory mandamus cases have extended the writs well beyond their traditional role." 16 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction s 3934 at 241 (1977). In both civil and criminal areas the use of the extraordinary writ in Federal review is burgeoning but at least one commentator believes that "stern admonitions that the writs remain reserved for extraordinary situations have been effective in preventing a debilitating rush of petitioners." Id. We hope the same will apply in West Virginia!*

Footnote: 4 *State ex rel. Hanley v. Hey, W.Va., 255 S.E.2d 354 (1979) (writ awarded to prohibit judge from granting probation to an individual who had already been adjudged in a final revocation hearing to have violated a condition of his probation by committing a felony); State ex rel. Moran v. Ziegler, W.Va., 244 S.E.2d 550 (1978) (writ awarded to prohibit private prosecutor from continuing to prosecute after defendant had initially*

contacted the prosecutor to represent him in the same criminal matter); State ex rel. Winter v. MacQueen, W.Va., 239 S.E.2d 660 (1977) (writ awarded to prohibit judge from granting probation to an individual who had been convicted of a felony within past five years); W. Va. Dept. of Highways v. Arbogast, W.Va., 201 S.E.2d 492 (1973) (writ awarded to prohibit denial of continuance when statute provides that proceedings should proceed after a reasonable time had elapsed for completion of the work and trial court failed to provide reasonable time); and, Woodall v. Laurita, 156 W.Va. 707, 195 S.E.2d 717 (1973) (writ denied but petitioner successfully demonstrated a multiplicity of pretrial errors by the prosecuting attorney that resulted in egregious failures of due process, however, rendered moot by subsequent prosecuting attorney who admitted error of predecessor.)

Footnote: 5 The federal appellate courts have wrestled with the problem of formulating objective principles to guide the use of their power to issue extraordinary writs. The Ninth Circuit recently helped frame the boundaries of this power by suggesting guidelines gleaned from cases that granted extraordinary relief. That court set out the following five guidelines for practical application:
(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal (This guideline is closely related to the first). . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression. Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted).

Footnote: 6 Or when one trial court judge interferes with the service of lawful process of another trial court judge. State ex rel. Shamblin v. Dostert, W.Va., 255 S.E.2d 911 (1979).

Footnote: 7 Schweppes U. S. A. Limited v. Kiger, W.Va., 214 S.E.2d 867 (1975); State ex rel. Stanek v. Kiger, 155 W.Va. 587, 185 S.E.2d 491 (1971); State ex rel. Judy v. Kiger, 153 W.Va. 764, 172 S.E.2d 579 (1970); and, State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d 798 (1969).

Footnote: 8 State ex rel. Daily Mail Publishing Co. v. Smith, W.Va., 248 S.E.2d 269 (1978) Aff'd. 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979), (prohibited proceedings under statute that prevents newspapers from publishing name of child in a proceeding under child welfare statute which was held unconstitutional); Pinkerton v. Farr, W.Va., 220 S.E.2d 682 (1975) (prohibited proceedings under felonious assault statute that destroyed presumption of innocence, infringed upon right against self- incrimination, and failed to provide proof of guilt beyond reasonable doubt); and Simms v. Dillon, 119 W.Va. 284, 193 S.E. 331 (1937) (Court stated for the first time that prohibition lies to test

constitutionality of a statute although denied writ and held condemnation proceedings under statute to be constitutional.)

Footnote: 9 State ex rel. Whitman v. Fox, W.Va., 236 S.E.2d 565 (1977).

Footnote:10 Beard v. Worrell, W.Va., 212 S.E.2d 598 (1974).

Footnote: 11 State ex rel. Dowdy v. Robinson, W.Va., 257 S.E.2d 167 (1979) (prohibited proceedings that violated protection against double jeopardy); Bullett v. Staggs, W.Va., 250 S.E.2d 38 (1978) (prohibited proceedings until indigent accused of misdemeanor was afforded assistance of counsel); State ex rel. Peck v. Goshorn, W.Va., 249 S.E.2d 765 (1978) (prohibited proceedings when party was denied due process when received no notice of appeal); State ex rel. W. Va. Truck Stops v. McHugh, W.Va., 233 S.E.2d 729 (1977) (prohibited proceedings when right to jury denied on a counterclaim); State ex rel. Peacher v. Sencindiver, W.Va., 233 S.E.2d 425 (1977) (writ denied on merits where accused not granted a neurological examination before trial and where felony-murder statute declared constitutional) and Williams v. Brannen, 116 W.Va. 1, 178 S.E. 67 (1935) (prohibited proceedings when party was denied due process when judge had pecuniary interest in the outcome of the case).

Footnote: 12 Arlan's Dept. Store of Huntington, Inc. v. Conaty, W.Va., 253 S.E.2d 522 (1979) (writ granted to prevent reinstatement on the docket in contravention of statute where no good cause shown); State ex rel. C. A. H. v. Strickler, W.Va., 251 S.E.2d 222 (1979) (writ granted to prevent placement of child in prison-like facility for a status offense when no consideration given to statutory requirement of "least restrictive" alternative); State ex rel. McCartney v. Nuzum, W.Va., 248 S.E.2d 318 (1978) (writ granted to prevent neglect proceeding where no facts of case would support the petition under statutory definition of "neglect"); and, State ex rel. Smith v. Scott, W.Va., 238 S.E.2d 223 (1977) (writ granted to prevent transfer proceedings where no data provided to allow court to make transfer under the statute).

Footnote: 13 When the United States Supreme Court considered the principle of Forum non conveniens they concluded that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). However, notwithstanding a policy permitting a plaintiff to choose his forum, the Court was willing to balance against the plaintiff's choice "all other practical problems that make trial of a case easy, expeditious and inexpensive." Id. We construe Rule 42b W.Va.RCP and Code, 56-9-1 (1939) as providing, in appropriate cases, a viable counterpart to 28 U.S.C. 1404 (1962).

CAPLAN, Justice, concurring:
While I agree with the decision to deny the writ in this case, I am not in agreement with much of the dissertation in the opinion relative to the function of the extraordinary remedy of prohibition. Preliminarily, I do not agree that the subject of prohibition "has not recently been adequately considered". The decisions of this Court, recent and throughout the years, which have, with clarity, instructed the bench and bar on the proper use of prohibition, are indeed legion and the purported instruction contained in the opinion, which I believe in large part is erroneous, tends to confuse rather than aid.

My basic disagreement goes to the general tenor of the opinion, wherein, despite the writer's protestation that "we are adamantly opposed to being in the interlocutory appeals business", we are instructed that we may use prohibition as an interlocutory appeal to correct "clear-cut, legal errors where there is the high probability that the trial will be completely reversed if the error is not corrected in advance." This over-simplification may sound of Solomonic justice at first blush, but I submit that the efficacy of prohibition, designed to serve an extraordinary purpose, will suffer by its implementation.

Which clear errors may be corrected by a writ of prohibition? Upon the admission of clear hearsay testimony, do we interrupt the trial and proceed in this Court in prohibition? Upon the giving of an erroneous instruction, is there to be another interruption of the trial to correct what appears to be clear error? The answers to these queries should be obvious a trial could be subjected to unreasonable delay and endless shuttling from trial to appellate court. No, I do not, as suggested by the writer of the opinion, "cringe at the bare mention" of interlocutory appeal interlocutory appeal, properly used, serves a proper function in our jurisprudence but I do "cringe" at the cavalier manner in which the Court, in this case, has subverted the clear and well established office of the writ of prohibition.

To carry out the teachings of the opinion could, and probably will, result in the piecemeal handling of litigation. This was deplored by the writer of the opinion in Woodall v. Laurita, 156 W.Va. 707, 195 S.E.2d 717 (1973) in the following language: "The piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice." It is my firm conviction that the pronouncements in the opinion in relation to the function of the writ of prohibition are far too broad, that they obliterate the distinction between that extraordinary remedy and appeal and that the use of prohibition in the manner prescribed will cause confusion and delay in the trial of cases.

203 W. Va. 335, 507 S.E.2d 698

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1998 Term

No. 24670

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
EX REL. SHARRON HISMAN, SOCIAL SERVICE WORKER,
Appellee
v.
ANGELA D., ZACHARY D., KRISTOPHER D., AND THE UNKNOWN
PUTATIVE FATHERS OF ZACHARY D. AND KRISTOPHER D.,
Respondents Below
DAVID W.,
Appellant

Appeal from the Circuit Court of Cabell County
Honorable L. D. Egnor, Judge
Civil Action No. 96-JA-8
AFFIRMED

Submitted: May 13, 1998
Filed: July 15, 1998

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "Under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. Sec. 1738A (1982), our courts are required to enforce an out-of-state child custody modification decree if: (1) the initial decree was consistent with the act; (2) the court in the first state had jurisdiction under its laws to modify the initial decree; and (3) a child or one of the contestants in such proceeding has remained a resident of the first state." Syl. Pt. 2, Arbogast v. Arbogast, 174 W.Va. 498, 327 S.E.2d 675 (1984).

3. "Before an out-of-state child custody decree can be enforced here, it must be demonstrated that the court making the decree had jurisdiction of the parties and of the subject matter of the dispute." Syl. Pt. 3, Arbogast v. Arbogast, 174 W.Va. 498, 327 S.E.2d 675 (1984).

4. " 'The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982), extends full faith and credit principles to child custody decrees and requires every state to enforce sister state custody determinations that are consistent with the act.' Syllabus Point 1, Arbogast v. Arbogast, 174 W.Va. 498, 327 S.E.2d 675 (1984)." Syl. Pt. 1, Sheila L. v. Ronald P.M., 195 W.Va. 210, 465 S.E.2d 210 (1995).

5. "The Uniform Child Custody Jurisdiction Act, W.Va.Code §§ 48-10-1 to -26 (1986), is premised on the theory that the best interests of a child are served by limiting jurisdiction to modify a child custody decree to the court which has the maximum amount of evidence regarding the child's present and future welfare." Syl. Pt. 1, In re Brandon L.E., 183 W.Va. 113, 394 S.E.2d 515 (1990).

6. "Notwithstanding their intent to require states adopting the Uniform Child Custody Jurisdiction Act to recognize custody decrees entered by sister states, the Act's drafters in no uncertain terms provided jurisdiction to both the original 'custody court' and other courts to determine whether modification of the initial custody decree is in the best interest of the child." Syl. Pt. 2, In re Brandon L.E., 183 W.Va. 113, 394 S.E.2d 515 (1990).

Per Curiam:See footnote 1

Mr. David W.See footnote 2 (hereinafter "Appellant") appeals the exercise of jurisdiction by the Circuit Court of Cabell County over Zachary D. in an abuse and neglect proceeding initiated in Cabell County, West Virginia. The Appellant contends that Lawrence County, Ohio, is the proper jurisdiction and that Ohio is the home state of the child pursuant to the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"). We disagree with the Appellant's contentions and affirm the determination of the lower court that West Virginia properly maintained jurisdiction in this matter.

I. Facts

Zachary D. was born on January 27, 1991. His mother, Angela D., was fifteen years old at the time of Zachary's birth, and Angela's mother, Barbara D.,See footnote 3 maintained temporary custody of Zachary prior to Angela's eighteenth birthday in July 1993.See footnote 4 Neither the putative father nor his family has ever had contact with Zachary. In November 1993, May 1994, and an additional six instances in 1995, the Cabell County Department of Health and Human Resources (hereinafter "DHHR") received referrals regarding Angela, Barbara, and Zachary, generally alleging that Angela was improperly caring for Zachary and had left him with various other individuals without providing for his care or well-being. The DHHR allegedly attempted to locate Angela subsequent to these referrals, but was unsuccessful.

On March 7, 1994, Kristopher D. was born to Angela. According to the record, Kristopher resided with Ms. Kathy Merritt, a family friend in Huntington, West Virginia, on the weekends for the first three months of his life and began residing exclusively with Ms. Merritt in June 1994. Ms. Merritt did not receive monetary compensation for this care of Kristopher. Zachary also allegedly spent considerable time with Ms. Merritt in Huntington, West Virginia, in 1994, and both Kristopher and Zachary resided with Ms. Merritt in June and July 1995.

Angela received AFDC support for Zachary during August and September 1995, and he was allegedly living primarily in her household in West Virginia during those months.See footnote 5 During portions of 1995, Zachary apparently stayed with Barbara and the Appellant in Ohio and was enrolled in Kindergarten in South Point, Ohio, near the Appellant's residence.

On November 20, 1995, the Appellant filed a petition in Ohio seeking custody of Zachary and claiming that Zachary had been living with him in Ohio for over a year. On December 21, 1995, pursuant to the Appellant's request for custody, Angela signed an Ohio consent form to permit the Appellant to adopt Zachary.See footnote 6 On December 26, 1995, the Ohio court issued an order placing Zachary with the Appellant in anticipation of potential future adoption. This Ohio order found that Zachary was a resident of Ohio.See footnote 7

On February 16, 1996, the DHHR in Cabell County, West Virginia, filed an abuse and neglect petition alleging that Zachary, then age five, and Kristopher, then almost two years of age, were neglected children.See footnote 8 *8* The whereabouts of

Zachary were unknown to DHHR, although the petition stated that DHHR believed that Zachary was living with Barbara, the maternal grandmother.See footnote 9 In response to the DHHR petition, the lower court granted emergency custody of Zachary and Kristopher to the DHHR on February 16, 1996. Zachary had not yet been located, and Kristopher thereafter remained in the care of Ms. Merritt in Huntington, West Virginia.

Based upon Angela's failure to appear at hearings scheduled in Cabell County on February 19, 1996, and March 4, 1996,See footnote 10 custody of the children remained with the DHHR. On March 14, 1996, in an attempt to find Zachary, the DHHR located Barbara at her Huntington, West Virginia, home. According to the testimony of Ms. Sharron Hisman, a child protective services worker, Barbara informed Ms. Hisman that Zachary was visiting the Appellant in Ohio. Ms. Hisman asked Barbara to transport Zachary to the DHHR later that day. The DHHR thus obtained physical custody of Zachary when he was brought to the DHHR office on March 14, 1996.

From March 1996, both Zachary and Kristopher resided in the Merritt home in Huntington, West Virginia. On May 6, 1996, CASASee footnote 11 Shirley Lewis submitted a report detailing her visitation to the Merritt home. Ms. Lewis indicated that the children both related well to Ms. Merritt and her teenaged daughters. Ms. Lewis also reported that Ms. Merritt was interested in adopting both children. The May 6, 1996, report recommended termination of Angela's parental rights based upon her neglect of the children. That report also related Zachary's alleged statements concerning the Appellant and his living quarters in what Zachary described as a "dirty old bus." Ms. Lewis also noted that based upon the Appellant's failure to appear for two initially scheduled adoption hearings in Ohio, the adoption proceedings were dismissed on March 14, 1996, and the Appellant subsequently refiled for adoption. The Appellant's petition for adoption was reinstated on March 21, 1996, in Ohio. Ms. Lewis also observed that the Appellant and the maternal grandmother, Barbara, were not residing together at that time.

In May 1996, the Appellant filed a motion to dismiss the abuse and neglect proceedings in Cabell County based on alleged lack of jurisdiction in West Virginia. The lower court denied the motion but included the Appellant as a party to the abuse and neglect proceedings in West Virginia. Guardian ad litem Lisa White, appointed on behalf of Zachary, informed the lower court that pursuant to her discussions with the Ohio judge and guardian ad litem, it was her understanding that adoption would not be recommended until a home study of the Appellant's home could be completed in Ohio.

In a June 13, 1996, report, Ms. Lewis recommended continued custody in the Merritt home, appointment of attorneys for the putative fathers so that termination of their parental rights could move forward, and denial of visitation to the Appellant.See footnote 12 In a June 17, 1996, hearing, as part of the improvement period granted to Angela, the lower court approved the Merritt home for temporary foster care and granted Angela supervised visitation with the children. The Appellant was permitted two supervised visits, and River Valley Child Development Center was to provide counseling and

developmental screenings on the boys. Counsel was also appointed for the putative fathers in anticipation of proceedings to terminate their parental rights.

On June 21, 1996, the lower court entered an order continuing legal and physical custody of the children with the DHHR, and indicating that Angela had admitted neglecting the children. The court further ordered that no family member, including Angela, Barbara, or the Appellant, should have contact with the caregiver for the children.

On July 11, 1996, the Ohio court entered an order appointing the Appellant as Zachary's guardian, but that order has been suspended pending a decision by this Court in the present jurisdictional matter.See footnote 13 In an August 20, 1996, CASA report, Ms. Lewis recommended termination of Angela's rights, placement of both boys with Ms. Merritt, and visitation rights for the Appellant and Barbara. On September 30, 1996, the lower court granted Angela a ninety-day improvement period, terminated the parental rights of the unknown putative fathers, and denied the Appellant's motion for weekend visitation, allowing him one supervised visit per month.

On December 6, 1996, Zachary's guardian ad litem moved for termination of Angela's improvement period based upon her failure to cooperate and her failure to attend counseling at Prestera Mental Health Center. Angela had also failed to appear for scheduled visitation with the children. The guardian emphasized the necessity for attention to be focused upon a permanency plan for the children.

In a December 13, 1996, CASA report, Ms. Lewis stated that Angela's improvement period had produced no positive results, that she was not in compliance with the treatment plan, and that she had failed to attend sessions at Prestera designed to address her substance abuse problems. Ms. Lewis again recommended termination of Angela's parental rights.

On January 6, 1997, Angela entered a drug rehabilitation program and departed the program without permission on January 15, 1997. DHHR has had no further contact with Angela since that time. Hearings in the lower court regarding the jurisdictional issue were held on February 6, 1997, and March 5, 1997. Although Ohio had taken jurisdiction pursuant to the Appellant's recitation of the facts concerning Zachary's living arrangements, the DHHR submitted evidence indicating that child protective service workers investigating referrals of suspected child neglect had been advised that Angela and the children were residents of Cabell County, West Virginia, and the allegations which formed the basis for the petition for neglect had occurred in West Virginia. The DHHR contended that the Appellant's allegations that he had maintained physical custody of Zachary for years preceding the initiation of the neglect petition were not consistent with the prior investigations by the DHHR or with reports by Kathy Merritt that Zachary had lived with Ms. Merritt for weeks or months at a time during the period immediately preceding the Appellant's initiation of custody proceedings in Ohio. At the conclusion of the jurisdictional hearings, the lower court explained as follows:

I find that because of the vagabond helter-skelter life of the mother, that at the time the State of West Virginia exercised its jurisdiction through the filing of the petition in February [1996], that it cannot be concluded that the State of Ohio could be determined to have been exercising jurisdiction substantially in conformity with Article 48 of the code. For reasons through her transitory and vagabond life they could not have met the -- the State of Ohio could not have met the residency requirement.

On March 27, 1997, the lower court found that Ohio did not have jurisdiction, and that West Virginia had properly maintained jurisdiction over Zachary.See footnote 14 The Appellant now appeals that order.

While this appeal was pending, continued reports of the CASA representatives have indicated that the children are thriving in the custody of Ms. Merritt and that Ms. Merritt has earned her BSN in nursing and her nurse's license. She is currently employed by Southwestern Community Action Council as an RN/Case Manager.

II. Analysis

The Appellant raises three allegations of error: (1) DHHR failed to comply with the UCCJA in exercising jurisdiction over Zachary; (2) the lower court erred in failing to recognize and enforce the Ohio custody decree which placed Zachary with the Appellant in anticipation of adoption; and (3) DHHR improperly removed Zachary from the Appellant's custody in Ohio. In syllabus point one of Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995), we explained that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review."

Upon review of the record and briefs in this matter, we find that the DHHR properly asserted jurisdiction in February 1996 by filing a petition alleging the neglect of Zachary after receiving referrals alleging neglect of the child while residing in Cabell County, West Virginia. Zachary was thus brought within the jurisdiction of the lower court by virtue of the reports of neglect occurring in Cabell County, the county in which DHHR had evidence indicating that he, his mother, and his maternal grandmother resided.See footnote 15

A. Applicability of the UCCJA and PKPA to Abuse and Neglect Proceedings

Once the lower court learned of the Ohio custody and adoption proceedings, the jurisdictional issue was raised and a determination of proper jurisdiction for this custody matter was necessitated. The UCCJA, West Virginia Code § 48-10-1, et seq. (1995), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994), (hereinafter "PKPA") govern interstate child custody disputes. Within the definition of "custody proceeding," the UCCJA expressly includes abuse and neglect proceedings. West Virginia Code § 48-10-2(3) provides: "'Custody proceeding' includes proceedings in which a custody determination is one of several issues, such as an action for divorce or

separation, and includes child neglect and dependency proceedings[.]" Thus, based upon the UCCJA's explicit inclusion of abuse and neglect proceedings within the definition of custody proceedings, we address the UCCJA in the context of this abuse and neglect matter. Application of the UCCJA to juvenile neglect proceedings has also been recognized in other jurisdictions. See, e.g., L. G. v. People, 890 P.2d 647 (Colo.1995); In Interest of L. C. , 857 P.2d 1375 (Kan.App.2d 1993); In re C. O., 856 P.2d 290 (Okl.Ct.App. 1993); In re E. H., 612 N.E.2d 174 (Ind. Ct. App.1993).

The Fourth Circuit Court of Appeals recognized in Meade v. Meade, 812 F.2d 1473 (4th Cir. 1987), that the PKPA was designed to remedy inconsistent UCCJA interpretations by various state courts and to create a uniform application of child custody jurisdictional standards. 812 F.2d at 1476. Addressing the applicability of the PKPA to abuse and neglect actions, the Court of Appeals of North Carolina explained as follows:

Although the PKPA does not include within its definition section any reference to neglect, abuse, or dependency proceedings, 28 U.S.C.A. S 1738A(b), "there is nothing to indicate that it was intended to be limited solely to custody disputes between parents." In re Appeal in Pima County Juvenile Action No. J-78632, 147 Ariz. 527, 711 P.2d 1200, 1206 (Ct.App. 1985), approved in part, vacated in part, 147 Ariz. 584, 712 P.2d 431 (1986). Furthermore, "[t]he PKPA's coverage of custody proceedings is exclusive [in providing that] 'every State shall enforce ... and shall not modify ... any child custody determination made ... by a court of another State.' " State ex rel. D.S.K., 792 P.2d 118, 129 (Utah Ct.App.1990). Accordingly, "the PKPA is applicable to all interstate custody proceedings affecting a prior custody award by a different State, including [abuse,] neglect and dependency proceedings." See id. at 130[.]

In re Van Kooten, 126 N.C.App. 764, 769, 487 S.E.2d 160, 163.

B. Analysis of UCCJA and PKPA

The PKPA requires every state to recognize and enforce custody determinations of sister states if such determinations were consistent with the Act, providing as follows at 28 U.S.C. § 1738A(a):

The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.See footnote 16

The UCCJA contains a similar arrangement, providing "that foreign states' custody decrees are to be recognized and enforced by West Virginia courts if they accord with statutory provisions substantially similar to those of the UCCJA or meet UCCJA jurisdictional standards." Arbogast v. Arbogast, 174 W.Va. 498, 502, 327 S.E.2d 675, 679 (1984). In syllabus point two of Arbogast, we explained:

Under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. Sec. 1738A (1982), our courts are required to enforce an out-of-state child custody modification decree if: (1) the initial decree was consistent with the act; (2) the court in the first state had jurisdiction under its laws to modify the initial decree; and (3) a child or one of the contestants in such proceeding has remained a resident of the first state.

Syllabus point three of Arbogast emphasized that "[b]efore an out-of-state child custody decree can be enforced here, it must be demonstrated that the court making the decree had jurisdiction of the parties and of the subject matter of the dispute." In Arbogast, we acknowledged that both the PKPA and UCCJA[See footnote 17] attempt "to eliminate judicial competition and conflicting decrees in interstate child custody dispute by establishing clear and definite rules about which state has jurisdiction of a custody dispute and enforcing orders of that state." Id.

In Sheila L. v. Ronald P. M., 195 W. Va. 210, 465 S.E.2d 210 (1995), we recognized that the full faith and credit doctrine will not be applied where a foreign court lacked jurisdiction under the UCCJA and the PKPA. Id. at 217, 465 S.E.2d at 217. In syllabus point one of Sheila L., we stated:

"The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982), extends full faith and credit principles to child custody decrees and requires every state to enforce sister state custody determinations that are consistent with the act." Syllabus Point 1, Arbogast v. Arbogast, 174 W.Va. 498, 327 S.E.2d 675 (1984).

In Sheila L., the mother lived in West Virginia with the child, and the father resided in Ohio. 195 W.Va. at 213, 465 S.E.2d at 213. The father obtained an ex parte order from the Ohio Court of Common Pleas granting him temporary custody of the child based upon allegations that the mother's stepfather abused the child while the child resided with the mother in West Virginia. Id. Ohio then retained jurisdiction, and West Virginia accorded full faith and credit to the Ohio determination of custody to the father. Id. at 215, 465 S.E.2d at 215. The mother appealed, and this Court held that although Ohio properly maintained jurisdiction for the purpose of emergency custody under the allegations of abuse, Ohio lacked jurisdiction for determination of the ultimate custody resolution and West Virginia, as the home state, was deemed the most appropriate forum for deciding the custody issue. Id. at 223, 465 S.E.2d at 223.

As we observed in syllabus point one of In re Brandon L.E., 183 W.Va. 113, 394 S.E.2d 515 (1990):

The Uniform Child Custody Jurisdiction Act, W.Va.Code §§ 48-10-1 to -26 (1986), is premised on the theory that the best interests of a child are served by limiting jurisdiction to modify a child custody decree to the court which has the maximum amount of evidence regarding the child's present and future welfare.

Syllabus point two of Brandon explained:

Notwithstanding their intent to require states adopting the Uniform Child Custody Jurisdiction Act to recognize custody decrees entered by sister states, the Act's drafters in no uncertain terms provided jurisdiction to both the original 'custody court' and other courts to determine whether modification of the initial custody decree is in the best interest of the child.

In Brandon, we concluded that the best interests of the child dictated that West Virginia, the court with the most substantial evidence regarding the child's present and future well-being, should have jurisdiction. 183 W.Va. at 119, 394 S.E.2d at 521. Significantly, we explained in Brandon that the UCCJA permits a sister state with contacts to the child to determine whether modification of the initial decree is in the best interests of the child and requires that West Virginia, if serving as a modifying court, " 'give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section twenty-two [Sec. 48-10-22] of this article.' W.Va.Code § 48-10-15(b)." 183 W.Va. at 120, 394 S.E.2d at 522. Under section twenty-two of the Act, a foreign court would be required to forward to the West Virginia court a certified copy of all documents pertaining to the custody determination upon appropriate request. W.Va.Code § 48-10-22 (1986).

We also found in Brandon that West Virginia had jurisdiction because of the "substantial evidence concerning the child's present or future care, protection, training and personal relationships." 183 W.Va. at 118, 394 S.E.2d at 520 (quoting W.Va.Code, 48-10-3(a)(2)(ii)). We found that Florida, the state making the initial determination, no longer had jurisdiction and recognized that the residence of a child within a community for six months can generate significant data. Id.

While a matter arising in the abuse and neglect arena obviously entails issues differing from a standard custody proceeding, the practice encouraged in the UCCJA regarding courts of the two states conferring and agreeing upon the appropriate forum for jurisdiction would still be prudent. If, for instance, a prior custody proceeding was made (or pending) in one state in accordance with the UCCJA jurisdictional prerequisites and subsequent abuse and neglect occurred in a second state, the evidence surrounding the abuse allegation would exist in that second state. In such instance, the better practice would be for the judges to confer and agree which court should hear the abuse and neglect matter.

III. Conclusion

In the case sub judice, we conclude that Ohio failed to satisfy the prerequisites for properly assuming jurisdiction over Zachary and that West Virginia was therefore not required to extend full faith and credit to the Ohio custody and adoption proceedings. Ohio would properly have obtained jurisdiction under the UCCJA if it satisfied any of the four criteria outlined in the statute, as quoted above. However, based upon the extensive record before this Court, it does not appear that Ohio could qualify as Zachary's home state at the time of the initiation of the Ohio proceedings, since he had not resided in Ohio for a period of six months prior to the initiation of the Ohio

proceedings in November 1995. According to the evidence, Zachary had spent considerable time with Ms. Merritt in June and July 1995 in Huntington, West Virginia, and had lived with his mother in West Virginia in August and September 1995.

Additionally, Ohio would not properly have assumed jurisdiction under 48-10- 3(2) since Zachary had no significant connection with Ohio. Only the maternal grandmother's boyfriend permanently resided in Ohio, with Zachary and the grandmother residing in that home on an irregular basis. He had not been abandoned; nor was it necessary in an emergency to protect him, under section 48-10-3(3). Likewise, Ohio could not premise jurisdiction upon 48-10-3(4) regarding the absence of any other state that would have jurisdiction under the UCCJA. An examination of the child's history of various living arrangements would indicate that his substantial connections were in West Virginia.

We conclude that West Virginia is properly vested with jurisdiction over this matter, and we therefore affirm the decision of the lower court.
Affirmed.

Footnote: 1 *We point out that a per curiam opinion is not legal precedent. See Lieving v. Hadley, 188 W. Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992).*

Footnote: 2 *We follow our past practice in domestic and juvenile cases involving sensitive facts and do not use the last names of the parties. See, e.g., State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 254 n. 1, 470 S.E.2d 205, 208 n. 1 (1996).*

Footnote: 3 *Barbara D. has a history of mental illness and had her own children removed from her custody. Although Barbara maintained an apartment in Huntington, West Virginia, she has also lived intermittently with the Appellant at his home in South Point, Ohio.*

Footnote: 4 *Zachary apparently resided at the Appellant's home in South Point, Ohio, with Barbara and the Appellant during portions of 1992 and 1993, Barbara received AFDC assistance for Zachary, and Angela kept Zachary during the day while the Appellant worked. According to the record, Angela was living at various locations in Cabell County, West Virginia, during this time.*

Footnote: 5 *In August 1995, Angela left Kristopher, then seventeen months old, with Ms. Kisha White who allegedly attempted to sell Kristopher for cocaine. The record is unclear as to the location of the residence of Kisha White. In October 1995, Kristopher once again began living exclusively with Ms. Merritt and her family in Huntington, West Virginia.*

Footnote: 6 *Pursuant to West Virginia Code § 49-6-5(a)(6) (1996), a parent against whom abuse and neglect proceedings have been filed may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding. See Alonzo v. Jacqueline F., 191 W.Va. 248, 445 S.E.2d 189 (1994). In the present case,*

however, Angela signed the adoption consent prior to the filing of the petition of abuse and neglect.

Footnote: 7 *The December 26, 1995, Ohio order provides as follows:*

This cause came on to be heard on the Application of Angela [D.], the parent of Zachary [D.] for approval of the proposed placement of the child with David [W.] for adoption.

There appeared before the court Angela [D.], the parent of the child, who was examined by the Court, and there was submitted to the Court the report of the Lawrence County Department of Human Service, Children's Services Division, who was appointed to make an independent investigation of the proposed placement and the Court finds, after consideration of the testimony, report and the evidence submitted that the child is a resident of Lawrence County, Ohio and has determined that the placement would be in the best interests of the child.

Footnote: 8 *The petition was based upon the referrals of November 1993, May 1994, and six referrals in 1995, alleging generally that Angela was improperly caring for Zachary and Kristopher and had left them with various individuals without properly providing for their care. Kristopher is not a subject of this appeal.*

Footnote: 9 *DHHR apparently had no knowledge of the adoption proceedings for Zachary in Ohio.*

Footnote: 10 *The record does not reveal whether Angela had been given proper notice of these hearings.*

Footnote: 11 *On April 16, 1996, the lower court had appointed a CASA (Court Appointed Special Advocate) for Zachary and Kristopher.*

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http://www.state.wv.us/wvsca/DOCS/Spring98/24670.htm - Footref12

Footnote: 12 *With regard to the denial of the Appellant's motion for visitation, Ms. Lewis reasoned that the Appellant had never served as the primary caretaker for the boys and had "hidden Zachary from DHHR and other agencies in the past. He has no job to support the child."*

Footnote: 13 *In the July 11, 1996, order, the Ohio Court of Common Pleas, Probate Juvenile Court, found "that at the time of the placement of the child that the Court had jurisdiction over the child. . . ." The court further found that prior to the abuse and neglect petition in West Virginia, the Ohio court "had exercised jurisdiction over Zachary Davis and that this Court was the appropriate form (sic) to exercise the jurisdiction of said minor."*

Footnote: 14 *As we explained in footnote 18 of Haller v. Haller , 198 W.Va. 487, 481 S.E.2d 793 (1996):*

The UCCJA encourages discussion and collaboration between the judges in the courts which could potentially assume jurisdiction over the matter, as evidenced by its

provisions regarding inconvenient forums and simultaneous proceedings in other states. West Virginia Code § 48-10-7(d) provides that a court, prior to determining whether to retain jurisdiction, "may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties." West Virginia Code § 48-10-6(c) specifies that if a court discovers, during the pendency of its own proceeding, the antecedent existence of a proceeding concerning custody in another state, "it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections nineteen, twenty, twenty-one and twenty-two [§§ 48-10-19, 48-10-20, 48-10-21 and 48-10-22] of this article.
The extent to which such conversations were had in the present matter is unclear.

Footnote: 15 *In State ex rel. Paul B. v. Hill, 201 W. Va. 248, 496 S.E.2d 198 (1997), we explained:*

While not explicitly stated in the abuse and neglect statutes, we previously have recognized that circuit courts have "original jurisdiction of all cases coming within the terms of the [child welfare] act," which serves to protect "delinquent, dependent and neglected children." Locke v. County Court of Raleigh County, 111 W. Va. 156, 158, 160, 161 S.E. 6, 7 (1931) (emphasis added).

201 W. Va. at ___, 496 S.E.2d at 207. West Virginia Code § 49-6-1(a), in pertinent part, provides:

(a) If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought.

Footnote: 16 *Subsection (f) of § 1738A provides:*

A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Footnote: 17 *The UCCJA provides that a court is authorized to assume jurisdiction over a child custody matter by initial or modification decree under section 48-10-3 of the UCCJA where certain requirements are satisfied:*

(1) This State (i) is the home state [home state defined as the State in which, immediately preceding the initiation of proceeds, the child lived with his parents, a

parent, or a person acting as parent, for at least six consecutive months]See footnote 18 of the child at the time of commencement of the proceeding or (ii) has been the child's home state within six months before commencement of the proceeding, the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training and personal relationships; or

(3) The child is physically present in this State, and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2) or (3) of this subsection, or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction....

The applicable language of the PKPA, 28 U.S.C. § 1738A(c), (d), and (g), provides as follows:

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine

the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

* * * * * *

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

Footnote: 18 *The phrase "home state" is defined identically in the PKPA and the UCCJA as the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months.*

227 W. Va. 699, 715 S.E.2d 397

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2011 Term

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No. 35750 and 35751

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IN RE: HUNTER H.

FILED
June 14, 2011
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Ohio County
The Honorable James P. Mazzone, Judge
Civil Action No. 07-CJA-50

REVERSED AND REMANDED

Submitted: April 26, 2011
Filed: June 14, 2011

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "*W.Va. Code* § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumably in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety

establishes that such placement is not in the best interests of the child." Syllabus Point 4, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005).

3. "By specifying in *W.Va. Code* § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case." Syllabus Point 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005).

4. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Per Curiam:

This is a consolidated appeal from the Circuit Court of Ohio County wherein the circuit court ordered that the minor child, Hunter H.[1], be permanently placed with his maternal grandmother, rather than his foster parents, whom the child had lived with for three years and who were seeking to adopt him.

The appellants, the foster parents and Hunter H.'s guardian ad litem, appeal from the circuit court's order and raise three main arguments: (1) the circuit court erred by giving improper weight to the statutory and Department of Health and Human Resources ("DHHR") policy preference for grandparent adoption, rather than focusing its analysis on the best interests of the child; (2) the circuit court's findings of fact were clearly erroneous and implausible in light of the entire evidentiary record; and (3) the circuit court erred when it failed to grant the foster parents' motion to stay and erred by ordering Hunter H. to be immediately transferred from his foster parents to his grandmother without a gradual transition period.

After a thorough review of this matter, we agree with the appellants that the circuit court erred by giving improper weight to the grandparent preference, rather than focusing its analysis on the best interests of the child. We therefore reverse the circuit court's

[1]We adhere to our usual practice in cases involving sensitive facts and refer to the parties by their first names and last initials only. *See In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

ruling and remand for entry of an order requiring that Hunter be placed with his foster parents for adoption.

I.
Facts & Background

Hunter H. was born on March 6, 2006. When Hunter was approximately 17 months old, his maternal grandmother, Donna D. ("Grandmother Donna" or "grandmother") contacted the DHHR because she feared for Hunter's safety after discovering that his biological parents were using crack cocaine.[2] On August 16, 2007, Grandmother Donna agreed to take custody of Hunter until a safety plan could be put into place. The DHHR subsequently received information that Grandmother Donna's husband, Frank B., regularly used marijuana and alcohol and had difficulty controlling his behavior. Due to these concerns, the DHHR sought to remove Hunter from Grandmother Donna's house and filed an abuse and neglect petition on behalf of Hunter, naming Hunter's biological parents, as well as Grandmother Donna and Frank B. as respondents. The child case plan prepared by Hunter's child protective services worker on September 22, 2009, described the conditions that existed in Grandmother Donna's residence prior to Hunter's removal:

> Hunter H. was staying with his maternal grandmother at that time as the result of a safety plan. Due to the illegal drug use and domestic violence between Amanda L. and Robert H.

[2]Hunter's biological parents, Amanda L. and Robert H., were addicted to crack cocaine and involved in other illegal activities, including writing bad checks, at the time the child was removed from their custody. Amanda L. also brought domestic violence charges against Robert H.

> (Hunter's natural parents) and the criminal history and drug use by paternal grandfather Frank B., it was determined to be in the best interest of Hunter H. that he [sic] removed from the home. The actions of the caretakers put Hunter at high risk of harm.

Hunter was subsequently removed from Grandmother Donna's residence and placed with foster parents, Joyce and Jerry W., where he resided continuously from August 2007 through August 2010.

Three months after Hunter was removed, Grandmother Donna asked the DHHR to conduct a home study of her residence so that she could be considered as a permanent placement option for Hunter. This home study was denied in December 2007 because of Frank B.'s substance abuse problems and his erratic behavior. Grandmother Donna and Frank B. were dismissed as respondents from the abuse and neglect petition in May 2008 because they were not being considered as a permanent placement option for Hunter at that time.[3]

Due to a change in circumstance, Grandmother Donna's separation and impending divorce from Frank B.[4], the DHHR conducted a second home study of her residence in May 2009. Prior to this second home study, Grandmother Donna underwent a psychological evaluation with Dr. Fremouw, who concluded that she had "no strategy" for

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[3]The DHHR initially sought to reunite Hunter with his biological mother but she failed to abide by the terms of her improvement period and voluntarily relinquished her parental rights to the child. Hunter's biological father also voluntarily relinquished his parental rights to the child.

[4]By May 2009, Grandmother Donna was no longer living with Frank B., and the two were officially divorced in July 2009.

disciplining Hunter and that she had a "tendency to deny or avoid common problems." Despite these issues, Dr. Fremouw characterized her as "a loving grandmother who is committed to her grandchild," but also stated that she needed to learn more appropriate ways of disciplining young children other than "yelling" at them or "smacking" them.

The second home study of Grandmother Donna's residence was approved on July 28, 2009. Following this approved home study, the DHHR sought to permanently move Hunter from the foster parents house and place him with Grandmother Donna. Hunter's guardian ad litem raised a number of objections to this proposed move, stating that it was not in the child's best interest to be removed from a stable, loving environment. He noted that Hunter was thriving with his foster family, identified his foster parents as "mom" and "dad" and identified his foster parents' daughter as "sis." The guardian ad litem was also concerned that Grandmother Donna had not gone through an improvement period after being named as a respondent in the abuse and neglect petition. He stated, "I don't recall any case that any child was returned to a home of a respondent custodian" without the respondent completing an improvement period.[5] The guardian ad litem was also concerned with the possibility that Hunter's biological mother, who had relinquished her parental rights due to

[5]Grandmother Donna enrolled in a parenting course, PRIDE (Parent Resource Information Development Education), after Hunter was removed from her custody, but she was never placed on an improvement period to address the specific issues that led to Hunter being removed from her custody.

her drug problem, would be allowed to have contact with Hunter if he was moved to Grandmother Donna's house.

Despite these objections, the DHHR requested that Hunter be placed with Grandmother Donna following a multidisciplinary treatment team ("MDT") meeting on August 18, 2009. The foster parents filed a motion to intervene, which the circuit court granted. Following four days of testimony regarding Hunter's permanent placement, the circuit court ordered that Hunter "be immediately and permanently placed with his maternal grandmother, Ms. Donna D.," because she had a successful home study, was recommended for placement by the DHHR, and because of the statutory grandparent preference found in *W.Va. Code* § 49-3-1(a)(3) [2001]. The foster parents and guardian ad litem filed motions to stay this order, which the circuit court denied on August 12, 2010.[6] Following the denial of these motions to stay, Hunter was placed with Grandmother Donna. The foster parents

[6]Neither the foster parents, nor the guardian ad litem filed a motion to stay the circuit court's decision with the West Virginia Supreme Court of Appeals. We stated in *In re Scottie D.*, 185 W.Va. 191, 198, 406 S.E.2d 214, 221 (1991), that a guardian ad litem has the duty to exercise the child's appellate rights if an appeal is deemed necessary:

> It is well established that 'after judgment adverse to his ward, the guardian ad litem has the right to appeal and the duty to do so if it reasonably appears to be to the advantage of the minor[.]' *Robinson v. Gatch*, 85 Ohio App. 484, 487, 87 N.E.2d 904, 906 (1949). This is based upon the principle that a guardian ad litem has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian ad litem were in a normal lawyer-client relationship.

and guardian ad litem appeal from the circuit court's order placing custody of Hunter with Grandmother Donna.

II.
Standard of Review

The standard of review that governs appeals in abuse and neglect cases is set forth in Syllabus Point 1 of *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). It states:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

III.
Discussion

The appellants assert that the circuit court erred by giving improper weight to the grandparent preference, rather than focusing its analysis on the best interests of the child. The Legislature adopted the grandparent preference to govern the adoption of children whose

parents' parental rights have been terminated through abuse and neglect proceedings. *W.Va. Code* § 49-3-1(a)(3) [2001] states:

> For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

The grandparent preference is also set forth in the DHHR's internal regulations, specifically DHHR Adoption Policy § 7.3 which states, in part:

> A Grandparent or an adult relative with a positive home study certifying the home adoption must be given preference over the non-relative home even if the non-relative home has the appearance of a better placement choice.[7]

The grandparent preference must be considered in conjunction with our long standing jurisprudence that "the primary goal in cases involving abuse and neglect . .. must be the health and welfare of the children." Syllabus Point 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). We have previously held that "in a contest involving the custody of an infant where there is no biological parent involved, the best interests of the child are

[7]For a detailed discussion of DHHR Adoption Policy § 7.3, see *Kristopher O. v. Mazzone*, 227 W.Va. 184, 706 S.E.2d 381 (2011).

the polar star by which the discretion of the court will be guided." Syllabus Point 1, in part, *State v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993). *Accord* Syllabus Point 5, in part, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In ... custody matters, we have traditionally held paramount the best interests of the child.").

This Court discussed the interplay between the grandparent preference and the overriding standard of the best interests of the child in *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005). Syllabus Points 4 and 5 of *Napoleon S.* provide guidance on how the grandparent preference and the best interests of the child analysis co-exist:

> *W.Va. Code* § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumably in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.
>
> By specifying in *W.Va. Code* § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," *the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case.*

(Emphasis added).

This Court again discussed the grandparent preference in *In re Elizabeth F.*, 225 W.Va. 780, 696 S.E.2d 296 (2010), and again came to the conclusion that the

grandparent preference is not an absolute directive to place a child with a grandparent. *Elizabeth F.* involved an appeal following a permanency hearing in which the circuit court placed four minor children with their maternal grandparents based solely on the grandparent preference. The circuit court stated that "[a]bsent the grandparent preference, the Court doubts that his decision would be the same." *Elizabeth F*. 225 W.Va. at 784, 696 S.E.2d at 300. As in the present case, the guardian ad litem in *Elizabeth F*. argued that placing the children with their grandparents was not in the children's best interests and that the grandparent preference should not supercede the best interests of the children. This Court agreed with the guardian ad litem and held:

> [A]doption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child's best interests, it is not obligated to prefer the grandparents over another, alternative placement that does serve the child's best interests. *See* Syl. pts. 4 & 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801. Because the circuit court accorded the grandparents an absolute preference in this case despite its expressed concerns about the propriety of such a placement, we reverse the circuit court's decision.

Elizabeth F. 225 W.Va. at 787, 696 S.E.2d at 303.

In the case *sub judice*, both the guardian ad litem and the only expert who testified before the circuit court concluded that it was in Hunter's best interests to remain with his foster family. After being removed from Grandmother Donna's house, Hunter lived with his foster parents for three years. Hunter's guardian ad litem said the child developed

a strong bond with his foster family during this three-year period and was a happy, well-adjusted child who identified himself as a member of the foster family, calling his foster parents "mom" and "dad," and referring to his foster parents' daughter as "sis." Based on the bond that formed between Hunter and his foster family, and the stability it brought to the child's life, Hunter's guardian ad litem testified that it was in Hunter's best interests to remain with his foster family.

Multiple child case plans prepared by the DHHR support the guardian ad litem's position that the foster family created a stable, loving environment for Hunter. An April 16, 2009, child case plan states "Hunter is provided a loving and supportive home by this foster mother. He is growing and thriving as a result of this placement." Another child case plan, dated September 22, 2009, states "Hunter H. is a very healthy little boy who appears to be well adjusted, growing and thriving with no current special needs."

The only expert who offered an opinion during the permanency hearings testified that it was in Hunter's best interests to remain with his foster family. Psychologist Sandra Street was qualified as an expert in mental and behavioral health assessments, counseling, and child development. Ms. Street testified that the foster family created "a consistent, stable environment in which he (Hunter) has limits and reinforcement." She stressed the importance of a child having a constant caregiver and stated that removing a child from a stable environment could put the child in a crisis and cause the child to act out,

despair or become withdrawn. Based on all of these factors, the expert psychologist concluded that:

> In my opinion, it's in Hunter's best interest to stay with the (foster family), where he has made an adjustment and he has been able to bond and be part of the family, which is extremely important at his age.

The circuit court's order placing Hunter with his grandmother includes a two-page "conclusion" section explaining its rationale for favoring Grandmother Donna over the foster parents. This explanation section does not mention the opinions of the expert psychologist or Hunter's guardian ad litem. Instead, the circuit court sets forth the following factors it relied upon in concluding that Hunter should be placed with his grandmother: (1) the DHHR's recommendation that Hunter be placed with Grandmother Donna; (2) the strong bond Grandmother Donna developed with Hunter through supervised visitation; (3) Dr. Fremouw's report stating that Grandmother Donna was a loving grandmother who was not a risk to commit neglectful behavior; (4) a successful home study approving Grandmother Donna's residence; and (5) the grandparent preference found in *W.Va. Code* § 49-3-1(a)(3) [2001].

A review of the entire evidentiary record reveals that the circuit court's "conclusion" omits many salient facts. For instance, the circuit court states that Hunter developed a "strong bond" with Grandmother Donna through the course of supervised visitations during the three years he lived with his foster family. The circuit court fails to mention the strong bond that Hunter developed with his foster family, fails to mention that

Hunter referred to his foster parents as "mom" and "dad," and fails to mention that Hunter lived with his foster family for three years. While the circuit court correctly noted that Dr. Fremouw considered Grandmother Donna to be a loving grandmother who was not a risk to commit neglectful behavior, the court's conclusion omits Dr. Fremouw's finding that Grandmother Donna had no strategy for disciplining the child and that she had a "tendency to deny or avoid common problems." Grandmother Donna did have an approved home study, but that fact alone does not dictate what is in the best interests of this child according to Hunter's guardian ad litem. Grandmother Donna divorced Frank B. whose use of drugs and violent behavior were largely responsible for the earlier failed home study, but this Court has serious concern about taking a child from a stable environment, one where he bonded with his foster family for three years, and returning him to an environment where drug use and violent behavior occurred in the recent past.

When considering all of the equities in this case, including the grandparent preference found in *W.Va. Code* § 49-3-1(a)(3) [2001], we hold that it is in Hunter's best interests to be permanently placed with his foster parents. This Court has previously stated that "stability in a child's life is a major concern when formulating custody arrangements." *Snyder v. Scheerer*, 190 W.Va. 64, 72-73, 436 S.E.2d 299, 307-08 (1993). There is no dispute that the foster family created a stable, loving environment in which Hunter was growing and thriving. Hunter was placed with his foster family when he was 17 months old and lived with them for three years. He was part of their family and both his guardian ad

litem and the only expert witness who testified before the circuit court agreed that it was in his best interests to remain with this family. Even the DHHR, which recommended that he be placed with his grandmother, concluded that Hunter was "well adjusted, growing and thriving," while he was living with his foster family. Based on all of these factors, we find that the circuit court's order placing Hunter with his grandmother was clearly erroneous because it elevated the grandparent preference over the best interests of this child.

Finally, we note that the manner in which the circuit court transferred custody of Hunter from his foster family to his grandmother was inconsistent with our case law. The circuit court's August 5, 2010, order stated that Hunter should be "immediately" placed with his maternal grandmother. After living with his foster family for three years, Hunter was transferred to his grandmother on August 13, 2010, a mere eight days after the entry of the circuit court's order. In *Kristopher O. v. Mazzone*, 227 W.Va. 184, 706 S.E.2d 381, 391 (2011), this Court stated that "it has been long understood that the law governing child custody directs that a child's best interests are best served by a gradual transition to a new home." In Syllabus Point 3 of *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), this Court explained the rationale behind the gradual transition policy:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the

> emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.[8]

Upon remand, the circuit court shall set a hearing forthwith, bringing all the parties and their counsel together for a full hearing on the most effective means of gradually transitioning Hunter from Grandmother Donna to his foster family. The circuit court may also consider setting up a visitation schedule for Grandmother Donna during this hearing. We have previously held that "(a) child has a right to continued association with individuals with whom he has formed a close emotional bond . . . provided that a determination is made that such continued contact is in the best interests of the child." Syllabus Point 11, *In re Jonathon G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996). It is imperative for all of the parties involved to work together for the ultimate goal: providing Hunter with a stable, loving environment.

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[8]This gradual transition policy has been reiterated by this Court on a number of previous occasions. *See In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009); *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005); *In re Desarae M.*, 214 W.Va. 657, 591 S.E.2d 215 (2003); *In re Jade E.G.*, 212 W.Va. 715, 575 S.E.2d 325 (2002); *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001); *In re Brian James D.*, 209 W.Va. 537, 550 S.E.2d 73 (2001); *In re Zachary William R.*, 203 W.Va. 616, 509 S.E.2d 897 (1998); *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997); *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *State ex rel. Virginia M. v. Eugene S.*, 197 W.Va. 456, 475 S.E.2d 548 (1996); *Weber v. Weber*, 193 W.Va. 551, 457 S.E.2d 488 (1995); *Michael Scott M. v. Victoria L.M.*, 192 W.Va. 678, 453 S.E.2d 661 (1994); *Feaster v. Feaster*, 192 W.Va. 337, 452 S.E.2d 428 (1994); *Robert Darrell O. v. Theresa Ann O.*, 192 W.Va. 461, 452 S.E.2d 919 (1994); *Alonzo v. Jacqueline F.*, 191 W.Va. 248, 445 S.E.2d 189 (1994); *Snyder v. Scheerer*, 190 W.Va. 64, 436 S.E.2d 299 (1993).

IV.
Conclusion

The circuit court's orders of August 5, 2010, and August 12, 2010, placing custody of Hunter H. with his grandmother are hereby reversed and this case is remanded for entry of an order gradually transitioning Hunter from his grandmother to his foster family.

Reversed and remanded.

231 W. Va. 118, 744 S.E.2d 228

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 12-0173

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE MATTER OF HUNTER H.

Certified question from the Circuit Court of Ohio County
The Honorable James P. Mazzone, Judge
Civil Action No. 07-CJA-50

CERTIFIED QUESTION ANSWERED

Submitted: February 20, 2013
Filed: March 14, 2013

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JUSTICE KETCHUM delivered the Opinion of the Court.

JUSTICE WORKMAN concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. The Grandparent Visitation Act, *W.Va. Code* § 48-10-101 *et seq.* [2001], is the exclusive means through which a grandparent may seek visitation with a grandchild.

2. The best interests of the child are expressly incorporated into the Grandparent Visitation Act in *W.Va. Code* §§ 48-10-101, 48-10-501, and 48-10-502 [2001].

3. Pursuant to *W.Va. Code* § 48-10-902 [2001], the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

Ketchum, J.:

The Circuit Court of Ohio County has submitted a certified question asking whether a court may order continued visitation to a grandparent when the child is adopted by a non-relative. Our review of this question is controlled by the Grandparent Visitation Act, *W.Va. Code* § 48-10-101 *et seq*. [2001]. After thorough review, we conclude that the Grandparent Visitation Act does not provide for continued grandparent visitation after a child is adopted by a non-relative. Accordingly, we answer the certified question in the negative.[1]

I. Factual & Procedural Background

This matter was previously before the Court in *In re Hunter H*., 227 W.Va. 699, 715 S.E.2d 397 (2011). Hunter[2] was approximately 17 months old at the time an abuse and neglect petition was filed.[3] Both of Hunter's biological parents had their parental rights terminated. Hunter was initially placed with his maternal grandmother, petitioner Donna D.

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[1] While this case was pending before the Court, Patrick Morrisey was sworn into office as Attorney General for the State of West Virginia, replacing former Attorney General Darrell V. McGraw, Jr. *See* W.Va. R. App. P. 41(c).

[2] We adhere to our usual practice in cases involving sensitive facts and do not refer to the parties using their full names. *See In re Clifford K*., 217 W.Va. 625, 619 S.E.2d 138 (2005). Hunter has been adopted by Joyce and Jerry W., and we will refer to him in this opinion as "Hunter."

[3] Because the facts are extensively set forth in *Hunter H*., *supra*, we will provide only a brief summary of that case and our ruling therein.

("grandmother" or "Grandmother Donna"). Hunter was removed from his grandmother's house shortly after this placement due to concerns about Grandmother Donna's then-husband. After being removed from his grandmother's house, Hunter was placed with a foster family, respondents Joyce and Jerry W., where he resided from August 2007 through August 2010. Hunter's guardian ad litem commented on Hunter's time with his foster family, stating that Hunter "was thriving with his foster family, identified his foster parents as 'mom' and 'dad' and identified his foster parents' daughter as 'sis.'" *Hunter H.*, 227 W.Va. at 702, 715 S.E.2d at 400.

After the Department of Health and Human Resources ("DHHR") conducted a successful home study of Grandmother Donna's residence, she petitioned the circuit court for permanent custody of Hunter. In August of 2010, the circuit court ordered that Hunter be removed from his foster family, over their objection, and that he be permanently placed with Grandmother Donna. Joyce and Jerry W. appealed and this Court reversed the circuit court's ruling, finding that the circuit court elevated the grandparent preference contained in *W.Va. Code* § 49-3-1(a)(3) [2001] over the best interest of the child. The Court ordered that Hunter be transitioned back to Joyce and Jerry W. for permanent placement.

Hunter was returned to Joyce and Jerry W.'s custody on November 1, 2011. Joyce and Jerry W. agreed to let Grandmother Donna have four-hour visits with Hunter twice a month. They also allowed Grandmother Donna to call Hunter on the telephone twice a week. Grandmother Donna was not satisfied with the amount of visitation she was receiving

and petitioned the circuit court for additional contact with Hunter. Over Joyce and Jerry W.'s objection, the circuit court entered an order on January 20, 2012, granting Grandmother Donna overnight visitation with Hunter every other weekend.[4]

Joyce and Jerry W. were in the middle of the six-month adoption waiting period when this order was entered.[5] After the entry of this order, the issue arose as to whether a grandmother could continue to receive visitation after a child has been adopted by a non-relative. Grandmother Donna conceded that "[w]ithout question, *W.Va. Code* § 48-22-703 entitles an adopting parent to unfettered rights as a parent and generally precludes grandparents from exercising visitation pursuant to . . . the Grandparent Visitation Act." She went on to argue, however, that under a best interest of the child analysis, she was entitled to receive post-adoption visitation with Hunter. Joyce and Jerry W. argued that the Legislature plainly contemplated this precise situation in *W.Va. Code* § 48-10-902 [2001], which states,

> If a child who is subject to a grandparent visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child.

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[4] The order states that "the grandmother shall visit with the child every other weekend" from 10:30 a.m. on Saturday until 3:00 p.m. on Sunday.

[5] Hunter was adopted by Joyce and Jerry W. in August of 2012. The adoption order states that the grandparent visitation that was in place prior to the adoption will continue until this Court resolves the instant certified question.

Joyce and Jerry W. asked the circuit court to apply the statute and deny Grandmother Donna's request for continued visitation. The circuit court thereafter submitted the following certified question to this Court:

> Does a child's right to continued association with individuals with whom he has formed a close emotional bond, i.e. his maternal grandmother, continue post-adoption by non-relatives, provided that a determination is made that such continued association is in the best interests of the child?

The circuit court answered the certified question in the affirmative. This Court accepted the certified question for review.

II. Standard of Review

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996). Following this standard, we proceed to consider the certified question presented.

III. Analysis

The issue before us is whether a court may order continued visitation to a grandparent when a child is adopted by a non-relative. Our resolution of this issue is controlled by the Grandparent Visitation Act set forth in *W.Va. Code* § 48-10-101 *et seq.* [2001]. The Grandparent Visitation Act is the exclusive means through which a grandparent

may seek visitation. *W.Va. Code* § 48-10-102 states, "It is the express intent of the Legislature that the provisions for grandparent visitation that are set forth in this article are exclusive." In *State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 755, 551 S.E.2d 674, 677 (2001), this Court stated that the "grandparent act, by its own express declaration, is the exclusive statutory scheme for resolving issues of grandparent visitation."

The Legislature expressly incorporated the best interests of the child considerations into the Grandparent Visitation Act. *W.Va. Code* § 48-10-101 states

> [t]he Legislature finds that circumstances arise where it is appropriate for circuit courts of this state to order that grandparents of minor children may exercise visitation with their grandchildren. The Legislature further finds that in such situations, as in all situations involving children, the best interests of the child or children are the paramount consideration.

Further, *W.Va. Code* § 48-10-501 provides that "[t]he circuit court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship." *W.Va. Code* § 48-10-502 sets forth a list of thirteen factors to be considered in making a determination regarding grandparent visitation. These factors include "[a]ny other factor relevant to the best interests of the child."

Having established that the Grandparent Visitation Act 1) is the exclusive means through which a grandparent can seek visitation and 2) expressly incorporates the best interests of the child, we turn to *W.Va. Code* § 48-10-902, *supra*. This statute, entitled

"Effect of adoption of the child," states that a grandparent's visitation rights are automatically vacated when a child is adopted by a non-relative. Importantly, the Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative. In the case *sub judice*, Hunter was adopted by his non-relative foster parents and Grandmother Donna seeks continuing visitation.

This Court addressed the issue of grandparents' ability to seek visitation under *W.Va. Code* § 48-10-902 in *Brandon L., supra*. In *Brandon L.*, the Court recognized that *W.Va. Code* § 48-10-902 allows a paternal grandparent to petition for visitation with a biological grandchild after the child was adopted by a stepparent. The Court recognized that the Legislature drew a distinction between adoptions that occur within the family and those that occur outside of the family,

> [T]he Legislature draws a distinction concerning issues of visitation depending on the type of adoption involved. Section 9(b) [now *W.Va. Code* § 48-10-902] makes clear that the Legislature both contemplated and approved the continuation of visitation rights following an adoption in those instances where the adoption occurs within the immediate family, as opposed to outside the family. [footnote omitted] In providing that visitation rights which are established preadoption are not to be affected by an adoption that occurs when the adopting parent is a stepparent, grandparent, or other relative of the child, the Legislature was both recognizing the difference between adoptions that occur within and without the immediate family and establishing a preference of continuing established relationships between children and their grandparents in the former instance. *Understandably, adoptions that take place outside the immediate family do not permit, nor perhaps should*

> *they, the continuation of visitation rights that were granted pre-adoption.*

Brandon L., 209 W.Va. at 757, 551 S.E.2d at 679. (Emphasis added.) The Court in *Brandon L.* reiterated its finding that the Legislature distinguishes between adoptions that occur inside and outside of the family stating, "Adoptions that take place outside the immediate family are clearly beyond the scope of this opinion as the Legislature has made clear that visitation should not be continued in such instances." *Id.*, 209 at 765 n. 21, 551 S.E.2d 687 n. 21.

This Court again recognized the distinction between adoptions that occur inside and outside of the family in *In re Grandparent Visitation of Cathy L. (R.) M. v. Mark Brent R.*, 217 W.Va. 319, 617 S.E.2d 866 (2005). Like *Brandon L.*, the Court in *Cathy L.* considered whether biological grandparents should be granted visitation following an adoption that occurred within the family. The Court in *Cathy L.* discussed *W.Va. Code* § 48-10-902 and noted that

> the Legislature distinguishes between adoptions occurring within the family and those occurring outside the family with respect to the appropriateness of continued visitation between a grandparent and a grandchild who has been adopted.

Id., 217 at 324, 617 S.E.2d at 871. Though the child in *Cathy L.* was adopted within the family, there was no visitation order in place prior to the adoption. The Court discussed whether a grandparent visitation order had to be in place prior to an adoption occurring within the family for a grandparent to receive continuing visitation under *W.Va. Code* § 48-10-902. In answering that question, the Court stated

> [w]hile the child in the present case was not subject to a grandparent visitation order prior to her adoption, and therefore the statute does not definitely resolve this issue, the statute does provide guidance regarding the legislative conception regarding the circumstances under which adoption should sever all visitation between adopted children and their biological grandparents.

Id., 217 at 324, 617 S.E.2d at 871. The "legislative conception regarding the circumstances under which adoption should sever all visitation between adopted children and their biological grandparents," referred to by *Cathy L*., is the situation presently before us – an adoption that occurs outside of the family.

The legislative directive that grandparent visitation should be severed when a child is adopted by a non-relative is consistent with the longstanding law of this state recognizing the ultimate effect of an adoption proceeding: a termination of previous familial relationships and the creation of new familial relationships. In this regard, the Legislature has specifically stated that

> [u]pon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this state, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so

> adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

W.Va. Code § 48-22-703(a) [2001].

Additionally, the legislative directive severing grandparent visitation when a child is adopted by a non-relative is consistent with the goal of creating finality in adoption proceedings. "[T]he central aim of adoption is finality, finality in the severance of pre-existing relationships and finality in the creation of new adoptive relationships, which breeds certainty for adopted children and their adoptive parents, alike, in their new adoptive relationship." *Cathy L.*, 217 W.Va. at 328, 617 S.E.2d at 875 (Davis, J., concurring) (citation omitted). *See also State ex rel. Smith v. Abbot*, 187 W.Va. 261, 266, 418 S.E.2d 575, 580 (1992) ("Finality is of the utmost importance in an adoption.").

Courts outside of our jurisdiction have considered this question and held that grandparent visitation should be severed when a child is adopted by a non-relative. For instance, in *In re Adoption of Child by W.P.*, 163 N.J. 158, 163, 748 A.2d 515, 518 (2000), the New Jersey Supreme Court found an "inherent conflict" between grandparent visitation and adoption, and held that the "overriding public policy" regarding adoptions precluded application of the grandparent visitation statutes in cases of adoption by "nonrelative adoptive parents." The court found that the grandparent visitation statute "must not be applied because court-enforced visitation by biological grandparents would discourage–if not

prevent[6]–adoption." 163 N.J. at 173-74, 748 A.2d at 524. Further, "[a]n adoptive family must be given the right to grow and develop as an autonomous family, and must not be tied to the very relationship that put the child in the position of being adopted." 163 N.J. at 175, 748 A.2d at 525.

Similarly, the Wyoming Supreme Court held that paternal grandparents had no right to visitation with a grandchild after the child was adopted by his maternal grandparents. In *Hede v. Gilstrap*, 107 P.3d 158 (2005), the Wyoming Supreme Court discussed a number of cases in which state courts have considered grandparent visitation rights following a grandchild's adoption.[7] After reviewing these cases, the court found that "the only universal

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[6] We are also cognizant of the chilling effect that could occur if the Legislature allowed former family members to seek continuing visitation with a child adopted by a non-relative. In the present case, Hunter's grandmother was awarded overnight visitation with him every other weekend. If Hunter's other grandparents or relatives petitioned the circuit court and demonstrated a "close emotional bond" with Hunter, the circuit court would be obliged to award those family members additional visitation based on its affirmative answer to the certified question. Further, if the employer of either of Hunter's adoptive parents transferred their job to another state, they arguably would not be able to move because of the overnight visitation with Grandmother Donna ordered by the circuit court. This restriction could indeed create a chilling effect on potential adoptive parents' willingness to adopt a child in this state.

[7] Cases considered by the court in *Hede v. Gilstrap, supra*, include the following: *Ex parte D.W.*, 835 So.2d 186, 189–91 (Ala.2002) (statute specifically allows visitation after intrafamily adoption); *In re Petition of R.A.*, 66 P.3d 146, 150–51 (Colo.App.2002) (statutory scheme is constitutional that allows post-adoption grandparent visitation where grandchild's parent has died, but not where parental rights have been terminated); *Sowers v. Tsamolias*, 262 Kan. 717, 718-19, 941 P.2d 949, 950–51 (1997) (adoption law has priority over grandparent visitation statute so that biological grandparent has no standing to petition for visitation after stranger adoption); *Hicks v. Enlow*, 764 S.W.2d 68, 71–73 (Ky. 1989) (grandparent visitation rights, by statute, do not extend to any but stepparent adoption); *In*

(continued...)

lesson to be learned from these cases is that both adoption and grandparent visitation are purely statutory creatures and, as such, their limits are to be found within the statutes." 107 P.3d at 166. In concluding that the paternal grandparents did not have the right to continued visitation, the court observed, "[i]ndeed, the statute reveals that the legislature knew how to make an exception to the severing effect of adoption because it did so for stepparent adoptions." *Id*. at 175. In the present case, *W.Va. Code* § 48-10-902 reveals that our Legislature also knew how to make an exception to the severing effect of adoption because it did so in cases where a child is adopted by his or her stepparents, grandparents or other relatives. Our Grandparent Visitation Act does not make such an exception when a child is adopted by a non-relative.

Grandmother Donna states that her request for continued visitation should be considered outside of the Grandparent Visitation Act. She argues that this Court should consider the issue *solely* through the prism of the best interest of the child.[8] This Court has

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[7](...continued)
Interest of A.C., 428 N.W.2d 297, 300 (Iowa 1988) (stepparent adoption is only statutory exception to rule against post-adoption grandparent visitation); and *Ramey v. Thomas*, 483 So.2d 747, 747 (Fla.App.1986) (adoption statute that terminates legal relationships of natural parents and former relatives does not allow for post-adoption grandparent visitation).

[8] Grandmother Donna's brief states that she is not seeking visitation with Hunter "solely based upon any blood tie. . . . Rather, she seeks continued contact with Hunter based upon the notion that it is in Hunter's best interest that such continued association continue[.]" We note that while Grandmother Donna analogizes her relationship with Hunter to a number of our previous best interest of the child cases, she has cited no statute or case from this (continued...)

consistently recognized that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989). However, we decline Grandmother Donna's invitation to consider her request for continued visitation with Hunter outside of the Grandparent Visitation Act because the Act, "by its own express declaration, is the exclusive statutory scheme for resolving issues of grandparent visitation." *Brandon L.*, 209 W.Va. at 755, 551 S.E.2d at 677. Furthermore, we need not conduct an independent best interest of the child analysis because the Legislature expressly incorporated this analysis into the Act, stating "the best interests of the child or children are the paramount consideration." *W.Va. Code* § 48-10-101. After considering the best interests of the child, the Grandparent Visitation Act excludes grandparent visitation with a child who has been adopted by a non-relative.

Additionally, Grandmother Donna's argument that post-adoption visitation may be ordered *solely* on a best interest of the child basis is at odds with the United States Supreme Court's ruling in *Troxel v. Greenville*, 530 U.S. 57 (2000). In *Troxel*, the Supreme Court examined a Washington state statute providing that any person could petition for visitation with a child at any time, thus allowing a court to order visitation rights for any person when the court found that the visitation served the best interests of the child. The Supreme Court held that this statute violated the substantive due process rights of a mother

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[8](...continued)
Court permitting a grandparent to seek post-adoption visitation with a child who has been adopted by a non-relative.

who objected to the lower court's order permitting the paternal grandparents to exercise visitation rights following the death of the children's father. 530 U.S. at 61. The Court observed that the Washington statute did not accord proper deference to "a parent's decision that visitation would not be in the child's best interest." *Id*. at 67. "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." *Id*. at 69. This Court discussed *Troxel* in *Cathy L*. and found that

> *Troxel* instructs that *a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis*. It must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis.

Cathy L., 217 W.Va. at 327-28, 617 S.E.2d at 874-75.[9] (Emphasis added.)

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[9] *Cathy L*. dealt with a grandparent seeking post-adoption visitation following an adoption that occurred within the family. *Cathy L.'s* instruction that a court must consider the best interests of the child and give significant weight to the parents' preference, is applicable in cases where a child has been adopted within the family pursuant to *W.Va. Code* § 48-10-902. In cases where the adoption occurs outside of the family, the Legislature, having incorporated its own best interests of the child analysis into the Grandparent Visitation Act, has determined that visitation should not be continued.

When adoptions occur within the family, the showing a grandparent must make to overcome a fit parent's preference regarding the care and custody of their children is substantial. In *Cathy L*., this Court reversed a family court's grant of grandparent visitation following an adoption that occurred within the family because "[t]he preference of the parents were not adequately considered by the family court, and proper weight was not given to those preferences." *Cathy L*., 217 W.Va. at 328, 617 S.E.2d at 875. Similarly, the Supreme Court stated in *Troxel* that

(continued...)

Based on *Troxel*, the Grandparent Visitation Act, and this Court's ruling in *Cathy L.*, we find no merit in Grandmother Donna's argument that post-adoption visitation may be granted *solely* on a best interest of the child basis.[10] We therefore answer the certified question in the negative and hold that the Grandparent Visitation Act, *W.Va. Code* § 48-10-101 *et seq.*, is the exclusive means through which a grandparent may seek visitation with a grandchild. The best interests of the child are expressly incorporated into the Grandparent Visitation Act in *W.Va. Code* §§ 48-10-101, 48-10-501, and 48-10-502. Pursuant to *W.Va. Code* § 48-10-902, the Grandparent Visitation Act automatically vacates

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[9](...continued)

> so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

530 U.S. at 68-69.

[10] Our ruling in the instant matter casts no doubt on our previous best interest of the child cases. We simply note that the present case is distinguishable from these prior cases. For instance, in *In re Jonathon G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996), this Court concluded that a child had a right to continued association with his foster parents after being returned to his natural parents, if the contact was in the child's best interest. *Jonathon G.* did not deal with grandparent visitation rights after a child has been adopted by a non-relative. In *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court stated that visitation rights may be granted to a parent whose parental rights have been terminated due to abuse or neglect proceedings. *Christina L.* did not deal with grandparent visitation rights after a child has been adopted by a non-relative. In *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991), this Court stated that circuit courts should consider whether continued association with siblings in other placements following an abuse and neglect proceeding would be in a child's best interest. *James M.* did not deal with grandparent visitation rights after a child has been adopted by a non-relative.

a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

Because we answer the certified question in the negative, we hereby vacate the circuit court's January 20, 2012, order granting visitation to Grandmother Donna.

IV. Conclusion

For the reasons explained in the body of this opinion, we answer the certified question in the negative.

Certified Question Answered.

No. 12-0173 – *In The Matter of Hunter H.*

FILED
June 17, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WORKMAN, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's determination that, under the circumstances of this case, continued visitation between the grandmother and the child was not appropriate. However, I dissent from the majority's reasoning because it shows a complete lack of understanding of our existing body of law concerning the rights of children to continued association.

While the majority gives lip service to the viability of the significant body of law that this Court has developed on a child's right to continued association, it effectively ignores that body of law in the analysis of this case.

It is important to note that the certified question was very direct:

> *Does a child's right to continued association* with individuals with whom he has formed a close emotional bond, i.e. his maternal grandmother, continue post-adoption by non-relatives, provided that a determination is made that such continued association is in the best interests of the child?

(Emphasis added). Notwithstanding the question posed by the circuit court, the majority simply ignores the question.

I dissent from the majority's absolute reliance on the Grandparent Visitation Act ("the Act"), West Virginia Code §§ 48-10-101 to -1201 (2009). Such slavish reliance solely on the foregoing statutory scheme is done with full abandonment of the well-established law by this Court concerning the child's right to continued association. Succinctly stated, the majority opinion only addresses the rights of grandparents as set forth in the Act and turns a blind eye to the rights of the child–rights that are wholly left unaddressed by Legislature in the provisions of the Act and now by the majority of this Court.

While the majority attempts to factually distinguish the instant case from some of the Court's earlier decisions involving continued association, they ignore an important case wherein the rights of children to continued association first emerged. In *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989), the natural father was challenging a six-month transition period in connection with the restoration of full custody of his child back to him. The child had been in the custody of her mother with reasonable visitation by the natural father. *Id*. at 449-50, 388 S.E.2d at 323. The child's mother remarried and the child lived during this marriage with her mother, stepfather and half-brother. The natural father, however, maintained his relationship with his daughter. *Id*. There was no contention or

evidence that the natural father was unfit (or had abandoned his parental rights or responsibilities). *Id*. But after the child's natural mother was killed in an automobile accident, pursuant to her will, she named the child's stepfather as guardian and the natural father sought custody of his daughter. *Id*. at 450, 388 S.E.2d at 323-24.

After the court set a six-month transition period, the father filed a petition for writ of mandamus and/or prohibition with this Court seeking immediate custody. This Court determined the natural father had a right to custody of his child, but also considered whether it was in the child's best interests to have a continued relationship with her stepfather and half-brother. The Court stated that

> [u]ndoubtedly, . . . [the child's] best interests must be the primary standard by which we determine her rights to continued contact with other significant figures in her life. Clearly, "these interests are interests of the child and not of the parent. Visitation is, to be sure, a benefit to the adult who is granted visitation rights with a child. But it is not the adult's benefit about which the courts are concerned. It is the benefit of the child that is vital." "Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well being by permitting partial continuation of an earlier established close relationship." *Looper v. McManus*, 581 P.2d 487, 488 (Okla. Ct. App.1978).

Honaker, 182 W. Va. at 452, 388 S.E.2d at 325 (footnotes omitted). Additionally, the Court stated:

> The best interests of the child concept with regard to visitation emerges from the reality that "[t]he modern child is

> considered a person, not a sub-person over whom the parent has an absolute and irrevocable possessory right. The child has rights . . . ." Another concern is "the need for stability in the child's life . . . . [T]ermination of visitation with individuals to whom the child was close would contribute to instability rather than provide stability.["]

Id., 388 S.E.2d at 326 (footnotes omitted). Thus, the Court held that even though the custody of the child should be with the natural parent absent proof of abandonment, misconduct or neglect, "the child may have a right to continued visitation rights with the stepparent or half-sibling." *Id*. at 449, 388 S.E.2d at 323, Syl. Pt. 2, in part.

Thus, the Court upheld the right of continued association of a child with a step-father (not even a blood relative), even in the face of the very strong parental right of a biological father.

Thereafter, in *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991), the Court held in syllabus point four that

> [i]n cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

Id. at 649, 408 S.E.2d at 401, Syl. Pt. 4. In so holding, the Court acknowledged the important concept that "[t]rends both in social work and the law relating to child placement indicate an

increased awareness of children's rights to such continued association with siblings and other meaningful figures." *Id*. at 658, 408 S.E.2d at 410.

The Court further explained a child's right to continued association in *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), a case which included not only the right to continued association between siblings, but also a child's right to a continued association with his mother post-termination of the mother's parental rights. We held in *Christina L.* that

> [w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. *Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.*

Id. at 448, 460 S.E.2d at 694, Syl. Pt. 5 (emphasis added). Thus, once again in *Christina L.*, like in *Honaker*, we reemphasized the importance of the visitation working in favor of the child's well-being and best interests, thereby implicitly recognizing that a court has an obligation to facilitate a child's right to human relationship when it is in his best interests.

Another case that is analogous to the instant case was *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996). In *Jonathan G.*, the child was ultimately returned to the legal custody of his natural parents after the child had been in the care and custody of foster

parents for years. Upon the return of the child to his natural parents, the circuit court determined that it had no basis upon which to order continued association between the foster parents and Jonathon G. *Id*. at 734, 482 S.E.2d at 911. This Court disagreed with the circuit court and remanded the case for proceedings to consider whether continued association between the child and his foster parents was in the child's best interests. *Id*. at 736, 482 S.E.2d at 913.

> We stated in *Jonathan G.*:
>
> > The guiding principle relied upon by this Court in recommending consideration of continued contact with a child is whether a strong emotional bond exists between the child and an individual such that cessation in contact might be harmful to the child, both in its transitory period of adjusting to a new custodial arrangement and in its long-term emotional development. We find no reason to except individuals, like the Stems, who have had a successful long-term relationship with a foster child and have been found, in fact, to be psychological parents to Jonathan G., from consideration for such continued association.

Id. at 735, 482 S.E.2d at 912. Additionally, we recognized that

> while "[t]here is little uniformity in the case law concerning nonparental visitation over the objection of a biological or adoptive parent, . . . some courts have observed a judicial trend toward considering or allowing visitation to nonparents who have a parent-like relationship with the child *if visitation would be in the best interest of the child*."

Id. (quoting in *In re Custody of H.S.H.K.*, 533 N.W.2d 419, 435 n.37 (Wis.), *cert. denied sub nom. Knott v. Holtzman*, 516 U.S. 975(1995)) (emphasis added).

Thus, we held in syllabus point eleven of *Jonathon G.* that "[a] child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." *Jonathan G.*, 198 W. Va. at 720, 482 S.E.2d at 897, Syl. Pt. 11; *see also In re Clifford K.*, 217 W. Va. 625, 646, 619 S.E.2d 138, 159 (2005) ("We would be remiss if we did not also reiterate that '[a] child has rights, too, some of which are of a constitutional magnitude.' *Lemley [v. Barr]*, 176 W. Va. [378] at 386, 343 S.E.2d [101] at 109 [(1986)] (internal quotations and citations omitted). Among these, '[a] child has a right to continued association with individuals with whom he has formed a close emotional bond . . . provided that a determination is made that such continued contact is in the best interests of the child.' Syl. pt. 11, in part, *In re Jonathan*, 198 W. Va. 716, 482 S.E.2d 893. *Accord Snyder v. Scheerer*, 190 W. Va. [64] at 72, 436 S.E.2d [299] at 307 [(1993)] (recognizing 'the right of a child to continued association with those individuals to whom the child has formed an attachment'). In this regard, '[t]he length of time that the child has remained with [such individual(s)] is a significant factor to consider in determining this issue.' *In re Jonathan*, 198 W. Va. at 736 n. 41, 482 S.E.2d at 913 n. 41.").

This Court has clearly held that, even when biological parental rights are involved, a *child's right* to continued relationship with non-parents can prevail.

Notwithstanding the foregoing precedent set forth by this Court regarding a child's right to continued association with individuals with whom the child has significant, strong emotional bonds, the majority, with its slavish devotion only to the law of the statutes, holds in syllabus points one, two and three as follows:

> The Grandparent Visitation Act, *W. Va. Code* § 48-10-101 *et seq*. [2001], is the exclusive means through which a grandparent may seek visitation with a grandchild.
>
> The best interests of the child are expressly incorporated into the Grandparent Visitation Act in *W. Va. Code* §§ 48-10-101, 48-10-501, and 48-10-502 [2001].
>
> Pursuant to *W. Va. Code* § 48-10-902 [2001], the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

While there is no question that these three new syllabus points address the rights of the grandparent, the majority's decision is devoid of any significant discussion about the rights of a child.

Finally, while the majority holds in the third new syllabus point that the visitation rights of grandparents are automatically vacated after a child is adopted by a non-relative pursuant to the provisions of West Virginia Code § 48-10-902, neither the majority,

nor the Legislature, has addressed the rights of the child. Despite what may happen to the rights of the grandparents in this case, the child, nevertheless, has a continued right to association with individuals with whom the child has strong emotional bonds so long as that continued association is in the child's best interests and is not detrimental to the parent-child relationship.

Let there be no mistake that upholding a child's right to continued association does not always mean always granting the visitation sought. In the instant case, while the guardian ad litem argued that the child desired continued association with his grandmother, the facts did not warrant the circuit court upholding the continued association as in the child's best interests. There was information offered by the guardian ad litem that demonstrated that the grandmother was interfering in a manner that was detrimental to the child's well-being.[1] This was demonstrated by the grandmother insisting on overnight

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[1]Visitation in conjunction with continued association with a child is analogous to shared parenting insofar as it necessitates a high degree of cooperation between the parties involved in order to be successful. *See generally* W. Va. Code §§ 48-9-101 to -604 (2009 & Supp. 2012). Included in this statutory scheme relating to the allocation of custodial responsibility and decision making responsibility of children is certain criteria that focuses upon the level of cooperation necessary to serve the best interests of the child. Specially, West Virginia Code § 48-9-102 (a) provides:

> (a)The primary objective of this article is to serve the child's best interests, by facilitating:
> (1) Stability of the child;
> (2) Parental planning and agreement about the child's custodial

(continued...)

visitation despite the child being sick and on medication. There was also information that the grandmother's attorney was demanding that the adoptive parents provide a physician's order showing the diagnosis, as well as the prescription. Further, there was indication that the grandmother was allowing the child to visit the child's biological mother, whose rights had been terminated. This conduct on the grandmother's part not only circumvented the wishes of the parents, but also violated the circuit court's order terminating the biological mother's parental rights. This pattern of behavior obviously indicated a contentious relationship between parents and the grandmother which was not in the child's best interests. Thus, in the analytical framework of the law relative to a child's right to continued

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[1](...continued)

> arrangements and upbringing;
> (3) Continuity of existing parent-child attachments;
> (4) Meaningful contact between a child and each parent;
> (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
> (6) Security from exposure to physical or emotional harm; and
> (7) Expeditious, predictable decision-making and avoidance of prolonged uncertainty respecting arrangements for the child's care and control.

Id.; *see Tevya W. v. Elias Trad V.*, 227 W. Va. 618, 623, 712 S.E.2d 786, 791 (2011) ("[T]he paramount consideration must be the best interests of the child. It is the 'public policy of this State to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together.' *Id*. at § 48–9–101(b)."); *Skidmore v. Rogers*, 229 W. Va. 13, 19, 725 S.E.2d 182, 188 (2011)(recognizing that "the Legislature set forth several overarching goals for courts to follow in determining custody arrangements[]" by enacting West Virginia Code § 48-9-102).

association the child's best interests must remain the polar star and the grandmother could not prevail.

For the foregoing reasons, I concur with the result reached by the majority insofar as it disallows visitation with the grandparent in this case. I dissent, however, from reasoning used by the majority in reaching its result.

233 W. Va. 500, 759 S.E.2d 447

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0004

IN RE: I.T.

Appeal from the Circuit Court of Raleigh County
The Honorable John A. Hutchison, Judge
Civil Action No. 10-CIGR-2-H

AFFIRMED

Submitted: February 19, 2014
Filed: March 6, 2014

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS

"'"The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).' Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008)." Syllabus Point 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011).

Per Curiam:

Petitioner Lesa M. ("Petitioner Grandmother") filed a petition with the Circuit Court of Raleigh County requesting that she be appointed guardian of her biological grandchild, I.T.[1] The circuit court denied this petition by order entered on December 3, 2012, finding that Petitioner Grandmother failed to present any evidence that Respondent Vanessa B. ("Respondent Mother") was an unfit mother. Further, the circuit court determined that "there has been no finding of abuse or neglect by the Respondent Mother upon the infant child[.]" The circuit court's ruling was consistent with the testimony of a Child Protective Services ("CPS") worker who stated that Respondent Mother was a fit and proper parent, and with the recommendation of I.T.'s guardian ad litem ("GAL"), who concluded that Respondent Mother should have custody of the child.

On appeal, Petitioner Grandmother raises two assignments of error: (1) the circuit court erred by failing to recognize that Petitioner Grandmother was the

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[1] We adhere to our usual practice in cases involving sensitive facts and do not refer to the parties using their full names. *See In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005). We also note that there is a distinction between the parties' biological and legal relationships. As the circuit court's order states, Petitioner is the biological grandmother and "legal aunt of the infant child." Petitioner Grandmother is also the biological mother and legal sister of Respondent Mother. Respondent Mother was adopted by her maternal grandparents when she was ten months old. Therefore, Petitioner Grandmother is legally Respondent Mother's sister and I.T.'s aunt. For ease of the reader, we will refer to Petitioner using her biological relationship to I.T., "grandmother."

psychological parent of I.T.; and (2) the circuit court erred by issuing its ruling prior to receiving the report of the GAL and prior to receiving the results of a paternity test.

After thorough review, we affirm the circuit court's December 3, 2012, order.

I.

FACTUAL AND PROCEDURAL BACKGROUND

I.T. was born on May 13, 2009. Approximately one month later, Respondent Mother and I.T. moved into Petitioner Grandmother's residence. Respondent Mother moved out of Petitioner Grandmother's residence five months later, leaving I.T. in Petitioner Grandmother's care. Respondent Mother testified that she and Petitioner Grandmother agreed that I.T. would remain in Petitioner Grandmother's care temporarily while Respondent Mother got settled in her new apartment. Petitioner Grandmother subsequently refused to return custody of I.T. to Respondent Mother[2] and filed a "Petition For Appointment of Guardian" in the Family Court of Raleigh County on

[2] Respondent Mother stated that she attempted to have Petitioner Grandmother return I.T. to her custody. Because these attempts were unsuccessful, Respondent Mother contacted the Raleigh County Police Department for assistance. After Respondent Mother contacted the police department, Petitioner Grandmother filed a domestic violence petition against Respondent Mother, alleging she had substance abuse issues that would create an unsafe environment for I.T.

November 30, 2010. This petition alleged that Respondent Mother "lived a lifestyle centered around a culture of substance abuse and did not maintain a stable residence[.]"

On December 7, 2010, the family court entered an "Emergency Temporary Order" granting temporary custody of I.T. to Petitioner Grandmother, and ordering that Respondent Mother receive weekly visitation with the child. Further, the family court's order stated that "due to the history of this matter including domestic violence petitions, this matter shall be overlapped and referred to the Raleigh County Circuit Court."[3]

Following a number of delays, the circuit court held hearings on Petitioner Grandmother's guardianship petition on July 13, 2012, and on July 25, 2012.[4] These

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[3] The family court order removing the guardianship petition to circuit court incorrectly cites "Rule 47a" of the *Rules of Practice and Procedure for Family Court* as its basis for removal, rather than Rule 48a(a). In fact, Rule 47(a) provides for the appointment of guardians ad litem in family court cases, while Rule 48a(a) establishes the basis for removing a guardianship petition to circuit court.

[4] Based on the record before us, it is unclear why a hearing was not held within ten days once the family court transferred this case to the circuit court. Rule 48a(a) of the *Rules of Practice and Procedure for Family Court* states

> (a) *Removal by family court to circuit court of infant guardianship cases involving child abuse and neglect.*—If a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va.Code § 44–10–3, is an allegation of child abuse and neglect as defined in W. Va.Code § 49–1–3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall

(continued . . .)

> continue the hearing, subject to an appropriate temporary guardianship order, **and remove the case to the circuit court for hearing to be conducted within 10 days**, for determination of all issues. At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence. Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va.Code § 44–10–3 and to the Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va.Code § 49–6A–2.

(Emphasis added).

The parties have not raised the failure to hold a hearing within ten days as error or asked for any relief due to this failure. We emphasize, however, that circuit courts must comply with the requirement to have a hearing within ten days when a family court transfers a case to circuit court pursuant to Rule 48a of the *Rules of Practice and Procedure for Family Court*. This ten day requirement is a mandatory provision that a circuit court may not ignore due to unjustified procedural delays. This Court has consistently recognized child abuse and neglect cases as high priority. *See* Syllabus Point 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365, (1991) ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.").

hearings included testimony from Respondent Mother, Petitioner Grandmother and a CPS worker.

Respondent Mother, addressing the issue of stability, testified that she has been employed at the same job for three years and has lived in the same residence for two years. While she acknowledged past marijuana use, she stated that she was no longer using marijuana and had passed all of her recent drug screens. Additionally, Respondent Mother stated that she has an infant child that she is raising with her boyfriend, and that she lives with this child and her boyfriend in a three bedroom apartment. Respondent Mother acknowledged that she and her boyfriend had experienced problems in the past which prompted her to file two domestic violence petitions against him that she eventually dropped. Respondent Mother testified that her current relationship with her boyfriend was positive and that "we both agreed that if we are having a disagreement, we will both walk out of the room . . . we've come to the understanding that that's not the way you do – that's not the way you handle things."

Lora Bailey, a CPS worker, testified at the July 25, 2012, hearing. The circuit court's order described her testimony as follows:

> [I]n 2010 she investigated allegations that Respondent Mother was abusing her children, and concluded that the allegations of abuse were not substantiated. She also testified that she met with the Respondent Mother and her boyfriend, at their home a few days prior to the July 25, 2012, hearing and that the home was clean and organized, and both parties were friendly, coherent and cooperative.

Further, Ms. Bailey testified that Respondent Mother is a fit and proper parent and that "CPS had no reason to say she (I.T.) should not be" returned to Respondent Mother's custody.

Petitioner Grandmother also testified before the circuit court. She stated that "my daughter [Respondent Mother], I know she's stable now. I can tell just by looking at her." While Petitioner Grandmother no longer had concerns about Respondent Mother's stability, she stated that she was concerned about Respondent Mother's boyfriend, and did not want I.T. to be raised in an abusive environment.

The circuit court appointed a guardian ad litem, J. Mingo Winters, for I.T. on September 10, 2012. The GAL conducted an investigation which included interviews with Petitioner Grandmother and Respondent Mother, as well as home studies of both residences. Following this investigation, the GAL concluded that "the guardianship requested by Lesa M. [Petitioner Grandmother] should be denied and permanent custody of the minor child should be returned to the child's biological mother [Respondent Mother]."

The circuit court entered an order on December 3, 2012, denying Petitioner Grandmother's guardianship petition. The court's order explains that:

> The Court finds that the Petitioner has presented no evidence that supports the assertion that the Respondent Mother is an unfit person to care for the child because of misconduct, neglect, immorality, abandonment or other dereliction of duty. Further, the Petitioner does not allege that the Respondent Mother has waived her right to custody of the child, or has transferred, relinquished or surrendered such custody.

> The Court finds that there has been no finding of abuse or neglect by the Respondent Mother upon the infant child, and there is no evidence that granting the Respondent Mother custody of the child would place the child in imminent danger of harm, or would in any way compromise the child's welfare.

The circuit court concluded that "the best interests of the infant child require that the child be immediately returned to the care and custody of the Respondent Mother, and that the Petitioner's Petition for Appointment of Guardian be denied." Following entry of the circuit court's order denying her petition for guardianship, Petitioner Grandmother filed the present appeal.

II.

STANDARD OF REVIEW

This Court has held that with regard to custody decisions, including guardianships:

> "'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989)." Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008).

Syllabus Point 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). With this standard in mind, we examine the parties' arguments.

III.

ANALYSIS

Petitioner Grandmother raises two assignments of error: (1) the circuit court erred by failing to recognize that Petitioner Grandmother was the psychological parent of I.T.; and (2) the circuit court erred by issuing its ruling prior to receiving the report of the GAL and prior to receiving the results of a paternity test.

This Court has repeatedly held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syllabus Point 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) (internal citation omitted). *See also* Syllabus Point 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children."); Syllabus Point 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child."). With this background in mind, we proceed to consider Petitioner Grandmother's assignments of error.

A. Psychological Parent

Petitioner Grandmother argues that the circuit court should have granted her petition for guardianship of I.T. because she is the child's psychological parent. Petitioner Grandmother did not raise the psychological parent argument before the circuit court. In fact, the circuit court's order denying the guardianship petition specifically noted that "[t]he Petitioner has not raised the argument that she has taken on the role of psychological parent to the infant child[.]"

The issue before the circuit court was whether Respondent Mother was a fit parent and whether it would be in I.T.'s best interest to be returned to the custody of Respondent Mother.[5] Petitioner Grandmother had the opportunity to raise the

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[5] This Court has previously addressed a parent's right to the custody of his/her child:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). *Accord* Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960) ("A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.").

psychological parent issue before the circuit court and declined to do so. Because this issue was not raised in the circuit court, we conclude that it has been waived. "In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syllabus Point 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971).

B. GAL Report and Paternity Test

Petitioner Grandmother's second assignment of error is that the circuit court erred by issuing its order denying her guardianship petition prior to receiving the report of the GAL and prior to receiving the results of a paternity test.

The GAL explained that his report was issued after the circuit court ruled on the guardianship petition because of a delay in receiving the results of a paternity test. Through this paternity test, the GAL sought to determine if Respondent Mother's boyfriend was I.T.'s father. After receiving the results of the test showing that her boyfriend was not the biological father, the GAL filed his report with the circuit court. The GAL's report agreed with the circuit court's ruling and concluded that "the guardianship requested by Lesa M. [Petitioner Grandmother] should be denied and permanent custody of the minor child should be returned to the child's biological mother [Respondent Mother]."

Petitioner Grandmother fails to cite any of the findings contained in the GAL's report. Similarly, Petitioner Grandmother does not state how the results of the

paternity test support her guardianship petition. Instead, Petitioner Grandmother's brief to this Court makes the general, conclusory argument that "the ruling on the guardianship proceeding without benefit of the paternity test results and guardian recommendations . . . was clearly erroneous." We disagree.

The GAL's report agreed with the circuit court's ruling. Assuming, arguendo, that it was error for the circuit court to issue its ruling without the benefit of the GAL report or the results of the paternity test, this error was harmless because the GAL recommended that the guardianship petition be denied. We conclude that Petitioner Grandmother did not suffer any prejudice as a result of the circuit court issuing its ruling prior to receiving the GAL's report or the results of the paternity test.

IV.

CONCLUSION

Based on all of the foregoing, we find that the circuit court did not abuse its discretion by denying Petitioner Grandmother's guardianship position. The circuit court's ruling is supported by the testimony of Respondent Mother, by CPS worker, Lora Bailey, who testified that Respondent Mother is a fit and proper parent, and by the GAL's report recommending that I.T. be placed in Respondent Mother's custody.

The circuit court's December 3, 2012, order denying the guardianship petition is affirmed.

Affirmed.

228 W. Va. 176, 718 S.E.2d 775

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35031

IN RE: ISAIAH A.,

Appeal from the Circuit Court of Wyoming County
The Honorable John S. Hrko, Judge
Civil Action No. 06-JA-87

Reversed and Remanded with Directions

Submitted: March 30, 2010
Filed: April 15, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

3. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

4. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

5. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 7, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

6. ""'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*,

164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

7. "Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child." Syl. Pt. 2, *In re Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41 (1999).

8. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Per Curiam:

This is an appeal by Timothy Lupardus, guardian ad litem, and the Department of Health and Human Resources (hereinafter "Appellants") from an order of the Circuit Court of Wyoming County declining to terminate the parental rights of Alicia T. (hereinafter "mother") to her son, Isaiah A.[1] The Appellants contend that the lower court erred in refusing to terminate the mother's parental rights and failed to correctly apply the applicable statutory standard for a determination regarding termination of parental rights. Based on the arguments of the parties, the record as provided to this Court, and the pertinent authorities, we reverse the ruling of the lower court and remand with directions to enter an order terminating the parental rights of Alicia T. to Isaiah A.

[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dept. of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 689 n. 1, 356 S.E.2d 181, 182 n. 1 (1987) (citations omitted).

I. Factual and Procedural History

An Abuse and Neglect Petition was filed on September 14, 2006, concerning eleven-month-old Isaiah A.[2] The evidence submitted in support of the Petition indicated that Isaiah's mother was bipolar and had consistently refused medication. She had also extensively used illegal drugs and tested positive for barbiturates, oxyzapan, PCP, and cocaine. She had demonstrated difficulty maintaining emotional control, and Isaiah had been discovered amid a variety of pills on the floor after the mother had taken an accidental overdose. The mother had also been uncooperative with DHHR attempts to provide remedial services.[3]

A preliminary hearing was held on October 2, 2006, and the lower court granted the mother a ninety-day pre-adjudicatory improvement period by order entered December 20, 2006. Evidence presented at that juncture further indicated that the mother had been charged with several crimes, including petit larceny, disorderly conduct,

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[2]Isaiah, born on September 23, 2005, was eleven months old at the time the Petition was filed and is now four and one-half years old. The lower court's dispositional order indicated that Isaiah's biological father, Charles A., is deceased.

[3]The lower court's dispositional order provided a chronology of the events leading to the Abuse and Neglect Petition, including the fact that Isaiah had been taken from the mother's custody in January 2006, at the age of four months, due to the mother's admitted ingestion of cocaine and PCP during a Super Bowl party. Isaiah was returned to the mother's custody after she was able to pass a drug test in February 2006. The mother agreed to the provision of in-home services offered at that time. She was not, however, willing to enter a drug treatment program.

obstructing a police officer, and entering without breaking. She had also tried to remove Isaiah from the home of a relative with whom he had been placed.

An adjudicatory hearing was conducted on March 15, 2007, and the mother stipulated that Isaiah had indeed been abused and/or neglected. The lower court granted a ninety-day post-adjudicatory improvement period by order entered April 3, 2007,[4] and stated that a dispositional hearing would be conducted on July 12, 2007.[5]

On May 3, 2007, the mother executed a document purporting to transfer custody of Isaiah to the DHHR for the purpose of being placed for adoption. She later maintained that she did not knowingly and intentionally relinquish her rights to Isaiah.

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[4]To assist the reader in processing the events occurring within the twenty-six months between the filing of the Abuse and Neglect Petition and the final order currently on appeal, the following chronology is provided:

September 14, 2006	Abuse and Neglect Petition filed
December 20, 2006	Pre-adjudicatory Improvement Period granted
April 3, 2007	Post-adjudicatory Improvement Period granted
August 15, 2007	DHHR filed first Petition for Termination of Parental Rights
October 31, 2007	First Extension of Improvement Period granted.
January 28, 2008	Second Extension of Improvement Period granted
May 5, 2008	Third Extension of Improvement Period granted
July 18, 2008	DHHR filed second Petition for Termination of Parental Rights
December 29, 2008	Final Order Denying Termination of Parental Rights

[5]The mother's older child, Madison, had been removed from the home due to the mother's drug usage, domestic violence, and neglect. The mother's parental rights to Madison were terminated on March 9, 2007, and Madison was adopted by relatives.

Although the mother refused to submit to many of the required drug tests, she did test positive for morphine, benzodiazapines, hydrocodone, oxycodone, oxazepam, and marijuana during drug screenings. The DHHR filed a Petition for Termination of Parental Rights on August 15, 2007.

By order entered October 31, 2007, the first ninety-day extension of the improvement period was granted by the lower court, and the lower court specified that a disposition hearing would be conducted on January 10, 2008. A January 7, 2008, status report submitted to the lower court by DHHR indicated very poor progress on the conditions of the extended improvement period. The mother had failed to cooperate with the in-home services provider[6] and had failed to appear for required drug screenings, despite the offered incentive of being permitted to visit Isaiah if she had three consecutive negative drug screenings. The mother also continued to date a convicted felon, Wendell T.,[7] and departed from a scheduled visit with Isaiah early because Wendell T. had not been permitted to accompany her on the visit. The DHHR reported that "it appeared that [mother] was focused more on Wendell not being in the visit then [sic] visiting with her son."

[6]One of the in-home service providers specifically stated that he could not continue to attempt to provide services to the mother due to her behaviors.

[7]Wendell T. is now deceased.

A second ninety-day extension of the mother's improvement period was granted by order entered January 28, 2008, and the court stated that a dispositional hearing would be conducted on April 10, 2008. The mother thereafter began having weekend visits with Isaiah, but these were discontinued based upon her refusal to appear for drug testing and her failure to cooperate with her in-home service providers. The DHHR submitted a status report dated April 4, 2008, and reported that the mother had become angry when she learned that she needed to appear for drug testing. She had initially agreed to the testing but subsequently refused to attend when a DHHR worker arrived to transport her to the testing location. She later tested positive for Oxymorphine, and her visitation thereafter became supervised.[8]

On April 10, 2008, the mother requested another extension of her post-adjudicatory improvement period. By order entered May 5, 2008, the lower court granted a third ninety-day extension of the improvement period and specified that a dispositional hearing would be conducted on July 10, 2008. The mother again refused a drug screening on May 28, 2008, and also informed Isaiah's foster mother that she was not going to visit Isaiah anymore. On July 14, 2008, the DHHR formally discontinued visits between the

[8]The April 4, 2008, status report also indicated that Wendell T. had been removed from the home during a March 19, 2008, domestic dispute at the mother's residence. They were allegedly arguing over the fact that Wendell T. had learned that the mother had engaged in a sexual encounter with another man at a motel. On March 22, 2008, the mother and Wendell T. were arrested after an altercation at a local pool hall.

mother and Isaiah. She had not visited Isaiah for three months and had been in several recent fights. The mother actually missed fifteen of twenty-eight scheduled visits with Isaiah and refused scheduled parenting instruction based upon her claim that she was already an excellent mother and did not need the services.

Another Petition for Termination of Parental Rights was filed by the DHHR on July 18, 2008. In this petition, the DHHR emphasized that Isaiah had been in custody since October 2006, a period of twenty-one months, and had not been returned to his parent or placed for adoption. A thorough chronology was presented in that petition, including the mother's extended pattern of drug abuse; the filth and cat urine odor of the home; the mother's termination of parental rights to Madison; the mother's verbal and physical aggression; her failure to submit to required drug screenings; her positive drug tests; the domestic violence between the mother and her boyfriend; and the various custody arrangements for Isaiah with different family members.

On September 30, 2008, the mother filed a motion for a post-dispositional improvement period, but Judge Hrko denied her motion, and the case proceeded to the dispositional stage. By order entered December 29, 2008, the lower court found that "although the Respondent has shown some signs of progress during her improvement periods, her improvement has been minimal and she has not corrected the conditions of

abuse and/or neglect." The lower court also acknowledged that the mother had denied having a drug addiction problem and had refused an in-patient drug program. The mother was tested immediately after the hearing and tested positive for hydocodone, oxycodone, oxazepam, and TCH.

Although the lower court specifically found that "[r]eturn to Respondent's home remains contrary to the best interests of the Child," it declined to terminate the mother's parental rights to Isaiah. The lower court reasoned as follows:

> Although the Respondent has been afforded numerous improvement periods and has shown only minimal progress and has failed to remedy the conditions that required removal of the Child from her home, the Respondent nontheless has not been shown to be so incorrigible as to leave this Court without the firm impression that the Respondent has the capacity to reform, should she so choose.

The lower court stated that "there is a glimmer of hope that the Respondent mother can make diligent efforts to remedy the conditions of abuse and neglect." Thus, the lower court ordered that Isaiah would remain in the custody of the relatives with whom he had been residing and allowed liberal supervised visitation with the mother. The lower court further ordered the guardian ad litem to "continue performing his duties until relieved thereof by further Order of this Court or as otherwise provided for by law." The court stated that if the relatives "cease to be a fit and willing placement," the DHHR should file a report thereof.

The guardian ad litem and DHHR now appeal. They contend that the best interests of Isaiah must guide this inquiry and that Isaiah deserves final and permanent placement in the form of adoption, as sought by the relatives with whom he has resided.

II. Standard of Review

This Court explained in *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), that abuse and neglect proceedings will be evaluated under a "compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." 208 W.Va. at 332, 540 S.E.2d at 549. Syllabus point one of *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), also provides the following standard of review for cases of this nature:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Furthermore, syllabus point one of *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996), explains the general criterion for appeals from the circuit court level, as follows:

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Utilizing these standards as guidance, we address the contentions of the parties in this matter.

III. Discussion

The guardian ad litem and DHHR maintain that the lower court erroneously failed to terminate the mother's parental rights, based upon the evidence presented and the specific factual findings made by the lower court. Further, they contend that the trial court improperly utilized the statutory standards governing the decision regarding termination of parental rights. In response, the mother argues that her dependence upon drugs and the consequences of that addiction must be considered as mitigating factors. She essentially contends that she did not receive the level of assistance that would have been required to permit her to overcome her addiction and remedy her insufficiencies as a parent. She also alleges that she possesses the potential for improvement.

This Court has consistently articulated and adhered to the statutorily-mandated standard for the termination of parental rights. West Virginia Code § 49-6-5(a)(6) (2006) (Repl. Vol. 2009) provides that parental rights may be terminated "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child. . . ." West Virginia Code § 49-6-5(b) supplies the definition of "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected," the complete text of which provides follows:

> As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> > (1) The abusing parent or parents have *habitually abused or are addicted to alcohol, controlled substances or drugs*, to the extent that proper parenting skills have been *seriously impaired and such person or persons have not responded to or followed through* the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;
> >
> > (2) The abusing parent or parents have willfully *refused or are presently unwilling to cooperate* in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

> (3) The abusing parent or parents have *not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies* designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;
>
> (4) The abusing parent or parents have abandoned the child;
>
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child;
>
> (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills; or
>
> (7) The battered parent's parenting skills have been seriously impaired and said person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with the recommended and appropriate treatment plan.

West Virginia Code § 49-6-5(b) (emphasis supplied).

In determining the appropriate disposition of an abuse and neglect proceeding based upon the foregoing statutory guidance, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). This Court has invariably implemented the principle that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Moreover, the precedent of this Court supports the proposition that children are entitled to permanency to the greatest degree possible. *See In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996); *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995); *In re Lindsey C.*, 196 W.Va. 395, 473 S.E.2d 110 (1995) (Workman, J., dissenting). Consistent with that goal, this Court explained as follows in pertinent part of syllabus point one of *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991): "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security."

In constructing the optimal resolution of a particular abuse and neglect case, this Court has explained that "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 7, in part, *Carlita B.*, 185 W.Va. at 616, 408 S.E.2d at 368. Indeed, termination of parental rights may be employed without intervening alternatives where there is no reasonable likelihood of correction of the conditions constituting abuse and neglect. Syllabus point one of *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), explains this point succinctly, as follows:

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)."

With regard to the time frame in which final disposition of abuse and neglect cases should be made, this Court has recognized that "[a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life. . .

." *Amy M.*, 196 W.Va. at 260, 470 S.E.2d at 214. Indeed, improvement periods are "regulated, both in their allowance and in their duration, by the West Virginia Legislature, which has assumed the responsibility of implementing guidelines for child abuse and neglect proceedings generally." *In re Emily*, 208 W.Va. at 334-35, 540 S.E.2d at 551-52.

West Virginia Code § 49-6-12(a) (1996) (Repl. Vol. 2009) provides that a pre-adjudicatory improvement period "not to exceed three months" may be granted in cases of child neglect or abuse. Section (b) of that statute permits a post-adjudicatory improvement period "not to exceed six months" if, among other requirements, the respondent demonstrates by clear and convincing evidence that he or she is likely to "fully participate in the improvement period"[9] and if the respondent "demonstrates that since the initial

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[9]The complete text of West Virginia Code § 49-6-12(b) provides as follows:

> After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:
>
> (1) The respondent files a written motion requesting the improvement period;
>
> (2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
>
> (3) In the order granting the improvement period,

(continued...)

improvement period, the respondent has experienced a substantial change in circumstances" which will permit the respondent to be "likely to fully participate in a further improvement period[.]" W.Va. Code § 49-6-12(b).

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[9](...continued)

> the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;
>
> (4) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and
>
> (5) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three [49-6D-3], article six-d of this chapter.

An extension of an improvement period, as granted thrice in the present case, is permitted by West Virginia Code 49-6-12(g) for periods not to exceed three months under the following conditions:

> when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.

See also Syl. Pt. 2, *In re Jamie Nicole H.*, 205 W.Va. 176, 517 S.E.2d 41 (1999) ("Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.").

This Court has explained that "an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged." *In re Emily*, 208 W.Va. at 334, 540 S.E.2d at 551. Thus, in the recent case of *In re Kaitlyn P.*, ___ W.Va. ___, 690 S.E.2d 131 (2010), this Court examined the evidence indicative of potential participation and found that the parents had failed to present

adequate evidence that they were likely to fully participate in the improvement period, as required where a post-adjudicatory improvement period is requested.

In the present case, the lower court permitted the mother ample opportunity to avail herself of the services provided and to correct the conditions of abuse and/or neglect existing at the time the original petition was filed. The lower court provided the mother with a ninety-day pre-adjudicatory improvement period in December 2006, a ninety-day post-adjudicatory improvement period in April 2007, and three ninety-day extensions of the improvement periods in October 2007, January 2008, and May 2008. Thus, in the judgment of this Court, the lower court was far more lenient in the granting of extensions than was warranted by the circumstances existing in this case and the absence of improvement demonstrated by the mother. This mother was provided with abundant opportunity to rectify the conditions of abuse and neglect. She failed to do so, and yet the lower court continued to extend the improvement periods. As this Court observed in *Amy M.*, "prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted" by statute. 196 W.Va. at 258, 470 S.E.2d at 212. While this Court has recognized that a lower court's discretion includes considerable flexibility in fashioning the appropriate relief in these cases, this Court has also declared that "there comes a time for decision." *Id.* at 260, 470 S.E.2d at 214.

When the lower court did eventually deny another request for an improvement period, it made factual findings in its final December 29, 2008, order and specifically stated that the mother had "shown only minimal progress and . . . failed to remedy the conditions that required removal" of Isaiah. In determining the ultimate disposition of this case, however, the lower court stated that it did "not find at this time that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." The lower court continued by stating that "there is a glimmer of hope that the Respondent mother can make diligent efforts to remedy the conditions of abuse and neglect."

We find no error in the lower court's factual findings. However, the lower court's application of law to the incontrovertible facts is erroneous, and its ultimate conclusion to allow Isaiah to remain in temporary foster care placement without termination of parental rights is an abuse of discretion. The determinitive standard, as provided and defined by statute and quoted above, is whether there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W.Va. Code § 49-6-5(a)(6). The lower court's utilization of a standard such as whether there is a "glimmer of hope" that the mother can make a diligent effort to remedy the situation is inconsistent with the criteria expressly provided by statute.

Applying the proper legal standard to the facts as determined by the lower court, this Court has evaluated the behavior of the mother over the twenty-six month period between the September 14, 2006, filing of the Abuse and Neglect Petition to the December 29, 2008, final order currently on appeal. We find that the facts as revealed in the record do not demonstrate any likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. The lower court provided extensive opportunity for remediation of the existing deficits. Improvement periods were granted and extended, in-home assistance was provided, and the mother consistently failed to cooperate with the service providers and the conditions of the improvement periods. Based upon the factual record, the best interests of the child, and the child's right to eventual permanency, this Court reverses the lower court's conclusion that the mother's parental rights should not be terminated.[10]

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[10]This Court has previously explained the potential for post-termination visitation, as follows in syllabus point five of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995):

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Based upon this Court's review of this matter and the argument of the parties to this action, we find that an order addressing post-termination visitation is not warranted in this case.

IV. Conclusion

Accordingly, for the reasons set forth above, the order of the Circuit Court of Wyoming County is reversed to the extent that it failed to terminate the parental rights of Alicia T. to Isaiah A. This case is remanded to the lower court for entry of an order terminating the parental rights of Alicia T. to Isaiah A. The mandate of this Court shall issue contemporaneously herewith.

Reversed and remanded with directions.

199 W. Va. 209, 483 S.E.2d 555

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA EX REL.
ISOBELLE DONNIE ROSS ISFERDING, Petitioner

v.

HONORABLE HERMAN G. CANADY, JR.,
JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY,
AND GEORGE ALLEN ROSS, Respondents

No. 23793
Submitted: January 14, 1997
Filed: February 21, 1997

SYLLABUS BY THE COURT

1. "Where supervised visitation is ordered pursuant to W.Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court." Syl. pt. 3, Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, State ex rel. Hoover v. Berger, No. 23737, ___ W. Va. ___, ___ S.E.2d ___ (Nov. 15, 1996).

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St. Albans, West Virginia

Attorney for the Petitioner

Per Curiam:
This original proceeding was submitted to this Court upon the petition of Isobelle Donnie Ross Isferding asking this Court to prohibit the Honorable Herman G. Canady, Judge of the Circuit Court of Kanawha County, West Virginia, from modifying the terms of the petitioner's visitation rights concerning her two children, which terms had been established during divorce litigation between the petitioner and respondent, George Allen Ross. In particular, the petitioner complains of an order entered on February 8, 1995, in the underlying action of Ross v. Ross (Isferding), Civil Action No. 83-C-2282 (Kanawha County), wherein the respondent judge changed the petitioner's unsupervised visitation with her children to supervised visitation and, in addition, directed that any visitation session between the petitioner and her children be upon the childrens' express consent.
This Court has before it the petition for a writ of prohibition, the memorandum in support thereof and the order of February 8, 1995. No responses to the petition have been filed. For the reasons stated below, this Court concludes that the question of modification of the petitioner's visitation rights was not properly raised below. Consequently, relief in prohibition is granted, and the respondent judge is directed to enter an order restoring the prior terms of visitation to the petitioner.

I

During their marriage, the petitioner and respondent George Allen Ross had two children. The first child was born on October 14, 1979, and the second child was born on December 16, 1980. In 1983, however, the petitioner and George Allen Ross were divorced. As the petition before this Court indicates, the petitioner was granted unsupervised visitation with the children every third weekend and for two non-consecutive weeks during the summer. In addition, the petitioner was granted visitation on alternate holiday weekends, and she could visit with the children by telephone each Sunday.

In December 1992, the petitioner instituted a contempt proceeding against respondent George Allen Ross in the Circuit Court of Kanawha County. The petitioner asserted that Ross had denied her visitation with the children. Soon after, a hearing was conducted in the circuit court during which the petitioner submitted evidence concerning the denial of visitation. Ross appeared at the hearing only through counsel, and the matter was continued in order to provide Ross with an opportunity to submit his evidence. Ross failed to appear at a later scheduled hearing, however, and was found in contempt.

According to the petition, Ross then filed a motion with the circuit court to reconsider the finding of contempt, and a hearing upon the motion was conducted

on March 18, 1994. Thereafter, on February 8, 1995, the respondent judge entered an order, the import of which modified the terms of the petitioner's visitation rights concerning her children. Specifically, the order provided that the petitioner's visitation rights were to be "on condition that the maternal grandparent, Martina Miller, shall be present during all visits, and upon the additional condition that [the two children] shall first call [the petitioner] in advance and register their willingness to undertake such visitation."

Importantly, although the order of February 8, 1995, indicated that the proceedings before the circuit court were upon the petitioner's motion that George Allen Ross "be held in contempt for denial of visitation," the order primarily concerned a modification of the petitioner's visitation rights. Even so, neither the petitioner nor Ross, as the petition before this Court states, ever filed a motion or petition requesting a modification of visitation. Moreover, as a review of the order of February 8, 1995, suggests, the circuit court made no specific findings concerning the necessity of supervised visitation and made no specific findings concerning the nature of supervised visitation with regard to the requirements of these two children.

II

In syllabus point 2 of Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996), this Court observed:

W.Va. Code, 48-2-15 (1993), grants the circuit court in a divorce proceeding plenary power to order and enforce a noncustodial parent's visitation rights with his or her children. W.Va. Code, 48-2-15(b)(1) (1993), the subsection specifically dealing with visitation, provides, in pertinent part: 'The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances. In every action where visitation is awarded, the court shall specify a schedule for visitation by the noncustodial parent [.]'

See also syl. pt. 3, Haller v. Haller, No. 23472 , ___ W. Va. ___, ___ S.E.2d ___ (Dec. 19, 1996). Although W. Va. Code, 48-2-15(b)(1) (1993), effective throughout much of the litigation below, has since been amended, the above-quoted provisions of the statute have remained the same.

In some circumstances, visitation should be supervised, "when necessary to protect the best interests of the children." Syl. pt. 3, Carter, supra; syl. pt. 4, Haller, supra. However, a conclusion that visitation should be supervised requires a variety of considerations and the making of specific findings. As this Court held in syllabus point 3 of Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992):

> Where supervised visitation is ordered pursuant to W.Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

See also syl. pt. 3, Alireza D. v. Kim Elaine W., No. 23420, ___ W. Va. ___, ___ S.E.2d ___ (Nov. 18, 1996).

In this proceeding, the order of February 8, 1995, fails to indicate that the above considerations and findings were made. As stated above, the order contains no findings concerning the necessity of supervised visitation and no findings concerning the nature of supervised visitation with regard to the requirements of these two children. Moreover, although that order directed that any visitation session between the petitioner and her children be upon the childrens' express consent, the order further suggests that George Allen Ross may have somewhat alienated the children from visitation with the petitioner. As the order states: "The conduct of the plaintiff/respondent [George Allen Ross] with respect to his duty to encourage visitation, although in many respects wanting, and in violation of duty not to hold the opposite parent to scorn, still appears not to be entirely the fault of plaintiff/respondent [.]" Furthermore, as noted above, although the order indicated that the proceedings before the circuit court were upon the petitioner's motion that George Allen Ross "be held in contempt for denial of visitation," the order primarily concerned a modification of the petitioner's visitation rights. Thus, the order of February 8, 1995, in changing unsupervised visitation to supervised visitation, is quite problematic. See footnote 1

Moreover, a review of the documents before this Court demonstrates that the petitioner is correct in her assertion that neither the petitioner nor George Allen Ross ever filed a motion or petition requesting a modification of visitation. The proceedings before the circuit court, resulting in the order of February 8, 1995, arose solely from the petitioner's request that Ross be held in contempt for denying her visitation with the children. Consequently, the question of modification of the petitioner's visitation rights was not properly raised below. As the petitioner's memorandum in support of the petition for a writ of prohibition makes clear:

> [T]he litigation of the matter below was initiated only by Isferding's filing of a Petition for Contempt on December 2, 1992. Nothing about this Petition related to the issue of altering visitation

> privileges, and all of the hearings conducted in this matter were for either Isferding to put on evidence in support of Ross' contempt, or for Ross to purge himself of same.

In Crone v. Crone, 180 W. Va. 184, 375 S.E.2d 816 (1988), this Court held that a former wife's due process rights were violated in failing to afford her notice and hearing prior to modifying her former husband's visitation rights concerning their son. Noting that a court, in considering visitation rights, is charged with giving paramount consideration to the welfare of the child, this Court, in Crone, stated: "[W]e have recognized that noncustodial visitation is an important natural parental right closely related to the issue of custody and meriting the same due process protections." 180 W. Va. at 186, 375 S.E.2d at 818.

Here, the petitioner acknowledges that, pursuant to W. Va. Code, 48-2-15, a circuit court has continuing jurisdiction to modify the terms of orders concerning visitation rights. In the underlying action, however, the modification occurred without proper notice and hearing, and, in this instance, in the absence of any motion or petition requesting a change in the petitioner's visitation rights. The proceeding arose solely upon the issue of contempt for an alleged denial of visitation rights previously established. This Court is of the opinion, therefore, that the petitioner is entitled to relief in prohibition with regard to the February 8, 1995, order.

In the recent case of State ex rel. Hoover v. Berger, No. 23737, ___ W. Va. ___, ___ S.E.2d ___ (Nov. 15, 1996), this Court discussed various circumstances warranting relief in prohibition. Syllabus point 4 of Hoover holds:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the

> third factor, the existence of clear error as a matter of law, should be given substantial weight.

See also W. Va. R. App. P. 14; W. Va. Code, 53-1-1 [1931], et seq.; syl. pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

The principles thus expressed in Hoover having been met by the petitioner herein, a writ of prohibition is hereby granted prohibiting the respondent judge from modifying the terms of the petitioner's visitation rights concerning her two children in the underlying action of Ross v. Ross (Isferding), Civil Action No. 83-C-2282. Instead, the respondent judge is directed to enter an order restoring the prior terms of visitation to the petitioner.

Writ granted.

Footnote: 1 Should allegations of abuse arise during the course of a proceeding, a circuit court can order measures to protect the child until a full hearing can be had on such allegations.

232 W. Va. 81, 750 S.E.2d 634

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2013 Term

FILED
October 17, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0109

IN RE: J.C.

Appeal from the Circuit Court of Braxton County
Honorable Jack Alsop, Judge
Civil Action No. 12-JA-21

AFFIRMED

Submitted: September 24, 2013
Filed: October 17, 2013

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The opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

2. "'When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).' Syllabus Point 4, *In re George Glen B., Jr.*, 205 W.Va.

435, 518 S.E.2d 863 (1999).” Syl. Pt. 4, *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000).

3. “‘“‘Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.’ Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).’ Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).” Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

4. “‘[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .’ Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

5. “‘Where there has been a prior involuntary termination of parental rights to a sibling . . . the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is

present.' Syllabus Point 2, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S..E.2d 863 (1999)." Syl. Pt. 3, in part, *In re George Glen B.*, 207 W.Va. 346, 532 S.E.2d 64 (2000).

Per Curiam:

This case is before this Court upon the appeal of the petitioner, Christina C., from the Circuit Court of Braxton County's January 3, 2013, order terminating her parental rights to her child, J.C.[1] The petitioner asserts that the circuit court erred in concluding that the facts and circumstances that gave rise to the abuse and neglect proceedings could not be substantially corrected in the foreseeable future; in denying her a post-adjudicatory improvement period; and in terminating her parental rights. Based upon the record, the parties' briefs, and the arguments presented, we find no error. Accordingly, we affirm both the denial of an improvement period and the termination of the petitioner's parental and custodial rights to J.C.

I. Factual and Procedural Background

On July 20, 2012, J.C. ("the child"or "J.C.") was born to the petitioner, Christina C. ("the mother"), and her estranged husband,[2] respondent Allen C. ("the father").[3] On July 23, 2012, the respondent, the West Virginia Department of Health and Human

[1]Consistent with our practice in cases involving sensitive matters, we use the first name and last initial of the parents and the child victim's initials. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990); *see also R.A.P.* 40(e)(1).

[2]At the time of J.C.'s birth, the parties were separated and remained separated throughout these proceedings. The father testified that although both he and the mother had discussed getting divorced, they "had not come to an agreement."

[3]The termination of the respondent father's parental rights to J.C. was affirmed in a Memorandum Decision issued by this Court on October 1, 2013, in Case No. 13-0393.

Resources ("the Department"), filed a verified Petition to Institute Child Abuse and Neglect Proceedings ("the Petition") in the Circuit Court of Braxton County against the mother and the father. The Petition was based, in part, upon West Virginia Code § 49-6-5b(a)(3) (2009)[4] given the prior involuntary termination of the mother's custodial and parental rights to three other children in 2006.[5] The Petition also alleged that the mother took Suboxone[6] throughout her pregnancy; that she had an extensive history with controlled substances; that the father was aware of her history; and that the mother and the father had a history of domestic violence in the home—the latest incident occurring in March 2012.

On the same day that the Department filed its Petition, the circuit court entered an Initial Order Upon Filing of Petition in which it, *inter alia*, transferred custody of J.C. to

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[4]West Virginia Code § 49-6-5b provides, in pertinent part, as follows:

> (a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:
>
> • • •
>
> (3) If . . . the parental rights of the parent to a sibling have been terminated involuntarily.

[5]The prior involuntary termination occurred in Webster County, West Virginia. The circuit judge who presided over the instant proceeding in Braxton County was the same judge who presided over the Webster County proceedings initiated in 2005.

[6]While the Department refers to this medication as "suboxin," it is referred to as "Suboxone" in the record, which is the correct name for this medication. Suboxone is used for "maintenance treatment of opioid dependence." *Physicians' Desk Reference*, p. 2223, 67th Edition (2013). Although the mother testified that she was assured that taking this drug throughout her pregnancy would not affect her baby, we note that this drug "is not indicated for use during pregnancy unless potential benefit justifies potential risk." *Id.* at p. 2222.

the Department and set the preliminary hearing for July 31, 2012, for the purpose of determining whether conditions existed that required the immediate removal of the child. The Department placed J.C. with foster parents, and he has lived with the same foster parents throughout this proceeding.

The mother waived the preliminary hearing. Thereafter, the circuit court found that due to the prior termination of the mother's parental rights to her three other children, imminent danger existed at the time of the removal of J.C., who was ordered to remain in both the legal and physical custody of the Department.[7] The circuit court set the adjudicatory hearing for August 30, 2012.

During the August 30, 2012, adjudicatory hearing, the mother admitted the allegations in the Department's Petition. She further admitted telling the Department's Child Protective Services ("CPS") worker, Marta Ware, that she was currently prescribed and

[7]On September 19, 2013, the guardian ad litem filed a status update with the Court pursuant to Rule 11 of the West Virginia Rules of Appellate Procedure. The guardian reported that J.C. is approximately fourteen months old; that he has remained with the same foster parents since July 23, 2012; that the permanency plan for J.C. remains adoption; and that J.C.'s foster parents seek to adopt him pending the outcome of the instant appeal. The Department also filed a child status update with the Court on September 23, 2013, in which it reported that J.C. has been diagnosed with pulmonary artery stenosis (a narrowing of the arteries which lead from the heart to the lungs); has two holes in his heart; has developed acid reflux; has suffered from chronic ear infections and Respiratory Syncytial Virus (RSV); and has significant developmental delays.

taking Suboxone and that she took it throughout her pregnancy.[8] The mother also admitted that she and the father have a history of domestic violence in the home and that the most recent incident occurred in March 2012, while she was pregnant with J.C. It was after this incident that the parties separated.[9] It is undisputed that the mother's parental rights to three other children were involuntarily terminated by the Circuit Court of Webster County in 2006. The circuit court accepted these admissions, adjudicated the mother as an abusive and neglectful parent, and took her motion for a post-adjudicatory improvement period under advisement. The circuit court awarded the mother weekly, two-hour, supervised visits with J.C. The disposition hearing was scheduled for September 19, 2012.

During the disposition hearing, CPS worker Ware testified since the inception of this proceeding, the mother had been compliant with services and had participated in the supervised visitation. Ms. Ware further testified that while the mother had tested positive for Suboxone at the beginning of the case, her drug screens had been negative since approximately August 8, 2012, although she was not undergoing any substance abuse treatment. When questioned regarding the mother's economic situation, Ms. Ware testified

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[8]A transcript of the adjudicatory hearing is not included in the appendix record; the testimony from the adjudicatory hearing is taken from the parties' appellate briefs.

[9]Although the parties separated and apparently initiated divorce proceedings, the record reflects the father's plan to move next door to the mother in the trailer park where she resides, which was a concern for the guardian ad litem given the parents' history of domestic violence.

that the mother had no income, that she did not think that she was employed, and that she did not know how the mother sustained her household or where she got money for food. Notwithstanding this testimony, and based solely on the mother's participation in services since the initiation of the instant proceedings, Ms. Ware stated that she would "not object to an improvement period[.]"

The record reflects that the circuit court then questioned CPS worker Ware concerning the prior involuntary termination of the mother's rights to three other children, as follows:

> Q. Ma'am, just how much investigation and review of the Webster County case have you done?
> A. Not a lot, sir. I have no copy of the disposition - -
> Q. Well, don't you think that might be an appropriate thing to do?
> A. Yes.
> Q. Because, I mean, I was the trial judge in that case.
> A. Yes.
> Q. And if you look to my order . . . or at the finding of abuse and neglect, the parties[10] were engaged in domestic violence, excessive corporal punishment; the respondent parents were requiring their children to go out and beg for money because they didn't have money to live on. That's the same condition we have here today. They required their children to rear the other children, and as an aside to that, I suspected at the time, subsequent to this Court's finding, one of the individuals that the daughter was being

[10]The mother testified that in either 2006 or 2007, she divorced the man who was her husband at the time of the prior termination proceeding.

> required to go beg from was sexually assaulting the daughter, and has been criminally convicted of that, as well as the drug use at the time of the dispositional hearing. So how can you come in here and say that you recommend - - when we have the mother in the same situation, she has no income, we don't know how she's living, and that was the same thing that happened in 2005 in Webster County. How do you do that? I mean, how do you not read that [disposition] order?
>
> A. *Just neglect o[n] my part, Your honor, I'm sorry.*

(Footnote and emphasis added.).

During the disposition hearing, an effort was also made to determine exactly how the mother supported herself. The mother testified that the rent for her mobile home is paid by "Raleigh County Housing" and, as for utilities and other living expenses, she explained that she relies upon the travel reimbursement checks that she receives for medical appointments. In that regard, she testified:

> A. To be honest, the non-emergency medical transportation . . . . Almost anybody would know that you never put that much in your gas tank. You always make really good profit when you go to doctors, and whenever all that extra came, I just kept the checks and I kept piling them up until it's enough to pay the bills.
>
> ••••
>
> The Court: Non-emergency - - for whom?
>
> A. For me. Like when you draw Medicaid, you get reimbursed for the mileage, going to the doctor's, and I was in the Suboxone program, I got reimbursed for that. I was pregnant, seeing the OB/GYN, I got reimbursed for that.

When asked whether she had any other source of income, the mother responded that she picked up odd jobs, such as sewing and mowing grass.[11]

The mother was also questioned about her use of Suboxone during her pregnancy with J.C. She testified that it was prescribed for her, explaining that given the "past problems that I've had, I tried my best to look at it in a way to keep me from falling, and I figured the Suboxone would be the best route to take throughout pregnancy to make sure that I wouldn't fall." The mother admitted that she failed to undergo drug treatment that was offered to her in the prior termination proceeding. When asked what she had done to remedy her drug addiction in the approximately seven years since the prior termination proceeding was instituted, the mother cited only her participation in the Suboxone program during her pregnancy with J.C.

In addition to the above, the mother testified that since the prior termination proceeding, she had served a penitentiary sentence following her conviction for selling hydrocodone; that she was released from prison in 2008; that she did not use drugs from 2008, through 2011; and that "the only thing that made [her] start taking again was being a

[11]The mother also testified that she had filed for a social security disability based on her "history of migraines . . . the problems with her neck, and the neuropathy." The mother also noted that J.C. would receive benefits based upon the father's social security disability.

patient at the Beckley Pain Clinic" in 2011.[12] The mother admitted that she had "pain clinic issues back in 2006" during the prior termination proceeding. She further testified after the institution of the instant proceedings, she ceased taking Suboxone, but added that she had been prescribed Tramadol[13] for "severe pain, severe headaches."

After the testimony concluded at the disposition hearing, the prosecutor stated, as follows:

> Regarding [the mother], I believe the Court knows her history better than anyone here, I suppose, and I'm sure the Court [is] troubled by things that came out during her testimony, including that she was going to a pain clinic in 2011. She had pain issues in the 2006 case in Webster County. She admitted she started using drugs in 2011 when she went to the pain clinic. Then she got on the Suboxone when she became pregnant with her child and all of those are issues that would indicate that until the filing of this petition that probably circumstances haven't changed a whole lot from the 2006 case until now when this petition was filed.

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[12]As indicated above, the mother testified that she suffers from migraine headaches, neuropathy, and neck issues from a car accident.

[13]Although the mother testified that Tramadol had been prescribed for her by a physician for pain, this is troubling to the Court given her history of abusing drugs and the apparently highly addictive qualities of Tramadol. *See Farmer v. State*, No. 02–09–00278–CR, 2011 WL 1601311 *1 (Tex. App. Apr. 8, 2011) ("Tramadol is the generic name for Ultram[.]"), *vacated on other grounds*, 2011 WL 4072126 (Tex.Crim.App. Sept. 14, 2011); *see also Disciplinary Counsel v. Wolf*, 853 N.E.2d 1169, 1170 (OH 2006) ("Ultram[] [is] a drug that turned out to have highly addictive qualities. . . . reliance on the drug evolved into serious substance abuse . . . .").

The circuit judge was clearly concerned about the mother having custody of J.C. while continuing to be unemployed. He described it as "the same condition [as before]- - she sent her children out to beg, she was selling drugs . . . I don't know how she's living. I have my suspicions, but from the evidence, I don't know how she's living." The mother's counsel responded that, in fact, the mother's circumstances had changed because, until her separation from the father in March 2012, she received the financial benefits of his income.[14] The circuit court observed, however, that having the father's disability income was not "substantially different from 2005 or 2006. At that time[,] she had children who had a father who had been . . . murdered, and she was drawing benefits, so it wasn't any different." The circuit court further noted that even with those benefits in the prior proceeding, "which she doesn't have now[,] [s]he was sending kids out to beg. She was selling controlled substances . . . And I don't know how she's supporting herself, much less a child. And that is something I have to be concerned about." The circuit court concluded, as follows:

> [the mother] does not have any income at this particular point in time, and I don't know how she's living in regards to that, but she doesn't have any ability to support a child, she engaged in inappropriate conduct because of lack of income in the prior proceedings, and I do not believe that the conditions out of which the prior abuse and neglect arose which resulted in the termination of parental rights have been substantially corrected, therefore the Court finds that it would be in the best interest of the child that the parental rights of the natural mother are hereby terminated.

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[14]The father testified that his income consisted of $700 per month in disability payments.

In its January 3, 2013, dispositional order, the circuit court took judicial notice of the mother's prior involuntary termination of parental rights and found that the mother had been "non compliant" with the court-ordered substance abuse treatment in that case; that she engaged in acts of domestic violence with her then husband; that she subjected her children to inappropriate conduct, such as making them beg for money so she could purchase illegal substances; and that she was convicted of selling hydrocodone. With regard to the mother's recent situation, the circuit court further found, *inter alia*, as follows:

> 3. The respondent mother has shown some improvement but she has had no significant substance abuse counseling. She was attending a pain clinic in 2011.
>
> 4. Further, the respondent mother has no income and no ability to support the child. This was an issue during her previous case and remains a problem that has not been substantially corrected.

The circuit court ruled that the "mother's parental and custodial rights to the child are hereby permanently terminated as there is no likelihood that the conditions of abuse and neglect has [sic] been or can be substantially corrected in the reasonable future." This appeal followed.

II. Standard of Review

We are asked to review a circuit court's order entered upon a petition for termination of parental rights. Our standard of review in this regard is well established:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and

> neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). As we explained in *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997), "the above standard of review requires deference by this Court to the findings of a circuit court in a civil abuse and neglect proceeding. The critical nature of unreviewable intangibles justify the deferential approach we accord findings by a circuit court." *Id.* at 562, 490 S.E.2d at 649. Furthermore, "a circuit court's substantive determinations in abuse and neglect cases on adjudicative and dispositional matters—such as whether neglect or abuse is proven, or whether termination is necessary—is entitled to substantial deference in the appellate context." *In re Rebecca K.C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723 (2003) (internal citations omitted). With these standards in mind, the parties' arguments will be considered.

III. Discussion

In the present appeal, the mother asserts that the circuit court's denial of her request for a post-adjudicatory improvement period and its termination of her parental rights are not supported by the evidence. More specifically, she argues that West Virginia Code § 49-6-5(a)(6) (2009 & Supp. 2013) requires a finding that there is no reasonable likelihood that the conditions of abuse or neglect can be substantially corrected in the near future and that none of the "conditions," as set forth in West Virginia Code § 49-6-5(b)(1) through (7), are present in this case.[15] The mother further argues that there was no bar to awarding her an improvement period and that the circuit court erroneously concluded that her circumstances had not changed since the prior termination of her parental rights to her three other children. The mother contends that her incarceration for selling hydrocodone "surely

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[15]West Virginia Code § 49-6-5(b) (2009) provides, in pertinent part, as follows:

> (B) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, *which shall not be exclusive*:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning[.]

Id. (emphasis added).

would have had some rehabilitative benefits," and that she, contrary to the circuit court's findings, has income through odd jobs, in addition to the mileage reimbursement payments discussed above.[16] Lastly, the mother contends that the circuit court failed to adhere to the evidentiary threshold set forth in *In Re: Rebecca K.C.*, 213 W.Va. 230, 579 S.E.2d 718, wherein the Court stated that "regardless of past events, unless the evidence is clear and convincing to the effect that an improvement period would be pointless, our law requires that one must be ordered." *Id.* at 235, 579 S.E.2d at 723.

For his part, the guardian ad litem argues in favor of affirming the circuit court's decision to deny a post-adjudicatory improvement period and to terminate the mother's parental rights to J.C. The guardian asserts that the facts, circumstances, and other conditions that gave rise to the prior termination of the mother's parental rights have neither been addressed nor corrected by the mother, thus warranting a termination of her parental

[16]The mother also testified that she had applied for disability benefits.

rights in the instant proceeding.[17] During oral argument, the guardian stated that J.C.'s placement with his foster parents has been in his best interest.

> We begin our analysis of these issues by acknowledging that
>
> "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). Indeed, "'"[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).' Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)." Syl. Pt. 2, *In the Interest of Kaitlyn P.*, at 123-124, 690 S.E.2d at 131-132.

In re Timber M., 231 W.Va. 44, __, 743 S.E.2d 352, 361 (2013). Inasmuch as the case at bar involves the prior termination of parental rights, we further observe that

> "[w]hen an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the

---

[17]While the guardian ad litem's position has remained constant in this matter, the Department's position has vacillated. During the disposition hearing, the Department had no objection to the mother being awarded an improvement period given her participation and sobriety during the pendency of the case which, at that time, was less than two months. In its one and a half page summary response filed with this Court in lieu of an appellate brief, the Department stated that while it did not object to the mother's request for an improvement period, it was now concerned about J.C.'s permanency. Then, in the Department's status update filed during the pendency of this appeal, it states that J.C.'s adoption by his foster parents is now in his best interest because he is a medically fragile, fourteen-month-old child who has lived with his foster parents since he was three days old.

> petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).” Syllabus Point 4, *In re George Glen B.*, Jr., 205 W.Va. 435, 518 S.E.2d 863 (1999).

Syl. Pt. 4, *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000). Importantly, when there has been a prior termination of parental rights, the Department is *not* required to make reasonable efforts to preserve the family:

> (7) For purposes of the court’s consideration of the disposition custody of a child pursuant to the provisions of this subsection, the department is *not* required to make reasonable efforts to preserve the family if the court determines:
>
> (A) The parent has subjected the child, *another child of the parent* . . . to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;
> ••••
> (C) The parental rights of the parent to another child have been terminated involuntarily.

W. Va. Code § 49-6-5(a)(7)(A) & (C) (emphasis added).

Here, the evidence surrounding the prior involuntary termination was developed through the adjudicatory and dispositional hearings held before the circuit court.[18]

[18]As previously discussed, the record reveals that the Department was woefully unprepared to address the circumstances that led to the prior involuntary termination of the mother’s parental rights to her three other children, even though the prior termination was one of the primary bases for the Department instituting the current proceeding. Simply stated, it was imperative that the Department thoroughly review the circumstances of the prior proceeding so that it could make a reasoned and informed recommendation in the current matter. Regrettably, it did not.

The mother argues that her prior involuntary termination does not mean that she does not have the right to prove herself in an improvement period. However, the decision as to whether to award an improvement period is discretionary with the lower court "based upon all of the evidence, *including evidence from any prior abuse and neglect cases*[.]" *In re Rebecca K.C.*, at 235, 579 S.E.2d at 723 (emphasis added). Indeed, the Legislature has expressly stated that improvement periods are *not* mandatory and are granted at the circuit court's discretion. W.Va. Code § 49-6-12 (2009 & Supp. 2013). Furthermore, as we explained in *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996):

> West Virginia Code § 49-6-12 (1996) . . . now *requires a parent* seeking an improvement period in cases of neglect or abuse *to file a written motion* requesting it, *and to demonstrate by clear and convincing evidence that he or she is likely to fully participate in the improvement period*. Thus rather than presuming the entitlement of a parent to an improvement period . . . the law now places on the parent the burden of proof regarding whether an improvement period is appropriate.

Id. at 461 n.9, 475 S.E.2d at 553 n.9 (emphasis added). Here, the mother's request for an improvement period fails in two ways. First, although she indicates in her appellate brief that she "moved" for an improvement period at the adjudicatory hearing, she does not state nor does the record reflect that she filed a written motion for an improvement period as required by West Virginia Code § 49-6-12. Second, she failed in her burden of proof. After holding two evidentiary hearings, the circuit court found that the conditions out of which the prior abuse and neglect arose have not been substantially corrected by the mother. The circuit

court specifically expressed concern regarding the mother's continued lack of income. As discussed above, the circuit court noted that in the prior termination proceeding, the mother's lack of income resulted in her requiring her children to beg for money, which, in turn, led to the sexual assault of her daughter. Further, the circuit court was not convinced that the mother's abuse of drugs had been resolved. *See In re Faith C.*, 226 W.Va. 188, 195, 699 S.E.2d 730, 737 (2010) (quoting, in part, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996) (we have previously stated that "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."). The circuit court was appropriately concerned given the mother's admission that she started "taking again" after going to a pain clinic in 2011, particularly when she had pain clinic issues in the prior termination proceeding. Moreover, although Suboxone was prescribed for her to take during her pregnancy with J.C., the very fact that she was prescribed this medication demonstrates that she had *not* resolved her drug issues since the prior termination proceeding.[19]

The circuit court recognized the mother's clean drug screens and compliance with the Department's services in the weeks leading up to the dispositional hearing when it stated in its disposition order that the mother had "shown some improvement[.]" However, the circuit court also correctly concluded that the mother was "non compliant" with the court-ordered substance abuse treatment in the prior termination proceeding and, that in the years

[19]*See supra* n.6.

since the prior termination, not only had she failed to undergo any "significant substance abuse counseling[,]" she had been convicted of selling hydrocodone and began attending a pain clinic in 2011. Under these circumstances, a few weeks of clean drug screens and compliance with the Department's services fail to sustain the mother's burden of proving by clear and convincing evidence that she was entitled to a post-adjudicatory improvement period. Accordingly, we conclude that the circuit court acted within its discretion in denying an improvement period in this matter.

Similarly, we also agree with the circuit court's conclusion that the mother's failure to substantially resolve the problems that led to the prior involuntary termination of parental rights warrant a termination of her parental rights in the present proceeding. As we have previously explained,

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010). Here, the circuit court found that there is no likelihood that the conditions of abuse and neglect have been or can be "substantially corrected in the reasonable future." Based on this Court's review of the

record, which demonstrates that the mother has failed to resolve these conditions in the several years since the prior involuntary termination, we agree.

We have held that "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). In this case, the mother had approximately seven years to resolve the problems that led to the prior involuntary termination of her parental rights and she clearly failed to do so. Instead, she continued to engage in domestic violence; continued to have drug problems, including a drug-related incarceration; continued to fail to participate in any significant substance abuse counseling; and continued to have no regular income.[20] Moreover, this evidence must be examined under a reduced minimum threshold given the mother's prior involuntary termination. *See* Syl. Pt. 3, *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64.

On appeal, this Court "must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873. Given the substantial deference owed the circuit court's

[20]Again, as the circuit court observed, the father's disability income was not substantially different from the prior termination where the mother's children were receiving benefits, yet she still required them to beg for money. Further, we agree with the circuit court that the mother's travel reimbursement checks for medical appointments are an unreliable source of income to sustain her, let alone a child.

decision,[21] as well as our examination of the evidence under a lower minimum threshold, and being guided by the polar star of the child's welfare,[22] we find no error in the circuit court's termination of the mother's parental rights to J.C.

IV. Conclusion

For the foregoing reasons, we find no error in either the Circuit Court of Braxton County's denial of the mother's request for a post-adjudicatory improvement period or in its termination of the mother's parental rights to her child, J.C. Accordingly, the circuit court's order entered January 3, 2013, is hereby affirmed.

Affirmed.

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[21]*See In re Rebecca K.C.*, 213 W.Va. 230, 235, 579 S.E.2d 718, 723.

[22]*See In re Timber M.*, at __, 743 S.E.2d at 361.

234 W. Va. 116, 763 S.E.2d 654

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2014 Term

FILED
September 18, 2014
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0831

IN THE INTEREST OF
J.L., JR.

Appeal from the Circuit Court of Wood County
Honorable John D. Beane, Judge
Juvenile Abuse Neglect No. 11-JA-134

REVERSED AND REMANDED

Submitted: September 10, 2014
Filed: September 18, 2014

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The jurisdiction of family courts is limited to only those matters specifically authorized by the Legislature, while circuit courts have original and general jurisdiction and other powers as set forth in Article VIII, § 6 of the Constitution of West Virginia." Syllabus point 5, in part, *Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 591 S.E.2d 308 (2003).

2. "A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code § 49-6-1, *et seq.*" Syllabus point 3, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198 (1997).

3. "When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child." Syllabus point 3, *West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005).

4. Pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, when a circuit court enters an order awarding or modifying child support in an abuse and neglect case, the circuit court retains jurisdiction over such child support order.

5. Pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

Davis, Chief Justice:

The petitioner herein, the West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement [hereinafter "BCSE"], appeals from an order entered July 16, 2013, by the Circuit Court of Wood County.[1] By that order, the circuit court remanded the case to the Family Court of Wood County with instructions to enforce the circuit court's order, entered in the underlying abuse and neglect case, modifying the child support obligation of the respondent father herein, Jason L.[2] On appeal to this Court, the BCSE assigns error to the circuit court's decision to remand the case to the family court for enforcement of the circuit court's modification order. Upon a review of the parties' arguments, the appendix record, and the pertinent authorities, we agree with the BCSE that it was improper for the circuit court to remand the case to the family court for enforcement of a child support order entered by the circuit court. Accordingly, we reverse the July 16,

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[1]This case originated in the Family Court of Wood County as a divorce action (Civil Action No. 05-D-95). During the pendency of child support enforcement proceedings therein, the underlying abuse and neglect case was filed in the Circuit Court of Wood County (Juvenile Abuse Neglect No. 11-JA-134). Because the child support order being enforced in the instant contempt proceeding was entered by the circuit court in the abuse and neglect case, we have adopted that case's style to maintain consistency therewith. For further discussion of the procedural posture giving rise to the case *sub judice*, see Section I, *infra*.

[2]"In this case involving sensitive facts, we adhere to our usual practice adopted in other such cases and refer to the parties by their last initials rather than by their complete surnames." *In re Emily*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000) (citations omitted). *See also* W. Va. R. App. P. 40(e)(1) (restricting use of personal identifiers in abuse and neglect cases).

2013, order of the Circuit Court of Wood County and remand this case for further proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case are straightforward and not disputed by the parties. The respondent parents herein, Mary P. [hereinafter "Mary"] and Jason L. [hereinafter "Jason"], previously were married and had one child. During their 2005 divorce proceedings, Mary was awarded custody of the parties' child, and Jason was ordered to pay child support in the amount of $165.66 per month.

In 2011, the BCSE initiated enforcement proceedings against Jason in the divorce case in the Family Court of Wood County for nonpayment of child support. On April 11, 2011, the family court entered an order declaring Jason to be in arrears and granting judgment against him in the amount of $13,130.53. When Jason still failed to fulfill his child support obligation or pay his arrearage, the BCSE initiated contempt proceedings against Jason seeking to enforce its judgment against him. During the pendency of the contempt proceedings, the instant abuse and neglect case was filed in the Circuit Court of Wood County alleging that the parties' child was an abused or neglected child because Jason had committed various acts of domestic violence in the child's presence and Mary had failed to

shield the child from such incidents.[3] Due to the pending abuse and neglect case, the family court determined that Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings[4] prohibited it from hearing the contempt petition insofar as the circuit court now had jurisdiction of child support matters and dismissed the contempt petition without prejudice.

Thereafter, in the abuse and neglect case, the circuit court, by "Order of Modified Support" entered November 21, 2012, terminated Jason's parental rights to the parties' child and modified his child support obligation by reducing it by one-half to $82.83 per month and setting his arrearage amount at $50.00 per month until it has been satisfied. When Jason failed to pay this amount, or any portion of the arrearages he owes, Mary filed a *pro se* petition for contempt. The circuit court held a hearing on Mary's petition for contempt, and, on July 16, 2013, entered the order at issue in the case *sub judice*. In its July 16, 2013, order, the circuit court held Jason to be in contempt for nonpayment of child

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[3]The appendix record in this case is exceedingly sparse, consisting of a mere twenty-four pages comprised of four orders entered during the course of this matter. While the Court appreciates counsel's attempt at brevity, such an abbreviated record leaves many questions about the procedural posture of this case unanswered, most notably the current status of the underlying abuse and neglect proceeding that has been pending for nearly three years and the permanency plan for the parties' child. *See* W. Va. R. P. Child Abuse & Neglect Proceed. 43 ("Permanent placement of each child shall be achieved within twelve (12) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay.").

[4]See Section III, *infra*, for the text of Rule 6.

support as ordered by the circuit court's November 21, 2012, order modifying his child support obligation, issued a capias warrant to secure his arrest, directed he be returned to the family court, and remanded the case to the family court for enforcement of the circuit court's modified child support order entered in the abuse and neglect case as well as "for all future contempt hearings and all future modification hearings regarding child support."

From this order, the BCSE appeals to this Court.

II.

STANDARD OF REVIEW

In the case *sub judice*, the BCSE challenges the correctness of the circuit court's order. We previously have held that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). Mindful of this standard, we proceed to consider the parties' arguments.

III.

DISCUSSION

Before this Court, the BCSE assigns error to the circuit court's order remanding the case to the family court for enforcement of the circuit court's order modifying child support and for all further modifications of child support. In its July 16, 2013, order, the circuit court ruled:

> [I]t is hereby **ADJUDGED** and **ORDERED**:
>
> 1. Jason L[.] shall be found in willful and contumacious contempt for failure to pay child support and failing to appear for this hearing.
>
> 2. This Order herein shall serve as a Capias warrant, and it is hereby ORDERED that any law enforcement officer authorized to execute a warrant in the State of West Virginia is hereby authorized to take JASON L[.] into custody and retain custody of him until the next judicial day that Family Court is in session in Wood County, West Virginia, and then delivery [sic] the body of JASON L[.] to appear before the Honorable C. Darren Tallman, Family Court Judge, between the hours of 9:00 a.m. and 4:00 p.m. to explain his failure to comply with the Order of the Court and to be further dealt with as the Court determines necessary.
>
> 3. This matter shall be remanded back to Family Court for all future contempt hearings and all future modification hearings regarding child support.
>
> **4. This matter shall be set for further hearing on the Petition for Contempt for failure to pay child support before the Honorable C. Darren Tallman, Family Court Judge of Wood County on August 7, 2013 at 9:15 a.m. in Civil Action Number 05-D-95.**

(Emphasis in original). In so ruling, the circuit court explained its reasoning as follows:

> Family Court is the more convenient forum for actions relating to child support as it addresses such issues on a daily basis.
>
> The WVBCSE attorney appears more frequently in Family Court and the WVBCSE is a party to all actions involving the collections and enforcement of child support, so Family Court would be the more appropriate forum based upon judicial economy.
>
> The State of West Virginia and the public defenders services should not be paying for an attorney, appointed in a circuit court proceeding unrelated to the enforcement and collection of child support, to defend an issue of contempt or modification on [sic] child support.
>
> An executed capias may be heard more expeditiously in Family Court as Circuit Court may be in the middle of a jury trial or may have hearings scheduled which would take precedence over the capias.
>
> Disregarding the arguments of the WVBCSE, all further proceedings concerning the support of this child should be heard in Family Court *regardless of the mandate in Rule 6*.

(Emphasis added). Therefore, we must determine whether the circuit court properly disregarded Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings when it remanded the case to the family court with instructions to preside over the present contempt proceedings for nonpayment of child support and to hear any future modifications of child support and contempt proceedings related thereto. In light of the limited jurisdiction of family courts, the exclusive jurisdiction of circuit courts over child abuse and neglect proceedings, and our Rules specifically directing circuit courts to award

child support in abuse and neglect cases, to retain jurisdiction over such awards, and to refrain from transferring such child support determinations to family courts, we conclude that the circuit court clearly exceeded its authority when it remanded the instant child support matter to the family court.

We begin our analysis by reviewing the jurisdiction with which family courts are vested. Pursuant to article VIII, § 16 of the West Virginia Constitution, "[f]amily courts shall have original jurisdiction in the areas of family law and related matters as may hereafter be established by law. Family courts may also have such further jurisdiction as established by law." In recognition of these jurisdictional limits, we have expressly held that "[t]he jurisdiction of family courts is limited to only those matters specifically authorized by the Legislature, while circuit courts have original and general jurisdiction and other powers as set forth in Article VIII, § 6 of the Constitution of West Virginia." Syl. pt. 5, in part, *Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 591 S.E.2d 308 (2003).

W. Va. Code § 51-2A-2 (2012) (Supp. 2014) defines the precise parameters of the family court's jurisdiction. Of particular relevance to our resolution of the case *sub judice* is the express recognition that the ambit of authority granted to family courts is limited and particularly defined:

> A family court is a court of limited jurisdiction. A family court is a court of record only for the purpose of exercising

> jurisdiction in the matters for which the jurisdiction of the family court is specifically authorized in this section and in chapter forty-eight [§§ 48-1-101 et seq.] of this code. A family court may not exercise the powers given courts of record in section one [§ 51-5-1], article five, chapter fifty-one of this code or exercise any other powers provided for courts of record in this code unless specifically authorized by the Legislature. A family court judge is not a "judge of any court of record" or a "judge of a court of record" as the terms are defined and used in article nine [§§ 51-9-1 et seq.] of this chapter.

W. Va. Code § 51-2A-2(e). Among such limits imposed upon a family court's jurisdiction are the inability of a family court to hear a matter involving child abuse or neglect insofar as such cases are within the exclusive authority of the circuit court and the corresponding directive to the family courts to stay proceedings pending therein when a related abuse and neglect case is simultaneously pending before the circuit court:

> If an action for divorce, annulment or separate maintenance is pending and a petition is filed pursuant to the provisions of article six [§§ 49-6-1 et seq.], chapter forty-nine of this code alleging abuse or neglect of a child by either of the parties to the divorce, annulment or separate maintenance action, the orders of the circuit court in which the abuse or neglect petition is filed shall supercede and take precedence over an order of the family court respecting the allocation of custodial and decision-making responsibility for the child between the parents. If no order for the allocation of custodial and decision-making responsibility for the child between the parents has been entered by the family court in the pending action for divorce, annulment or separate maintenance, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making responsibility for the child between the parents and defer to the orders of the circuit court in the abuse or neglect proceedings.

W. Va. Code § 51-2A-2(c).

By contrast, circuit courts, being courts of general jurisdiction, have more expansive authority. *See* Syl. pt. 5, in part, *Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 591 S.E.2d 308. Of relevance to the case *sub judice* is the exclusive authority of circuit courts to hear cases alleging the abuse and/or neglect of a child. In this regard, we specifically have recognized that "[a] circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code § 49-6-1, *et seq.*" Syl. pt. 3, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198 (1997). *See also* W. Va. Code § 49-6-1(a) (2005) (Repl. Vol. 2014) (specifying that abuse and neglect petition is to be presented to circuit court of county in which subject child resides). Because child and abuse proceedings are confidential in nature, access to the records of such cases is limited, with even the family court being afforded restricted access to only certain documents in an abuse and neglect case file:

> All records and information maintained by the courts in child abuse and neglect proceedings shall be kept confidential except as otherwise provided in W. Va. Code, Chapter 49 and this rule. In the interest of assuring that any determination made in proceedings before a family court arising under W. Va. Code, Chapter 48, or W. Va. Code § 44-10-3, does not contravene any determination made by a circuit court in a related prior or pending child abuse and neglect case arising under W. Va. Code, Chapter 49, family courts and staff shall have access to all circuit court orders and case indexes in this State in all such related Chapter 49 proceedings.

W. Va. R. P. Child Abuse & Neglect Proceed. 6a(b). *See also* W. Va. R. P. Child Abuse & Neglect Proceed. 3a(d) (similarly restricting access to pre-petition investigation in abuse and

neglect cases). Therefore, it is clear that exclusive jurisdiction over abuse and neglect cases is reposed in the circuit courts of this State, and that the family courts are required to defer to the circuit courts' rulings in such matters.

Included within a circuit court's abuse and neglect jurisdiction is the authority to decide child support issues arising in an abuse and neglect case. Recognizing that circuit courts, and not family courts, are vested with jurisdiction over child abuse and neglect cases, we previously have held that "[w]hen a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child." Syl. pt. 3, *West Virginia Dep't of Health & Human Res., Bureau for Child Support Enforcement v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005). This holding serves to clarify not only that the circuit court has exclusive jurisdiction over abuse and neglect matters but also that the establishment of an award of child support is a necessary and integral part of the resolution of an abuse and neglect proceeding: "A circuit court terminating a parent's parental rights pursuant to *W. Va. Code*, § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W. Va. Code*, § 48-13-101, et seq. [2001]." Syl. pt. 2, in part, *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 (2009). *See* Syl. pt. 4, *Smith*, 218 W. Va. 480, 624 S.E.2d 917 ("When a circuit judge enters an order on an abuse or neglect petition

filed pursuant to Chapter 49 of the *West Virginia Code*, and in so doing alters the custodial and decision-making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, *W. Va. Code*, 49-7-5 [1936] requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child. *The entry of an order establishing a support obligation is mandatory; it is not optional.*" (emphasis added)). *See also* Syl. pt. 1, *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 ("The Legislature's 2006 amendment of *W. Va. Code*, § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support."). The requisite imposition of a child support obligation in an abuse and neglect case also is detailed in Rule 16a of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings:

> (a) *Entry of support orders.* – Every order in a child abuse and neglect proceeding that alters the custodial and decision-making responsibility for a child and/or commits the child to the custody of the Department of Health and Human Resources must impose a support obligation upon one or both parents for the support, maintenance and education of the child.
>
> (b) *Use of guidelines.* – Any order establishing a child support obligation in an abuse and neglect proceeding must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq.* The *Guidelines* may be disregarded, or the calculation of an award under the *Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

> (c) *Modifications.* – Any order establishing a child support obligation in a child abuse and neglect proceeding may be modified by the court upon motion of any party. An order granting modification of a support obligation must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq.* . . .

(Emphasis in original).

Insofar as the authority to determine matters involving the abuse and/or neglect of a child is reposed in the circuit court, not the family court, continuing jurisdiction over such cases likewise is vested in the circuit court:

> Each civil child abuse and neglect proceeding shall be maintained on the circuit court's docket until permanent placement of the child has been achieved. The court retains exclusive jurisdiction over placement of the child while the case is pending, as well as over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation, except that (1) if the petition is dismissed for failure to state a claim under Chapter 49 of the W. Va. Code, or (2) if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both his/her cohabiting parents without any visitation or child support provisions, then any future child custody, visitation, and/or child support proceedings between the parents may be brought in family court. However, should allegations of child abuse and/or neglect arise in the family court proceedings, then the matter shall proceed in compliance with Rule 3a.

W. Va. R. P. Child Abuse & Neglect Proceed. 6. Moreover, the exclusivity of such jurisdiction in the circuit court precludes the transfer of any portion of an abuse and neglect case to the family court, even if the issue involved concerns a matter usually within the

purview of the family court's jurisdiction. Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings makes it patently clear that circuit courts, and not family courts, possess and retain abuse and neglect jurisdiction and specifically prohibits circuit courts from transferring abuse and neglect matters to family court: "No portion of a child abuse and neglect proceeding may be transferred or remanded to a family court for assessment of a child support obligation."

Based upon the foregoing authorities, we therefore hold that, pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, when a circuit court enters an order awarding or modifying child support in an abuse and neglect case, the circuit court retains jurisdiction over such child support order. We further hold that, pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

Applying these holdings and the foregoing authorities to the facts of the case *sub judice*, it is clear that the circuit court did not have the authority to remand this case to the family court for enforcement of its modified order of support through contempt proceedings or for the family court's determination of future child support matters herein insofar as the circuit court entered its modified order in the instant abuse and neglect

proceeding and, thus, retained jurisdiction over the same. Moreover, it goes without saying that, as a tribunal of limited jurisdiction, the family court neither has full access to the record giving rise to the order of modified support in the abuse and neglect case nor the authority to modify or reverse the circuit court's child support order. Accordingly, we reverse the July 16, 2013, order of the Circuit Court of Wood County that remanded the case to the Family Court of Wood County for the enforcement of the circuit court's modified child support order through contempt proceedings and directed the family court to hear all future proceedings concerning the enforcement and modification of child support. We further remand this case to the circuit court with directions that it retain jurisdiction over its modified order of child support that it entered in the underlying abuse and neglect case and instructions to the circuit court to see to fruition the pending contempt proceedings as well as any future proceedings concerning the enforcement or modification of said child support order.

Finally, we would be remiss if we did not address the many procedural issues that have come to our attention during our review of the underlying abuse and neglect proceedings. First, and foremost, the order from whence the contempt petition in this case originates, the circuit court's November 21, 2012, "Order of Modified Support" very tersely describes the respondent father's modified support obligation as follows: "Jason L[.]'s current child support obligation shall be reduced in that his current child support obligation shall be Eighty-Two and 83/100 dollars ($82.83) per month effective on the first day of

August 1st [sic], 2012[,] and arrearages in the amount of $50.00 (Fifty) dollars per month until paid."

As we noted previously in this opinion, Rule 16a(b) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings *requires* the use of the child support *Guidelines* to calculate an award of child support:

> Any order establishing a child support obligation in an abuse and neglect proceeding *must* use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq.* The *Guidelines* may be disregarded, or the calculation of an award under the *Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

W. Va. R. P. Child Abuse & Neglect Proceed. 16a(b) (emphasis added). Use of the *Guidelines* is *mandatory*. "Any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the *West Virginia Code must* use the *Guidelines for Child Support Awards* found in *W. Va. Code*, 48-13-101, *et seq.*" Syl. pt. 5, *Smith*, 218 W. Va. 480, 624 S.E.2d 917 (emphasis added).

Although both Rule 16a(b) and our prior precedent recognize that use of the *Guidelines* may not be appropriate in a given case, a court still is required to explain why it has chosen not to follow them.

> A circuit court terminating a parent's parental rights pursuant to *W. Va. Code*, § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the

> child, pursuant to the *Guidelines for Child Support Awards* found in *W. Va. Code*, § 48-13-101, et seq. [2001]. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the *Guidelines* pursuant to *W. Va. Code*, § 48-13-702 [2001].

Syl. pt. 2, *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601.

In the circuit court's modified support order, no explanation is given as to whether the *Guidelines* were used or were not used, and, if they were not used, why the court found them to be inapplicable to this case. Therefore, on remand, the circuit court should correct its November 21, 2012, order awarding modified child support to comply with this Court's directives for the calculation of child support in abuse and neglect cases in accordance with the *Guidelines for Child Support Awards* as set forth in Syllabus point 5 of *West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005), and Syllabus point 2 of *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 (2009).

Moreover, while it is apparent to this Court that the respondent father's parental rights have been terminated in the circuit court's order of modified support, we are unable to locate an order finally concluding the abuse and neglect proceedings. Rather, the circuit court's November 21, 2012, "Order of Modified Support" succinctly terminates the

respondent father's parental rights with a passing reference to the fact that this disposition was achieved by the agreement of the parties. In so ruling, the circuit court states that

> [c]ounsels for both Mary . . . P[.] and Jason L[.] have entered into an agreement wherein Jason L[.]'s parental rights should be terminated and Jason L[.]'s current child support obligation established by Family Court should be reduced in half.
>
> . . . .
>
> Therefore, it is hereby Adjudged and Ordered:
>
> Jason L[.]'s parental rights shall be terminated.

While we do not believe that the circuit court's failure to render more detailed findings of fact regarding the termination of Jason's parental rights warrants reversal on this point where none of the parties have raised the issue on appeal, we do instruct the circuit court, when composing its corrected order of child support, to thoroughly detail the factual findings giving rise to its termination of Jason's parental rights. *See* Syl. pt. 2, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983) ("W. Va. Code, 49-6-1 *et seq.*, does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect."). *See also* Syl. pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001) ("Where it appears from the record that the process established by the Rules of Procedure for Child

Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.").

Lastly, we cannot discern from the record in this case whether a guardian ad litem has been appointed to represent the subject child. If no such guardian has been appointed, we remind the circuit court of the child's entitlement to such representation and direct that a guardian be so appointed for the minor child in this case. *See* Syl. pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993) ("Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W. Va. Code*, 49–6–2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct* , respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.").

IV.

CONCLUSION

For the foregoing reasons, we reverse the July 16, 2013, order of the Circuit Court of Wood County and remand this case for further proceedings consistent with this opinion.

Reversed and Remanded.

233 W. Va. 394, 758 S.E.2d 747

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

FILED
April 25, 2014
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0583

In Re: J.S. and D.S.

AND

No. 13-0567

In Re: D.S., B.S., I.S., F.S., and M.S.

Appeal from the Circuit Court of Fayette County
The Honorable John W. Hatcher, Jr., Judge
Case Nos. 12-JA-74 and 12-JA-20 through 25

AFFIRMED

Submitted: March 5, 2014
Filed: April 25, 2014

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JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "A trial court's ruling on a motion in limine is reviewed on appeal for an abuse of discretion." Syl. Pt. 1, *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004).

3. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review

evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. Pt. 1, in part, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995).

4. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).

5. "Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are: First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Syl. Pt. 2, *North v. Bd. of Regents,* 160 W.Va. 248, 233 S.E.2d 411 (1977).

6. "Under article [VIII], section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." Syl. Pt. 1, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988).

7. In a child abuse and neglect civil proceeding held pursuant to West Virginia Code § 49-6-2 (2009), a party does not have a procedural due process right to confront and cross-examine a child. Under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, there is a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony. The circuit court shall exclude this testimony if it finds the potential psychological harm to the child outweighs the necessity of the child's testimony.

8. "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

9. "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to

be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syl. Pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

10. "'"'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5b [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).' Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

Workman, Justice:

In this proceeding we address two appeals from the final order of the Circuit Court of Fayette County, West Virginia, entered on May 3, 2013. This is a child abuse and neglect matter brought against the petitioner father J.S.[1] and the petitioner mother C.S. (hereinafter collectively "the petitioners" or individually "the father" and "the mother"). This Court considers the primary issue of whether the petitioners' procedural due process rights were violated when out-of-court statements of two children were admitted to prove allegations of sexual abuse when the petitioners were not given the opportunity to confront and cross-examine the children. The West Virginia Department of Health and Human Resources ("the DHHR") and the guardian ad litem on behalf of the children contend the circuit court properly excluded the testimony of the children pursuant to Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect because the petitioners offered no evidence to overcome the presumption that the potential psychological harm to the children outweighed the necessity of their testimony.

Upon careful review of the briefs, the appendix record, the arguments of the parties, and the applicable legal authority, we find that the circuit court adequately

[1] We follow our normal practice in juvenile and domestic relations cases which involve sensitive facts and use the parties' initials. *See, e.g., W.Va. Dept. of Human Servs. v. La Rea Ann C.L.*, 175 W.Va. 330, 332 S.E.2d 632 (1985); *see also* W.Va. R. App. P. 40(e).

safeguarded the petitioners' procedural due process rights. We find no error and affirm the termination of their parental rights.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises out of a child abuse and neglect petition filed following allegations of sexual abuse and failure to protect. N.L. (age 11), the niece of the mother, reported that the father had sexually assaulted her. A DHHR child protective services case worker spoke with N.L. and the child disclosed in graphic detail repeated sexual assaults by the father. N.L. stated that she told the mother about the abuse but the mother did not believe her.

The father was living with the mother, their infant son J.S. Jr., N.L., and his son from a previous relationship, D.S. (age 14). N.L. reported that the father would lock D.S. in his room, put J.S. Jr. in his crib and sexually assault her when the mother was at work. The DHHR filed an amended petition that added allegations against the father concerning D.S. (discussed below). The DHHR alleged in the petition that the mother ignored repeated warnings from the DHHR that the presence of the father in the home presented a significant risk to the safety of the children.

The mother had guardianship of N.L. from the fall of 2009 until early June of 2011.[2] In the guardianship case, the court ordered that the father was not to have contact with N.L. or reside in the home with N.L. and the mother due to substantiated prior sexual misconduct by the father.[3] This order was ignored by the mother and she married the father in November of 2010. N.L. lived in the home with the mother and the father until June of 2011.[4]

As a result of filing the petition, D.S. and J.S. Jr. were removed from the home. The couple's infant daughter, D.S.,[5] was born after the filing of the petition, and the DHHR sought her custody soon after birth due to these pending allegations.

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[2] N.L. is the daughter of the mother's sister. N.L.'s grandmother had custody of N.L. since the child was born but she suffered medical problems and was hospitalized. Thereafter, the mother gained guardianship of N.L. in 2009.

[3] The father was indicted and found not guilty of second degree sexual assault of his former wife. However, in November of 2009, an investigator with child protective services noted in a status report that the DHHR had substantiated the sexual assault. Further, the investigator noted the father, by his own admission, had previously been accused of inappropriately touching his daughter, although he denied this accusation.

[4] In May of 2011, the DHHR informed the judge presiding in the guardianship case that the couple had married and had a child. A hearing was conducted in this matter in June of 2011, and the mother testified that she allowed the father to live in her home with their child and N.L. knowing that she was in violation of the provisions of the guardianship order. Thereafter, the court entered an order terminating the mother's guardianship and appointing the paternal great uncle and great aunt of N.L. as guardians.

[5] The father has seven children -- two with the mother.

Prior to the adjudicatory hearing, the DHHR filed a motion in limine to exclude the testimony of the children and instead procure the evidence through viewing previously recorded forensic interviews of N.L. and D.S. The DHHR informed the circuit court that the children feared having to testify against the father. The petitioners filed a response objecting to this evidence and asserting they had the right to cross-examine the children. At the beginning of the adjudicatory hearing, the circuit court granted the DHHR's motion in limine and stated:

> Rule 8 of the [West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings][6] . . . talks about a rebuttable presumption that it's psychologically harmful to children of young and tender years to undergo testimony in front of total strangers, adult total strangers, and then be cross-examined. And there is nothing in the record to, no

[6] Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings states:

> *Restrictions on the testimony of children.* – Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the court as determined by the Rules of Evidence and the Rules of Civil Procedure. However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the court shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the court may exclude the child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

> professional evidence in the record, or otherwise, which rebuts that presumption. And I think it goes without saying in this case, considering the ages of these two children and the nature of what they would have to talk about, even if they just talked to me in camera, is very, very horrific and will clearly only compound whatever simply being in a foster home has done to them, can only compound the psychological harm, most of which we would not – I'll probably be dead and gone by the time it manifests itself, maybe. It's not something you can see next week or this afternoon or tomorrow morning, it comes out over a period of gestation as it stews and bubbles in peoples' heads for years and years and years.
>
> So I grant your motion in limine to those two children for the reasons that the rebuttable presumption has not been rebutted, no evidence offered, as I said, to do that, other than to say that, basically, they need the testimony and it would be harmful to their clients' interest if [the testimony was not taken]. I disagree. (footnote added).

At the adjudicatory hearing held July 9, 2012, the DHHR submitted the videotaped interviews of N.L. and D.S., and the handwritten notes taken from those interviews. The interviews were videotaped by the Fayette County Sheriff's Department at the Just for Kids Center in Oak Hill, West Virginia. The interviews were conducted by an employee with the child services agency. N.L. detailed graphic sexual abuse by the father. There are various timeframes in the interview where N.L. denies telling anyone about the abuse, but she later indicates she told the mother and the mother did not believe her. In his interview, D.S. disclosed that on one occasion, the father accused him of masturbating, scolded him, and touched his penis. D.S. stated that he was repeatedly locked in his room, with the lock on the outside of the door so he could not get out.

The DHHR submitted a letter dated January 18, 2012, addressed to "mommy," wherein N.L. described details of sexual assaults suffered at the hands of the father. N.L. wrote that the father threatened violence against the mother and N.L.'s grandparents if she were to tell anyone about the sexual assaults. This letter was admitted into evidence without objection. The therapy treatment records of N.L. were also admitted without objection.[7]

The father testified and denied any inappropriate contact with the children. The mother testified and denied that N.L. made any disclosures that the father had sexually abused her. The mother testified that the first time she learned about the abuse allegations was when her sister called her after N.L. had left a therapy session in February of 2012. The mother acknowledged that when she was granted guardianship of N.L., the court prohibited the father from having contact with N.L. In spite of that prohibition, she allowed him to live in the home with N.L.

In the adjudicatory order entered December 17, 2012, the circuit court found that the father sexually abused N.L. on numerous occasions, in a variety of ways. The circuit court also found that the mother permitted the father to remain in her home despite having knowledge of past sexual abuse allegations against him and in violation of the guardianship order entered in 2009. The circuit court held that the father sexually

[7] N.L.'s letter and her therapy treatment records were not included in the appendix record submitted to this Court by the parties.

abused D.S. by inappropriately touching the child on one occasion. The circuit court found that the children were abused and neglected as defined by West Virginia Code §§ 49-1-3(a) (2009)[8] and 49-1-3(a)(4) (2009).[9]

At the dispositional hearing held on April 12, 2013, the DHHR called Barbara A. Nelson, M.A., psychologist, to testify regarding an evaluation of the mother. She stated the mother's failure to recognize the danger that the father presents to her children stems from poor judgment and a tendency to put her own desires above the safety of others. The DHHR also called child protective services worker Amanda Hayhurst to testify regarding the DHHR's decision to seek termination of the petitioners' rights. Ms. Hayhurst testified that during the entire time this case was pending, members of the multidisciplinary team told the mother repeatedly that she needed to have the father move out of her home. The mother refused and continued to reside with the father even though serious allegations of sexual abuse were substantiated. The petitioners did not testify at the dispositional hearing.

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[8] West Virginia Code 49-1-3(a) defines an "abused child" as a child whose health or welfare is harmed or threatened by: "(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or (2) Sexual abuse or sexual exploitation[.]"

[9] West Virginia Code 49-1-3(a) defines an "abused child" as a child whose health or welfare is harmed or threatened by "(4) Domestic violence[.]" In these appeals, the parties do not address the evidence regarding domestic violence between the father and the mother.

The circuit court terminated the parental rights of the petitioners by order entered May 3, 2013. The circuit court found "[t]here is no reasonable likelihood that the conditions of neglect or abuse" can be substantially corrected and the welfare of the child respondents in this case necessitates the termination of their parental rights. This appeal followed. [10]

II. STANDARD OF REVIEW

We are asked to review a circuit court's order entered upon a petition for termination of parental rights. This Court has explained that "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). In addition, we have held:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless

[10] The father faced criminal charges from the sexual abuse allegations of N.L. and D.S. He was indicted for nine counts of first degree sexual assault and nine counts of sexual abuse by a custodian (N.L.) and one count of sexual abuse in the first degree and one count of sexual abuse by a parent (D.S.). The criminal trial was held just weeks after the circuit court terminated his parental rights. In May of 2013, a jury returned guilty verdicts on all eighteen counts. The court sentenced the father to prison, the minimum term of which exceeds his normal lifespan.

> clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

In this appeal, the petitioners challenge the circuit court's decision to grant the DHHR's motion in limine to exclude the children's testimony. "A trial court's ruling on a motion in limine is reviewed on appeal for an abuse of discretion." Syl. Pt. 1, *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004). The petitioners also contest the circuit court's evidentiary rulings. Our pertinent standard of appellate review is set forth in Syllabus Point 1, in part, of *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995):

> The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

With these principles in mind, we turn to the parties' arguments.

III. DISCUSSION

A. Procedural Due Process

The petitioners challenge the circuit court's decision to exclude the children's testimony under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. The petitioners concede they did not present evidence to overcome the presumption that the potential psychological harm to the children outweighed the necessity of the children's testimony. Nevertheless, the petitioners contend they have a constitutional due process right to confront and cross-examine the children.[11] Stated abstractly, this is by no means a frivolous claim. A parent has a fundamental liberty interest in the care and custody of his or her child. *See Santosky v.*

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[11] The petitioners appropriately refrain from arguing they were denied the Sixth Amendment right of confrontation, which applies only to criminal cases.

> "The Confrontation Clause contained in the Sixth Amendment to the United States Constitution provides: 'In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him.' This clause was made applicable to the states through the Fourteenth Amendment to the United States Constitution." Syl. Pt. 1, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *overruled on other grounds by*, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

Syl. Pt. 2, *State v. Kaufman*, 227 W.Va. 537, 711 S.E.2d 607 (2011). Because abuse and neglect proceedings are civil proceedings, the Confrontation Clause of the Sixth Amendment of the United States Constitution is not applicable here. *See e.g., In re J.D.C.*, 159 P.3d 974, 981 (Kan. 2007) (discussing Confrontation Clause did not apply to "child in need of care" proceeding); and *In re S.A.*, 708 N.W.2d 673, 679 (S.D. 2005) (recognizing Sixth Amendment right of confrontation did not apply to civil abuse and neglect proceedings).

Kramer, 455 U.S. 745, 753 (1982) (recognizing this fundamental liberty interest requires the State to "provide the parents with fundamentally fair procedures" in termination proceedings); and Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973) (holding parental custody of minor child is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions). In child abuse and neglect proceedings, we have long espoused the position that the rights of the parents are an essential consideration. The government's interest in protecting the welfare of children is also significant. However, the best interest and welfare of the child outweigh all other considerations. *See* Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."). In other words, "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).

We begin with the relevant parameters of the petitioners' due process claim. Any right that a civil litigant can claim to confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments of the

United States Constitution[12] and article III, section 10 of the West Virginia Constitution. We are mindful that proceedings to terminate parental rights implicate fundamental liberty interests. Without question, a parent is entitled to due process of law before he or she can be deprived of his or her right to the custody, care and control of his or her child. The right is not absolute in that it can be limited or terminated by the State if a parent is proven unfit through proceedings affording the parent due process of law.

Statutorily, termination is proper only when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and "when necessary for the welfare of the child[.]" W. Va. Code § 49-6-5(a)(6) (2009). "Given the significance of parental rights, a heightened level of evidentiary proof is necessary to warrant termination. 'The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof.'" *In re Jessica M.*, 231 W.Va. 254, __, 744 S.E.2d 652, 658 (2013) (*quoting* Syl. Pt. 6, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129).

The fundamental requirement of procedural due process in a civil proceeding is "the opportunity to be heard at a meaningful time and in a meaningful

[12] *See Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103 (1963) (stating procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood).

manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). What would constitute due process in this case must be determined by weighing the competing interests of the children, the parents, and the State. It is well established that

> [t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation and firmly established that what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Stanley v. Illinois, 405 U.S. 645, 650-51 (1972); *see e.g., U.S. v. Alisal Water Corp.*, 431 F.3d 643, 658 (9th Cir. 2005) ("[I]n the context of a civil suit, cross-examination is not, in every instance, a sine qua non of due process. It all depends on the situation.") (quotations omitted).

This Court has recognized that due process in the civil context "is a flexible concept which requires courts to balance competing interests in determining the protections to be accorded one facing a deprivation of rights." *Clarke v. W.Va. Bd. of Regents*, 166 W.Va. 702, 710, 279 S.E.2d 169, 175 (1981); *see generally, Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982) (commenting that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause"). In syllabus point two of *North v. Board of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977), this Court found

> [a]pplicable standards for procedural due process, outside the criminal area, may depend upon the particular

> circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are: First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

In *North*, a medical student challenged the administrative process that ultimately led to his expulsion from a State-supported university for falsification of his application for admission. Therefore, his due process claim involved a property interest, not a liberty interest. Because of the substantial property interest involved in *North*, we held due process procedures included "a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings." Syl. Pt. 3, in part, *North*, 160 W.Va. 248, 233 S.E.2d 411.

In the instant case, we find the petitioners were afforded procedural due process. They were provided with fundamentally fair procedures including proper notice of the petition, amended petitions and proceedings pursuant to West Virginia Code § 49-6-1(b) (2009). The circuit court appointed the petitioners counsel pursuant to West Virginia Code § 49-6-2(a) (2009). They had a full and fair opportunity to review and present evidence at the adjudicatory and dispositional hearings before an unbiased

tribunal pursuant to West Virginia Code § 49-6-2 (2009). The petitioners viewed the videotaped interviews of the children prior to the adjudicatory hearing and were given the opportunity to rebut this evidence. Notably, they did not raise any alleged impropriety in the questioning techniques employed by the interviewer or attack the reliability of this evidence. Finally, the petitioners were provided a record of the proceedings below along with the right of appellate review.

The petitioners complain that they were denied the opportunity to confront and cross-examine the children. While their argument lacked development below, essentially the petitioners complain that the procedures were inadequate to minimize the risk of an erroneous finding of abuse. This assertion lacks merit. There may be situations where a circuit court could find the evidence was sufficient to overcome the rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony. The West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provide guidance *when* the presumption is overcome and the circuit court determines it is necessary to take testimony from a child to enhance the integrity of the fact-finding process. [13] However, the petitioners have failed to articulate with any degree

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[13] Rule 8(b) provides:

> *Procedure for taking testimony from children.* – The court may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the court determines that the presence of attorneys will be

(continued . . .)

of specificity how confrontation and cross-examination would have enhanced the fact-finding process in this case.

We next turn to the petitioners' argument that Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings violates their statutory right of confrontation and cross-examination under West Virginia Code § 49-6-2(c) (2009).[14] The petitioners appear to equate this statutory provision with the rule set forth in *Crawford v. Washington*, 541 U.S. 36 (2004):

> especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the court shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the court may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in camera interview of a child, the court may, before the interview, require the attorneys to submit questions for the court to ask the child witness rather than allow the attorneys to question the child directly, and the court may require the attorney to sit in an unobtrusive manner during the in camera interview. Whether or not the parties' attorneys are permitted to attend the in camera interview, they may submit interview questions and/or topics for consideration by the court.

[14] West Virginia Code 49-6-2(c), provides, in part:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental

(continued . . .)

> Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. Syl. Pt. 6, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

Syl. Pt. 6, *State v. Kaufman*, 227 W.Va. 537, 711 S.E.2d 607 (2011). We reject this claim because there is no authority for it in a civil proceeding. As discussed above, a child abuse and neglect hearing is a civil rather than criminal action, with the right to confront witnesses subject to "due limitations." *In re Murphy*, 414 S.E.2d 396, 400 (N.C.App. 1992). [15]

We find that to the extent Rule 8(a) may conflict with West Virginia Code § 49-6-2(c), there is no doubt the rule would control. *See* Rule 1 of the Rules of Procedure for Child Abuse and Neglect Proceedings ("These rules set forth procedures for circuit courts in child and abuse neglect proceedings instituted pursuant to W.Va.

> rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

[15] In *In re Lauren R.*, 715 A.2d 822 (Conn. App. Ct. 1998), the court addressed a similar statute in a child abuse and neglect proceeding. The mother alleged the trial court violated her statutory right of confrontation and cross-examination when it refused to allow her daughter to testify. The appellate court upheld the trial court's decision not to question the child because requiring her to testify could "victimize" her and the child's testimony was not necessary based on the evidence. *Id.* 715 A.2d at 831.

Code § 49-6-1, et seq. If these rules conflict with other rules or statutes, these rules shall apply."). Moreover, the Legislature lacks the constitutional authority to direct the courts in procedural matters. West Virginia Constitution, article VIII, § 3 confers upon this Court the power to promulgate rules for all cases and proceedings, civil and criminal. "Under article [VIII], section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law." Syl. Pt. 1, *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988).

Based on the foregoing, we hold that in a child abuse and neglect civil proceeding held pursuant to West Virginia Code § 49-6-2 (2009), a party does not have a procedural due process right to confront and cross-examine a child. Under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, there is a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony. The circuit court shall exclude this testimony if it finds the potential psychological harm to the child outweighs the necessity of the child's testimony.

B. Admission of Out-of-Court Statements

We now address the admissibility of the children's videotaped interviews under the West Virginia Rules of Evidence, which remain the paramount authority in

determining the admissibility of evidence in circuit courts.[16] *See* Syl. Pt. 7, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994); 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 101.02 at 1-6 (5th ed. 2012). We note from the onset the petitioners did not make a sufficient objection to the use of this evidence. In *In re Tiffany Marie S.*, 196 W.Va. 223, 234, 470 S.E.2d 177, 188 (1996), we stated:

> The West Virginia Rules of Evidence declare that parties must object to the wrongful offer of evidence at a particular time and with reasonable specificity. The failure to object at the time and in the manner designated by Rule 103(a) of the West Virginia Rules of Evidence is treated as a procedural default, with the result that the evidence, even if erroneous, becomes the facts of the case. West Virginia practice imposes the same duty of diligence in regard to nonjury cases. Silence in the circuit court typically constitutes a waiver of objection. *See* W.Va. R. Evid. 103(a)(1).

The petitioners' only objection on hearsay grounds to the introduction of the children's out-of-court statements came in their response to the DHHR's motion in limine filed prior to the adjudicatory hearing. At oral argument in this matter, the petitioners contended that, by its very nature, a motion in limine does not require an objection to preserve the alleged error for appeal. This argument would be correct had they objected to the circuit court's ruling. "An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in

[16] West Virginia Code § 49-6-2(c) provides, in part, "[t]he rules of evidence shall apply" in child abuse and neglect proceedings.

the basis for admitting the evidence." Syl. Pt. 1, *Wilmer v. Hinkle*, 180 W.Va. 660, 379 S.E.2d 383 (1989). However, the petitioners did not object to the circuit court's ruling on the motion in limine at the adjudicatory hearing.

In addition, when the children's videotaped interviews were introduced and admitted into the record, the petitioners failed to object.[17] Our general rule is "[w]here objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered upon appeal." Syl. Pt. 7, *Wheeling Dollar Savings & Trust Co. v. Leedy*, 158 W.Va. 926, 216 S.E.2d 560 (1975). (Citation omitted). Clearly, the response to the motion in limine did not relate to a jurisdictional matter. It was made for the purpose of excluding out-of-court statements. Therefore, "[a]t most, it went to the admissibility of the evidence. As such, the matter was not jurisdictional and, in the absence of an objection, was not preserved for appeal." *Smith v. Holloway Constr. Co.*, 169 W.Va. 722-23, 289 S.E.2d 230-31 (1982); *see also Coleman v. Sopher*, 201 W.Va. 588, 601, 499 S.E.2d 592, 605 (1997) (discussing failure to preserve alleged errors when party presented motion in limine for exclusion of evidence but record failed to establish that specific challenges raised were presented to or addressed by court below on the record).

[17] The circuit court's adjudicatory order provides, in error, that the petitioners objected to the admission of the videotaped interviews.

The petitioners' failure to object to the admission of the children's statements at the adjudicatory hearing is significant for purposes of our appellate review. Because this evidence was not challenged, the circuit court did not specify on the record what hearsay exception(s) applied. However, we find the issue warrants brief discussion and we may review an unpreserved error if the error is "plain." *See* W.Va. R. Evid. 103(d). Under a plain error analysis "the alleged error must have seriously affected the fairness or integrity of the trial." *In re Tiffany Marie S.*, 196 W.Va. at 234, 470 S.E.2d at 188.

In reviewing the circuit court's admission of this evidence, we begin with the well-established rule that

> [g]enerally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.

Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990). The purpose of excluding hearsay testimony at trial is to prevent unreliable information from reaching the jury.

The first step of our analysis is to determine whether the videotaped interviews of the children were hearsay under West Virginia Rule of Evidence 801(c).

We answer this question in the affirmative as the out-of-court statements were offered to prove the truth of the matter asserted. *See id.*

We now proceed to determine if the out-of-court statements fell within any of the hearsay exceptions. "[W]hen a child is the declarant, virtually every state has a child hearsay exception, or uses a catch all to permit hearsay that would otherwise be barred." Myrna Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 Crim. Just. 24, 33 (Summer 2005). "A few states have also adopted exceptions that require the videotaping of the child interviews typically by law enforcement, psychologists, social workers, or others employed by the local child services agency. This approach is designed to show . . . that the child has not been misled by suggestive questioning techniques[.]" *Id.*

Under circumstances factually similar to the instant case, other jurisdictions have found videotaped interviews of child sexual abuse victims admissible under the "catch all" or residual exception to the hearsay rule. In *In re A.S.W.*, 834 P.2d 801 (Alaska 1992) the court addressed the question of whether a videotaped interview of a child identifying her father as an abuser was properly admissible in parental termination proceedings. The videotaped interview lasted approximately one hour and the victim described in child-like terms explicit sexual abuse. Prior to the adjudicatory hearing, the guardian ad litem moved for a protective order precluding the use of the child as a witness. In granting the motion, the court found the child was unavailable because the

trauma of testifying could aggravate her medical problems. Both parties briefed this issue before the adjudicatory hearing. The court admitted the videotaped statement under the residual exceptions to the hearsay rules. On appeal, the father claimed the court abused its discretion in admitting the videotaped interview because it lacked the circumstantial guarantees of trustworthiness that would justify its admission. The Supreme Court of Alaska disagreed and held "[t]he out-of-court statements of a child in proceedings where abuse is alleged are often quite necessary to the administration of justice. Therefore, if the child is unavailable to testify, the courts should admit the statements if the statements are sufficiently reliable." *Id.* at 804.

In *In re Pamela A.G.*, 134 P.3d 746 (N.M. 2006), the state filed a notice of intent to offer a child's videotaped interview in an abuse and neglect proceeding in lieu of her testimony but did not indicate which hearsay exception it relied upon. The court analyzed the statements and found they were unambiguous in both the detailed description of the abuse and the identity of the abuser. The court admitted the statements under the catch all exception to the hearsay rule. On appeal, the Supreme Court of New Mexico upheld the termination of parental rights and found the child's out-of-court statements had sufficient guarantees of trustworthiness to be admissible under the hearsay catch all exception. *Id.* at 752.

In the instant case, we find no error in the circuit court's decision to admit the videotaped interviews of the children because the record reflects they fall under the

residual exceptions to the hearsay rules, embodied in West Virginia Rules of Evidence 803(24) and 804(b)(5). [18] This Court has held:

> The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

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[18] The residual exceptions to the hearsay rules permit the admission of hearsay statements that do not fall within one of the traditional exceptions. Rule 803(24) (availability of declarant immaterial) provides, in part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804(b)(5) (declarant unavailable) contains the identical wording.

Syl. Pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

It is apparent the DHHR proved requisite compliance with the above factors. As we stated in *Smith*, our major concern with any evidence admitted under this exception is its reliability. *Id.* First, the petitioners do not attack the trustworthiness of the children's hearsay statements or the interview techniques. Second, this evidence is clearly probative on the material issue of whether the children were sexually abused. Third, the circuit court assessed these videotaped interviews and was in the best position to determine if they were more probative on the point for which they were offered than other evidence, and whether they had sufficient guarantees of trustworthiness to be reliable. Fourth, the interest of justice would be served by admission of these statements considering the restrictions on taking a child's testimony under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect. Finally, the DHHR provided notice prior to the adjudicatory hearing that it intended to offer this evidence and the petitioners were provided with a fair opportunity to prepare to meet it. *See Smith*, 178 W.Va. at 113, 358 S.E.2d at 197.

As discussed above, because the evidence was not challenged at the adjudicatory hearing, the circuit court did not articulate its reason(s) for admitting these statements. Nevertheless, this Court allocates significant discretion to the circuit court in making evidentiary rulings. "Unlike a jury, a trial judge in a bench trial is presumed to

know the law and to follow it" and this presumption may only be rebutted when the record shows otherwise. *Misty D.G. v. Rodney L.F.*, 144 W.Va. 144, 151, 650 S.E.2d 243, 250 (2007) (quoting *People v. Thorne*, 817 N.E.2d 1163, 1177 (Ill.App. 2004)).[19]

C. Termination of Father's Parental Rights

We now turn to the merits of the circuit court's adjudication and disposition of the father. In view of the elaborate statement of the facts in the circuit court's adjudicatory order, we can greatly abbreviate our own. The circuit court reviewed the evidence and found the father "forced [N.L.] to engage in sexual intercourse with him" on multiple occasions. The circuit court also found the father sexually abused D.S. on one occasion. Determining whether a parent has neglected or abused his children is a predominantly fact-bound endeavor. It follows that, absent a mistake of law, an appellate tribunal should disturb a circuit court's determination only if it is clearly erroneous. No clear error appears, and we find the circuit court was not clearly wrong in holding the DHHR satisfied its burden of proof.

The father testified at the adjudicatory hearing and denied all allegations against him. Clearly, the circuit court was not persuaded by his testimony. This Court

[19] "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfok*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

confers great deference to credibility determinations made following a bench trial because the circuit court has viewed the demeanor of the witnesses. *See Brown v. Gobble*, 196 W.Va. 559, 565, 474 S.E.2d 489, 495 (1996); *see generally*, *State v. Guthrie*, 194 W.Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) ("An appellate court may not decide the credibility of witnesses . . . as that is the exclusive function and task of the trier of fact.").

Based on the foregoing, we find that termination of the father's parental rights in the present proceeding is warranted. We believe the DHHR proved that the father sexually abused N.L. and D.S. Furthermore, the children remain at substantial risk of significant harm from the father as there was no showing of a reasonable likelihood that the conditions of abuse could be substantially corrected. As we have previously explained:

> "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 1982 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

D. Termination of Mother's Parental Rights

In her appeal, the mother asserts the circuit court erred by terminating her parental rights without granting a post-adjudicatory improvement period when the DHHR failed to make reasonable efforts to reunify the family. The mother contends the only service offered to her for almost a year while the case was pending was supervised visitation. Further, the mother argues that she is entitled to a remand for another adjudicatory hearing because N.L. testified under oath in the father's subsequent criminal trial that she did not tell the mother about the sexual abuse. We are not persuaded by these arguments.

The circuit court did not err in holding the DHHR satisfied its burden of proof with regard to the mother. The evidence throughout this case concerned the mother's repeated pattern of allowing the father to have contact with the children despite clear warnings to the contrary.[20] The mother knowingly violated the court's order in the 2009 guardianship matter that specified the father was not to live in the home with or have any contact with N.L. because of substantiated sexual abuse claims against him. As the DHHR explained, the mother was not offered services or an improvement period because she was living with the father, even at the time of the dispositional hearing. At

[20] The mother also criticizes the circuit court's adjudicatory findings and states the ruling essentially implies that she "should have known" of the risk the father posed. We reject this argument because the circuit court found her claims of ignorance not credible. In its adjudicatory order, the circuit court stated the mother failed to investigate N.L.'s accusations and "casually dismissed the child's serious accusations by simply telling the child that she did not believe" her.

oral argument in this matter, the guardian ad litem for the children expressed his frustration that throughout the entire time this case was pending, the mother did nothing but ignore his requests and the requests of her attorney to have the father move out of the home.

Considering the foregoing, we find the circuit court did not err in denying the mother's request for an improvement period because any attempt would be futile. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened. . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, the DHHR was not required to make reasonable efforts in this case to preserve the family because the children were subjected to aggravated circumstances of sexual abuse. *See* W.Va. Code § 49-6-3(d)(1).

Accordingly, we find the circuit court had before it sufficient evidence with which to terminate the mother's parental rights and deny her request for an improvement period. We deny her request to remand the case for a new adjudicatory hearing because we find N.L.'s testimony at the father's subsequent criminal trial would not change the outcome of these proceedings.

IV. CONCLUSION

Based upon the foregoing, the final order of the Circuit Court of Fayette County entered May 3, 2013, is affirmed.

Affirmed.

211 W. Va. 339, 566 S.E.2d 226

SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 13, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30039

RELEASED
June 14, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: JAMES G. AND EMMETT M. L., III

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Case Nos. 99-JA-26-B & 99-JA-27-B

REVERSED AND REMANDED

Submitted: January 15, 2002
Filed: June 13, 2002

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JUSTICE McGRAW delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "When the parental rights of a parent to a child have been involuntarily terminated, *W. Va. Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child." Syl. pt. 1, *In re George Glen B. Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000).

2. "While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W. Va. Code*, 49-6-5b(a)(3) [1998], the Department must still comply with the evidentiary standards established by the Legislature in *W. Va. Code*, 49-6-2 [1996] before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W. Va. Code*, 49-6-3 [1998] before a court may grant the Department the authority to take emergency, temporary custody of a child." Syl. pt. 2, *In re George Glen B. Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000).

3. In the context of an abuse and neglect proceeding, a court may accept a parent's voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of W.Va. Code § 49-6-7 (1977), where applicable, and the relevant provisions of the Rules of Procedure for Abuse and Neglect Proceedings.

4. A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

McGraw, Justice:

The West Virginia Department of Health and Human Services (the "Department") filed a Petition for Finding of Abuse and/or Neglect and/or Abandonment against a mother, eventually seeking the involuntary termination of her parental rights with respect to her two children. As the termination proceedings neared their end, the mother offered to execute a voluntary relinquishment of her parental rights, to which the Department refused to agree. The lower court held that because the Department did not agree to the mother's voluntary relinquishment, the court was obliged to rule on the petition and to terminate her rights involuntarily or not at all. The mother appeals, arguing that the Department's consent was not required for the court to consider her voluntary relinquishment. She argues that the court should have approved her voluntary relinquishment, and not proceeded to an involuntary termination. We agree with the mother, in part, and therefore reverse the decision of the lower court.

I.

BACKGROUND

Victoria M. is the biological mother of the two children who are the subject of this action, Emmett M. L. and James G. Child James is the older of the two children, born in July 1996, and is the child of Victoria M. and James, Sr. Child Emmett was born later, in July

of 1999, and is the biological child of Victoria M. and Emmett Sr.[1] During most of the time periods at issue in this case, Victoria M. and the children lived with her boyfriend, Emmett Sr.

The family has had frequent contact with the criminal justice and child welfare systems. The West Virginia Department of Health and Human Services (the "Department") is the state agency with ultimate responsibility for child abuse and neglect cases. Within the Department, the Division of Child Protective Services ("CPS") is responsible for investigating allegations of child abuse or neglect. W.Va. Code § 49-6A-9 (2001). During 1997, CPS received a referral that James, who had been born prematurely, was not being taken to his scheduled medical appointments by his mother. Later, in January 1999, CPS received a referral that James, then two, had cigarette burns on the palms of both hands, a cigarette burn on his chest, various bruises on his head and cheek, and burns on his genitalia. Apparently the Department attempted to provide the family with parenting and behavior management services, but these efforts failed, in part because James moved temporarily to his maternal grandmother's house in Ohio, and Emmett Sr. was jailed for domestic battery of Victoria.

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[1]As we have done in the past in domestic and juvenile cases involving sensitive facts, we do not use the last names of the parties. *See State v. George W. H.*, 190 W. Va. 558, 562 n.1, 439 S.E.2d 423, 427 n.1 (1993). Also, for ease of reading we omit most initials and use the suffix "Sr." to differentiate father from child, though the parties may not actually use such suffix.

In July 1999, CPS received another referral, this one stating that Victoria had spanked James with a fly swatter, leaving a bruise on the child's leg and buttocks. As a result, the Department filed a "Petition for Finding of Abuse and/or Neglect and/or Abandonment" (a "petition") on behalf of both children on July 28, 1999, in the Circuit Court of Raleigh County. W. Va. Code § 49-1-1 *et seq.* provides for a preliminary hearing to be held shortly after the filing of a petition, followed later by an adjudicatory hearing, which in turn is followed by a disposition hearing. The court may allow improvement periods for the parents at various times during the proceedings.

In the instant case, the lower court held the preliminary hearing on August 19, 1999, at which time the parties informed the court of an agreed upon three-month improvement period during which the mother would attend parenting classes and behavior modification counseling to help control her anger, and would have weekly supervised visitation with the children.[2]

The court held an adjudicatory hearing on January 21, 2000. The court found that Victoria had not complied with the agreement, that the Department's evidence that James had suffered abuse was uncontested, and that the allegations in the petition were supported by clear and convincing evidence. The court then terminated Victoria's parental rights to both children,

[2]It appears that physical custody of the children remained with the Department.

and left legal and physical custody of the children with the Department. The court left unresolved the question of the parental rights of the respective fathers, pending further investigation.

As the case proceeded, boyfriend Emmett Sr., asked for a paternity test, which established that he was the father of child Emmett, and the court ordered a home study of James Sr., father of child James. Also during this time, Victoria M. moved the court to reconsider its termination of her parental rights. In April 2000, the court reconsidered its January ruling and granted Victoria and her boyfriend Emmett an improvement period, during which they had the opportunity to demonstrate that conditions in the home had improved.

Apparently Victoria and Emmett were unable to comply with the improvement plan, and the Department renewed its request for the permanent involuntary termination of Victoria's and Emmett's parental rights. The court held a final disposition hearing on February 1, 2001, some eighteen months after the Department first filed a petition. At this hearing, at which the court was prepared to order the involuntary termination of the parental rights of Emmett and Victoria, Victoria tendered a signed *voluntary* relinquishment of her parental rights.

The court refused to accept and ratify the voluntary relinquishment, finding that this offer was in the nature of a settlement to which the Department did not agree, and finding

further that the Court had no power to force the Department to agree to such a settlement. By order dated February 1 and filed April 27, 2001, the court involuntarily and permanently terminated Victoria's parental rights as to both children and Emmett's parental rights as to child Emmett. The order granted custody of both children to the Department, but required the Department to attempt to unify James with his natural father, James Sr. Finally, the order stated that "the Department shall not be required to accept the voluntary relinquishment of [Victoria] the respondent mother."

Only Victoria appeals, and in her appeal she does not ask that her parental rights be reinstated, but claims only that the court erred in not accepting her offer of a voluntary relinquishment. She argues that there is no legal authority whereby during the pendency of an abuse and neglect case, the Department of Health and Human Services, or the circuit court may reject a parent's offer to voluntarily relinquish his or her parental rights. Because we partially agree with her on this limited point, we must reverse the decision of the lower court.

II.

STANDARD OF REVIEW

We have often explained the standard of review used by this Court in cases such as this: "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re*

Emily, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000). Or, as we explained at greater length in another case:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). In the instant case, because we are only asked to consider a question of law, our review is simply *de novo*.

III.

DISCUSSION

The basis of Victoria's argument is that there is no authority that would allow the Department, or the circuit court, to refuse her offer to voluntarily relinquish her rights. The Department argues that there is no authority that requires it or the court to accept such a relinquishment. Furthermore, the Department suggests that Victoria only made the voluntary offer because she knew she would lose these children, but wished to limit the Department's ability to take action against her should she later have another child.

Our law provides for the voluntary termination of parental rights, but places certain limits on such an action: "An agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud." W. Va. Code § 49-6-7 (1977). The Rules of Procedure for Child Abuse and Neglect Proceedings place other requirements on any such voluntary termination. First, the Rules demand that any stipulation made by a party in an abuse or neglect proceeding must be made voluntarily and in the best interest of the child:

> (b) *Voluntariness of consent.*—Before determining whether or not to accept a stipulation of disposition, the court shall determine that the parties and persons entitled to notice and the opportunity to be heard, understand the contents of the stipulation and its consequences, and that the parties voluntarily consent to its terms. The court must ultimately decide whether the stipulation of disposition meets the purposes of these rules, controlling statutes and is in the best interests of the child. The court shall hear any objection to the stipulation of disposition made by any party or persons entitled to notice and the opportunity to be heard. The stipulations shall be specifically incorporated in their entirety into the court's order reflecting disposition of the case.

Child Abuse and Neglect Proceedings Rule 33 (2000). And the Rules have specific requirements for a voluntary termination of parental rights:

> (a) *Uncontested termination of parental rights.*—If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing: . . .
>
> (3) If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of

> possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

Child Abuse and Neglect Proceedings Rule 35 (2000). While the statute and the Rules demonstrate a strong concern that any so-called voluntary termination of parental rights truly be a voluntary decision, i.e., made with an understanding of the consequences and free of duress, they do not authorize the Department, by withholding its agreement, to preclude a circuit court from accepting a parent's truly voluntary agreement to the termination of his or her parental rights.

The Department is correct that an *involuntary* termination of parental rights carries lasting consequences for the parent beyond the termination of rights with respect to the child or children in question. As the Department points out, it is required by statute to file a petition regarding any other children of a parent who has had his or her rights involuntarily terminated.

> (a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:
>
> (1) If a child has been in foster care for fifteen of the most recent twenty-two months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is sixty days after the child is removed from the home;
>
> (2) If a court has determined the child is abandoned; or

> (3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children; *or the parental rights of the parent to a sibling have been terminated involuntarily*.

W. Va. Code § 49-6-5b (1998) (emphasis added). Thus, if the termination of Victoria's parental rights with respect to her two children is deemed involuntary, the Department will have a duty to file a petition if she has any additional children.

We have explained that the involuntary termination of a parent's rights, while requiring the Department to file a petition, does not result in the automatic termination of rights as to other children born to the same parent:

> When the parental rights of a parent to a child have been involuntarily terminated, *W. Va. Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.
>
> While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in *W. Va. Code*, 49-6-5b(a)(3) [1998], the Department must still comply with the evidentiary standards established by the Legislature in *W. Va. Code*, 49-6-2 [1996] before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in *W. Va. Code*, 49-6-3 [1998] before a court may grant the Department the authority to take emergency, temporary custody of a child.

Syl. pts. 1 and 2, *In re George Glen B. Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000). While this language is instructive, it does not bear directly on the outcome of the instant case. The question before this Court today is whether the Department, or the circuit court, may refuse to accept a voluntary termination of parental rights in an abuse and neglect proceeding.

The Department directs us to a case where a mother consented to the adoption of her child by a third party during the pendency of a child abuse and neglect proceeding. We found in that case that language in W. Va. Code § 49-6-5(a)(6)(1992) prevented such an action before the abuse and neglect proceeding reached its end:

> This language [of *W.Va. Code*, 49-6-5(a)(6)(1992)] is designed to forestall any attempt by anyone to obtain custody of an abused or neglected child through adoption until there is a final disposition of the abuse and neglect case by the circuit court. Thus, the consent to adopt given by Jacqueline F. is a nugatory act until the final disposition of this case.
>
> From the foregoing provisions, we conclude that where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

Alonzo v. Jacqueline F., 191 W. Va. 248, 250, 445 S.E.2d 189, 191 (1994).

While it is true that *Alonzo* stands for the proposition that a parent's right to control the custody or placement of a child is limited while the state is proceeding against that parent, we are faced with a somewhat different issue in the instant case. In this case, the nature of the termination of rights, voluntary or involuntary, does not affect these children; their legal

relationship with their mother has in any event been severed. The nature of the termination of rights basically affects, at present, only one person -- Victoria.

We agree with the Department that a parent like Victoria may have similar problems with later-born children. We understand the Department's concern that later-born children not "fall through the cracks" and escape the notice of the authorities. The guiding principle in any child abuse or neglect proceeding is to do what is best for the child: "First and foremost in a contest involving the custody of a child is the consideration of that child's welfare. It has been held repeatedly by this Court that the welfare of the child is the polar star by which the discretion of the court will be guided." *State ex rel. Cash v. Lively*, 155 W. Va. 801, 804, 187 S.E.2d 601, 604 (1972); *accord, Michael K. T. v. Tina L. T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989); *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 192, 544 S.E.2d 403, 407 (2001) (Davis, J. concurring).

We cannot overstate this precept. Doing what can be done to rescue a child from an abusive situation is more than a metaphorical celestial aid to our navigation; the welfare of the child is the *raison d'etre* for our abuse and neglect law - nothing is more important. Nothing in this opinion should be construed as a departure from this principle.

We note that while W.Va. Code § 49-6-5b (1998) does not include the voluntary termination of parental rights as one of the factors triggering a new petition against a parent

with additional children, the *absence* of one of these factors does not in any way prevent the Department from filing such a petition should conditions warrant. Nothing prevents the Department from conducting an investigation if it believes that a parent who has voluntarily terminated parental rights with respect to one child might be mistreating another child, or from providing such a parent with assistance or counseling where available.

We also recognize that in some circumstances a truly voluntary termination is clearly the best disposition of an abuse and neglect petition. The statutes do not say that the DHHR is the determiner of when such circumstances exist, nor is the parent appointed by statute as the determiner of such circumstances. Rather, the statutes provide that the circuit judge must independently make such a determination, having heard from all sides.

We hold, therefore, that in the context of an abuse and neglect proceeding, a court may accept a parent's voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of W.Va. Code § 49-6-7 (1977)[3], where applicable, and the relevant

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[3]Our ruling in this case is in harmony with our decision in the case of *In re: Tessla N. M. and Sarah S. B.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29964, June 13, 2002). While the instant case deals with a written agreement, the *Tessla* opinion deals with a voluntary relinquishment of rights made orally in open court, which the court in that case willingly accepted, but which the mother later wished to retract. We held in *Tessla* that, because the Rules of Procedure for Child Abuse and Neglect Proceedings have provisions for making an oral relinquishment of parental rights, no writing is needed so long as one complies with the (continued...)

provisions of the Rules of Procedure for Abuse and Neglect Proceedings. The Department, of course, had every right to oppose the agreement that was offered by Victoria for the voluntary termination of her parental rights. But we find no authority for the proposition that the circuit court was bound to adopt the Department's position.

We hold, therefore, that a circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

In the instant case, the circuit court did not exercise its discretion, but rather viewed itself as bound by the non-acquiescence of the DHHR to a voluntary termination. This, we conclude, was erroneous.

IV.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Raleigh County is reversed, and remanded for reconsideration of the issue of permitting the voluntary

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[3](...continued)
requirements of the Rules.

relinquishment of Victoria's parental rights as to James G. and Emmett M. L., III.

Reversed and remanded.

185 W. Va. 648, 408 S.E.2d 400

Supreme Court of Appeals of West Virginia

JAMES M., Timothy M., Ike S.M., and Brandon C.M., infants under the age of eighteen years, Petitioners,

v.

Honorable Elliott E. MAYNARD, Judge of the Circuit Court of Mingo County, and Steve M., Respondents.

No. 19948

Submitted March 12, 1991

Decided July 29, 1991

SYLLABUS BY THE COURT

1. " '[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syl.Pt. 1, in part, *In re R.J.M.*, [164] W.Va. [496], 266 S.E.2d 114 (1980)." Syl.Pt. 1, in part, *In re Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).

2. Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period.

3. It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

4. In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

5. The guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.

Jane Moran, Williamson, for petitioners.

Teresa McCune, Williamson, for respondent Steve M.

WORKMAN, Justice:
This case is before the Court upon a petition for writ of prohibition See footnote 1 against the Honorable Elliott E. Maynard, Judge of the Circuit Court of Mingo County, by the petitioners, James M. See footnote 2, Timothy M., Ike S.M., and Brandon M., who seek relief from a January 11, 1991, order in which the lower court granted the respondent father, Steve M.'s, motion for an in-home improvement period in Ohio and further ordered that Timothy M. and James M. be surrendered to respondent's custody on the night of January 11, 1991, with Ike S.M. and Brandon M. being surrendered to his custody within thirty days thereafter. See footnote 3 Petitioners contend that the court abused its discretion in awarding the father of the children an in-home improvement period and disregarding the compelling needs and best interests of the children. We agree with the petitioners' contention and award the writs of prohibition requested, thereby reversing the lower court's ruling and directing the lower court to enter an order terminating the parental rights to these children.

During the course of the proceedings below, Betty M. related a marital history marked by her husband's alcohol abuse and physical abuse toward her severe enough to have required her hospitalization. There were frequent separations, the last in late December 1988, when Steve M. quit his job, abandoned the family and moved to Ohio. When Steve M. departed, he left his wife no transportation and a $1,500.00 heating bill. At that time, James (or Jamie) was three years old, Timothy (or Timmy) was two years old, Ike was approximately twelve months old, and Betty M. was pregnant with their fourth child, Brandon. The family had been living in a trailer in Justice, Mingo County, for approximately three weeks, but was unable to pay the rent after Steve M's departure and stayed temporarily at the Tug Valley Recovery Shelter.

When Betty M. was abandoned with three children under four and another on the way, she was not well-equipped to survive. The record reflects that she had also been a victim of physical and emotional abuse by an alcoholic father. Married at seventeen, she had a full scale I.Q. of seventy-six, and her verbal comprehension skills were also very low. Psychological evaluations indicated she was unable to cope with many of life's simplest problems, with one of her most pronounced ineptitudes being in the area of parenting.

Meanwhile, on December 29, 1988, not long after Steve M. left his family, the Department of Human Services See footnote 4 (hereinafter referred to as DHS) was referred to the home where Betty M. and her three children were then living. The DHS report indicated that at the time of the referral, the children were found to be dirty and improperly dressed, with no coats or shoes. Further, the oldest child was suffering from swollen genitals, a condition which Betty M. told DHS had existed for some time, and the youngest child had a cold and severe diarrhea. The family was living a somewhat

nomadic lifestyle, moving about from place to place. At the time of the referral to DHS, they were residing with three men, at least one of whom was described as very loud, intoxicated, and rude on the occasion of the DHS visit.

On that same day, DHS transported the family to a health care center where the children were examined and treated. Jamie was referred to a physician for his genital condition. The family was also assisted with food, shelter, clothing, transportation, and parenting counselling. They were placed at the Mountaineer Hotel from December 29, 1988, through January 4, 1989, under a homeless program, because they had no money, relatives, or any other place to stay.

The DHS on January 10, 1989, rented an apartment for the family, and continued to assist them with food, diapers, medicine and clothing. However, Mrs. M. left the apartment without notifying the landlord or DHS, leaving behind two large boxes of food, a lot of the children's clothing, and substantial damage to the apartment.

Jamie had been diagnosed as having a cyst on his scrotum, and scheduled for surgery on February 15, 1989. However, Betty M. failed to bring the child for the appointment.

Mrs. M. surfaced again on February 16, 1989, when she called DHS to advise that they were once again homeless and that the youngest child (Ike) had been sick and not had anything to drink for seven days. DHS provided immediate medical attention and assigned a DHS volunteer to work with Betty M. to care for the children. Prescriptions were given for the child, but never filled. The family left the Williamson area almost immediately. The family had also apparently been receiving AFDC benefits from the State of Ohio, and Mrs. M. would go there periodically to pick up her check. The D.H.S. would lose contact with her until she needed more assistance.

Therefore, the DHS, on February 16, 1989, filed a petition seeking removal of the three children from the custody of their mother for both physical and medical neglect. The petition also alleged that Steve M. had left the family home. The children were taken into the custody of DHS, and a preliminary hearing was scheduled for February 21, 1989. Although the DHS was forced to give Steve M. notice of the preliminary hearing via publication in a Columbus, Ohio, newspaper, since his whereabouts were unknown, the record does indicate that, by his own admission, he learned of the removal of his children by the DHS in March 1989 in a phone conversation with his sister. A preliminary hearing was conducted on February 21, 1989, and the lower court granted a six- month out-of-home improvement period to Betty M. and Steve M. However, since Steve M. had left the children, his voluntary absence precluded him from taking advantage of this improvement period.

The children were subsequently placed in foster care. Jamie and Timmy were so aggressive and violent that the Mingo County foster parents with whom they were originally placed requested that they be removed from their home. They were then placed in a special needs home See footnote 5 in the Charleston, West Virginia, area through a special needs foster placement agency. Ike was successfully placed in a Mingo County foster care home. Brandon was not born until September 5, 1989. The DHS subsequently returned Ike to his mother's physical custody on October 6, 1989. Both Brandon and Ike remained in their mother's custody until the DHS filed an amended petition on February 5, 1990, and took emergency custody See footnote 6 of both children on the basis of physical abuse and medical neglect by the mother and failure to provide proper care. In addition to the petition for emergency custody, the DHS filed a second amended petition on behalf of all four children, alleging continuing physical and medical neglect and abuse, and re-alleging that Steve M. had left the family home and that he had not contacted the West Virginia DHS to inquire about his children.

Specifically, the DHS alleged in the petition for emergency custody that Mrs. M. had left Ike and Brandon with Gail A. on February 1, 1990, with only one can of Similac and four jars of baby food. Mrs. M. dropped the children off at 4:00 p.m. and was to return to pick them up at 9:00 p.m., but failed to return as agreed. Finally, on February 3, 1990, Mrs. A. returned the children to Mrs. M. Mrs. M. reported that she had been too intoxicated to pick up the children. The DHS also alleged other instances where Mrs. M. had left her children with inappropriate care. For instance, on January 6, 1990, the DHS learned that Mrs. M. had left her children overnight with Abby B., an elderly man in a wheelchair. Mrs. M. indicated that she had also left her children in the care of a sixteen-year-old juvenile and one of her male friends. Additionally, on January 31, 1990, Patrolman Dave Tincher reported to the DHS that he had been called to Mrs. M.'s residence on two recent occasions by neighbors who heard a baby crying for several hours. Patrolman Tincher reported that when he answered the calls, Mrs. M. along with a male friend, were intoxicated with beer cans strewn around the bed and he had difficulty waking them. Also, the DHS noted in the petition that Brandon appeared malnourished, weighing only twelve pounds at five months of age.

A hearing was conducted on March 23, 1990, based upon the amended petition. The record reflects that Steve M. did attend the March 23, 1990, hearing and at that time, an evaluation of the father's home in Ohio was ordered for the purpose of possible placement of the children. The respondent, however, did not request an improvement period at that time, nor did he ask to see his children. Although several hearings were scheduled during the fall of 1990, another hearing was not held until January 11, 1991, after several continuances were granted because service of process could not be obtained on the father. During this hearing, the father moved for an improvement period, and the court proceeded to take evidence regarding the motion.

The record before this Court is replete with psychological and medical data concerning the children. First, regarding the younger children Ike and Brandon, the January 11, 1991, testimony of Sherry Wise, a caseworker with the specialized foster care agency, indicated that both Brandon and Ike were special needs cases from the time that they arrived at the home. Ike was suffering from severe asthma and had frequent ear infections. The medical evidence indicated that the child had suffered a partial hearing loss of forty percent in his right ear due to chronic untreated ear infections. Because of these medical problems, extraordinary measures were taken by the foster parents at their own expense. Ike and Brandon's foster mother testified that they added a filtering system to the furnace in their home to help eliminate dust particles. She also stated that they purchased a humidifier and two vaporizers, and removed the carpeting from the boys' bedroom, all to aid their respiratory problems. Wise testified that it had been necessary to take Ike to the hospital approximately thirty times for his medical problems after his initial placement.

Additionally, Ike exhibited behavioral problems, including aggressiveness and hyperactivity requiring medication. Further, both the caseworker and the foster mother's testimony reflected that after his natural father finally decided to visit in August, 1990, Ike suffered substantial deterioration in his progress, demonstrating vastly increased aggressiveness, having problems at his daycare facility (where his foster mother was employed), and suffering nightmares and sleeplessness. After the child's second visit with the father, he again demonstrated aggressive behavior and nightmares. His foster mother's testimony indicated that it took almost two weeks to settle Ike back into his normal behavior pattern. Consequently, Dr. R. Jenee Walker, a child psychiatrist who examined and treated Ike subsequent to the visits with his father, recommended that "because of the severe negative emotional impact visits with his natural father has on this child, [it is my recommendation] that visits be withheld for the time being." There was, however, no move by DHS to restrict visits with the natural father, but no more were requested.

Further testimony from Sherry Wise regarding Brandon revealed that the child suffers from asthma, chronic untreated ear infections, gastroesophagel reflex disorder and bacterial viral infections all of which had required some forty hospitalizations. There was no psychological evidence offered concerning Brandon.

Next, the behavior reported by Jamie's foster mother after his initial placement in foster care included kicking, hitting, biting and spitting at family members. Jamie told his foster mother, just after his placement in March 1989, that his father had "stomped" him in the groin area and in the head. Jamie also informed his foster parent that he, along with his brother and mother, had hidden from his father because his father had threatened to shoot his mother. Jamie's foster parents also reported excessive sexual acting out by the child, primarily in the form of masturbation out of the norm (e.g. rubbing against

furniture and people). Dr. LaRee D. Naviaux, a psychologist, also testified at the January 11, 1991, hearing that Jamie exhibited characteristics of an abused and neglected child, suffered from an adjustment disorder and possibly had an attention deficit disorder.

From a medical standpoint, Jamie had to undergo hydroseal and hernia surgery and dental surgery. Further, at the time of his placement in a special needs foster care home, he also suffered from a rash, thrash and scabies and had many colds and viruses, according to Debbie Wells, a case manager and counselor with the foster care agency.

Dr. Naviaux also diagnosed Timmy as having an adjustment disorder based upon abuse, neglect and sexual abuse. Dr. Naviaux found characteristics of sexual abuse on the basis of the foster parents' reports that Timmy was acting out explicit sexual behavior, including masturbation and rubbing himself up against furniture and people. Timmy was also observed inserting his finger into his rectum. The child would also scream "don't hurt me," when his foster mother attempted to diaper him. Also, the child had indicated on a sentence completion test that "his daddy jumped on Jamie with his boots." She further testified that this child appears to have "no conscience" in that he never felt guilty about things he had done. The doctor indicated that a child of his age exhibiting this characteristic created real concern. The child also liked to play with knives and guns and went through dangerous periods of throwing objects. Timmy also had chronic ear infections and his speech was developmentally delayed, according to Debbie Wells.

Finally, regarding the two visits by the father in August and September of 1990, and the effect of those visits on Jamie and Timmy, negative changes were noted in both of these children's behavior and verbalization. It was noted by the caseworker present during the visits that Mr. M. showed "only superficial interest in the boys ... in that very little interaction occurred." The foster parents of these two boys, James Pauley, testified that the visit affected Timmy the most. Particularly, after the August visit, Timmy became very aggressive and "would talk about himself and say, 'I'm stupid. I'm going to kill somebody or kill myself.' " Additionally, Jamie expressed fear and anxiety prior to one of these visits with his father when he asked a caseworker: " 'What will we do if he has his boots? What will we do it he kicks us with his boots? I don't want to see him. I have a stomach ache.' " Dr. Naviaux testified that Jamie and Timmy were fearful of their father as indicated by the regressive behaviors they displayed after visits with him. Dr. Naviaux opined that the father should not be granted an improvement period due to the amount of regression that had taken place in the two children as a result of just the two visits. Dr. Naviaux further testified that Jamie and Timmy had made dramatic improvements in all arenas of their lives since being stabilized in specialized foster care, and recommended both the children continue to live in such a stable environment. Finally, the testimony of Debbie Wells regarding Jamie and Timmy included a recommendation that "the children not be placed back with their biological parents because we [the agency] have not seen them [the natural parents] work with the children

to alleviate any of their fears or provide for any of their needs." Clearly, these were children with special problems and special needs.

The evidence offered by the respondent father included his own testimony and that of Kathy C., the woman with whom he was residing. Steve M. testified that he loves his kids and that he wants custody of them. He testified that while he did have problems with his wife Betty M. and admitted that he had hit her, he testified that he has not shown any violence toward Ms. C. or her four children who resided with them. His testimony also revealed that he was arrested for driving under the influence at a time subsequent to when he claimed to have given up alcohol totally.

Additional evidence offered by the respondent included two reports from Franklin County (Ohio) Children Services which performed a home study at the request of the DHS. Even though Steve M. contends that the home studies were somewhat favorable to him and Kathy C., it is significant to note that information contained therein reflects several concerns.

In the first report, dated May 8, 1990, Steve M. admitted to having been a heavy drinker, but denied any continued alcohol use. Yet according to the second report, dated November 30, 1990, he had "recently lost his driver's license for 45 days due to an arrest while driving under the influence of alcohol and reports he spent five days in the county jail for reckless driving."

Also in that second report, the social worker indicated concern that despite having not been ordered to pay any child support, Steve M. had neither called, written, nor visited his children. The home was approved with reservations "due to the special needs of the children and father's ability to distance himself from his children."

The Franklin County Children Services agency further recommended that, if the children were to be placed in the home, it be done gradually. See footnote 7

> At the end of the hearing See footnote 8 the trial court rendered the following decision:
>
> I'm going to rule at this time on the motion for an improvement period. I'm going to grant an improvement period to the father in this case.
> ....
> In this case, I am unable to find compelling circumstances to justify denying the natural father the chance to see if he is able to be a father to these children. This man has never really had a chance, absent the presence of the natural mother, to try to be a parent to these children.

It is from this decision that the children bring this petition for a writ of prohibition.

IMPROVEMENT PERIODS

The law in West Virginia is clear that in child neglect and abuse proceedings

> the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. *The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof,* but may require temporary custody in the state department or other agency during the improvement period.

W.Va.Code § 49-6-2(b) (1984) (emphasis added). This code provision makes it clear that such an improvement period must be granted "unless the court finds compelling circumstances to justify a denial." Syl.Pt. 2, in part, *State ex rel. Dept. of Human Serv. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987); *accord* Syl.Pt. 2, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

However, we have also previously held that

> 'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.'

Syl.Pt. 1, in part, *In re Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985) (quoting Syl.Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)).

We have also previously upheld the termination of parental rights without an improvement period where the evidence indicated potential danger to the children's welfare had they been returned home. *State v. C.N.S.*, 173 W.Va. 650, 319 S.E.2d 775, 779 (1984). This conclusion was reached in *C.N.S.* as a result of evidence which indicated that the children had suffered from improper feeding habits causing their hospitalization, as well as improper supervision and discipline of the children. 319 S.E.2d at 777; *see In re R.J.M.*, 266 S.E.2d 114, 266 S.E.2d 114 (Court upheld denial of improvement period where evidence indicated that parents had starved child and parents had deliberately missed child's doctor appointments and concealed themselves from Department of Welfare). We also upheld the denial of an improvement period in the

case of *In re Darla B.*, 331 S.E.2d at 870-71, where the evidence indicated that the parents had inflicted such serious life-threatening injuries upon the child that termination was the only reasonable course of action.

In examining other grounds which would justify the denial of an improvement period, we turn to our decision in *Nancy Viola R. v. Randolph W.*, 177W.Va. 710, 356 S.E.2d 464 (1987). In *Nancy Viola R.*, this Court ordered that the parental rights of a child's natural father be terminated where there was evidence before the court that the father had habitually abused alcohol, had continually been absent from the home, had not provided his family with adequate support and had abused his spouse. See footnote 9 356 S.E.2d at 467-68. *See also State v. C.N.S.*, 319 S.E.2d 775; *In re R.J.M.*, 266 S.E.2d 114.

In the present case, it is significant to note that an improvement period was granted to both the mother and father, although obviously the father's voluntary absence prevented him from benefitting from it. Moreover, not only had the father simply walked out on his wife and children, but he evinced no interest whatsoever in the children until some fifteen months later in March of 1990, despite the fact that, by his own admission, he learned of their taking in March 1989. The evidence showed that the respondent did not actually visit or have any contact with his children until August 20, 1990, almost two years after he left them. Further, during this two-year absence from his children's lives, he made no effort whatsoever to lend any financial or emotional support. It is difficult to perceive a more compelling set of circumstances to justify the denial of an improvement period.

The tender ages of these children must also be considered. As we pointed out in *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991) (citing White, *The First Three Years of Life* at v., (1985)), the experiences of the first three years of a child's life form the foundation for all his later development. *Id.*

Consequently, we hold that the abandonment of a child by a parent constitutes compelling circumstances sufficient to justify the denial of an improvement period.

TERMINATION

The circuit court was presented with a plethora of evidence that these four small children were severely and profoundly abused and neglected during their most crucial and formative years. This was clearly proven not only through direct and unrefuted evidence, but also by the reports and testimony of psychiatrists, psychologists, and social workers along with the children's current foster parents. Not one of the individuals who either testified or submitted a report recommended that it would be in any of the children's best interest to be placed in the respondent's custody for an improvement period. As a matter of fact, there was compelling evidence introduced from one of the psychiatrists recommending that Ike not even have visitation with the father due to the

extent of the negative impact from the previous visits with the respondent father on that child.

We have indicated that the focus of child abuse and neglect proceedings must be what is in the child's best interest and welfare. *See* Syl.Pt. 1, in part, *In re Darla B.*, 175 W.Va. 137, 331 S.E.2d 868; *see also* W.Va.Code § 49- 6-5. It becomes apparent, however, that in this case, the lower court was attempting to exhaust "every speculative possibility of parental improvement" before making a determination of whether to terminate parental rights. *See* Syl.Pt. 1, in part, *In re Darla B.*, 175 W.Va. 137, 331 S.E.2d 868. This is evidenced by the trial court's ruling as follows:

> If Mr. M. is given an improvement period, it may not even be necessary to terminate the parental rights of the natural mother. If we proceed to the conclusion of this hearing today, I would have to tell you, frankly, that I've heard enough evidence to where I think it would probably warrant terminating her parental rights. If it was a question of giving her the children or terminating her parental rights, there's grounds to terminate her parental rights. If the children can be given to the father, and if that will work, then it is not necessary to terminate the mother's parental rights. So, this improvement period, if it is successful, might and probably will prevent the harsh remedy of terminating the natural mother's parental rights.... If the improvement period is not granted, the only remedy left open to me today is to terminate the parental rights of both sets of parents.

Furthermore, the lower court has overlooked the law in this jurisdiction which stresses the protection of the parent and child relationship, but " 'recognizes that the right of the natural parent to the custody of his child is not absolute ... [but] limited and qualified by the fitness of the parent to honor the trust of the guardianship and custody of the child.' " *In re Darla B.*, 175 W.Va. at 139, 331 S.E.2d at 870 (quoting *In re Willis*, 157 W.Va. 225, 237, 207 S.E.2d 129, 137 (1973)).

The standard for determining the fitness of a parent to maintain custody of his child was recently reiterated in syllabus point 1 of *Nancy Viola R.*, 177 W.Va. 710, 356 S.E.2d 464. We stated the following:

> A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts. Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168

> S.E.2d [798] (1969). Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).

Id.

Additionally, W.Va.Code §§ 49-6-5(a)(6), (b)(1), (b)(3), (b)(4), and (b)(5) (1988) which provide for the disposition of neglected or abused children specifically state that:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, [the court can] terminate the parental or custodial rights and responsibilities.... Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such abusing parent or parents have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;
> ....
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child;
> (4) The abusing parent or parents have abandoned the child;
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child....

Consequently, based upon the evidence presented to the lower court, it is the determination of this Court that the record is abundantly clear that these parents were unfit, and that accordingly, the lower court should have terminated parental rights on the basis of abandonment by the respondent father, and physical and medical neglect and abuse by the natural mother and father, and on the further basis that there is no reasonable likelihood that these conditions of neglect and abuse can be substantially corrected in the near future.

TRANSFER OF PHYSICAL CUSTODY

An ancillary matter that bears discussion is the manner in which the physical custody of the children was transferred to the father. At the time the circuit court ordered the transfer of the children, Brandon was one year old, Ike was three years old, Timmy was four years old, and Jamie was five years old. Except for the two visits in August and September 1990, none of the children had any contact with the father for almost two years. Despite the guardian ad litem's protestations and request for a stay from Friday afternoon until the following Monday, the court directed that Timmy and Jamie be turned over to the father that evening and that Ike and Brandon be turned over to the father within thirty days.

The lower court virtually ignored the extensive evidence regarding the children's fear of their father and their special needs for stability and consistency. Even the Franklin County Children Services recommended that any transfer in custody to the respondent father occur gradually due to the special needs of the children, as well as the fact that the father and his companion already had her four children in their care. Consequently, it is beyond comprehension as to why the lower court ordered that two of the children be surrendered to the respondent father on the night of the hearing with denial of even a three-day stay.

As we noted in *Honaker v. Burnside*, 182 W.Va. 448, 452-453, 388 S.E.2d 322, 326 (1989) in upholding a gradual transition from the step- father to the natural father, it is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. See footnote 10 Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods "should be developed in a manner intended to foster the emotional adjustment of ... [the] children to this change ..." and to maintain as much stability as possible in their lives. *Honaker*, 182 W.Va. at 453, 388 S.E.2d at 326. These same principles may apply whenever a child is to be removed from the custody of anyone with whom he has formed an important attachment. *See* Hegar,*Foster Children's and Parents' Rights to a Family*, Soc.Serv.Rev., Sept.1983, 429.

CHILDREN'S RIGHT OF ASSOCIATION

It is also important to address the rights of these children to continued association amongst themselves as siblings. The guardian ad litem indicated during oral argument that these children will more than likely remain in long- term or permanent foster care, hopefully in the homes where they have resided since being placed in special needs foster care, wherein they have made such good progress. Also, according to the guardian ad litem, the DHS and the foster families have worked to maintain contact among the children, and every effort should be made to continue their familial connection.

In *Honaker,* we recognized that a child's best interests must be the primary standard by which his rights to continued contact with other significant figures in his life are to be determined. 182 W.Va. at 452-453, 388 S.E.2d at 326. Certainly in a case wherein children, by virtue of termination of parental rights, are losing their biological parents, all efforts should be made to preserve their rights to a continued relationship with their only other immediate family blood relatives.

Trends both in social work and the law relating to child placement indicate an increased awareness of children's rights to such continued association with siblings and other meaningful figures. *See generally,* Hegar, *Legal and Social Work Approaches to Sibling Separation in Foster Care,* 67 Child Welfare 113 (1988); Reddick, Juv.Just., Nov. 1974, 31- 32. The increased professional emphasis in social work on the sibling relationship is consistent with the broadening focus of the literature about separation. Hegar, *supra,* 67 Child Welfare at 113. The growing legal emphasis on the best interests of the child as the primary criterion for child placement decisions facilitates efforts to preserve stable relationships for children. Hegar, *supra,* Soc.Serv.Rev., Sept., 1983, at 429; *see also* Note, *Visitation Beyond the Traditional Limitations,* 60 Ind.L.J. 191 (1984).

Because sibling relationships often become more meaningful for brothers and sisters when they are permanently separated from their mothers and fathers, there is a growing judicial recognition of sibling rights in other jurisdictions. *See id.*

"[I]n a 1977 New York case, a child-placing agency was ordered by the court to present a plan for integrating a brother into the lives of sisters in a different placement, despite the brother having been separated from his sisters for seven years. The opinion note[d] that 'in the final analysis when these children become adults, they will have only each other to depend on.' " Hegar, *supra,* 67 Child Welfare at 117-18 (quoting *In re Patricia Ann W.,* 89 Misc.2d 368, 379, 392 N.Y.S.2d 180, 187 (1977)).

In *In re Elizabeth M.,* 232 Cal.App.3d 553, 283 Cal.Rptr. 483 (1991), wherein parental rights were terminated because of abuse and neglect, the court concluded that the statutory scheme which required the court to consider the best interests of the child in such proceedings included an implicit requirement that the court consider whether continuing sibling visitation is in the child's best interests.

As stated in *Honaker,* the best interests of the child concept with regard to visitation emerges from the reality that " '[t]he modern child is considered a person, not a sub-person over whom the parent has an absolute and irrevocable possessory right. The child has rights....' " 182 W.Va. at 452, 388 S.E.2d at 326 (quoting Note, *supra,* at 221 (footnote omitted)). Therefore, in the present case, we direct the court the DHS and any permanent families or custodians involved in these children's lives to make every effort to facilitate the children's continued association with one another.

In doing so, we follow *Honaker* and adopt the reasoning of the New York and California courts in determining that in cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

ROLE OF GUARDIAN AD LITEM

Finally, in *State v. Scritchfield*, 167 W.Va. 683, 688-89, 280 S.E.2d 315, 319 (1981) we recognized that in neglect and abuse proceedings the child has the right to be represented by an attorney at all stages of the proceedings, including any appeal. *See* Syl. Pt. 3, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214, 220 (1991) (guardian ad litem's duty to exercise reasonable diligence in protecting rights of children *includes* exercising appellant rights of children). Likewise, a child has a right to continued legal representation pursuant to W.Va.Code § 49-6-8, *Scritchfield* and *In re Scottie D.*, until such time as he is adopted or placed in permanent foster care.

Specifically, West Virginia Code §§ 49-6-8(a) and (b) mandate a twelve-month review by the court after the state department has received the child where no permanent placement has been made. Further, the statute requires the state department to file with the lower court a petition for review of the case and a report detailing all efforts to place the child in a permanent home. The court then must conduct a hearing to review the child's case, determine what efforts are necessary to provide the child with a permanent home and what services are required to meet the child's needs, and otherwise determine what is in the child's best interest. The statute requires a supplemental review of the child's case within eighteen months and every eighteen months thereafter until the child has a permanent placement.

Thus, the guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.

Based upon the foregoing opinion, we hereby reverse the lower court's granting of an improvement period to the respondent father and further direct the lower court to issue a ruling in this matter consistent with this opinion.

Writ granted as moulded.

Footnote: 1 Although the petition was filed as a writ of prohibition, it also clearly sounds in mandamus and is treated as both.

Footnote: 2 *Consistent with our practice in cases involving sensitive matters, we use the victims' last name initials. Since, in this case, the victims are related to the respondent, we have referred to him by his last name initial also. See State v. Edward Charles L., 183 W.Va. 641, 398 S.E.2d 123 n. 1 (1990) (citing Benjamin R. v. Orkin Exterminating Co., 182 W.Va. 615, 390 S.E.2d 814 n. 1 (1990)).*

Footnote: 3 *It is important to note that the petitioners' attorney immediately requested a stay of execution of the lower court's ruling from Friday, January 11, 1991, until Monday, January 14, 1991, so that relief could be sought from this Court. The lower court refused to issue that stay even for a three-day period; however, on January 17, 1991, this Court ordered that the execution of the January 11, 1991, order be stayed and that the children be returned forthwith to the custody of the Department of Human Services. Further, on January 24, 1991, this Court denied a motion to vacate the stay brought on behalf of the respondent father, Steve M.*

Footnote: 4 *The Department of Human Services is now known as the Division of Human Services, and is now a part of the Department of Health and Human Resources. See W.Va.Code § 5F-2-1(d)(2) (1990); W.Va.Code § 5F-2- 1(j) (1990); W.Va.Code § 9-2-1a (1985).*

Footnote: 5 *A special needs home, according to the record, provides specialized care and treatment for those children requiring special medical and/or behavioral and emotional attention.*

Footnote: 6 *When the DHS took emergency custody of Brandon and Ike, these two children were also placed in special needs homes in Charleston, West Virginia.*

Footnote: 7 *A third report on the father's home was received by the lower court subsequent to the ruling at issue here, and was included in the record on appeal. The lower court relies heavily on the third report as bolstering the correctness of its ruling. The third report was very brief and outlined the Ohio agency's visits to the home in Columbus, Ohio, during the ten-day period the subject children were there. The gist of the report was that all appeared to be going well during the visits.*

Footnote: 8 *It is significant to note that the lower court refused to allow the guardian ad litem to finish presenting all her evidence in the case, but instead permitted an avowal which was not considered by the court.*

Footnote: 9 *The natural father was indicted for the murder of his wife and was ultimately convicted and sentenced to life imprisonment without a recommendation of mercy. Nancy Viola R., 356 S.E.2d at 468.*

Footnote: 10 *The Honaker case dealt with two fit and proper parties, with no allegation whatsoever of abuse and neglect, and even there we found the lower court was correct in directing a gradual transition. 182 W.Va. at 452-453, 388 S.E.2d at 326.*

188 W. Va. 44, 422 S.E.2d 521

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA, Plaintiff Below, Appellant,

v.

JAMES R., II, Defendant Below, Appellee

No. 20933
Submitted: September 23, 1992
Filed: October 9, 1992

SYLLABUS BY THE COURT

1. "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." Syllabus point 1, Nicholas v. Sammons, 178 W.Va. 631, 363 S.E.2d 516 (1987).

2. "As the primary responsibility of a prosecuting attorney is to seek justice, his affirmative duty to an accused is fairness." Syllabus point 2, State v. Britton, 157 W.Va. 711, 203 S.E.2d 462 (1974).

3. No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W.Va. Code § 49-6-4(a) (1992).

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Brotherton, Justice:

In an order dated November 6, 1991, the Circuit Court of Harrison County disqualified the Prosecuting Attorney of Harrison County and his assistants from pursuing sexual abuse charges against the appellee. The basis for this decision was

the prosecution's representation of the State of West Virginia in a civil abuse and neglect case which arose from the same facts and circumstances. The appellant, the State of West Virginia, now appeals from this order.

A child abuse and neglect petition was initially filed against the appellee, James R., and his wife, Cindy R., in the Juvenile Court of Harrison County on March 4, 1991. The petition alleged that the appellee sexually abused his three children and also forced his wife to engage in sexual relations with their oldest son, who was twelve years of age.

On April 11, 1991, the appellee moved for an improvement period which is provided by W.Va. Code § 49-6-2(b).See footnote 1 The circuit court granted the appellee's motion on April 29, 1991, and set forth various terms and conditions of the improvement period, one of which was the requirement that the appellee undergo a psychological examination.

The appellee subsequently filed a motion seeking a grant of immunity that would serve to suppress any inculpatory evidence revealed in the course of his psychological treatment. The appellee also sought to disqualify the prosecuting attorney and his assistants from pursuing criminal charges against him because of their involvement in the civil abuse and neglect case.

A hearing was held on this motion on August 13, 1991. The appellee argued that the prosecuting attorney would obtain privileged information as a result of his involvement in the abuse and neglect proceeding, and he should therefore be disqualified and precluded from pursuing any criminal charges against the appellee that would arise from these proceedings. The State pointed out that W.Va. Code § 49-6-4(a) specifically prohibits the use of such evidence in subsequent criminal proceedings. Nonetheless, the circuit court found in favor of the appellee and disqualification, but did not enter an order at this time.

On September 9, 1991, a Harrison County grand jury returned a nine-count indictment against the appellee, alleging that he had committed various sexual offenses against his own children as well as other children who lived in his home. See footnote 2

On September 25, 1991, a hearing was held on the appellee's motion to dismiss the indictment and his motion to have the court enter an order reflecting its decision regarding prosecutorial disqualification. First, the lower court dismissed the indictment, and then on November 6, 1991, an order was entered disqualifying the prosecutor's office from pursuing criminal charges against the appellee.

On appeal, the State of West Virginia now argues that the circuit court erred in disqualifying the prosecutor. The State contends that the prosecutor's office has not represented conflicting interests in the case. Furthermore, the State points out that "[a] prosecutor's duty as a public officer is to serve the interest of the State in securing convictions of those who violate the laws of this organized society." State v. Britton, 157 W.Va. 711, 715, 203 S.E.2d 462, 466 (1974).

In this instance, the prosecution maintains that its first duty as counsel for the State in the abuse and neglect proceeding was "to assure the safety and well-being of the abused children." However, "once the prosecutor had reason to believe the appellee sexually abused his children and others, there was a statutory duty incumbent upon him to prosecute criminal charges against the appellee." It is the State's position that "[c]learly, these interests are not conflicting." We agree.

In Nicholas v. Sammons, 178 W.Va. 631, 363 S.E.2d 516 (1987), at syllabus point 1, we recognized two major categories of prosecutorial disqualification:

> The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

Neither category is applicable to the facts of this case. There was never an attorney-client relationship between the prosecutor and the appellee herein, See footnote 3 nor was there even a hint of a direct personal interest of any kind. Instead, at all times the prosecution has represented only the interests of the State of West Virginia against those of the defendant, first in the civil proceedings and then when initiating criminal charges. However, a prosecutor does not represent conflicting interests by representing the State first in a civil abuse and neglect proceeding and then in subsequent criminal proceedings against the same person. See footnote 4 "As the primary responsibility of a prosecuting attorney is to seek justice, his affirmative duty to an accused is fairness." Syl. pt. 2, State v. Britton, 157 W.Va. 711, 203 S.E.2d 462 (1990).

More significant for purposes of our decision is the fact that the Legislature has already anticipated and addressed the situation with which we are now confronted. In W.Va. Code § 49-6-4(a) (1992), the Legislature dealt specifically with medical and mental examinations of parties to abuse and neglect proceedings and provided that, "[n]o evidence acquired as a result of any such examination of the parent or

any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person."

We find this statutory provision to be dispositive of the issue which is now before us. Therefore, we reverse the November 6, 1991, order of the Circuit Court of Harrison County which disqualified the prosecuting attorney and his assistants from pursuing criminal charges against the appellee.

Reversed.

Footnote: 1West Virginia Code § 49-6-2(b) (1992) states that:

(b) In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-d of this chapter.

Footnote: 2The R.'s apparently lived in an "open" marriage with another couple who shared their home.

Footnote: 3In State v. Riser, 170 W.Va. 473, 294 S.E.2d 461 (1982), we pointed out that "there is a considerable distinction between the propriety of a private prosecutor acting against a man with whom he had previously spoken about defending him; and the propriety of allowing a private prosecutor to act in a criminal case and also in a civil case against a defendant." Id. at 465 (emphasis added).

Footnote: 4See also State v. King, 183 W.Va. 440, 396 S.E.2d 402, 411 (1990), in which we found no appearance of impropriety where an assistant prosecutor represented a different party against the defendant in two separate instances. Before becoming an assistant prosecutor, the attorney was in private practice and was appointed guardian ad litem for the appellant's three daughters in a child abuse and neglect proceeding. As assistant prosecutor, the attorney subsequently represented the interests of the State in the appellant's criminal prosecution.

205 W. Va. 176, 517 S.E.2d 41

Supreme Court Of Appeals Of West Virginia

IN THE INTEREST OF: JAMIE NICOLE H. AND THOMAS ALVIN H.

No. 25800
Submitted: May 4, 1999
Filed: June 17, 1999

SYLLABUS

1. "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syl. Pt. 1, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.

3. Since the procedural mechanisms for objecting to and modifying a family case plan are clearly in place, a parent cannot wait until the improvement period has lapsed to raise objections to the conditions imposed on him/her. The rules of procedure which govern abuse and neglect proceedings clearly require that a party seeking to modify a family case plan must act promptly and inform the court as soon as possible of the need for modification.

4. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of

appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, In re Christina L, 194 W. Va. 446, 460 S.E.2d 692 (1995).

G. Ernest Skaggs, Esq. Skaggs & Skaggs Fayetteville, West Virginia Attorney for Dorothy H.	Barbara L. Baxter, Esq. Assistant Attorney General Charleston, West Virginia Attorney for Department of Health & Human Resources
Kevin Duffy, Esq. Clay, West Virginia Attorney for Stanley L.K.	William C. Garrett, Esq. Gassaway, West Virginia Guardian ad Litem

Justice Workman:

Dorothy H. See footnote 1appeals from the July 14, 1998, order of the Circuit Court of Braxton County terminating her rights to her minor children, Jamie H., who is currently eleven years old, and Thomas H., who is currently ten years old. Appellant asserts error with regard to the trial court's refusal to grant an extension of the ninety-day post-adjudicatory improvement period. In addition, Appellant maintains that the trial court, in refusing to extend the post-adjudicatory improvement period, wrongly relied on her failure to comply with certain improvement period objectives which had no bearing on her parental fitness. After carefully reviewing Appellant's assertions of error against the record in this matter, we conclude that the lower court did not error in terminating Appellant's parental rights or in denying an additional improvement period.

The most recent charges of neglect See footnote 2were instituted on December 19, 1997, when the Department of Health and Human Resources ("DHHR") filed a petition pursuant to West Virginia Code § 49-6-1 (1998), charging Appellant with "refusal, failure and inability to supply the infant children with necessary food, clothing, shelter, supervision, medical care and education." See footnote 3On this same date, the trial court entered an order temporarily transferring custody to DHHR. On December 29, 1997, Appellant waived the preliminary hearing and moved for a sixty-day improvement period, which the trial court granted.

At the adjudicatory hearing, held on February 2, 1998, Appellant admitted to multiple instances of neglect that were alleged in the petition. See footnote 4The trial court concluded that Jamie and Thomas H. were neglected, but recognized that there were no allegations of physical abuse. Appellant moved for a ninety-day improvement period to run from the December 29, 1997, hearing. While the lower court denied this request, it did grant a ninety- day improvement period which commenced on February 2, 1998. During the improvement period, Appellant was to achieve the following goals:

> (1) To maintain housing for the children;
> (2) To undergo a psychological evaluation and obtain counseling;
> (3) To work toward her GED;
> (4) To obtain employment;
> (5) To maintain an alcohol-free environment for the children without negative social behaviors.

During the post-adjudicatory improvement period, Appellant was incarcerated on two separate occasions. First, she was incarcerated from April 11, 1998, until April 23, 1998, for petit larceny. Within less than a full week of her release from jail, Appellant was arrested for battery and revocation of probation and then incarcerated on those charges from April 29, 1998, until May 15, 1998. At the dispositional hearing held on June 22, 1998,See footnote 5Appellant's parental rights were terminated. See footnote 6Appellant moved for a sixty-day extension of the post-adjudicatory improvement period based on a pattern of improvement and cooperation. See footnote 7 The trial court denied this motion, determining that it was too little, too late. See footnote 8In her prayer for relief, Appellant seeks a remand of this matter to the circuit court.

I. Standard of Review

In syllabus po int one of In re Tiffany S. , 196 W. Va. 223, 470 S. E.2d 177 (1996), we set forth the standard of review for abuse and neglect cases:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a ju ry, the circuit court shall make a determination based upon the evid ence a nd shall m ake findi ngs of fact and conclusions of law as to whether such c hild i s abused or neglected. These findings shall not be set aside by a reviewing court unless clearly errone ous. A findin g is clearly erroneous w hen, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction

> that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

196 W. Va. at 225-26, 470 S.E.2d at 179-80 .

II. Discussion

Appellant argues that the trial court erred in not granting her an extension of the post-adjudicatory improvement period. Related to this assignment is her contention that the trial court abused its discretion in imposing certain conditions with regard to the post- adjudicatory improvement period. Appellant argues that the trial court wrongly focused on her failure to diligently work toward the attainment of her GED and to find gainful employment. To rely on these conditions as a basis for denying her an additional improvement period was error, according to Appellant, since neither of these conditions impact on whether she is a good mother to her children.

Pursuant to West Virginia Code § 49-6-12(g) (1998), a trial court may grant up to a three-month extension of the post-adjudicatory improvement period, provided certain statutory requirements are met. Before a circuit court can grant an extension of a post- adjudicatory improvement period, the court must first find "that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the department [DHHR] to permanently place the child; and that such extension is otherwise consistent with the best interest of the child." W. Va. Code § 49-6-12(g). This Court recognized in In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996), that a circuit court's failure to extend an improvement period is not error where there is no "evidence showing a reasonable likelihood of improvement." Id. at 89, 479 S.E.2d at 599.

The record in this case demonstrates conclusively that Appellant was given more than adequate time to demonstrate whether she could provide a basic level of care for her two minor children. While Appellant claims to have been "making substantial progress toward meeting the conditions of the improvement period," the record in this case reveals otherwise. At the dispositional hearing held on June 22, 1998, Appellant admitted that she did not even begin to attempt to comply with the terms of her family case plan until late in April of 1998.See footnote 9 She further admitted that her efforts were prompted by the approaching date of the disposition hearing.

Appellant's efforts to comply with the family service plan amounted to her attendance at four counseling sessions following her release from jail on May 15, 1998.See footnote 10 In addition, Appellant attended six GED classes, with the first class beginning on June 2, 1998.See footnote 11 Appellant readily admits that she did not have employment or suitable housing See footnote 12 for her children by the date of the dispositional hearing. Moreover, as the trial court observed, Appellant spent a good part of her post-adjudicatory improvement period incarcerated. See footnote 13

The circuit court reviewed Appellant's history See footnote 14and her performance during the post-adjudicatory improvement period. The court observed the following:

> In this matter, Case 97-JA-5, is not the first occasion that the respondent mother had to come before the Court relative to the care that she was providing to her children.
>
> She was in the Court system as a result of a neglect petition previously filed in this case.
>
> . . .
>
> As a result of that encounter, the Department offered a range of services that it's called upon to offer . . . and worked with the respondent mother for a period of four years or thereabout.
>
> . . . .
>
> The Court find[s] -- I don't believe it's a question of ability. I think it's a question of what . . . [Appellant] desires to do with her time, and it appears to the Court that she desires to put what she wants to do ahead of her responsibility to the children.
>
> Her predicament probably wouldn't be as bad had she taken the step of securing support and maintenance for these children.
>
> . . . .
>
> The Court is of the opinion that Dorothy H[.] does not suffer from an inability to understand what is required of her as a mother.

> The Court concludes that Dorothy H[.] suffers from a lack of desire and a lack of desire to accept the responsibilities for properly rearing and caring for these children.
>
> . . . .
>
> The Court is of the opinion that maybe she shouldn't have -- maybe I shouldn't have returned the children to her when they were returned to her the first time, because it's the same pattern.
>
> These children are entitled to know that there is more to life than what they've been exposed to up to now.
>
> . . . .
>
> In this instance, this case is merely a continuation of what these children previously encountered, and the Court is of the opinion that the time for continued improvement periods and continued counseling and continued rendering of service by the Department of Health and Human Resources should be concluded.

Appellant faults the trial court for basing its decision not to extend her post-adjudicatory improvement period on two conditions that were made a part of her family case plan. The specific goals to which she now objects are the securement of employment and working towards the attainment of a GED. Pursuant to West Virginia Code § 49-6D-3 (1998), a family case plan must be developed by the DHHR and submitted to the circuit court. The conditions about which Appellant now complains were developed by the DHHR with her consent and input. Appellant signed the family case plan, thereby acknowledging what efforts were required on her part to remedy her parenting deficiencies. When the family case plan was introduced and made a part of the record of this case at the February 2, 1998, adjudicatory proceeding, Appellant made no objection to the plan.

Our statutes and rules of procedure both anticipate and provide for the modification of family case plans. West Virginia Code § 49-6D-3(b) states that "[t]he family case plan may be modified from time to time by the department to allow for flexibility in goal development, and in each such case the modifications shall be submitted to the court in writing." Rule 35(b)(2) of the West Virginia Rules of Procedure for Abuse and Neglect Proceedings expressly provides for modification of case plans where termination of parental rights is contested at a pre-dispositional hearing. That rule provides, in pertinent part:

> The guardian ad litem for the children, the other respondents and their counsel shall advise in the pre- dispositional hearing and, where termination is sought, after the co urt's findings on the f actual issues surrounding termination are announ ced, w hether a ny such pers ons seek a modification of the child' s case plan as submitted or desire to offer a substitute child's case plan for consideration by the court. The court shall require any proposed m odifications or substi tute plans to be promptly laid before the court and take such action, including the receipt of evidence with respect thereto, as the circumstances shall require. It shall be the dut y of a ll the parties to the pr oceeding a nd their counsel to co-operate with th e court in m aking this information available to the court as early as possible. . . .

W.Va.R.Pro.Abuse/Neglect 35(b)(2). These same rules provide that any party can seek a status conference "to advise the court of pertinent developments in the case or problems which arose during the formulation and implementation of a case plan." W.Va.R.Pro. Abuse/Neglect 47.

While the procedural mechanisms for objecting to and modifying a family case plan are clearly in place, a parent cannot wait until the improvement period has lapsed to raise objections to the conditions imposed on him/her. The rules of procedure which govern abuse and neglect proceedings clearly require that a party seeking to modify a family case plan must act with alacrity and inform the court as soon as possible of the need for modification. See W. Va. R. Pro. Child Abuse/Neglect 35(b)(2); see also In re Carlita B., 185 W. Va. 613, 625-26, 408 S.E.2d 365, 377 n.15 (1991) (stating that "[a]t the outset of an improvement period, the attorneys for the parents should apprise the court if their clients foresee any obstacles to compliance with the plan of improvement, and the court should make any directives as necessary to obliterate these obstacles"). In this case, Appellant never sought to modify the conditions set forth in the family case plan. Not until this appeal was filed did Appellant ever raise an objection to the objectives set forth in her case plan.

We disagree with Appellant's position that the conditions set forth in the family case plan have no bearing on her fitness to be a good mother to her children. As we stated in West Virginia Department of Human Services v. Peggy F., 184 W. Va. 60, 399 S.E.2d 460 (1990), "the ultimate goal is restoration of a stable home environment, not simply meeting the requirements of the case plan." Id. at 64, 399 S.E.2d at 464. Since Appellant's primary problem as a parent was her inability to provide even a "minimum level of care" for her children, See footnote 15 the inclusion of conditions designed to encourage Appellant to acquire a high school equivalency diploma and employment does not appear unreasonable to this Court. See footnote 16 Family case plans are to be designed with the overriding goal of

"identifying family problems and the logical steps to be used in resolving or lessening those problems." W. Va. Code § 49-6D-3(a). The facts in this case support the goals delineated in the family case plan. Provision of shelter and financial support for children is one of the most basic components of parental responsibility. The DHHR, along with Appellant, determined that without employment Appellant was unlikely to ever graduate from her current level of failing to provide for her children. Requiring her to attend GED classes was simply a related method of helping her to secure a job. Thus, we conclude that the conditions of the improvement period and the family case plan were expressly tailored to address Appellant's problems with parenting her children. See footnote 17 See In re Renae Ebony W., 192 W. Va. 421, 426-27, 452 S.E.2d 737, 742-43 (1994) (discussing "importance of . . . crafting improvement periods in a manner designed to remedy the problem that led to the abuse and neglect action"); see also State v. Julie G., 201 W.Va. 764, 776, 500 S.E.2d 877, 889 (1997) (Workman, dissenting) ("recognizing that court's determination at the conclusion of the improvement period in an abuse/neglect case involves a decision regarding 'whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child'") (citing syl. pt. 6, in part, Carlita B., 185 W. Va. at 616, 408 S.E.2d at 368).

After fully reviewing Appellant's contentions in conjunction with the record in this case, we find no abuse of discretion with regard to the trial court's decision not to extend the post-adjudicatory improvement period. Under the statutory language of West Virginia Code § 49-6-12(g), the trial court properly denied Appellant's request for an extension, given her failure to comply with the improvement period conditions and the trial court's conclusion that an extension would not be in the best interests of Jamie and Thomas H. As to Appellant's contention that the trial court wrongly examined her conduct during the post-adjudicatory improvement period with regard to the conditions of obtaining employment and working towards her GED, we determine that she failed to timely object to such conditions or to seek a modification of the family case plan setting forth those conditions.

While Appellant has not raised the sufficiency of the trial court's dispositional order, we address this issue sua sponte. As we recognized in State v. Michael M., 202 W. Va. 350, 504 S.E.2d 177 (1998), a circuit court may

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or,

> if not, to either the permanent gua rdianship of the state departm ent or a licensed child welfare agency.

Id. at 357, 504 S.E.2d at 184 (quoting W. Va. Code § 46-6-5(a)(6)). We observed in Carlita B. that the finding required by West Virginia Code § 46-6-5(a)(6) concerning the absence of a "reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future" is a "prerequisite to termination of parental rights." 185 W. Va. at 622, 408 S.E.2d at 374 n.11. The dispositional order entered by the circuit court on July 13, 1998, in connection with the June 22, 1998, hearing does not track the language of West Virginia Code § 46-6-5(a)(6). Upon a review of the transcript from the dispositional hearing, however, we are convinced that the trial court first reached the conclusions required by West Virginia Code § 46-6-5(a)(6) before terminating Appellant's parental rights. See footnote 18 As to the issue of termination of rights, See footnote 19 we find no basis for reversing the lower court's findings. See Tiffany S., 196 W. Va. at 225-26, 470 S.E.2d at 179-80, syl. pt. 1.

It is of concern to this Court that, although there was evidence in the record of a parent/child emotional bond, See footnote 20 the court and counsel for Appellant appear to have totally dropped the ball as to the possibility of a post-termination relationship. We directed in syllabus point five of In re Christina L, 194 W. Va. 446, 460 S.E.2d 692 (1995) that:

> When pare ntal rights are term inated due t o ne glect or abuse, the circuit court m ay nevertheless in a ppropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Am ong other things, the circuit court should consider whether a close emotional bond has been established between pa rent and child and t he child's wishes, if he or she is of appropriate maturity to make s uch request. The evidence mus t indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child' s best interest.

While it does not appear that a formal petition seeking a post-termination relationship was filed, Appellant's counsel did inquire at the dispositional hearing regarding the circuit court's position on post-termination visitation. The trial court indicated that it would take the matter under advisement, while admitting on the record that it was disinclined to permit such visitation. It appears that a ruling was never issued on the subject; however, during the oral argument of this case DHHR represented that a hearing was finally to be held on this issue on May 14, 1999. If indeed such a hearing took place, it occurred almost a year after the issue of post-termination visitation was first raised. We find it utterly irresponsible that such a

lengthy time period passed with no resolution of this issue. If the bond that once existed between these children and their mother is determined to be worth preserving, then the children have been detrimentally affected by this lengthy period of time with no contact.

Finally, we have once again determined that there has been no resolution as to the paternal rights with respect to one of the two minor children involved. During the course of this proceeding, the trial court approved the request of the biological parent of Jamie H. to voluntarily relinquish his parental rights. While the biological father of Thomas H. was both located and, in fact, appeared at the February 2, 1998, adjudicatory proceeding, the record does not reflect the termination of such parent's rights to Thomas H. See footnote 21 Obviously, without a voluntary or involuntary termination of parental rights, there can be no permanent placement of Thomas H. As we recognized in Christina L., "[d]angling, unresolved parental rights . . . have a chilling effect on potential adoptive parents." 194 W. Va. at 456, 460 S.E.2d at 702; see W. Va. Code § 49-6-1 (requiring abuse/neglect petition to be served on both parents). And, as we discover all too often in these cases, there is no permanency plan that has been filed by the DHHR concerning its recommended placement of these two children.

Based upon the foregoing, the decision of the Circuit Court of Braxton County is hereby affirmed as to the issue of termination and the denial of an extension of the post- adjudicatory improvement period. We are forced to remand this case, however, due to the apparently unresolved issue of post-termination visitation. See footnote 22 In the event that the lower court has still not ruled on the issue of a post-termination relationship between Appellant and her children, we direct the lower court to make a ruling on such issue post haste pursuant to this Court's directives in Christina L. See Syl. Pt. 5, 194 W.Va. at 448, 460 S.E.2d at 694. Because the paternal rights with regard to Thomas H. have never been resolved and because no permanency plan See footnote 23has apparently ever been prepared and submitted to the circuit court, we remand this case for resolution of those two specific issues.

Affirmed; Remanded with Direction.

Footnote: 1 *Consistent with our practice in cases involving sensitive facts, we identify the parties by initial only. See In re Jeffrey R.L., 190 W. Va. 24, 26, 435 S.E.2d 162, 164 n.1 (1993).*

Footnote: 2 *Jamie H. and Thomas H. had previously been removed from Appellant's custody and placed in foster care from August 28, 1990, to April 24, 1995.*

Footnote: 3 *This petition resulted from an investigation by DHHR case worker, Patty Salisbury, in response to a complaint made by Appellant's brother and sister-in-law that Appellant had sold all of her furniture, was purportedly dying of cancer (or so she claimed), and attempting to get various local businesses to collect money for her benefit. Another averment set forth in the petition concerned Appellant's failure to return home after asking a teenager to watch her children for a few hours on December 16, 1997. While the record is unclear as to how much time passed before Appellant did return, the fact that Appellant's family members took her children to DHHR suggests that more than a nominal period of time was involved. Additional grounds of neglect cited in the petition included the fact that neither Jamie H. or Thomas H. were attending school on a regular basis and Thomas H. was not being given his Ritalin.*

Footnote: 4 *She admitted that Jamie H. and Thomas H. had been absent from school on all the days specified in the petition; that she had left them in the care of a teenager on December 16, 1997, and not returned; that she had been caught driving on a suspended license; and that her children had previously been in foster care for a lengthy period of time.*

Footnote: 5 *This hearing had been scheduled for May 8, 1998, but had to be continued because of Appellant's incarceration.*

Footnote: 6 *The trial court concluded, inter alia, that while Appellant did not lack the ability to understand what was expected of her, she "suffers from a lack of desire to accept the responsibilities of rearing and caring for these children."*

Footnote: 7 *Following Appellant's release from jail on May 15, 1998, she attended counseling on May 19, May 26, June 1, and June 12. Appellant states that during the first six months of 1998, she attended a total of ten counseling sessions, four of which were after her release from jail. Beginning on June 2, 1998, Appellant began attending GED classes. By the time of the dispositional hearing, she had attended six such classes. As to the other conditions of her improvement period, Appellant had not secured employment, but she had completed the required psychological evaluation.*

Footnote: 8 *The circuit court stated: "But the Court is of the opinion and views this case in which at the eleventh hour [the Appellant] is going to do all of these things." And the court also commented that, Appellant had "been afforded an opportunity to get her act in order and she chose to ignore it."*

Footnote: 9 *The post-adjudicatory improvement period was slated to end on May 3, 1998.*

Footnote: 10 *These sessions took place on May 19, May 26, June 1, and June 12. Appellant represents in her brief that the counselor canceled sessions scheduled for June 2 and June 19.*

Footnote: 11 *We observe that Appellant's GED class attendance actually took place after the time period when the post-adjudicatory improvement period had technically expired on May 3, 1998. It was only because of Appellant's imprisonment that the dispositional hearing held on June 22, 1998, could not be held as originally scheduled on May 8, 1998.*

Footnote: 12 *At the time of the dispositional hearing, Appellant and her two children were residing with Appellant's mother and brother in a two-bedroom mobile home.*

Footnote: 13 *The guardian ad litem stated at the June 22, 1998, proceeding that Appellant had been incarcerated five times during the eighteen-month period that preceded the dispositional hearing.*

Footnote: 14 *The trial court commented that it "has had occasion to observe the respondent mother here in Court on many occasions[.]"*

Footnote: 15 *This observation was made by the guardian ad litem at the February 2, 1998, adjudicatory hearing.*

Footnote: 16 *While we are not unmindful of the argument raised by Appellant that both a job and pursuit of her GED would take her away from her children, we do not perceive sincerity or proper motivation in Appellant's suggestion that she should be permitted to stay at home and spend more time with her children, rather than being forced out of the home to work or acquire an educational degree. Given Appellant's track record of ignoring the basic needs of her children while she pursued her own interests, such as alcohol consumption, plus her repeated stints of incarceration, we find it difficult to believe that Appellant genuinely desires to stay at home for the benefit of nurturing her children.*

Footnote: 17 *Even more important, however, is the fact that Appellant's parental rights, as the record makes clear, were terminated for reasons far more crucial to the issue of whether Appellant was meeting minimal standards for parenting, as opposed to her failure to obtain a GED or housing. This Court, and*

the court below, would be unlikely to terminate parental rights solely on the basis of failure to acquire a GED or adequate housing.

Footnote: 18 *The order is similarly deficient in that it fails to state the following:*

(1) That continuation in the home is not in the best interest of the child and why; (2) why reunification is not in the best interests of the child; (3) whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made such efforts unreasonable or impossible; and (4) whether or not the department made reasonable efforts to preserve and reunify the family including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances.

W. Va. Code § 49-6-5(a)(6). Upon a thorough review of the transcript from the dispositional hearing, we are satisfied that the trial court considered each of these factors prior to making its ruling of termination.

Footnote: 19 *We are not clear as to whether Appellant is even appealing the issue of termination as the petition for appeal seeks only a remand to the circuit court, ostensibly to revisit the issue of the lower court's denial of an extension of the improvement period.*

Footnote: 20 *The guardian ad litem acknowledged at the June 22, 1998, hearing that he had "no doubt that they [Jamie and Thomas H.] love their mother. The bond of the children toward the mother is strong in this case and they love her."*

Footnote: 21 *The trial court determined only that the father of Thomas H. had been regularly making child support payments in the amount of $14l.50 and that such individual desired no visitation with his son.*

Footnote: 22 *We recognize that a hearing resolving this issue may have been held on May 14, 1999, but to this Court's knowledge no order resolving this issue has been entered.*

Footnote: 23 *We observe that had a permanency plan been approved by the circuit court as required by West Virginia Code § 49-6-5a (permanency hearing must be held within thirty days of dispositional hearing wherein reunification is ruled out), then under the provisions of Rule 39 of the Rules of Procedure for Abuse and Neglect Proceedings, the trial court would have been obligated to hold*

periodic review conferences concerning the placement plan "[a]t least once every three months until permanent placement [wa]s achieved."

219 W. Va. 729, 639 S.E.2d 821

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

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November 13, 2006
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33079

IN THE MATTER OF: THE ADOPTION OF
JAMISON NICHOLAS C.,
BY CHARLES M. AND TWILA M.

Appeal from the Circuit Court of Wayne County
Honorable Darrell Pratt, Judge
Civil Action No. 00-A-007

AFFIRMED

Submitted: October 3, 2006
Filed: November 13, 2006

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JUSTICE MAYNARD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The manner in which a state administers a federal assistance program must be consistent with federal law." Syllabus Point 1, *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982).

2. Under the Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 - 679b (2000 & 2003 Supp.), and W.Va. Code § 49-2-17 (2000), the West Virginia Department of Health and Human Resources has an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of assistance for the care of a potentially special needs child in instances where the Department has responsibility for placement and care of the child or is otherwise aware of the child.

Maynard, Justice:

Appellant West Virginia Department of Health and Human Resources ("DHHR") appeals the December 5, 2005, order of the Circuit Court of Wayne County that required DHHR to grant to the appellees, Charles M. and Twila M., medical assistance for the care of their adopted son, Jamison Nicholas C.[1] For the reasons set forth below, we affirm the circuit court.

I.

FACTS

Jamison Nicholas C. was born April 22, 1996, to Crystal C. and Clyde C. Crystal C. died of cancer on September 9, 1998, while she and Jamison were living with her parents, the appellees. Prior to that time, Crystal C. and Clyde C.'s marriage, which was volatile and involved many domestic disputes, had ended and Clyde C. had become a fugitive from justice. As a result, Clyde C. had very little contact with Jamison.

On the day that Crystal C. died, DHHR was granted emergency custody of

[1]We follow our long-standing tradition herein of using initials in cases involving minors and sensitive facts.

Jamison on the grounds that Jamison would be in imminent danger if his father gained physical and legal custody of him. At a subsequent preliminary hearing, on September 18, 1998, Jamison was adjudged to be neglected, abused, and abandoned by his father. Upon the recommendation of DHHR, the court rescinded DHHR's temporary custody of Jamison and granted his full legal care, custody and control to the appellees.

Shortly thereafter, Jamison was diagnosed with Attention-Deficit Hyperactivity ("ADHD") and depressive disorders.[2] On April 11, 2000, the appellees filed both a petition to adopt Jamison and a petition to terminate the parental rights of Clyde C.[3] By order dated September 19, 2000, the circuit court terminated Clyde C.'s parental rights to Jamison. After a hearing, the appellees' adoption petition was granted by order dated October 13, 2000, and entered February 15, 2001.

Subsequent to the adoption, Jamison was diagnosed with Asperger's

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[2]Attached to the appellees' pleading to this Court is a copy of a letter from Debra Stultz, M.D. of United Health Professionals in Huntington, and dated January 15, 1999, which states that "Jamison [C.] has been treated under my services since 11/9/98. He has been diagnosed with Depressive disorder, NOS; and ADHD."

[3]Clyde C. was convicted in Wayne County Circuit Court of Grand Larceny on October 13, 1999. He was subsequently sentenced to the penitentiary for a period of not less than one year nor more than ten years. Thereafter, he was convicted of Escape and sentenced for a period of one year to run consecutively with his Grand Larceny sentence.

Syndrome. From September 9, 1998, until February 2004, DHHR provided medical assistance to Jamison by way of either Federal Medicaid Assistance or the State Children's Health Insurance Program. In February 2004, DHHR notified the appellees that Jamison was no longer eligible for medical assistance due to an increase in the appellees' household income.

In January 2005, the appellees filed a motion with the circuit court to amend the final order of adoption to provide that Jamison continue to be eligible for a medical card issued by DHHR. After a hearing on the matter, the circuit court granted the motion and ruled that the adoption order would be amended to provide that DHHR shall enter into an adoption assistance agreement with the appellees for medical assistance to be provided to Jamison. The circuit court's order was based on the following conclusions of law:

> 2. Jamison became a ward of the state when placed in temporary custody of WVDHHR upon an adjudication of abuse and neglect and upon a finding that it would be contrary to Jamison's best interest to return him to his father's custody; the DHHR properly placed the child with a responsible relative; West Virginia Code, §49-6-3;
> 3. Jamison had a significant relationship with his maternal grandparents; there existed emotional ties between the child and [Charles and Twila M.]; the DHHR recognized [Charles and Twila M.] as prospective permanent adoptive parents; Adoption and Safe Families Act of 1997 (Pub. L. 105-89);
> 4. Jamison's physical, mental, medical, and emotional disabilities qualify him as a special needs child as defined in Section 473(c) of the Adoption Assistance and Child Welfare Act of 1980, (Pub. L. 96-272); See 42 U.S.C. § 673(c);
> 5. The DHHR had an affirmative duty to fully explain all available assistance programs to potential adoptive parents; the prospective adoptive parents cannot waive adoption assistance without full knowledge and

information to assist them in making an informed decision to proceed by private adoption as opposed to an assisted adoption; 42 C.F.R. 1356.40(f); Ferdinand v. Dept. for Children and Families, State of Rhode Island, 768 F.Supp. 401 (1991);

6. Jamison was a special needs child while in the temporary custody of the WVDHHR even though his special needs were not evident when he was two (2) years old; Jamison would have been eligible for Title IV-E adoption assistance when placed with [Charles and Twila M.] even though the Department never discussed this with [Charles and Twila M.]; the subsequent determination as a special needs child constitutes changing circumstances relevant to the period readjustment provisions of 42 U.S.C. §673(a)(3) and (4), as discussed in Ferdinand, 768 F.Supp. 401, *supra*;

7. The State Department of Health and Human Resources must actively seek ways to promote the adoption assistance programs; 42 C.F.R. 1356.40(f);

8. It is the child's needs, and not the adoptive parent's needs, which determines eligibility for adoption assistance of a special needs child; Ferdinand, 768 F.Supp. 401, *supra*;

9. The failure of the WVDHHR to fully advise [Charles and Twila M.] of available adoption assistance or the risks of jeopardizing Jamison's eligibility by proceeding with a private adoption, and the fact that the Department continued to provide medical assistance throughout the process, constitutes extenuating circumstances that existed at the time of placement with [Charles and Twila M.], and before adoption, which requires the matter to be re-opened consistent with the findings in Ferdinand vs. Rhode Island, Id.

DHHR now appeals the circuit court's order.

II.

STANDARD OF REVIEW

The question before us concerns the proper construction of the relevant law and its application to the facts. Therefore, we review the circuit court's order *de novo*. *See* Syllabus Point 1, *Public Citizen, Inc. v. First Nat. Bank,* 198 W.Va. 329, 480 S.E.2d 538

(1996) (holding in part that "[q]uestions of law are subject to a *de novo* review").

III.

DISCUSSION

The Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 - 670b (2000 & 2003 Supp.), an amendment to Title IV-E of the Social Security Act, provides for the adoption of children with special needs. According to a policy statement issued by the United States Department of Health and Human Services ("DHHS"),

> The [Act's] legislative history indicates that Congress was concerned primarily with moving children in State foster care systems into permanent adoptive homes when appropriate. The title IV-E adoption assistance program, therefore, was developed to provide permanency for children with special needs in public foster care by assisting States in providing ongoing financial and medical assistance on their behalf to the families who adopt them.

Policy Interpretation Question, Log No. ACYF-CB-PA-01-01, U.S. Department of Health and Human Services, Children's Bureau, Issued January 23, 2001 (footnote omitted). Pursuant to the federal act, each state is to develop an approved plan to administer adoption assistance. 42 U.S.C. § 673.

The applicable plan in West Virginia for administering the federal act is found

in W.Va. Code § 49-2-17 (2000),[4] which provides in relevant part:

> From funds appropriated to the department of health and human resources, the secretary shall establish a system of assistance for facilitating the adoption or legal guardianship of children. An adoption subsidy shall be available for children who are legally free for adoption and who are dependents of the department or a child welfare agency licensed to place children for adoption. A legal guardianship subsidy shall not require the surrender or termination of parental rights. For either subsidy, the children must be in special circumstances either because they:
>
> (a) Have established emotional ties with prospective adoptive parents or prospective legal guardians while in their care; or
>
> (b) Are not likely to be adopted or become a ward of a legal guardian by reason of one or more of the following conditions:
>
> (1) They have a physical or mental disability;
>
> (2) They are emotionally disturbed;
>
> (3) They are older children;
>
> (4) They are part of a sibling group;
>
> (5) They are a member of a racial or ethnic minority; or
>
> (6) They have any combination of these conditions.
>
> The department shall provide assistance in the form of subsidies or other services to parents who are found and approved for adoption or legal guardianship of a child certified as eligible for subsidy by the department, but before the final decree of adoption or order of legal guardianship is entered, there must be a written agreement between the family entering into the subsidized adoption or legal guardianship and the department. Adoption or legal guardianship subsidies in individual cases may commence with the

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[4]This Court has indicated that the goal of W.Va. Code § 49-2-17,

> is to encourage foster parents not to treat the children placed in their care as an income producing commodity, but rather to love their foster children as their own. The Legislature wants foster parents to know that if they become attached to a child in their care, the bureaucrats will not come and take the child away. Presumptively, if a child is in a loving and caring foster home, the child will be harmed by being removed from that home and placed in a strange, unknown home. The state, therefore, has implemented a policy encouraging foster parents to adopt their foster children.

State ex rel. Treadway v. McCoy, 189 W.Va. 210, 213, 429 S.E.2d 492, 495 (1993).

> adoption or legal guardianship placement, and will vary with the needs of the child as well as the availability of other resources to meet the child's needs.

As set forth above, the circuit court found that Jamison's adoption met the requirements of the federal adoption assistance act and W.Va. Code § 49-2-17, so that DHHR is obligated to provide assistance to the appellees in the form of medical assistance for Jamison.

DHHR now challenges the circuit court's order on several grounds. First, according to DHHR, because Jamison was not in the State's custody at the time of his adoption, he is not entitled to assistance. DHHR explains that at no point after legal and physical custody of Jamison was granted to the appellees was DHHR involved in any legal action in regards to Jamison. Essentially, it is DHHR's position that the purpose of the federal adoption assistance act is to facilitate the adoption of foster children, and Jamison was never a foster child.

We find that DHHR's argument has no merit. W.Va. Code § 49-2-17 provides that assistance is available for facilitating either the adoption *or legal guardianship* of children. At the time the appellees were granted full legal custody, control and care of Jamison, on September 18, 1998, DHHR had temporary legal custody of him.[5] Therefore, per the provisions of the statute, Jamison was at one point a "dependent" of DHHR.

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[5]A guardian is defined as "[o]ne who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy[.]" *Black's Law Dictionary* 566 (Abridged 7th ed. 2000).

Further, we believe that prior to the circuit court's granting of full care, custody, and control of Jamison to the appellees, DHHR knew or should have known that Jamison was a potential special needs child. By this time, Jamison, who was approaching two and one-half years of age, had been adjudicated a neglected, abused, and abandoned child. Also, he likely witnessed a great deal of domestic turmoil. In addition, he had suffered the death of his mother. Finally, within two months of September 18, 1998, Jamison began mental health treatment, and shortly thereafter was diagnosed with a depressive disorder and ADHD, qualifying him as a special needs child under W.Va. Code § 49-2-17.

Second, DHHR asserts that because Jamison was adopted privately, it had no duty to inform the appellees of the availability of assistance. We do not believe that the fact that Jamison's adoption was private is of legal significance under these specific facts. This Court has held that, "[t]he manner in which a state administers a federal assistance program must be consistent with federal law." Syllabus Point 1, *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). Because W.Va. Code § 49-2-17, is this State's codification of the federal adoption assistance act, we look to federal law to determine how best to apply our statute.

According to 45 C.F.R. § 1356.40(f) (2005), "[t]he State agency must actively seek ways to promote the adoption assistance program." This duty is further explained in a DHHS policy statement as follows:

> The State title IV-B/IV-E agency is required to actively seek ways to promote the adoption assistance program. This means that it is incumbent upon the State agency to notify prospective adoptive parents about the availability of adoption assistance for the adoption of a child with special needs. There is no prescribed way in which promotion of the program must be accomplished. One example would be to alert potential adoptive parents during a recruitment campaign for adoptive homes (websites, newspapers, flyers, etc). Another example would be to alert every prospective adoptive parent who inquires to the State agency about adoption.

Policy Interpretation Question, Log No. ACYF-CB-PA-01-01, U.S. Department of Health and Human Services, Children's Bureau, Issued January 23, 2001 (footnote omitted). This policy statement further indicates,

> However, in circumstances where the State agency does not have responsibility for placement and care, or is otherwise unaware of the adoption of a potentially special needs child, it is incumbent upon the adoptive family to request adoption assistance on behalf of the child. It is not the responsibility of the State or local agency to seek out and inform individuals who are unknown to the agency about the possibility of title IV-E adoption assistance for special needs children who also are unknown to the agency. This policy is consistent with the intent and purpose of the statute, and that is to promote the adoption of special needs children who are in the public foster care system.

Id. Based on this DHHS policy, we now hold that under the Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 - 679b (2000 & 2003 Supp.), and W.Va. Code § 49-2-17 (2000), the West Virginia Department of Health and Human Resources has an affirmative duty to notify prospective adoptive parents and prospective legal guardians

of the availability of assistance for the care of a potentially special needs child where the Department has responsibility for placement and care of the child or is otherwise aware of the child.

When we apply this law to the instant facts, we find that DHHR had a duty to the appellees both at the time the appellees became responsible for the care, custody, and control of Jamison and at the time of Jamison's adoption to notify them of available assistance. The facts show that DHHR had temporary legal custody of Jamison for ten days. Also, DHHR was aware or should have been aware that Jamison was a potentially special needs child due to his circumstances. Further, DHHR was aware that the appellees were granted care, custody and control of Jamison. Finally, DHHR continued to provide financial assistance to the appellees for Jamison's care from the time DHHR was granted temporary custody of Jamison until several years after his adoption by the appellees. While we agree with DHHR that it is not responsible for seeking out and informing individuals who are unknown to it about the possibility of assistance to those who adopt or who become legal guardians of a special needs child, in the instant case the appellees and Jamison were clearly known to DHHR.

In its final argument to this Court, DHHR contends that the appellees are not eligible for assistance because the federal adoption assistance act and W.Va. Code § 49-2-17

require that before assistance can be rendered, an adoption assistance agreement must be signed and in effect at the time of or prior to the final decree of adoption. We do not believe that the absence of such an agreement renders Jamison ineligible for assistance under the facts of this case.

According to *Policy Interpretation Question,* Log No. ACF-PIQ-92-02, U.S. Department of Health and Human Services, Children's Bureau, Issued June 25, 1992,[6] the State agency's failure to notify adoptive parents of the availability of assistance may be considered an "extenuating circumstance" which justifies a fair hearing and a subsequent

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[6]According to the applicable portion of *Policy Interpretation Question,* Log No. ACF-PIQ-92-02,

> **QUESTION 3:**
>
> Would grounds for a fair hearing exist if the State agency fails to notify or advise adoptive parents of the availability of adoption assistance for a child with special needs?
>
> **RESPONSE:**
>
> Yes. The very purpose of the title IV-E adoption assistance program is to encourage the adoption of hard-to-place children. State notification to potential adoptive parents about its existence is an intrinsic part of the program and the incentive for adoption that was intended by Congress. Thus, notifying potential adoptive parents is the State agency's responsibility in its administration of the title IV-E adoption assistance program. Accordingly, the State agency's failure to notify the parents may be considered an "extenuating circumstance" which justifies a fair hearing.

grant of medical assistance.[7] Therefore, we find that DHHR's failure to inform the appellees of the availability of assistance, both at the time they were granted care, custody, and control of Jamison and at the time they adopted Jamison, constitutes extenuating circumstances under the federal policy statement above, and that these extenuating circumstances permitted the appellees to reopen this matter and to receive medical assistance.

III.

CONCLUSION

In sum, we find that Jamison is eligible for medical assistance under W.Va. Code § 49-2-17. The facts show that Jamison was a dependent of DHHR prior to the time the appellees were granted full legal care, custody, and control of Jamison and prior to the time the appellees adopted him. Also, Jamison meets the definition of a special needs child by virtue of his mental and/or emotional disabilities. In addition, DHHR had a duty to inform the appellees about the availability of assistance under W.Va. Code § 49-2-17 because DHHR had legal custody of Jamison for a period of ten days and thereafter continued to be aware of his and the appellees' circumstances. Finally, the failure of DHHR to inform the appellees of availability of medical assistance for Jamison constituted

[7]We note that this policy statement was withdrawn by the Department of Health and Human Services on January 23, 2001. However, it was in effect at all times relevant to the issue in this case, specifically when the appellees were granted care, custody, and control of Jamison and when they petitioned to adopt Jamison.

extenuating circumstances for the court below to subsequently revisit the issue and to require medical assistance to Jamison. For these reasons, we conclude that the circuit court committed no legal error in ordering DHHR to enter into an adoption assistance agreement for medical assistance with the appellees. Therefore, the circuit court's December 5, 2005, order is affirmed.

Affirmed.

219 W. Va. 485, 637 S.E.2d 583

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33009

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: JASON S. AND JASMINE B.

Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Civil Action Nos. 99-D-253-4 and 01-D-164-4

REVERSED and REMANDED

Submitted: September 13, 2006
Filed: October 5, 2006

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Joseph B.
Clarksburg, West Virginia
Pro Se

Gale E. Carroll
Clarksburg, West Virginia
Guardian Ad Litem for the Infant Children,
Jason S. and Jasmine B.

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.' Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004)." Syllabus point 1, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005).

2. "Prior to ordering supervised visitation . . . if there is an allegation involving whether one of the parents sexually abused the child involved, a family law . . . [judge] or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law . . . [judge] or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law . . . [judge] or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child." Syllabus point 2, in part, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992).

3. "In visitation as well as custody matters, we have traditionally held

paramount the best interests of the child." Syllabus point 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

4. "Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true." Syllabus point 3, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Per Curiam:

Peggy S.[1] and Misty B. (hereinafter "Peggy" and "Misty"), as mothers of infant children, Jason S. and Jasmine B. (hereinafter "Jason" and "Jasmine"), appeal from an order entered July 20, 2005, by the Circuit Court of Harrison County. By that order, the circuit court affirmed the May 16, 2005, order of the Family Court of Harrison County. In its order, the family court found that there was no credible evidence that the father, Joseph B. (hereinafter "Joseph"), sexually abused the children, and further found no justification to order supervised visitation. On appeal to this Court, Peggy and Misty argue that the family court abused its discretion and applied an incorrect legal standard in arriving at its decisions, and that the circuit court was incorrect in affirming the family court's errors. Peggy and Misty request that Joseph be allowed only supervised visitation. Based upon the parties' written filings,[2] the record designated for our consideration, and the pertinent authorities, we find that Joseph should have only supervised visitation. Accordingly, we reverse the underlying decisions of the circuit court that affirmed the rulings of the family court and

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[2]This case proceeded on the written pleadings and was not orally argued before this Court. The appellant mothers, Peggy and Misty, through their joint counsel, filed a brief setting forth their arguments. The guardian ad litem for the children filed a letter summarizing the pertinent recommendations and agreeing with the positions set forth in the appellants' brief. The father, Joseph, filed a letter in response to the mothers' petition for appeal wherein he denied any inappropriate actions and asked that he be allowed unsupervised visitation with his children.

remand for implementation of a plan for supervised visitation.

I.

FACTUAL AND PROCEDURAL HISTORY

This case involves allegations of sexual abuse by Joseph, who is the father and non-custodial parent of Jason and Jasmine. Jason was born January 24, 1997, to Peggy and Joseph, and Jasmine was born May 20, 1999, to Misty and Joseph. The two children live in separate households. In separate suits, the cases were first instituted to establish paternity and set child support. Joseph was deemed to be the father of both children and was awarded visitation rights and ordered to pay child support.

In May and June of 2004, both mothers moved for modification of visitation after the children disclosed sexual abuse. Because of the similarity of the allegations and because both cases involved Joseph as the alleged abuser, the cases were consolidated for purposes of court hearings on the alleged sexual abuse. The family court suspended Joseph's contact rights with the children and approved only supervised visitation to be monitored by the Youth Advocate Program pending the outcome of the hearings. Gale Carroll was appointed as the guardian ad litem for both children.

Evidentiary hearings were held on November 16, 2004, and on February 17, 2005, and witnesses testified regarding the allegations of sexual abuse. The testimony of the

relevant witnesses is summarized as follows:

A. Testimony of Relevant Witnesses

1. Kerry Jones. Kerry Jones is a social worker and the director of Children's Services for West Virginia University Pediatrics. Peggy took Jason to be seen by Mr. Jones on May 7, 2004, after Jason told his mother that his father, Joseph, put his penis in Jason's mouth and rectum. Jason stated that Joseph instructed him not to tell anyone or he would not be allowed to see his mother anymore. Kerry Jones' report contained information supplied by Peggy that Joseph had been sexually abused as a teenager and that he had been convicted of burning a house.[3]

Jason's physical examination was normal, but he reported to Mr. Jones that Joseph was mean and had squeezed his wrist. Jason named his body parts and indicated that his father had hurt his "butt." Mr. Jones then drew a picture of Joseph without a penis, and Jason finished the drawing by including a line where a penis would be located. Jason then indicated the penis and stated that his father put it in his "butt." Jason continued that this action happened a lot. Further, Jason said that he had seen his father do this to Jasmine in her "butt" and in her "front."

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[3]Though not directly relevant to the instant case, the record reveals that the father, Joseph, is a convicted arsonist who had a penchant for setting things on fire from a young age. He has also been categorized as nonpolygraphable because he passed a polygraph in an arson case in which he later confessed and was convicted.

Kerry Jones testified that he noticed that Jason's language skills were atypically low, but that he was able to understand Jason. He further stated that Jason did not seem rehearsed and that if he was coached, it was either an extraordinary amount of coaching or the coaching was extraordinary. Mr. Jones did not make conclusions as to whether the abuse occurred, but stated that he does believe that Jason is credible. Mr. Jones based this conclusion on his many years experience with this type of situation, as well as the way Jason spoke to him, the way he told his story, and the details he added. Jasmine would not talk to Mr. Jones; however, based on Jason's testimony, a report was forwarded to the West Virginia Department of Health and Human Resources (hereinafter "DHHR") regarding both children.

2. Georgia Daniel. Ms. Daniel is a certified nurse practitioner and a registered nurse who had an established relationship with Jason. Peggy called Ms. Daniel and advised that she feared Joseph was sexually abusing Jason; thus, an appointment was scheduled for April 2, 2004. The physical examination was normal, but Jason told Ms. Daniel that "daddy put his pee-bug in his mouth." Further, Jason stated that his father put his "pee-bug" in his rectum and that it hurt. Ms. Daniel's examination and interview of Jason took place with the mother present; however, Ms. Daniel stated that there was no prompting from Peggy. Ms. Daniel indicated that she had limited experience with sexual abuse cases, but that she contacted the police and a psychologist. Jason was referred to Amy Wilson Strange, a psychologist, who found that Jason disclosed inappropriate sexual actions by his father. Ms. Strange found Jason to be a credible reporter.

3. Tammy Hamner. Tammy Hamner is a psychologist who was contacted to provide therapy to both Jason and Jasmine. Ms. Hamner testified that, while she did not form an opinion as to whether the alleged abuse took place, she does believe the children have sexual knowledge that is inappropriate, especially given their ages. She further explained that her role as therapist was to provide counseling to the children, and did not require her to determine the veracity of the statements. While meeting with Ms. Hamner, Jason reported a "ding-dong" in his "mouth and butt." Further, Jasmine indicated touches to her vaginal area and buttocks, as well as an indication of a tongue being below her belly button in the same vicinity. The first time this was reported, Ms. Hamner felt that it might possibly be a situation of Jasmine enacting being wiped by her father, but the second report of the same action, along with Jasmine's mimicking of the tongue movements was inappropriate.

Ms. Hamner indicated that the children's functional level is delayed approximately two years, and that their speech is difficult to discern. Because of the language difficulties, Ms. Hamner felt that the children might not be credible in the case where their delayed speech may cause someone to have to interpret what they were saying. However, Ms Hamner testified that the children possessed age-inappropriate sexual knowledge that led her to believe something improper must have happened. Ms. Hamner also responded to the fact that Joseph, the father, had experienced both sexual abuse and

physical abuse in his life. She commented that such an experience makes it statistically more likely that Joseph will also be an abuser. Ms. Hamner also expressed that she had instructed Joseph on activities that he should refrain from, such as bathing or wiping the children. She stated that these recommendations were to protect Joseph from any further allegations, but he failed to follow her suggestions. To the family court, Ms. Hamner recommended supervised visitation until the children are older and more articulate.

4. Gale E. Carroll, guardian ad litem. The guardian ad litem for the children filed a report recommending that only supervised visitation be allowed between Joseph and his children. The guardian ad litem investigated and found that the children were credible. This determination was based on Jason's words and actions and on Jasmine's sexual acting as she was too young to communicate effectively otherwise. Reliance on the reports and testimony of all of the witnesses reinforced the guardian ad litem's conclusion.

B. Underlying Findings

After hearing the testimony, the family court noted that the children were difficult to understand verbally and, for that reason, were difficult to find credible. Moreover, the court's order recognized that it was apparent that both children have a strong desire to please their mothers, and that any interviews of the children in the vicinity of their mothers were possibly tainted. The family court also noted that all adult parties involved

were lacking in certain intellectual and analytical functioning abilities. Significantly, because of the animosity between Joseph and the mothers of the children, the family court found it likely that a significant misunderstanding or intentional deception might play a part in the sexual abuse allegations. The family court concluded that the children's emotional and physical well-being were not endangered and that immediate restoration of unsupervised visitation was appropriate.

> In its order, the family court found that
>
> > each of the subject children has been sexually abused *at least due to age-inappropriate exposure to sexual information*. However, the Court also finds that . . . [the mothers] failed to establish, by credible evidence, clear and convincing evidence, a preponderance of evidence, or any other applicable standard that . . . [Joseph] in any way is responsible for this abuse or that he in any way has abused their child[ren].

(Emphasis in original). The family court went on to conclude that

> > [e]ven if one is to acknowledge that the allegations may have merit - as the Court must - if the likelihood of significant misunderstanding and/or intentional deception is at least just as great, as it clearly is herein, the petition for modification seeking elimination or in the alternative supervision of . . . [Joseph's] visitation must fail.

(Footnote omitted). The family court ordered Schedule A visitation to commence after the summer break ended.

All parties appealed the family court's ruling to the circuit court. The circuit

court stated that

> [w]hile this Court would not have restored . . . [Joseph] to unsupervised Schedule A Visitation, given the nature of the allegations and the opposing recommendations, this Court is required to give "substantial deference" to the Family Court Judge Crislip's factual findings. Even though this Court would be inclined to make different, contrary inferences and findings, this Court cannot substitute its own findings merely because it disagrees with Judge Crislip's findings.

Accordingly, the circuit court refused the petitions for appeal and affirmed the family court's order. Subsequently, the mothers of the subject children appealed to this Court asking for a reversal of the underlying decisions and requesting a finding by this Court that Joseph is entitled to only supervised visitation.

II.

STANDARD OF REVIEW

The standard of review with which we approach this matter has been explained as follows:

> "In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

Syl. pt 1, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005). Mindful of these standards, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, the appellant mothers assign error to the circuit court's affirmation of the family court's decisions. Specifically, Peggy and Misty contend that the family court was clearly erroneous in its interpretation of the facts and that it applied the incorrect standard of law when it determined that the father had not sexually abused the children. Thus, the appellants maintain that it was not in the best interests of the children to allow the father unsupervised visitation. The children's guardian ad litem agreed with the appellant mothers' positions and recommended only supervised visitation be allowed between Joseph and his children. Conversely, Joseph submitted a letter claiming that the sexual abuse allegations were false and that the mothers contrived the story to get back at him. Joseph avers that he is entitled to unsupervised visitation with his children.

To determine the appropriateness of supervised or unsupervised visitation, the crux of our analysis must necessarily focus on the sexual abuse allegations. West Virginia jurisprudence has explained as follows:

> Prior to ordering supervised visitation . . . if there is an allegation involving whether one of the parents sexually abused the child involved, a family law . . . [judge] or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law . . . [judge] or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law . . . [judge] or circuit court

> should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child.

Syl. pt. 2, in part, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992). Thus, in the present case, there must be credible evidence that sexual abuse occurred prior to an order of supervised visitation.

As has been previously explained, "because termination of parental rights is *not* involved, but only supervised visitation, we believe that *credible evidence* of such sexual abuse allegations is all that is necessary for a family law . . . [judge] or circuit court to order supervised visitation." *Id.*, 190 W. Va. at 348, 438 S.E.2d at 528. In reaching this result, the Court in *Mary D. v. Watt* specifically rejected more stringent standards such as clear and convincing and a preponderance of the evidence when the case is a civil matter before a family law judge or circuit court. *Cf. Sharon B.W. v. George B.W.*, 203 W. Va. 300, 507 S.E.2d 401 (1998) (per curiam) (holding that a preponderance of the evidence standard, as opposed to credible evidence, applies when a family court or circuit court is determining whether a third party sexually abused a child, such as in the case of a mother's boyfriend).

In its order, the family court found that

> each of the subject children has been sexually abused *at least due to age-inappropriate exposure to sexual information*. However, the Court also finds that . . . [the mothers] failed to establish, by credible evidence, clear and convincing evidence,

> a preponderance of evidence, or any other applicable standard that . . . [Joseph] in any way is responsible for this abuse or that he in any way has abused their child[ren].

(Emphasis in original). The family court appears to have articulated a standard of evidence that encompasses all possible standards of proof. Because the present case deals with a non-custodial parent, to the extent that the family court applied any standard other than credible evidence, it abused its discretion. Application of the appropriate standard of credible evidence results in a reversal of the family court's decision.

The family court found that the children were sexually abused; however, the court was not convinced that the evidence was credible that the father was the abuser. In this regard, the family court overlooked and disregarded the only evidence in the record, which identified the father as the abuser. Interestingly, the family court found the evidence credible that the children were abused, but not that they could properly identify the abuser. The family court based its determination that the children were not credible on perceived communication difficulties caused by the language impediments of the children. We disagree with this ruling by the family court.

Significantly, all of the evidence in the record, including that from the social worker, the medical doctors, the psychologist, and the two guardians ad litem, was consistent. The children reported that their father was the abuser, and this testimony never wavered. Moreover, all persons involved, even if not involved for the specific purpose of

finding sexual abuse, agreed that the children were credible reporters as long as they could be properly understood. While Ms. Hamner testified that the children were not credible in the case where their language difficulties may be misinterpreted, such is not the case here. In examinations where the children were difficult to understand, their verbal recitation was reinforced by their own actions in pointing to their body parts and in their drawings of stick figures. Moreover, both children referred to the abuser as their father, or "Joseph" or "Joey." Thus, there is no evidence that the children's identity of the perpetrator is not credible. While a communication gap could be significant, it is not in a case such as this where the examiners stated that they understood the children and where the children's words were corroborated by acting, drawing, and pointing to their own body parts in describing what occurred. None of the reporters questioned the content of what the children were telling them, and in light of the fact that the identity of the abuser remained consistent throughout the children's stories, the family court was clearly wrong in finding there was no credible evidence that the father was the abuser.

In the family court order, after finding the children were abused, but not accepting their identification of the abuser, the family court went on to explain

> [e]ven if one is to acknowledge that the allegations may have merit - as the Court must - if the likelihood of significant misunderstanding and/or intentional deception is at least just as great, as it clearly is herein, the petition for modification seeking elimination or in the alternative supervision of . . . [Joseph's] visitation must fail.

The family court seems to say that if it is possible that the allegations have merit, but also possible that there has been a misunderstanding, that Joseph's rights prevail and supervised visitation will not be ordered. We disagree with the family court's interpretation of the current posture of West Virginia law and find that the misconstruction constitutes an abuse of discretion.

The facts of this case are similar to the case of *Meadows v. Meadows*, 202 W. Va. 327, 504 S.E.2d 154 (1998) (per curiam), wherein this Court reversed and remanded the case for implementation of supervised visitation. This Court held that the underlying court, in *Meadows*, improperly disregarded testimony of the child and of the professionals. While the lower court was fearful that animosity between the parents led to the creation of untrue stories, this Court felt that the evidence reported by the child and the experts could not be ignored. The underlying courts in the present case disregarded unrefuted testimony that Jason and Jasmine reported being abused and exhibited behavior consistent with such experiences. Additionally, the underlying courts disregarded the expert recommendations that the children should be subjected only to supervised visitation with Joseph.

Significantly, our case law is replete with the admonition that the best interests of the child must be protected. The Legislature succinctly stated:

> The Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the court's primary concern in allocating custodial and

> decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced.

W. Va. Code § 48-9-101(b) (2001) (Repl. Vol. 2004). In furtherance of this principle, this Court has previously instructed that "[i]n visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996). In *Keith Allen A. v. Jennifer J.A.*, 201 W. Va. 736, 500 S.E.2d 552 (1997) (per curiam), we reiterated:

> In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the paramount and controlling factor must be the child's welfare. "[A]ll parental rights in child custody matters," we have stressed, "are subordinate to the interests of the innocent child." *David M. [v. Margaret M.]*, [182 W. Va. 57, 60,] 385 S.E.2d [912] at 916 [(1989)].

Id., 201 W. Va. at 744, 500 S.E.2d at 560 (citing *In re Carlita B.*, 185 W. Va. 613, 629, 408 S.E.2d 365, 381 (1991)). More pointedly,

> [b]ecause of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the

child if the allegations are true.

Syl. pt. 3, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Applying the correct legal principles, it is clear that the family court failed to follow established law that the best interests of the children are paramount. If the allegations of sexual abuse are true, the risk of harm of allowing unsupervised visitation is much greater than any harm caused by limiting the father's visitation rights.[4] This point is compounded by the fact that the father may not always be limited to supervised visitation.[5]

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[4]Our concern for protecting the best interests of the children is enhanced by various references throughout the record concerning Joseph. Significantly, and in addition to the arson predilection, he has serious mental problems. He suffers from major depression and has committed himself for evaluation on more than one occasion. He has also threatened bodily harm on himself, his children, and their mothers, and wrote a letter to the family court judge early in the paternity case wherein he stated that "because of my illness of my nerves, I'am [sic] afraid of hurting my son and his mother. The best thing is for me is [sic] to stay away." The record is clear that Joseph also suffers from severe anger control issues. The first guardian ad litem, who was involved prior to any sexual abuse allegations, recommended supervised visitation based on Joseph's failure to manage his anger. Thus, there were concerns with Joseph's ability to safely watch the children prior to any allegations of sexual abuse.

[5]As this Court has recognized in the past,

> [i]f the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "*credible evidence* " (*Mary D. v. Watt*, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the

(continued...)

IV.

CONCLUSION

Accordingly, this Court concludes that the family court erred in finding that there was no credible evidence that the father sexually abused the children, and further erred when placing the visitation rights of the father above the best interests of the children. For the foregoing reasons, we reverse the July 20, 2005, order of the Circuit Court of Harrison County that affirmed the May 16, 2005, order of the Family Court of Harrison County. We find that the protection of the children, Jason and Jasmine, is paramount and that the father, Joseph, is entitled only to supervised visitation at this time and therefore issue the mandate of this Court contemporaneously herewith. The case is further remanded for entry of an order setting forth the appropriate parameters of supervised visitation.

Reversed and Remanded.

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[5](...continued)
ultimate goal of providing unsupervised visitation. The best interests of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

Syl. pt. 4, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

207 W. Va. 154, 529 S.E.2d 865

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
April 24, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27061

RELEASED
April 24, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. JEANETTE H.,
Petitioner,

V.

HONORABLE DAVID M. PANCAKE,
JUDGE OF THE CIRCUIT COURT OF CABELL COUNTY,
AND
THE WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
Respondents.

PETITION FOR WRIT OF PROHIBITION

WRIT DISMISSED

Submitted: February 22, 2000
Filed: April 24, 2000

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**West Virginia Department of Health
and Human Resources**

JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property are not properly cognizable by a court.' Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908)." Syllabus point 1, *State ex rel. Durkin v. Neely*, 166 W. Va. 553, 276 S.E.2d 311 (1981).

2. "'A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.' Syllabus point 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984)." Syllabus point 2, *State ex rel. Davis v. Vieweg*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26845 January 28, 2000).

3. "Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided." Syllabus point 1, *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

4. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1." Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

5. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

6. "'In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody [of] his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses

of the West Virginia and United States Constitutions.' Syllabus Point 1, *In Re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973)." Syllabus point 1, *In Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988).

7. "'West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his [or her] child, without notice and the opportunity for a meaningful hearing.' Syl. pt. 2, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973)." Syllabus point 1, *West Virginia Department of Welfare ex rel. Eyster v. Keesee*, 171 W. Va. 1, 297 S.E.2d 200 (1982).

8. "The specific procedural protections accorded to a due process liberty or property interest generally require[] consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any[,] of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Syllabus point 5, *Major v. DeFrench*, 169 W. Va. 241, 286 S.E.2d 688 (1982).

9. "Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental

principles in regard to procedural due process embodied in Article III, Section 10 of the *West Virginia Constitution*, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation." Syllabus point 2, *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977).

10. Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.

11. In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience

of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

Davis, Justice:

In this original proceeding in prohibition, petitioner, Jeanette H.,[1] a parent who was incarcerated by the State of West Virginia, sought to prohibit the Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, from refusing to order her transportation to a dispositional hearing where her parental rights to her five minor children might be terminated. During the pendency of the proceedings in this Court, however, Jeanette H. was granted parole. Consequently, the issue raised is technically moot and the writ, therefore, is dismissed. Nevertheless, because the important question raised in the instant petition satisfies the exception to the mootness doctrine, we address the issue on its merits. In this regard, we conclude that the decision of whether to transport an incarcerated parent to a dispositional hearing is within the circuit court's discretion, and we set forth the factors to be considered by that court in exercising its discretion.

I.

FACTUAL AND PROCEDURAL HISTORY

The following facts are set forth in the Petitioner's brief, and are not disputed by the respondents. Throughout the proceedings that lead to the filing of the instant petition, Jeanette H., the petitioner, was in the custody of the West Virginia Department of Corrections. Following Jeanette H.'s arrest, for violating conditions imposed upon an earlier parole, the West Virginia Department of Health and

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[1]"We follow our past practice in domestic and juvenile cases involving sensitive facts and do not use the last names of the parties. *See, e.g., State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, [254 n.1,] 470 S.E.2d 205[, 208 n.1] (1996)." *Elmer Jimmy S. v. Kenneth B.*, 199 W. Va. 263, 264 n.1, 483 S.E.2d 846, 847 n.1 (1997).

Human Resources [hereinafter "DHHR"] filed a petition to gain immediate custody of Jeanette H.'s five minor children. In response to this petition, Judge Pancake found probable cause of abuse and neglect and granted custody of the children to the DHHR. On August 31, 1999, Jeanette H. filed a motion requesting a post-adjudicatory improvement period. Judge Pancake granted the motion on September 8, 1999. The improvement period was to commence upon Jeanette H.'s arrival at a drug rehabilitation treatment center.[2] Thereafter, on October 18, 1999,[3] the DHHR initiated proceedings to terminate Jeanette H.'s parental rights.[4] A termination hearing was then docketed for January 12, 2000.

After receiving notice of the termination proceedings, Jeanette H. presented Judge Pancake with a proposed order directing her transportation from the McDowell County Jail so that she might attend the proceedings. Judge Pancake declined to enter the order and responded by letter to Jeanette H.'s counsel stating "I know of no constitutional directive for your client to be present, and it is not our custom to transport persons under these circumstances." Jeanette H. then filed a motion for a writ of prohibition in this Court seeking to prohibit the circuit court from refusing to enter her proposed order. We granted a rule to show cause returnable on February 22, 2000. Subsequent thereto, on April 10, 2000, Jeanette H. filed a motion to dismiss stating that she had been released on parol and, as a consequence of her release, the issue raised in her petition for writ of prohibition had been rendered moot.

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[2]At the time her petition for writ of prohibition was filed, Jeanette H. was engaged in a six-month residential drug-treatment program.

[3]Jeanette H.'s brief does not indicate the duration of her improvement period.

[4]The DHHR also sought termination of the parental rights of the minor children's fathers.

II.

MOOTNESS

Due to Jeanette H.'s release from custody, her incarceration is no longer an impediment to her attendance at the hearing to take up the issue of her parental rights. For this reason, the issue herein raised is technically moot. Generally, moot questions are not proper for consideration by this Court. "'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property are not properly cognizable by a court.' Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908)." Syl. pt. 1, *State ex rel. Durkin v. Neely*, 166 W. Va. 553, 276 S.E.2d 311 (1981). As with most general rules, however, there is an exception to this rule:

> "A case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review." Syllabus point 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984).

Syl. pt. 2, *State ex rel. Davis v. Vieweg*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26845 January 28, 2000). Elaborating on this exception, we have explained:

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

Syl. pt. 1, *Israel by Israel v. West Virginia Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989). Applying these criteria to the circumstances presently before us, we conclude that the issue raised is proper for our consideration. Therefore, after reviewing the appropriate standard for our consideration of Jeanette H.'s petition, we will address the issue on its merits.

III.

STANDARD FOR WRIT OF PROHIBITION

We have frequently expressed the limits to our exercise of our original jurisdiction in prohibition by explaining that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

Jeanette H. fails to explicitly state why prohibition is appropriate in this instance. Having observed that her arguments in support of her petition raise no jurisdictional issues, however, we conclude that she claims the lower court exceeded its legitimate powers. We have previously defined the factors to be considered by this Court in determining whether prohibition should issue where it is asserted that a court has exceeded its legitimate powers:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired

> relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Finally, we have repeatedly declared that "'[m]andamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . As extraordinary remedies, they are reserved for really extraordinary causes.'" *State ex rel. Lawson v. Wilkes*, 202 W. Va. 34, 38, 501 S.E.2d 470, 474 (1998) (quoting *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996)). *See also State ex rel. United States Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995); *State ex rel. Doe v. Troisi*, 194 W. Va. 28, 31, 459 S.E.2d 139, 142 (1995). Because Jeanette H. has raised a new and important issue of law of first impression in this jurisdiction, we find it may properly be considered in the context of a writ of prohibition.

IV.

DISCUSSION

Jeanette H. contends that the circuit court erred by declining to enter her proposed order authorizing her transportation to the Cabell County Courthouse to attend a dispositional hearing addressing

the possible termination of her parental rights.[5] She argues that a parent is entitled to certain due process protections flowing from the fundamental interests associated with the parent/child relationship. The specific issue raised by Jeanette H., whether an incarcerated parent has a due process right to be present at a hearing on the termination of his or her parental rights, is a question of first impression for this Court.[6]

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[5]We note that the circuit court's ruling on Jeanette H.'s request for transportation was rendered in a letter rather than a formal order. While the remedy of prohibition is typically invoked to prohibit the enforcement of an order, we find that under the particular circumstances of this unique case, the issue raised may nevertheless be addressed.

[6]We are troubled by the fact that, although this is an issue of first impression, neither the West Virginia Department of Health and Human Resources nor the guardian *ad litem* for Jeanette H.'s five children saw fit to file a response on the merits. We recognize that the guardian *ad litem* for these children has a reputation for diligently and competently discharging her guardianship duties. However, due to her failure to respond in this instance, we feel compelled to reiterate our prior declarations of the duty owed to minors by their guardians *ad litem* when a child abuse and neglect case is brought to this Court. The importance of appellate representation by guardians *ad litem* was summarized in *State v. Michael M.*, 202 W. Va. 350, 355 n.11, 504 S.E.2d 177, 182 n.11 (1998), wherein we observed:

> In Syllabus Point 5 of *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991), we held that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." In *In re Christina L.*, 194 W. Va. 446, 454, n. 7, 460 S.E.2d 692, 700, n. 7 (1995), we admonished guardians *ad litem* that "it is their responsibility to represent their clients *in every stage* of the abuse and/or neglect proceedings. This duty includes appearing before this Court to represent the child during oral arguments." The guardian *ad litem* is also responsible for filing an appellate brief on behalf of his or her child ward. . . . We again underscore that guardians *ad litem* have a duty *to fully represent the interests of their child wards at all stages of the abuse and/or neglect proceedings*, both in the circuit court and on appeal.

(Emphasis added). In addition to filing briefs to represent their client's interests to this Court, the appearance of guardians *ad litem* during oral argument provides an important resource from which this Court may obtain valuable information. In *In re Katie S.*, 198 W. Va. 79, 91 n.16, 479 S.E.2d 589, 601 n.16 (1996), we commended a guardian *ad litem* for his appearance at oral argument and further

(continued...)

Although the specific issue herein raised is novel in this jurisdiction, it is, nevertheless, well established that a parent has a constitutionally protected liberty interest in retaining custody of his or her child and is, therefore, entitled to certain due process protections when the State seeks to terminate the parent/child

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[6](...continued)
described the guardian's duty of appellate representation:

> We note with approval that the guardian ad litem for the children appeared before this Court for oral argument and was able to answer several questions concerning the interests of the children. The record indicates that the guardian ad litem has been diligent in protecting his clients' interests below. We continue to emphasize that guardians ad litem have *a duty* to represent fully . . . the child's appellate rights, if an appeal is necessary. In *Matter of Scottie D.*, 185 W. Va. 191, 198, 406 S.E.2d 214, 221 (1991), we stated:
>
> > It is well established that "[a]fter judgment adverse to his ward, the guardian ad litem has the right to appeal and the duty to do so if it reasonably appears to be to the advantage of the minor[.]" *Robinson v. Gatch*, 85 Ohio App. 484, 487, 87 N.E.2d 904, 906 (1949). This is based upon the principle that a guardian *ad litem* has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian *ad litem* were in a normal lawyer-client relationship.
>
> Part of the duty of appellate representation is the filing of appellate briefs, *even when not invited to do so*. . . .

(Emphasis added). Although the instant proceeding is not before this Court on an appeal, and the ruling sought to be prohibited is not *necessarily* a judgment adverse to children herein involved, it nevertheless warrants participation by the guardian *ad litem*. The outcome of this action certainly affects the children's interests. Furthermore, our decision on this novel issue would have been aided by a response framed from the perspective of the children's interests. Therefore, we remind all guardians *ad litem* that their duty to represent their clients extends to *all stages* of abuse and neglect proceedings. *See Michael M.*, 202 W. Va. at 355 n.11, 504 S.E.2d at 182 n.11; *In re Christina L.*, 194 W. Va. 446, 454 n.7, 460 S.E.2d 692, 700 n.7 (1995).

relationship:

> "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody [of] his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, *In Re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 1, *In Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988). The Supreme Court of the United States has similarly observed:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982).

Some general due process protections relating to a parent's participation in proceedings involving the welfare of his or her child(ren) have been established by the West Virginia Legislature, which has directed that "[i]n any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child *shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-*

examine witnesses." W. Va. Code § 49-6-2(c) (emphasis added). *See also* W. Va. Code § 49-6-5(a) (1998) (Repl. Vol. 1999) ("The court shall forthwith proceed to disposition giving both the petitioner and respondents *an opportunity to be heard*." (emphasis added)). In addition, this Court has previously held:

> "West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his [or her] child, without notice and *the opportunity for a meaningful hearing*." Syl. pt. 2, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 1, *West Virginia Dep't of Welfare ex rel. Eyster v. Keesee*, 171 W. Va. 1, 297 S.E.2d 200 (1982) (emphasis added).[7] While the foregoing authority clearly establishes that parents are entitled to a meaningful hearing, *i.e.*, the right to testify and to present and cross-examine witnesses, before their parental rights may be terminated, it does not resolve the specific question before us, as we have not heretofore addressed the question of whether an incarcerated parent's right to a meaningful hearing requires the parent's physical presence.[8]

We believe that an incarcerated parent's right to a meaningful hearing is not accompanied

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[7]Though not an issue in the present case, we note that this Court has also recognized a parent's due process right to the assistance of counsel in proceedings which may result in the termination of parental rights. Syl. pt. 7, *In re Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995).

[8]For a discussion of an incarcerated parent's right to be physically present at termination hearings, see Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. Fam. L. 757, 774 (1991-92).

by an automatic or absolute right to be physically present at termination proceedings. *See* Syl. pt. 4, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992) ("Parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights."); *In re Baby K.*, 143 N.H. 201, ___, 722 A.2d 470, 472 (1998) ("[D]ue process does not absolutely require an incarcerated parent's physical presence at a parental rights termination hearing, provided the parent is otherwise afforded procedural due process at the hearing." (citation omitted)). While there is no absolute right to be physically present at a hearing, there is the remaining question of what process is due. As we observed above, the right of a natural parent to the custody of his or her infant child implicates a fundamental liberty interest. We have previously explained that in determining the specific procedures necessary to protect a liberty interest, we should consider three general factors:

> The specific procedural protections accorded to a due process liberty or property interest generally require[] consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any[,] of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Syl. pt. 5, *Major v. DeFrench*, 169 W. Va. 241, 286 S.E.2d 688 (1982). *Accord Matthews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976). We have also recognized that there are certain fundamental principles to be applied when conducting a due process analysis, and due process requirements may need to be tailored to the specific circumstances of the case under consideration:

> Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the *West Virginia Constitution*, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

Syl. pt. 2, *North v. West Virginia Bd. of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977).

Applying *Major* and *North* to the circumstances with which we are presented in this case, we are instructed that the determination of the particular due process protections to which a parent is entitled in connection with a dispositional hearing on the termination of his or her parental rights necessitates the balancing of various important factors. First, in considering the private interests that will be affected by termination proceedings, utmost priority must be given to the best interests of the child(ren) involved. In addition, regard should be had for the parent's substantial interest in retaining legal custody of his or her child(ren). *See, e.g.*, Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.").[9] Next, the risk of erroneously terminating the parent's rights due to his or her absence from the dispositional hearing, and the effectiveness

[9]*See also In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (1993) ("Although the rights of the natural parents to the custody of their child and the interests of the State as *parens patriae* merit significant consideration by this Court, the best interests of the child are paramount.").

of alternate methods for obtaining the parent's participation, should be weighed. Third, the State's various interests, which include, but are not necessarily limited to, the State's significant *parens patriae* interest in protecting the welfare of the children involved,[10] the State's compelling interest in protecting its citizens from the risk that a convicted criminal might escape (especially when the parent has been convicted of a violent crime), and the fiscal and administrative burdens to the State that are associated with allowing an incarcerated parent to attend a dispositional hearing, should be contemplated. Finally, in analyzing these factors, due regard should be given to the fundamental principles set forth in Syllabus point 2 of *North v. West Virginia Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411.

While these considerations present a rather complex analytical framework, we note that other courts have wrestled with this issue and formulated a more manageable list of specific criteria as an aid in performing the appropriate analysis. One such court, the Supreme Court of Nebraska, has held:

> In deciding whether to allow a parent's attendance at a hearing to terminate parental rights, notwithstanding the parent's incarceration or other confinement, a court may consider the delay resulting from prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody or confinement to attend the hearing, the reasonable availability

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[10]*See Jeffrey R.L.*, 190 W. Va. at 32-33, 435 S.E.2d at 170-71 (recognizing "that the State, in its role of *parens patriae*, 'is the ultimate protector of the rights of minors[,]' and 'has a substantial interest in providing for their health, safety, and welfare, and may properly step in and do so when necessary'" (citing *In Interest of Betty J.W.*, 179 W. Va. 605, 608, 371 S.E.2d 326, 329 (1988)).

> of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing.

Syl. pt. 6, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250. Applying these criteria, the court in Nebraska concluded that a lower court had not abused its discretion in disallowing an incarcerated father's physical presence at termination proceedings where the father was provided notice of the hearing and the specific accusations against him, was represented by counsel throughout the proceedings, was provided with transcripts of an initial hearing, participated in a second hearing by phone, was given the opportunity to recall any previously called witnesses for cross examination and had the opportunity to present his own evidence. The court cautioned, however, that "the procedure utilized by the county court surpassed the requirements of procedural due process applicable to [this] case; hence, the procedure used . . . should not be construed as *the* standard to determine procedural due process for one who has a constitutional right to be heard in a proceeding." *In re Interest of L.V.*, 240 Neb. at ___, 482 N.W.2d at 259.

In reaching its holdings, the Nebraska Court relied on a decision by the Supreme Court of North Dakota, in which that court had similarly stated:

> From our review of cases from the various jurisdictions and the principles of law involved, we are compelled to conclude that a convict does not have a constitutional right to personally appear in a civil suit where he has been permitted to appear through counsel and by deposition, if appropriate. Any right to appear personally would have to rest upon convincing reasons and would ultimately be left to the sound discretion of the trial court.

> In making its determination the trial court may take into account the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

In Interest of F.H., 283 N.W.2d 202, 209 (N.D. 1979) (citations omitted). In this case, the court found that a father's due process rights had not been violated as the father was "represented by able counsel . . . . [and] was given the opportunity and did appear by deposition." *Id.*

While these two cases from Nebraska and North Dakota involved parents who were incarcerated outside of the state wherein their parental rights were being adjudicated, as opposed to the instant case where Jeanette H. was an in-state prisoner, the courts did not limit their discussions or holdings to out-of-state prisoners.[11] Because due process is a flexible concept, and factors such as those outlined

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[11]For other cases involving out-of-state incarcerated parents where the courts' analyses do not appear to have been limited to that particular factual condition, see *Pignolet v. State Dep't of Pensions & Sec.*, 489 So. 2d 588, 591 (Ala. Civ. App. 1986) (explaining that "[w]here there is representation by counsel and an opportunity to present testimony through deposition, then due process does not require that an incarcerated parent be allowed to attend the termination hearing"); *In re Heller*, 669 A.2d 25, 32 (Del. 1995) (concurring with the proposition that "'[i]f a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court'" (quoting *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250), and finding no due process violation where mother, who knowingly, intelligently and voluntarily chose to discharge appointed counsel and proceed pro se, participated in proceedings by telephone); *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986) (finding no due process violation where parent was represented at all stages of the proceedings, counsel had the right to cross examine all opposing witnesses, parent testified by deposition

(continued...)

by the Nebraska and North Dakota courts may be applied to determine the particular due process procedures that are required given the circumstances of each individual case, we conclude that the same due process analysis is applicable regardless of where a parent is confined.[12] As one court has aptly

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[11](...continued)
that was taken two weeks after all other evidence had been presented and counsel had the option of re-opening the hearing for further cross-examination or additional testimony); *In re Vasquez*, 199 Mich. App. 44, ___, 501 N.W.2d 231, 235 (1993) (commenting that due process requires the three-part balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976), otherwise "there is never a requirement of producing incarcerated parents at trial even if they are in a nearby jail and the court finds that their physical presence is essential either to assist counsel or to resolve crucial factual disputes"); *In re Welfare of HGB*, 306 N.W.2d 821, 825-26 (Minn. 1981) (observing that "the determination of what process is due involves a balancing of the interests involved in the specific case under consideration," and concluding there was no due process violation where parent was represented by counsel and could have participated through "[d]epositions or interrogations"); *In re Baby K.*, 143 N.H. 201, ___, 722 A.2d 470, 472 (1998) (reasoning that "due process does not absolutely require an incarcerated parent's physical presence at a parental rights termination hearing," but concluding that mother's rights were violated by informal procedures involving telephone connection); *In re Rich*, 604 P.2d 1248 (Okla. 1979) (deciding that parent was not deprived of due process where he was appointed counsel and where his opportunity to participate in proceedings via deposition was not impaired); *State ex rel. Juvenile Dep't v. Stevens*, 100 Or. App. 481, 786 P.2d 1296 (1990) (finding no due process violation where state was required to prove facts by clear and convincing evidence, father was represented by counsel, father testified by telephone following adverse witnesses and responded to adverse evidence, father was able to consult with his counsel by telephone, counsel meaningfully cross-examined adverse witnesses and appellate review was de novo); *In Interest of Darrow*, 32 Wash. App. 803, ___, 649 P.2d 858, 861 (1982) (stating "[i]n those cases where the imprisoned parent's attendance cannot be procured safely and timely, the trial court should assure that the parent is afforded a full and fair opportunity to present evidence or rebut evidence presented against him," and concluding that father's due process rights were not violated by virtue of his absence at termination proceedings where he "was afforded a full opportunity to defend in a fair hearing while represented by counsel"). However, some courts have seemingly limited their analysis to situations where the incarcerated parent is confined in another state. *See In re Juvenile Appeal*, 187 Conn. 431, 446 A.2d 808 (1982) (providing tenuous guidance as to whether decision applied only to out-of-state prisoners); *In Interest of Baby Doe*, 130 Idaho 47, 936 P.2d 690 (1997) (same); *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 126 N.M. 670, 974 P.2d 164 (1999) (limiting decision to out-of-state prisoners).

[12]We recognize that this State's ability to achieve the appearance of a parent who is incarcerated in another state, assuming such appearance is appropriate, will require the consent and (continued...)

explained, "[d]ue process is not a static concept; rather its requirements vary to assure the basic fairness of each particular action according to its circumstances." *In Interest of J.L.D.*, 14 Kan. App. 2d 487, ___, 794 P.2d 319, 321 (1990) (criticizing an earlier decision of the Court of Appeals of Kansas, *In re S.M.*, 12 Kan. App. 2d 255, 738 P.2d 883 (1987), which involved an in-state prisoner and had the effect of "logically lead[ing] one to believe that a parent has an absolute right to be present at a severance hearing without regard to the particular circumstance in the individual case").[13]

Moreover, other jurisdictions have adopted similar rules in cases involving prisoners confined within the state. *See People in Interest of C.G.*, 885 P.2d 355, 357 (Colo. Ct. App. 1994) (rejecting state-incarcerated father's attempt to distinguish his case from one where parent was incarcerated out-of-state, and finding no due process violation where "a respondent has an opportunity to appear through counsel and is given an opportunity to present evidence and cross-examine witnesses through deposition or otherwise"); *In Interest of J.S.*, 470 N.W.2d 48, 52 (Iowa Ct. App. 1991) (concluding, in case involving in-state incarcerated father, "[w]here a parent receives notice of the petition and hearing, is represented by counsel, counsel is present at the termination hearing, and the parent has an opportunity to present testimony by deposition, we cannot say the parent has been deprived of fundamental fairness" (citations omitted)); *In Interest of A.P.*, 692 A.2d 240, 243 (Pa. Super. Ct. 1997) (finding state-

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[12](...continued)
cooperation of that other state.

[13]At least one jurisdiction has statutorily granted an absolute right to appear at termination proceedings to parents who are incarcerated in certain specified facilities within the state, *e.g.*, state prison, county jail, etc. *See* Cal. Penal Code § 2625 (1996) (West's Supp. 2000); *In re Gary U.*, 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982) (discussing Cal. Penal Code § 2625).

incarcerated parent's due process rights were not violated where parent participated "[b]y way of a conference call, . . . was able to hear the testimony presented, testif[ied] in his own behalf, and confer[red] confidentially with his counsel"); *Najar v. Oman*, 624 S.W.2d 385, 387 (Tex. Ct. App. 1981) (holding trial court did not abuse its discretion in denying a bench warrant that would have allowed in-state incarcerated parent to be present at termination proceedings where parent "was represented by counsel," and where "[c]ounsel cross-examined [opposing party's] witnesses and was given the opportunity to present evidence").

Finally, we note that the question of whether an incarcerated parent may appear at a dispositional hearing is within the discretion of the circuit court. *See* Syl. pt. 3, in part, *Craigo v. Marshall*, 175 W. Va. 72, 331 S.E.2d 510 (1985) ("Whether a prisoner may appear at trial is a matter committed to the sound discretion of the trial court."). *See also In re Heller*, 669 A.2d 25, 32 (Del. 1995) ("'If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court.'" (citation omitted)); Syl. pt. 5, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 ("If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion."); *In Interest of F.H.*, 283 N.W.2d 202, 209 (N.D. 1979) ("Any right to appear personally would have to rest upon convincing reasons and would ultimately be left to the sound discretion of the trial court."); *Najar v.*

Oman, 624 S.W.2d 385 (holding trial court did not abuse its discretion in denying a bench warrant that would have allowed in-state incarcerated parent to be present at termination proceedings).

After thoughtfully considering the above-discussed authority, we first hold that whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court. Next, we hold that in exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

In the case at bar, Jeanette H. has filed a motion to dismiss stating that she has been

released on parole. Consequently, a writ of prohibition to prevent the enforcement of Judge Pancake's ruling is no longer necessary, and the writ of prohibition is dismissed.

V.

CONCLUSION

For the reasons explained in the body of this opinion, the writ of prohibition is dismissed.

Writ Dismissed.

190 W. Va. 24, 435 S.E.2d 162

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1993 Term

No. 21535

IN RE: JEFFREY R. L., JUVENILE

Appeal from the Circuit Court of Mineral County
Honorable C. Reeves Taylor, Judge
Civil Action No. 91-J-58
REVERSED

Submitted: April 7, 1993
Filed: June 14, 1993

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JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989).

2. "W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988).

3. Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

4. "In a proceeding to terminate parental rights pursuant to W. Va. Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W. Va. Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary." Syl. pt. 3, In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

5. Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to

act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians Ad Litem in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the West Virginia Code, the West Virginia Rules for Trial Courts of Record, and the West Virginia Rules of Professional Conduct, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed.

McHugh, Justice:

Jane Moran, who was appointed as guardian ad litem to represent Jeffrey R.L. in this appeal,See footnote 1 seeks review of an order of the Circuit Court of Mineral County which transferred physical custody of Jeffrey R.L. to his mother, Gail L., and directed the West Virginia Department of Health and Human Resources (hereinafter "DHHR") to monitor the situation with home visits. The guardian ad litem asserts that: (1) the circuit court erred in failing to terminate the parental rights of Jeffrey R.L.'s parents; (2) the circuit court abused its discretion in returning Jeffrey R.L. to his mother's custody without substantial evidence to support the ruling; and (3) Jeffrey R.L.'s best interests were not adequately represented before the circuit court. The Facilities Review Panel, commonly known as the Juvenile Justice Committee, has filed an amicus curiae brief urging this Court to adopt guidelines for attorneys who represent children in abuse and neglect cases to follow in order to ensure effective representation of their clients in those proceedings.

I

At the outset, we point out that it is necessary to set forth the facts before us in detail because of the nature of this proceeding and the decision we make. Gail L. gave birth to Jeffrey R.L. on May 23, 1991. Jeffrey's birth was a normal vaginal delivery; however, Jeffrey suffers from hemangioma, an overgrowth of blood vessels on the back of his neck. He has been receiving treatment from Bilal Itani, M.D. for his hemangioma and recurring vomiting since his birth. X-rays of Jeffrey were taken for his medical problems on May 24, 1991 and July 26, 1991. These x-rays revealed no trauma or fractures.See footnote 2

Gail L. arranged for Jeffrey R.L. to be examined again by Dr. Itani on August 30, 1991, because he was not moving his right arm in the same way he was moving his left arm. The x-rays taken by Dr. Itani revealed fractures to his skull, clavicle, ribs, arms and legs. Upon reviewing these x-rays, Dr. Itani arranged to have Jeffrey R.L. transferred to West Virginia University Hospital for further evaluation and treatment.

Although Gail L. and her grandparents had asserted that the injuries were the result of a genetic bone disease, the staff at West Virginia University Hospital confirmed that Jeffrey R.L. had sustained fifteen fractures to his skull, clavicle, ribs, arms and legs, which were at various stages of healing, and that these fractures were not disease-

related. The physicians instead diagnosed that Jeffrey was suffering from battered child syndrome.

Upon receiving the diagnosis from West Virginia University Hospital, Grant Hospital, where Dr. Itani was employed, filed a report of child abuse with the Child Protective Services of the DHHR. On September 5, 1991, the DHHR worker assigned to the case, Barbara Mosier, and State Trooper Scott Goodnight went to Gail L.'s home to investigate the report of child abuse. Ms. Mosier found that Gail L., her husband Jeffrey L.,See footnote 3her grandmother and her grandfather were all caretakers of Jeffrey R.L. Gail L., who denied knowing the cause of Jeffrey's injuries, suggested that perhaps he sustained these injuries while rolling around in his crib. Upon examining the crib, however, Ms. Mosier observed that the inside of the crib was well-padded.

By order dated September 9, 1991, the DHHR was granted emergency custody of Jeffrey R.L. The DHHR then filed a petition in the circuit court seeking to have the parental rights to Jeffrey R.L. terminated, and requesting that it be granted guardianship of him. A preliminary hearing on the petition was held before the circuit court on September 19, 1991. The DHHR presented two witnesses at the hearing, Ms. Mosier and William Thomas Corder, M.D., Jeffrey R.L.'s attending pediatric physician upon discharge from West Virginia University Hospital. The guardian ad litem before the trial court presented no testimony.

Dr. Corder testified that Jeffrey R.L. was examined by a pediatric neurologist, a genetics expert, an orthopedist and an ophthalmologist. Dr. Corder testified that all of the experts consulted, with the exception of the ophthalmologist who only ruled out osteogenesis imperfecta,See footnote 4 concluded that Jeffrey R.L. was suffering from battered child syndrome.See footnote 5 Dr. Corder testified that it would be impossible for Jeffrey R.L. to have sustained all of his fractures from rolling around in his crib, that great force would be necessary to cause fractures of the ribs, and that the other fractures he sustained were "consistent with a twisting, torsion, shaking of limbs[.]"See footnote 6 Dr. Corder also testified that when he first saw Jeffrey R.L. he thought the child was blind because most three-month-old children enjoy looking at faces and Jeffrey R.L. did not look at his face.See footnote 7 After a few days of interacting with the nurses, however, Dr. Corder testified that Jeffrey R.L. "started regarding faces[.]"

Ms. Mosier testified at the hearing that she became involved in the case following a referral from Grant Memorial Hospital. Ms. Mosier testified that she spoke with the physicians at West Virginia University Hospital who told her that they believed Jeffrey R.L. suffered from battered child syndrome. Ms. Mosier testified that she then spoke to both of the parents who stated that the child could have a bone disease that caused the fractures, that he could have hurt himself rolling around in his crib, or that he could have sustained the fractures during his delivery.See footnote 8 Ms. Mosier examined the child's crib and found it to be well-padded on the inside. Ms. Mosier then found out through the hospital that Jeffrey R.L. did not have a genetic bone disease, and that he had a normal delivery.

At the conclusion of the preliminary hearing, the court found probable cause to believe Jeffrey R.L. was an abused or neglected child, and concluded that temporary custody should be awarded to the DHHR. The court ordered controlled visitation and directed that the parents undergo psychological evaluations.

Both parents were evaluated by Gregory Trainor, M.A., in October of 1991. With respect to Jeffrey R.L.'s father, Mr. Trainor reported that Jeffrey L. acknowledged that he experienced black-outs, but denied any recent violent behavior.See footnote 9 Mr. Trainor found that his "dissociative experiences are particularly disturbing and may represent some brief psychotic episodes." Mr. Trainor recommended that Jeffrey L. undergo a psychiatric evaluation to determine whether he needed medication.

With respect to Jeffrey R.L.'s mother, Mr. Trainor believed that she had "at least some serious inattention difficulties" and that she was quite dependent on others.See footnote 10 Mr. Trainor suggested that her denial of problems indicates that she would not be "a very good candidate for counseling."See footnote 11 Mr. Trainer opined that it was "difficult to comprehend that this situation could have continued as long as it did in ones own home without some realization that there was some serious difficulty." Mr. Trainor further opined that "[t]he implication here is that [Gail L.] may be quite wrapped up in her own world and not . . . able to focus resources on the care of this child." Mr. Trainor believed that it was very important to identify who caused Jeffrey R.L.'s injuries, and that Gail L.'s "apparent lack of serious motivation to uncover this does not augur well with this goal."

An adjudication hearing was held on November 20, 1991, in response to the DHHR petition to have Jeffrey R.L. found to be an abused child. Both parents admitted at the hearing that some trauma to their child had occurred, but neither one of them admitted to harming the child or identified the abuser. The court found that Jeffrey R.L. was an abused child, granted the parents an improvement period and ordered custody to remain with DHHR during the improvement period. DHHR was also ordered to develop a treatment plan for the parents to complete during the improvement period.

A hearing was held in January of 1992, at which time Mr. Trainor testified that he did not believe Gail L. was active in her child's abuse and that Gail L.'s grandfather had stated that Jeffrey L. confessed to abusing the child.See footnote 12 Mr. Trainor also stated that he would not be opposed to visitation between Gail L. and Jeffrey R.L. in her grandparents' home. The circuit court then entered an order continuing visitation twice a week, and ordered that if a treatment plan was not signed by the parties by February 10, 1992, then the parties would have to appear before the court for another hearing.

The parties appeared before the circuit court again on March 20, 1992 and March 25, 1992, to consider Gail L.'s challenge to the amended treatment plan and to consider further progress in this matter. At the hearing, the DHHR pointed out that Gail L. continued to refuse to sign the treatment plan because she asserted that it failed to address future visitations with the child nor did it provide for ultimately returning the child to his home.

At the hearing held on March 25, 1992, the court heard testimony from several witnesses. Vickie House, a family services specialist with Telamon Corporation, and Bobbie Harman, a case manager at Burlington Children's Placing Agency, testified at the hearing that Gail L.'s parenting skills had improved, and that they did not believe she would cause Jeffrey R.L. any harm. Ms. Harman, however, testified that she believed they still needed to identify who caused Jeffrey R.L.'s injuries.

Ms. Mosier also testified at the March 25, 1992 hearing. Ms. Mosier stated that she believed it was the position of DHHR that unsupervised visitation between Jeffrey and his mother would not occur until the abuser was identified. Ms. Mosier testified that the initial treatment plan had to be modified because Gail L. and her husband, Jeffrey L., were getting a divorce and that it would effect the course of treatment. Ms. Mosier testified that Jeffrey L. had admitted that he has blackouts, and has attempted to hurt himself. Ms. Mosier stated that he acknowledged he needed treatment. Ms. Mosier testified that she had no "hard core evidence" that Jeffrey L. caused his son's injuries. However, Ms. Mosier clarified in her testimony that the statement made by Gail L.'s grandfather that Jeffrey L. confessed to Ms. Mosier that he had battered his son was not true. Ms. Mosier also testified that she had not had any problems in working with Jeffrey L. Ms. Mosier acknowledged that neither Gail L. nor Jeffrey L. had yet completed all of the Telamon program nor had they completed all of the required counseling.

Jerry Borror, assistant supervisor for the DHHR, testified at the March 25, 1992 hearing that if the DHHR does not know who the perpetrator of the abuse is then they believe the child would be at risk to be placed back into the home. Unless the DHHR is satisfied that the perpetrator is identified, Mr. Borror testified that they would move to have the parental rights terminated. Mr. Borror testified that despite what Ms. House and Ms. Harman stated, he believed Gail L.'s parental rights should be terminated. Mr. Borror stated that he had no evidence that either Gail L. or Jeffrey L. caused Jeffrey R.L.'s injuries.

At the conclusion of the hearing on March 25, 1992, the circuit court found that neither of the case plans developed by the DHHR were adequate and required the DHHR to present an amended treatment plan. The court further ordered that after Gail L.'s next counseling session with Mr. Trainor, she would be allowed an unsupervised weekend visitation with her son at her grandparents' house. The court stated that if the first unsupervised visitation was favorable, then another unsupervised weekend would be allowed at Gail L.'s home without her grandparents.

In April of 1992, Jeffrey R.L. was hospitalized so that he could undergo surgery for his hemangioma, and therefore the unsupervised weekend visitation could not occur. The records from Jeffrey R.L.'s hospital stay indicate that he experienced stress because of a conflict between Gail L. and his foster mother over his feeding and care. In a letter dated April 7, 1992, the prosecuting attorney advised the circuit court that a social worker from the hospital contacted Beverly Hill, Jeffrey R.L.'s foster care worker, to inform her that Jeffrey does not eat well for Gail L. and that he became dehydrated

during his hospital stay. The physicians at the hospital, therefore, directed the foster mother to be present while Gail L. was visiting her son.

By letter dated April 13, 1992, Mr. Trainor advised the circuit court that, based on the incidents that occurred during Jeffrey R.L.'s hospital stay, he did not believe that the previously planned weekend visit with Gail L. and her grandparents was appropriate at that time. Mr. Trainor explained that

[t]here have been interactions observed, between Gail and her grandparents, that suggest that Gail's care of the baby in their presence is a rather tension producing affair. The anxiety seems to be telegraphed to the baby, resulting in a decrease in his desire to take his formula. The weekend visitations . . . should not occur at the present time, pending stabilization in his condition.

Another hearing concerning visitation was held on August 11, 1992. Trooper Goodnight, Gail L. and Beverly Hill, Jeffrey R.L.'s foster care worker, testified. Trooper Goodnight testified that he interviewed Harry Braithwaite, who made a statement regarding an incident he observed between Gail L. and Jeffrey L. while they were with Jeffrey R.L. in front of the "fire hall" in July of 1991. Mr. Braithwaite told Trooper Goodnight that when Jeffrey L. told Gail L. that the baby's diaper needed changing, Gail L. responded that she "ain't cleaning the damned kid." Trooper Goodnight also testified that he interviewed Charles Lee Riggleman, Jr., regarding his visit with Gail L. and Jeffrey L. at their trailer in August of 1991. Mr. Riggleman told the trooper that he went with Jeffrey L. to get the baby from Gail L.'s grandmother's house. When they went into the house to get Jeffrey R.L., Mr. Riggleman told Trooper Goodnight that Gail L.'s grandmother picked up Jeffrey R.L. by the right arm above the elbow and that Jeffrey "screamed" when she did this. Mr. Riggleman also told Trooper Goodnight that he saw Gail L. squeeze her son's chest in front of the fire hall when his diaper needed to be changed again a few minutes after it had been changed before, and that the baby cried as though he were in pain. Trooper Goodnight also testified that when he interviewed Jeffrey L., he believed that he was telling the truth. He further testified that when he interviewed Gail L., he had the impression that "something just wasn't right."

Gail L. was questioned at the hearing about an argument she had with her grandfather. Gail L. testified that she and her grandfather were arguing over the remote control to the television and that he hit her in the nose. Gail L. went to the Burlington Fire Department where the rescue team is located to have someone look at her nose because she thought it was broken. Gail L. admitted that she told the EMT, Karen Davy, that she could not call the police because her grandfather told her if she called them, he would have her placed in jail.

Ms. Hill, the foster care worker, testified that in observing Gail L. with her son, she seemed "a little nervous" and "uncomfortable" in handing him but that it was understandable in light of the fact that several people were watching her. She testified that both parents had been fulfilling the requirements of the case plan. At the conclusion of the hearing, the circuit court concluded that there was not sufficient evidence to

terminate the parental rights of Gail L. and Jeffrey L., and directed them to schedule an appointment with Thomas Stein, Ed. D., for an evaluation.See footnote 13

In a progress summary dated August 11, 1992, Mr. Trainor reported that he had made no progress with Gail L. in determining who abused Jeffrey R.L. Mr. Trainor reported that, although Gail L. had made progress on her treatment plan and was attempting to gain more independence from her grandparents, his work with her "has been made difficult by the fact that no one has acknowledged involvement in [Jeffrey R.L.'s] abuse and that that problem has never been directly analyzed and dealt with."

In a letter dated September 28, 1992, Vickie House of the Telamon Corporation stated that although Gail L. and Jeffrey L. had adequately completed their parenting classes, she could not recommend that Jeffrey R.L. be returned to the home until the person who inflicted the abuse is identified.

By letter dated October 29, 1992, the Juvenile Justice Committee was contacted by Dr. Itani, who requested assistance in protecting Jeffrey R.L., and advised them of the proposed unrestricted visitation allowed by the circuit court's order in January, 1992. Dr. Itani wrote that he felt "the child's welfare has not been addressed adequately thus far." Dr. Itani believed that there was strong mother-child bonding between Jeffrey R.L. and his foster mother, and that he called her "mommy."

In response to a request by Gail L., a status hearing was held on December 9, 1992. The circuit court denied the motion of the guardian ad litem for a stay of the proceedings until he could determine from the investigating officer, Dr. Itani and the foster mother their respective positions in this case. The circuit court then ordered that physical custody of Jeffrey R.L. be returned to his mother. The guardian ad litem did not request a stay of execution nor did he initiate an appeal with this Court. The matter has been appealed to this Court by a newly appointed guardian ad litem, Jane Moran, on behalf of Jeffrey R.L.

II

The first issue we shall address is whether the circuit court erred in failing to terminate the parental rights of Jeffrey R.L.'s parents, and whether the circuit court abused its discretion by returning custody of Jeffrey R.L. to his mother without sufficient evidence to support the ruling. The guardian ad litem asserts that the conditions giving rise to the abusive behavior cannot be substantially corrected when the perpetrator of the abuse has not been identified, and that the best interests of the child preclude returning his custody to either parent. Gail L. contends that: (1) there is insufficient evidence in the record to support termination of her parental rights; (2) there is no evidence that she was the abuser; and (3) she has fulfilled all of the requirements placed upon her by the circuit court and the DHHR. The DHHR contends that Jeffrey R.L. should not have been returned to his mother's custody until the perpetrator of the

abuse had been identified and a determination of Gail L.'s ability to provide a safe environment for her son has been made.

In the Court's analysis of child abuse and neglect cases, we must take into consideration the rights and interests of all of the parties in reaching an ultimate resolution of the issues before us. Although the rights of the natural parents to the custody of their child and the interests of the State as parens patriae merit significant consideration by this Court, the best interests of the child are paramount. Thus, as an initial matter, we emphasize that the health, safety, and welfare of Jeffrey R.L. must be our primary concern in analyzing the facts and issues before us.

We shall begin our discussion by reviewing the rights of the natural parents to the custody of their children. Relying on the Supreme Court of the United States' decision in Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), we acknowledged the constitutional right of the natural parents to the custody of their children in syllabus point 1 of In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973):

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

While this Court has repeatedly recognized the constitutionally-protected right of the natural parent to the custody of his or her minor children, we have also emphasized that such right is not absolute. In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991); In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987); In re Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985); In re Willis, supra. We explained the limits of the natural parent's right to custody of his or her minor children in In re Willis: "[T]his Court, early in the history of this State, recognized that the right of the natural parent to the custody of his child is not absolute; it is limited and qualified by the fitness of the parent to honor the trust of the guardianship and custody of the child. 157 W. Va. at 237-38, 207 S.E.2d at 137 (emphasis added).

This Court has also identified the interests of the State where the issue of guardianship and custody of minor children is raised. We have recognized that the State, in its role of parens patriae, "is the ultimate protector of the rights of minors[,]" and "has a substantial interest in providing for their health, safety, and welfare, and may properly step in and do so when necessary." In re Betty J.W., 179 W. Va. 605, 608, 371 S.E.2d 326, 329 (1988). While the State's parens patriae interests may favor preservation of the natural family bonds rather than severance of those bonds, "[t]he countervailing State interest in curtailing child abuse is also great." Id. We have, therefore, observed that "[i]n cases of suspected abuse or neglect, the State has a clear interest in protecting the child and may, if necessary, separate abusive or neglectful parents from their children." Id. Thus, a parent's right to custody of his or her children

may be called into question by the State when there is evidence establishing that those children have been subject to abuse and neglect.

W. Va. Code, 49-1-3(a)(1) [1992] defines an "[a]bused child" as "a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or mental or emotional injury, upon the child or another child in the home[.]" This Court has recognized, in syllabus point 3 of In re Betty J.W., supra, that a parent who "takes no action in the face of knowledge of the abuse" to the child can have his or her parental rights terminated:

W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

A parent's rights to custody of his or her child may also be terminated where there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected:

'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

Syllabus point 4, In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989). Such termination of parental rights is even more appropriate in cases where the welfare of a child less than three years of age is seriously threatened and there is no reasonably likelihood that the conditions of abuse can be substantially corrected, as we recognized in syllabus point 1 of In re Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985):

'As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syl. pt. 1, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

Finally, the evidence upon which parental rights may be terminated must be clear and convincing. W. Va. Code, 49-6-2(c) [1992]; Nancy Viola R. v. Randolph W., 177 W. Va. at 715-16, 356 S.E.2d at 469-70 (citing cases).

Relying upon the well-established principles stated above, we shall now review the facts before us in the present case. To begin with, during the first three months of his life, Jeffrey R.L. was in the care of his mother, father and maternal grandparents. At the helpless age of approximately three months, Jeffrey R.L. was brought to the hospital when his maternal grandparents showed Gail L. that he was not moving his right arm in the same manner he was moving his left.See footnote 14 X-rays revealed that Jeffrey R.L. suffered fifteen fractures to his skull, clavicle, ribs, arms and legs.See footnote 15 It is undisputed that Jeffrey R.L. suffered these extensive injuries as a result of physical abuse, and the physicians diagnosed him as suffering from battered child syndrome.

Yet, his mother, Gail L., gave several possible explanations for the injuries to Jeffrey R.L. She stated that he could have suffered these injuries while he was rolling around in his crib. However, the crib was found by the social worker to be well-padded. Gail L. also stated that his injuries could be the result of a genetic bone disease from which her grandfather suffered.See footnote 16 Yet, after several tests were performed at West Virginia University Hospital, there was no indication that Jeffrey R.L. suffered from any bone disease. Furthermore, Gail L. offered the explanation that Jeffrey R.L. suffered his injuries during birth, despite the fact that the evidence in the record reveals Gail L. experienced a normal vaginal delivery. None of the evidence in the record supports any of Gail L.'s explanations of Jeffrey R.L.'s injuries.See footnote 17

Although Gail L. admitted to the circuit court at the hearing held on November 20, 1991, that some trauma had occurred to Jeffrey R.L., absent from the record is any evidence which would indicate that Gail L. made any attempts to identify her child's abuser. In fact, as previously noted in this opinion, Mr. Trainor, in his psychological report dated October 3, 1991, found that Gail L. showed "no emotionality about the loss of her child or apparent concern over [his] injuries except for some resentment over the way they had been treated by the physicians and by the Department of Human Services." He also observed that Gail had an "apparent lack of serious motivation to uncover" Jeffrey R.L.'s abuser. Although her grandfather had alleged that Jeffrey R.L.'s father had confessed to him and to a social worker that he had abused Jeffrey R.L., that allegation appears to be without foundation.See footnote 18

Even in the face of knowledge of her son's abuse, there is no indication in the record that Gail L. made any attempts to identify her son's abuser. At the time Jeffrey R.L. suffered these extreme injuries, he was under his mother's care and the care of those individuals with whom she entrusted him. Gail L. is aware of those individuals who cared for her child during the first three months of his life when he was subject to physical abuse; yet, she has never attempted to identify his abuser. Nearly two and one-half years have passed since Jeffrey R.L. suffered his injuries. By failing to even attempt to identify his abuser during this two and one-half-year period, Gail L. has not shown that she is fully committed to the welfare of her child.See footnote 19

Establishing the identity of the person or persons who inflicted these injuries on Jeffrey R.L. is crucial to his health, safety and welfare. Ms. Mosier, Mr. Trainor, Ms. Harman, Mr. Borror and Ms. House have all stated that Jeffrey R.L. should not be returned to either parent until the perpetrator of his abuse has been identified. Yet, despite the fact that the perpetrator has not been identified, the circuit court returned custody of Jeffrey R.L. to his mother. We find that the circuit court clearly erred in returning Jeffrey R.L. to his mother before the perpetrator who inflicted such extensive physical abuse on this helpless infant has been identified.

There is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of Jeffrey R.L.'s physical abuse has not been identified. Jeffrey R.L., due to his young age and physical condition, needs consistent close interaction with fully committed adults. Jeffrey R.L.'s health, safety and welfare would be seriously threatened if he were to be placed back into the environment where he suffered extensive physical injuries when his abuser has not been identified. Therefore, because it appears that Jeffrey R.L.'s abuser will never be identified, this Court will not place him back into the environment where he suffered his abuse.

We find that: (1) continuation in Jeffrey R.L.'s home is not in his best interests because his abuser has not been identified; (2) reunification between Jeffrey R.L. and his parents is not in his best interests because his parents have not identified his abuser; and (3) the state department made reasonable efforts to reunify the family, drafted a treatment plan Gail L. refused to sign, arranged for Gail L. and Jeffrey L. to complete a parental training program, and monitored the case. See W. Va. Code, 49-6-5 [1992]. Rather than prolong these proceedings, we believe there is clear and convincing evidence before us to warrant terminating parental rights. Thus, this Court believes that in order to safeguard Jeffrey R.L.'s well being, Gail L.'s parental rights to Jeffrey R.L. should be terminated.

In summary, we hold that parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser. Accordingly, the parental rights of Gail L. and Jeffrey L. to their son, Jeffrey R.L., are hereby terminated.See footnote 20 The guardian ad litem shall continue to represent Jeffrey R.L. until he is adopted or placed into a permanent home. If the guardian ad litem is unable to continue representing Jeffrey R.L., another guardian ad litem will be appointed.

III

By the very nature of the painful issues involved, abuse and neglect cases are troublesome to this Court. Despite our efforts to give the highest priority to child abuse and neglect cases, we have yet to find viable solutions to all of the problems which arise

in these cases. As a result, we continue to explore stronger approaches to facilitate the fair and expeditious handling of child abuse and neglect cases.

The Juvenile Justice Committee has brought to this Court's attention the problems which commonly arise with the representation of children by guardians ad litem in abuse and neglect proceedings. Quite often children do not get adequate representation because the guardians ad litem have not been given proper direction as to their role in representing the child in abuse and neglect proceedings. Thus, to further our goal of protecting the interests of children who suffer from abuse and neglect, the Juvenile Justice Committee has proposed that this Court adopt guidelines for guardians ad litem to follow in order to provide children in abuse and neglect proceedings with adequate representation.

In suggesting the guidelines, the Juvenile Justice Committee represents that it has relied upon our state Code, Rules of Professional Conduct, Rules of Civil Procedure for Trial Courts of Record and case law. The Juvenile Justice Committee has also consulted other sources such as: (1) the Department Advisory Committee of the Fourth Department Law Guardian Program in New York, Guidelines for Law Guardians/Abuse and Neglect Proceedings; (2) the National Association of Counsel for Children, Guidelines for Guardians Ad Litem in Abuse and Neglect Cases; and (3) the New York State Bar Association's study, Jane Knitzer & Merrill Sobie, Law Guardians in New York State: A Study of the Legal Representation of Children (1984).

As a brief background, we believe that two studies which were performed, one in North Carolina See footnote 21 and the other in New York,See footnote 22 to evaluate programs that provide children with attorneys in protection proceedings, illustrate why there is concern about the performance of guardians ad litem in child abuse and neglect cases. Robert F. Kelly & Sarah H. Ramsey, Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys For Abused and Neglected Children, 40 Rutgers L. Rev. 1217, 1231 (1988). First, the North Carolina study found, among other things, that experienced attorneys who knew how to represent their child clients and worked hard, spoke with their clients, and involved themselves in the negotiating and fact-finding, had a beneficial influence in the outcome of the case. However, the North Carolina study found that these experienced, hard-working attorneys were in the minority.See footnote 23 Kelly & Ramsey, 40 Rutgers L. Rev. at 1239. Among the findings of the New York study were that law guardians are uncertain about what is expected of them and that they "feel that they need assistance in their work, in particular, regular briefings on case law and legislation, and access to independent social work and mental health professionals." Kelly & Ramsey, supra at 1246. The results of both studies lead to the conclusion that there should be "greater accountability in the performance of individual attorneys, . . . systematic and continuing evaluations of program outcomes, and . . . enhanced efforts geared toward implementing and testing new approaches to representing children in protection proceedings." Kelly & Ramsey, supra at 1250 (footnote omitted).

More recently, the Colorado Bar Association Family Law Section and Juvenile Law Forum established a Joint Guardian Ad Litem Standards Committee for the purpose of developing proposed standards for guardians ad litem because of increasing dissatisfaction with the inadequate representation of children and the lack of direction given to the guardians ad litem.See footnote 24 Marie Walton & Donna Schmalberger, Standards of Practice for Guardians ad Litem, 12 ABA Juv. & Ch. Wel'f L. Rptr. pp. 13-16 (March 1993). The goals and requirements of the standards adopted by Colorado's Joint Guardian Ad Litem Committee substantially reflect those of the guidelines proposed in other jurisdictions. Those goals and requirements are succinctly stated under the "Guardian ad Litem Mission Statement" included at the beginning of the standards, where the Committee summarized the role of the guardian ad litem and outlined the categories under which the standards are set forth:See footnote 25

The guardian ad litem [GAL] plays an important role in legal outcomes affecting children . . . . The GAL should take an active role in presenting evidence regarding the child's well-being. Therefore, it is appropriate to describe generally the rights and responsibilities of the attorney who assumes this office. The GAL does not necessarily represent a child's desires but should formulate an independent position regarding relevant issues. To safeguard a child's well being, a GAL must render recommendations.

1. **Attorney of Record**: The GAL assumes a pivotal professional role in litigation. As an attorney of record in the case, the GAL is entitled to be treated professionally with respect and courtesy.
2. **Litigation**: The GAL shall have the right to and should actively participate and be included in all aspects of litigation including, but not limited to, discovery, motions practice, settlement negotiations, court appearances, jury selection, presentation of evidence and appeals.
3. **Education**: GAL practice is unique and complex and, as such, requires special education, training and experience with regard to the needs of children.
4. **Investigation**: The GAL shall conduct a thorough and independent investigation. The GAL shall meet with the child. Relevant evidence should be developed and presented to the court. The GAL may conduct interview[s] with other relevant persons and review exhibits as the GAL deems appropriate. Other parties should fully cooperate with the GAL as the investigation is conducted.
5. **Recommendations**: The GAL should render informed and independent recommendations which serve the child's best interests. The child's wishes should be considered by the GAL, but need not be adopted by the GAL unless doing so serves the child's best interests.
6. **Compensation**: The GAL shall be entitled to reasonable compensation for services rendered. The court, in recognition of the important role of the GAL, shall encourage timely payment of the fees and costs to the GAL.

All of the guidelines we have reviewed attempt to provide guardians ad litem with comprehensive standards, like those in Colorado, so that there is little question as to the attorney's responsibilities in representing children. To begin with, the guidelines issued

by the Departmental Advisory Committee of the Fourth Department Law Guardian Program set forth the role of the guardian, and set forth the guardian's responsibilities prior to the guardian's initial appearance, prior to and during the fact-finding hearing, at the predispositional and dispositional hearing, and after disposition. Next, the guidelines suggested by the National Association of Counsel for Children provide standards for an independent investigation by the guardian ad litem, preparation for hearings, and "helpful hints" to assist guardians ad litem. The standards developed as part of the New York study, Knitzer & Sobie, supra, set forth guidelines to be followed by the guardian ad litem prior to and during the fact-finding hearing, prior to and during the dispositional hearing, and after disposition.

While the standards recommended in the case before us by the Juvenile Justice Committee conform with the standards discussed above, it is also important to ascertain whether these rules are in accord with applicable rules of practice and case law in West Virginia. In West Virginia, the role of guardian ad litem is generally stated in Rule XIII of the West Virginia Trial Court Rules for Trial Courts of Record, which provides, in pertinent part:

In any proceeding in which a guardian ad litem is appointed, such guardian ad litem shall be selected independently of any nomination by the parties or counsel.

Any guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding; and either by his testimony made of record, or by full and complete answer therein, make known to the court his [or her] recommendations, concerning the action sought in the proceedings unless otherwise ordered or instructed by the court.

Although this Court has not previously adopted guidelines for guardians ad litem, we have addressed a child's right to independent counsel in child abuse and neglect cases in State v. Scritchfield, 167 W. Va. 683, 280 S.E.2d 315 (1981),See footnote 26 and the role of guardians ad litem in child abuse and neglect cases in In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991). We recognized in In re Scottie D., that the guardian ad litem is responsible for securing the infant's rights, and that "[s]ecuring the infant's rights includes taking an assertive role and, if in the judgment of the guardian ad litem, a case so warrants, prosecuting an appeal." 185 W. Va. at 198, 406 S.E.2d at 221. We summarized the guardian ad litem's role in child abuse and neglect cases in syllabus point 3 of In re Scottie D.:

In a proceeding to terminate parental rights pursuant to W. Va. Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W. Va. Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary.

We further elaborated in syllabus point 5 of James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home."

Finally, the proposed guidelines encompass some of the basic principles found under our Rules of Professional Conduct. Specifically, Rule 1.1 requires an attorney to "provide competent representation to a client" which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Furthermore, Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." We believe the guidelines proposed for guardians ad litem essentially reflect these basic rules of practice by which each attorney is bound.

In summary, each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians Ad Litem in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the West Virginia Code, the West Virginia Rules for Trial Courts of Record, and the West Virginia Rules of Professional Conduct, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed. Therefore, this Court adopts these guidelines, effective within sixty days of the date of this opinion, to further ensure the adequate representation of children in abuse and neglect cases by court-appointed guardians ad litem.See footnote 27 By adopting the proposed guidelines in this case, we are providing guardians ad litem with fairly comprehensive standards which they can follow so that they may conduct an independent investigation of the case and present the child's position to the court. The guardians ad litem may use their discretion in acting under the guidelines because the applicability of each of the guidelines is dependent upon the facts of each case.

In addition to the guidelines adopted herein, we believe attorneys who act as guardians ad litem should participate in special continuing legal education relating to the representation. The attorneys in this State are required under Chapter VII, section 5.2 of the Constitution, By-Laws and Rules and Regulations of the West Virginia State Bar to satisfy the following requirements:

¶ 5.2. After the above two year phase-in period, each active member of the state bar shall complete a minimum of twenty-four hours of continuing legal education, as approved by these rules or accredited by the Commission, every two fiscal years. At least three of such twenty-four hours shall be taken in courses on legal ethics or office

management. On or before July 31, 1990, and every other July 31 thereafter, each attorney must file a report of completion of such activities. The commission recommends that such report be completed on Form C --- Certification of Completion of Approved MCLE Activity.

Furthermore, W. Va. Code, 49-6-2(a) [1992] provides that attorneys who represent children in abuse and neglect proceedings should complete a minimum of three hours of continuing legal education on representation of children in child abuse and neglect cases per year. Those three hours are merely included in the 24 hours of continuing legal education already required by the West Virginia State Bar. W. Va. Code, 49-6-2(a) [1992] further provides that "where no attorney who has completed this training is available for such appointment, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent the child."

We believe that, because the practice of guardians ad litem is rather unique, and at times complex, guardians ad litem need specialized education and training to fulfill their responsibilities. While this Court, rather than the legislature, controls the practice of law in this State,See footnote 28 we find that the three hour per year requirement of specialized continuing legal education under W. Va. Code, 49-6-2 [1992] is in accord with what this Court intends to be the practice for guardians ad litem. Therefore, we find that a minimum of three hours of continuing legal education per year, relating to representation of children, for guardians ad litem to complete is necessary to ensure the effective representation of children.

IV

Thus, for the reasons stated herein, we reverse the order of the Circuit Court of Mineral County returning custody of Jeffrey R.L. to his mother, Gail L., and terminate the parental rights of Gail L. and Jeffrey L. Furthermore, we adopt the Guidelines for Guardians Ad Litem in Abuse and Neglect Cases, set forth in Appendix A, within sixty days of the date of this opinion.

Reversed.

APPENDIX A

GUIDELINES FOR GUARDIANS AD LITEM IN ABUSE AND NEGLECT CASES

Initial Stages of Representation

1. Notify promptly the child and any caretaker of the child of the appointment of counsel and the means by which counsel can be contacted.
2. Contact the caseworker and review the caseworker's file and all relevant information.
3. Contact and interview persons such as older children, caseworkers, and caretakers who may have information with respect to the child and obtain names and

addresses of hospital personnel, physicians, teachers, law enforcement, and other persons who may have pertinent information regarding the child and interview them.

4. Absent extraordinary circumstances and the child is three or under:

a. If the child is in the care of someone other than the respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs and visit the child in the caretaker's home, making observations of the child or

b. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the respondent(s) concerning the child's care and the type of services the child needs and visit the child in his/her home, making observations of the child. If refused, ask for assistance of the court.

5. Absent extraordinary circumstances and the client is over three:

a. If the child is in the care of someone other than respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs.

b. If the child is in the care of someone other than the respondent(s), conduct interviews with the child in a manner and environment appropriate to the child's age and maturity to obtain facts concerning the alleged abuse or neglect and to determine the child's wishes and needs regarding temporary visitation and/or placement.

c. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the child out of the presence of the respondent(s) in a manner and environment appropriate to the child's age and maturity. It is essential that the guardian ad litem understand that the interview is for the purpose of gathering information not influencing information. If refused, ask the assistance of the court.

6. Provide to the child, his or her parents, and any caretaker notice of the petition and all subsequent motions.

7. Maintain contact with the child throughout the case and assure that s/he is receiving counseling, tutoring, or any other services needed to provide as much stability and continuity as possible under the circumstances.

Preparation for and Representation at Adjudicatory and Dispositional Hearing

8. Pursue the discovery of evidence, formal and informal.

9. File timely and appropriate written motions such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.

10. Evaluate any available improvement periods and actively assist in the formulation of an improvement period, where appropriate, and service plans.

11. Monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring monthly updates or status reports from agencies involved with the family.

12. Participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in a legally acceptable and emotionally neutral setting.

13. Maintain adequate records of documents filed in the case and of conversations with the client and potential witnesses.

14. Ensure that the child is not exposed to excessive interviews with the potential dangers inherent therein. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature of the examination requested and the intrusiveness; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination; and (6) the evidence already available for the defendant's use.

15. Ensure that a child who is court ordered to be interviewed by a psychologist or psychiatrist is interviewed in the presence of the guardian ad litem attorney unless the court, after consulting the child's guardian ad litem, believes that the interview is best conducted without the guardian ad litem.

16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.

17. Review any predispositional report prepared for the court prior to the dispositional hearing and be prepared to submit another if the report is not consistent with all other appropriate evidence.

18. Apprise the court of the child's wishes.

19. Explain to the child, in terms the child can understand, the disposition.

20. Advocate a gradual transition period, in a manner intended to foster emotional adjustment whenever a child is to be removed from the custody of anyone with whom s/he has formed an important attachment.

21. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests and an appropriate order is entitled to preserve the rights of siblings to continued contact.

22. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports.

Post-Dispositional Representation

23. Inform the child of his/her right to appeal.

24. Exercise the appellate rights of the child, if under the reasonable judgment of the guardian ad litem, an appeal is necessary.

25. File a motion for modification of the dispositional order if a change of circumstances occurs for the child which warrants a modification or represent the child if said motion for modification is filed by any other party.

26. Continue to represent the child until such time as the child is adopted, placed in a permanent home, or the case is dismissed after an improvement period.

Footnote: 1 *We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. See In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).*

Footnote: 2 *The x-ray report dated May 24, 1991, found a "[n]ormal newborn chest." The x-ray report dated July 26, 1991, stated that "[t]he organs, soft tissues, and bones appear normal as visualized. There is no evidence of fecal retention or bowel dilatation."*

Footnote: 3 *Jeffrey L. has represented to this Court that "he desires to remain mute" on the issue of whether the circuit court erred in returning Jeffrey R.L. to his mother, and requests that this Court decide this issue based upon the best interests of the child and the evidence presented to the circuit court.*

Footnote: 4 *The ophthalmologist was consulted because a symptom of osteogenesis imperfecta, a congenital bone disease causing the bones to fracture easily, is a thin cornea. Jeffrey R.L.'s cornea, however, showed normal thickness.*

Footnote: 5 *Dr. Corder testified that he placed a "ninety-six hour hold" on Jeffrey R.L. until the courts could decide where to place the child because he felt that "it would not be appropriate to send him . . . back into the environment where he had sustained the injuries."*

Footnote: 6 *Dr. Corder further testified that he went over Jeffrey R.L.'s x-rays with the radiologist, and that they were able to determine that the fractures were at different stages of healing. While there was a question raised as to when the various fractures were inflicted, the record shows that x-rays taken of Jeffrey R.L. on May 24, 1991, and July 26, 1991, revealed no fractures. Thus, it appears that these fractures were sustained between July 26, 1991, and the date Jeffrey R.L. was examined by Dr. Itani on August 30, 1991.*

Footnote: 7 *Dr. Corder gave the following response when asked whether there were any other indications that Jeffrey's development was not normal up until this point:*

A. Several people had noted something that concerned me from a developmental aspect. When a child, well when you examine a child of three months of age, they like to look at a face. In fact if I were examining a child, if this microphone was a child and a three month old I wouldn't hold up a toy. They wouldn't regard that at all. What they like is to look at a face. And the way you look at the extraocular movements would be to actually get down and have a child close to your face. They just love to look at faces. When I walked into the room the first time he didn't regard me at all, no regard at all, and at first I thought the child was blind so I checked him for light reflexes. It was like literally walking up to someone who is staring a hole through you and that concerned me. Several other people had also found that too. Over the next couple of days and, you know, I noticed when the nurses were feeding him and so forth he started regarding faces, following them and so forth. You know, he had much more normal appearance in interaction.

Footnote: 8 *In reports submitted by Gregory Trainor, M.A., another explanation given by his parents for Jeffrey R.L.'s injuries was that he had rolled off his father's chest while he was sleeping with him and that his father may have rolled over onto him.*

Footnote: 9 *Mr. Trainor also reported that Jeffrey L. told him he usually takes his anger out on himself and that Jeffrey L. described an incident where Gail L. was physically abusive to him:*

[Jeffrey L.] reported that he tends to take his anger out on himself, particularly hitting his head on things. He reported the last time he did this was three months ago after an argument with his wife where he struck his head against the wall with enough force to put a hole in it. He reported an incident again with his wife where she had kicked him in the groin and scratched him and he responded by holding her by the wrists so as to obtain her attention to try to talk this disagreement out. She had complained that he was hurting her when doing this. He acknowledged that his 'wife has a temper on her.'

Footnote: 10 *Mr. Trainor also observed that Gail L. showed "no emotionality about the loss of her child or apparent concern over [his] injuries except for some resentment over the way they felt they had been treated by the physicians and by the Department of Human Services."*

Footnote: 11 *Gail L. also related to Mr. Trainor some "physical struggles" she had with her husband. Mr. Trainor reported that:*

[Jeffrey L.] will grab her by the wrists rather forcefully and keep her from going off to herself. She reported his grabbing her hard enough to leave bruises. She also said he will sit on her to restrain her. These actions were reported to keep her from walking away. She reports that these interactions occur as a result of her being upset with him. She felt that his feelings get hurt rather easily. She reported that he has never struck her but does engage in some self injurious behavior himself.

Gail L. also gave similar testimony regarding these incidents with her husband at the hearing held on March 25, 1992.

Footnote: 12 *Jeffrey L. has denied that he abused his son. Furthermore, in a letter dated October 28, 1992, R. L. Catlett, a polygraph examiner, stated that after testing the grandfather concerning Jeffrey L.'s alleged confession, Mr. Catlett believed the grandfather's allegations were not true. Mr. Catlett also stated that, after testing Gail L. and Jeffrey L., he did not believe that either one of them had caused the child's injuries. We further note, however, that polygraph test results are not admissible in evidence in a criminal trial in this State. Syl. pt. 2, State v. Frazier, 162 W. Va. 602, 252 S.E.2d 39 (1979).*

Footnote: 13 *Thomas E. Stein, Ed.D., performed a psychological examination of Jeffrey R.L.'s parents and maternal grandparents. He found that Gail L's grandparents had "good knowledge" about appropriate child behavior management strategies. Although he diagnosed Gail L. as suffering from "[r]eactive depression" and "[r]elationship problems," he stated that her prognosis was good. With respect to Jeffrey L., Dr. Stein found that he too suffered from "[r]elationship problems" and found that his prognosis was "[f]air with appropriate intervention."*

Footnote: 14 *There is nothing in the record which indicates that Gail L. was aware of Jeffrey R.L.'s injuries before her grandparents showed her that he was not moving his right arm. The Court questions how a mother could be oblivious to her son's extreme injuries.*

Footnote: 15 As we stated above, Dr. Corder testified that great force would be necessary to fracture Jeffrey R.L.'s ribs, and that the other fractures he sustained were consistent with a "twisting, torsion, shaking of limbs[.]"

Footnote: 16 Dr. Corder testified that the grandfather's medical records made no mention that he suffered from osteogenesis imperfecta.

Footnote: 17 As we have previously noted, polygraph test results are inadmissible in a criminal trial. Curiously, however, Gail L. attached as an exhibit to her brief the report of the polygraph examiner, Mr. Catlett, dated March 4, 1993. In that report, Mr. Catlett stated that "[d]uring the interview, [Gail L.], mother of the infant stated 'she felt the baby was injured at the hospital.'" Gail L.'s statement to the polygraph examiner in March of 1993 suggests that Gail L. continues to offer explanations for Jeffrey R.L.'s fifteen fractures that are inconsistent with the documented medical evidence.

Footnote: 18 As previously noted, n. 12 *supra*, the reader of the polygraph concluded that the grandfather's statement regarding the alleged confession was not true, and Ms. Mosier testified that Jeffrey L. never stated that he physically abused Jeffrey R.L. Even more troubling to this Court is the fact that Gail L. testified at the March 25, 1992, hearing that she heard Jeffrey L. confess to her grandfather that he abused Jeffrey R.L.; yet, the report of the polygraph examiner, Mr. Catlett, dated March 4, 1993, attached as an exhibit to Gail L.'s brief, states that Gail L. "stated she never actually heard her husband say he injured their infant son."

Footnote: 19 We note that Gail L., who completed her parenting classes, contends she was cooperative with the DHHR. However, she refused to sign the treatment plan.

Footnote: 20 The guardian *ad litem* before this Court asserts that Jeffrey R.L.'s interests were not adequately represented before the circuit court. She points out that the attorney representing the child did not call any witnesses, did not place any exhibits into evidence, and did not confer with the treating physician or with the foster parents until this petition was filed with this Court. She also asserts that at the hearing in December of 1992, the attorney represented to the circuit court that he had yet to decide whether the child should be placed back with his family. However, because we are terminating parental rights in this case and adopting standards for guardians *ad litem* to adhere to in the future, we need not further address this issue.

Footnote: 21 *See* Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference? -- A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. Fam. L. 405 (1983).

Footnote: 22 *See* Jane Knitzer & Merrill Sobie, *Law Guardians In New York State--A Study of the Legal Representation of Children* (1984).

Footnote: 23 Several useful lessons were learned from the North Carolina study:

That attorneys had little effect overall is understandable if circumstances surrounding the guardian's role are considered. First, there was much confusion about the role of the guardian ad litem . . . . This confusion not only prevented the guardian ad litem from having a clear goal, but it was also a source of confusion to the judge who may have resented, criticized, or ignored a guardian ad litem who was taking on responsibilities that the judge felt were inappropriate . . . . The attorney survey showed that 53% felt that judges expected them to assume an adversarial role in representing their client's position, while 41% felt that judges did not have this expectation, at best an ambivalent situation . . . . The condition of ambivalence with respect to the expectations of the attorney was not aided by the fact that guardians typically had received no specialized training relevant to abuse and neglect cases, either during law school or thereafter.

Another, and perhaps more critical, factor in limiting attorney effectiveness was that both guardians and judges seemed to assume that the guardian should play only a minor role. Court records from our sample indicated that attorneys spent a median of only five hours per case. Since this figure includes all court time, the time left for investigation, negotiation, or consultation is negligible. Not surprisingly, guardians indicated that they concurred with the department of social services recommendations in 88% of their cases. Additionally, attorneys usually did not follow their cases after the dispositional hearing to see if treatment plans were being carried out. Attorneys, it appears, were a presence rather than an influence in the court's handling of the cases. *Kelly & Ramsey, 21 J. Fam. L. at 451-52 (footnote omitted).*

Footnote: 24 *The Colorado Committee's standards are for representation of children generally, and are not limited to child abuse and neglect cases. Furthermore, in some states, such as Minnesota, the guidelines are established for lay people who represent children in a variety of proceedings. See Minnesota Judges Association, Guidelines for Guardians Ad Litem (June 1986). W. Va. Code, 49-6-2(a) [1992] provides children the right to be represented by an attorney, but makes no provision for children to be represented by lay persons.*

Footnote: 25 *In order to be concise, we are not listing each of the standards provided under the categories. The categories effectively summarize and reflect the purpose of the standards listed under them.*

Footnote: 26 *See W. Va. Code, 49-6-2(a) [1992].*

Footnote: 27 *The compensation and expenses for those attorneys who are appointed to represent children in abuse and neglect cases pursuant to W. Va. Code, 49-6-2(a) [1992] fall under the provisions of article 21, chapter 29 of the West Virginia Code. W. Va. Code, 29-21-2(2) [1990] provides, in relevant part, that "Eligible proceedings" include "child abuse and neglect proceedings which may result in a termination of parental rights[.]" An "Eligible client" is defined under W. Va. Code, 29-21-2(1) [1990] as "[a]ny person who meets the requirements established by this article to receive publicly funded legal representation in an eligible proceeding as defined herein[.]"*

Thus, abuse and neglect proceedings where parental rights may be terminated are eligible proceedings under the provisions of article 21, chapter 29 of the Code. Moreover, a child in an abuse and neglect proceeding is an eligible client under W. Va. Code, 29-21-2(1) [1990]. Attorneys, therefore, who are appointed to represent children in abuse and neglect proceedings will submit claims for fees and expense reimbursements to the appointing court in accordance with the provisions of article 21, chapter 29 of the West Virginia Code. See W. Va. Code, 29-21-13a [1990].

Footnote: 28 *"The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals." Syl. pt. 1, State ex rel. Askin v. Dostert, 170 W. Va. 562, 295 S.E.2d 271 (1982).*

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35487

IN THE INTEREST OF JESSICA G.

Appeal from the Circuit Court of Logan County, West Virginia
Hon. Eric H. O'Briant, Judge.
Case No. 08-JA-33-0

VACATED AND REMANDED

Submitted: May 4, 2010
Filed: June 3, 2010

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN concurs and reserves the right to file a concurring Opinion.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. " Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syllabus Point 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Per curiam:

Morris G.,[1] hereafter "Appellant" or "father," appeals an order of the Circuit Court of Logan County which terminated his parental rights to the minor child, Jessica G., and transferred physical and legal custody of Jessica G. to the West Virginia Department of Health and Human Services, hereafter "DHHR." The Appellant argues that the circuit court failed to properly consider the wishes of his then thirteen-year-old daughter, Jessica G., before terminating his parental rights. In a brief filed with this Court, the guardian *ad litem* for Jessica G. also assigns as error that the circuit court failed to make "findings of fact as to whether it considered the wishes of Jessica G., age thirteen, regarding the permanent termination of the parental rights of the Appellant as required by West Virginia Code 49-6-5(a)(6) and if so, why such wishes were ignored."

Having fully considered the record, arguments and briefs of the parties, we vacate the circuit court's order terminating the Appellant's parental rights and remand this matter for further proceedings consistent with this Opinion.

[1] We follow our traditional practice in child abuse and neglect matters, as well as other cases involving sensitive facts, and do not use the last names of the parties. *See, e.g.*, *In the Matter of: Scottie D.*, 185 W.Va. 191, 192 n. 1, 406 S.E.2d 214, 215 n. 1 (1991).

I. Factual Background

The Appellant is the biological father of Jessica G. and has a long history of addiction to prescription medications. The record shows that on August 10, 2007, an abuse and neglect proceeding was instituted against the Appellant and Jessica G.'s biological mother, Kelly G., alleging substance abuse and neglect of Jessica G. The circuit court, upon receipt of the petition, granted DHHR temporary custody of Jessica G. In a subsequent hearing, the Appellant was granted a pre-adjudicatory improvement period, which he successfully completed and custody of Jessica G. was returned to the Appellant.

On April 7, 2008, the DHHR received another referral, again alleging substance abuse by the Appellant. An investigation into that referral found the Appellant to be taking his medication as prescribed, but that Kelly G. admitted to extensive substance abuse. However, an abuse and neglect petition was not filed because Kelly G. had moved out of the Appellant's home, the Appellant had full custody of Jessica G. and the Appellant informed DHHR that he was divorcing Kelly G.

On July 2, 2008, DHHR received another referral, this time informing DHHR that the Appellant had overdosed on benzodiapines and opiates, necessitating his hospitalization in intensive care and placement on a ventilator. DHHR filed an abuse and neglect petition and sought immediate custody of Jessica G., which the circuit court granted.

In his Answer to DHHR's abuse and neglect petition, the Appellant admitted to the allegations that his substance abuse had resulted in the neglect of Jessica G., and

moved for a post-adjudicatory improvement period. The record shows that over the course of the next several months, the circuit court and DHHR made substantial efforts to provide the Appellant with opportunities to treat his addiction to prescription medications.[2] These efforts ultimately proved unsuccessful, and DHHR moved to terminate the Appellant's and Kelly G.'s[3] parental and custodial rights.

On June 5, 2009, a hearing was held on DHHR's motion, at which time neither the Appellant, nor Kelly G., appeared. The only witness who testified at the hearing was a social worker employed by DHHR. The social worker testified that while the Appellant had successfully completed an inpatient treatment program early in the proceedings, he failed to follow through with his treatment plan which required the Appellant to enroll in a post-discharge addiction treatment program.

The social worker also testified to Jessica G.'s statements regarding termination of the Appellant's parental rights, stating: "I would note that the child is thirteen and does not wish her father's parental rights to be terminated" and that there "is a very strong bond between Jessica and her father" and that if the Appellant's rights were terminated as requested, that she "would want them [Jessica G. and the Appellant] to be able to have some

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[2] The record reflects that the Appellant had been seriously injured in an accident and began taking pain medications, leading to his addiction. At the time of the institution of the abuse and neglect proceeding underlying this appeal, the Appellant continued to be prescribed pain medication and was under the care of a pain management specialist.

[3] The record indicates that Kelly G. had been largely uncooperative during the post-adjudicatory improvement period granted to her, including signing herself out "against medical advice" from an inpatient treatment program.

sort of contact, just because there is such a significant bond." Notwithstanding the "significant bond" between Jessica G. and her father, the social worker testified that she did "not think it would be appropriate for [the Appellant] to regain custody of Jessica."

Following the social worker's testimony, and argument of counsel for the parties, the circuit court granted DHHR's motion to terminate the Appellant's parental rights.[4] In terminating the Appellant's parental rights, the circuit court made the following findings from the bench:

> . . . [in] Jessica's best interest we all have hoped that Kelly and Morris would deal with their substance abuse issues. Early on it was recognized and recommended that they avail themselves voluntarily of in-patient treatment programs to help them get clean so that we could work keeping them clean so that they could properly parent their teenage daughter.
>
> The [DHHR] did not object to post-adjudicatory improvement period for either parent. However, the parents have failed to respond or follow through with recommended treatment which would have improved their capacity for parenting. They have willfully refused and are presently unwilling to cooperate in the development of a reasonable family case plan to lead to the child's return to their care, custody, and control.
>
> We have had [treatment plans] and formulated preliminary plans to let them rehabilitate themselves but they again have refused and are presently unwilling to cooperate. Their attendance at hearings has been sporadic. They have not followed through with their

[4] The circuit court also terminated Kelly G.'s parental rights. She did not appeal that termination.

> drug screens as they promised that they would do which can only lead to the conclusion that they are continuing to use drugs. There is no doubt that each of them loves their daughter and that their daughter loves them; and that their daughter yearns for them to clean up their act so that they can be a family unit.
>
> However, the Court finds by clear and convincing evidence in this case that there is no reasonable likelihood that the conditions of Morris and Kelly being addicted to controlled substances can be substantially corrected; and therefore, the Court grants the petition to [t]erminate both the parental and custodial rights of each of the biological parents.

After terminating the Appellant's parental and custodial rights, the circuit court did note the testimony that established the strong bond between Jessica G. and the Appellant, and ordered the Appellant be provided post-termination visitation with Jessica G., under such conditions as deemed appropriate by the DHHR.

II. Standard of Review

We set forth our standard of review in abuse and neglect cases in Syllabus Point 1of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), which states as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall

> not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

III. Discussion

The record before us clearly demonstrates that the Appellant is addicted to prescription medications and that the underlying action was instituted following the Appellant's having overdosed – the overdose resulting in the Appellant's being placed in intensive care and on a ventilator. There is no dispute by the parties that several efforts were undertaken by DHHR and the circuit court, during the pendency of the action below, to provide the Appellant an opportunity to obtain treatment for his addiction.

While the Appellant participated in the treatment plans, it is clear that he did so with varying degrees of effort and ultimately failed to overcome his addiction. This failure resulted in a recommendation by DHHR that the Appellant's parental rights be terminated. The circuit court agreed with DHHR's recommendation and terminated the Appellant's parental rights on the basis that the Appellant's addiction rendered him incapable of providing the necessary parental care and supervision of Jessica G.

On appeal, the Appellant and the guardian *ad litem* for Jessica G. argue that the circuit court erred in failing to properly consider the wishes of Jessica G. before terminating the Appellant's parental rights. The guardian *ad litem* further argues that the conditions giving rise to the neglect of Jessica G. – the Appellant's addiction – were resolvable by a means other than termination of the Appellant's parental rights. This point is succinctly stated in the guardian *ad litem*'s brief as follows:

> . . . the [DHHR] was wrong when it believed it had no choice but to ask for termination of the Appellant's parental rights. Under West Virginia Code 49-6-5(a)(5), Jessica G. could have been placed in foster care until she reached the age of eighteen. Such disposition could have allowed [the Appellant] to petition the court at a later date and show he was willing to provide for Jessica G.'s needs.

The guardian *ad litem* further argues that another alternative disposition that the court could have considered was to "bifurcate the parental rights of the Appellant . . . and terminate his custodial rights only." The guardian *ad litem* reasons that such a bifurcation would have "allowed [the Appellant] to retain his parental rights to Jessica G. and to honor the wishes of Jessica G." To be clear, the guardian *ad litem* does not argue that Jessica G. should be returned to the custody of the Appellant as a result of this appeal and specifically takes the position that the Appellant should not have custody until his addiction is in remission.

The record is clear that the circuit court was made aware by the Appellant, DHHR and the guardian *ad litem* that Jessica G. did not want her father's parental rights

terminated and that Jessica G. had a "significant bond" with her father. In granting post-termination visitation to the Appellant, the circuit court acknowledged this bond. However, under *W.Va. Code*, 49-6-5(a)(6) [2006][5], the circuit court should have considered Jessica G.'s wishes before terminating the Appellant's parental rights:

> Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older *or otherwise of an age of discretion as determined by the court* regarding the permanent termination of parental rights. (Emphasis added).

Id.

After reviewing the circuit court's order terminating the Appellant's parental and custodial rights, as well as a review of the transcript of the dispositional hearing, we find

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[5] *W.Va. Code*, 49-6-5(a)(6)[2006] states, in relevant part, as follows:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a non-abusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors: (A) The child's need for continuity of care and caretakers; (B) the amount of time required for the child to be integrated into a stable and permanent home environment; and (C) other factors as the court considers necessary and proper. *Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights.* (Emphasis added).

that the circuit court failed to adequately explain why Jessica's G., who was thirteen years old at the time of the dispositional hearing (and is now fourteen years old), was not "otherwise of an age of discretion," *Id*., and why her wishes were not factored into whether termination of the Appellant's parental rights, and the concomitant bond between Jessica G. and her father, might be contrary to Jessica G.'s best interests and emotional well-being. We are particularly concerned with the complete absence of *any* testimony at the dispositional hearing by a licensed mental health care provider as to the possible psychological consequences to Jessica G. by terminating her father's parental rights.

In Syllabus Point 5, *In re: Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001) we held that:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

In the case before us, the circuit court should have considered Jessica G.'s wishes, pursuant to *W.Va. Code*, 49-6-5(a)(6), before terminating the Appellant's parental and custodial rights and failed to do so. Accordingly, we vacate the circuit court's order terminating the Appellant's parental rights and remand this matter for further proceedings. On remand, the circuit court shall consider Jessica G.'s wishes and whether placement in a

foster home until her eighteenth birthday might best serve the interest of this child. Those findings shall be specifically set forth in the court's dispositional order.[6]

IV. Conclusion

For the reasons set forth herein, the order of the Circuit Court of Logan County is vacated and this matter remanded for further proceedings consistent with this Opinion.

Vacated and Remanded.[7]

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[6] In the event that the circuit court again finds that termination of the Appellant's parental rights is in Jessica G.'s best interest, we encourage the circuit court to again specifically address – as it appropriately did at the time of the dispositional hearing and dispositional order presently before us in this Appeal – those matters set forth in Syllabus Point 5 of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), where we held that:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

[7] Nothing in this Opinion should be interpreted to require the transfer of the custody of Jessica G. from the DHHR to the Appellant. This Opinion vacates *only* the circuit court's June 8, 2009, dispositional order. All prior orders of the circuit court regarding temporary custody of Jessica G. remain in full force and effect.

226 W. Va. 242, 700 S.E.2d 302

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2010 Term

No. 35441

FILED
September 16, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Appellee,

v.

JESSICA JANE M.,
Appellant.

Appeal from the Circuit Court of Ohio County
The Honorable James P. Mazzone, Judge
Criminal Action No. 08-F-17

AFFIRMED

Submitted: September 8, 2010
Filed: September 16, 2010

Michael C. Alberty, Esquire
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Jenna Perkins Wood, Esquire
Ohio County Prosecutors Office
Attorneys for Appellee

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." Syllabus Point 6, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

2. "A defendant who wishes to cross-examine an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution, which presentation may in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of our rape shield law, *W.Va. Code*, § 61-8B-11 [1986] and *West Virginia Rules of Evidence* 404(a)(3)[1994]." Syllabus Point 3, *State v. Quinn*, 200 W.Va. 432, 490 S.E.2d 34 (1997).

3. "Requiring strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that

evidence which is within the scope of our rape shield law *W.Va. Code*, § 61-8B-11 [1986] and *West Virginia Rules of Evidence* 404(a)(3)[1994], is not erroneously considered outside of its scope." Syllabus Point 2, *State v. Quinn*, 200 W.Va. 432, 490 S.E.2d 34 (1997).

4. "'The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error.' Syllabus Point 8, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974)." Syllabus Point 10, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001).

5. "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." Syllabus Point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

Per Curiam:

This is an appeal of a January 14, 2009, final order from the Circuit Court of Ohio County sentencing the defendant/appellant Jessica Jane M.[1] (hereinafter "Jessica M." or "defendant") to serve not less than 101 years, nor more than 235 years in the state penitentiary upon being convicted of three counts of first degree sexual assault, four counts of sexual abuse by a parent, three counts of incest, and one count of conspiracy. The defendant asserts that the trial court committed reversible error by (1) allowing the State to introduce hearsay statements the alleged victim made to her foster mother; (2) incorrectly applying our rape shield law by prohibiting the defendant from asking the alleged nine-year-old victim: "How many different men did you have sex with?"; (3) denying defense counsel's request to inquire as to the alleged victim's competency to testify at trial; and (4) denying defendant's motion to disqualify the Ohio County Prosecuting Attorney's Office due to previous contact between the defendant and certain members of the prosecutor's office in a separate matter.

After thorough review of the briefs, the legal authority cited and the record presented for consideration, we find that the circuit court committed no reversible error and therefore affirm the judgment of conviction and sentencing order.

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[1] The use of the defendant's last name would make her young daughter easily identifiable. We will therefore adhere to our usual practice and refer to the parties by their first names and last initials only. *See In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

I.
Facts & Background

The charges against the defendant stem from allegations made by her daughter, R.M. R.M. was born on December 28, 1998, and resided with her mother until February 28, 2006, when she and her two younger siblings were removed from her mother's residence due to allegations of abuse and neglect unrelated to the sexual abuse allegations that form the basis of this appeal.

R.M. and her siblings were placed in the foster home of Sally Keefer in August 2006.[2] A month after the children moved into her house, Sally Keefer observed R.M. "french kissing" her 18 month-old younger brother and engaging in other overt sexual conduct that she considered abnormal behavior for a seven-year old child. During October and November 2006, R.M. told Ms. Keefer that she had been sexually abused by her mother and her mother's boyfriend, Jack Jones[3], prior to being removed from her mother's house. Sally Keefer recorded these disclosures in a journal, contacted a DHHR (Department of Health and Human Resources) worker and requested that R.M. receive therapy to deal with this abuse.

R.M. also reported these sexual abuse allegations to Michelle Hogan, the CPS (Child Protective Services) worker assigned to handle her case. Ms. Hogan made an

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[2] Between February and August 2006, R.M. and her siblings were placed in a number of different foster homes.

[3] Jack Jones was also charged with sexually assaulting R.M. He was tried and convicted separately from the defendant herein.

audio recording of an interview she conducted with R.M. in which R.M. described being sexually abused by her mother and her mother's boyfriend, Jack Jones.[4]

Following these sexual abuse disclosures, R.M. underwent a physical examination and a forensic interview on November 7, 2006. Dr. Joan Phillips performed the physical examination and determined that a portion of R.M.'s hymen "was totally gone, which is abnormal," and further testified that the absence of the hymen "is considered clear evidence of a penetrating trauma."

Maureen Runyon, a social worker who has worked exclusively with sexually abused children for the last eleven years, conducted the forensic interview. While R.M. denied the sexual abuse allegations during this interview, Ms. Runyon concluded that "based on the . . . behavior and statements that she's made . . . I felt like there had been some type of inappropriate sexual activity." In preparation for trial, Ms. Runyon reviewed R.M.'s history of sexual abuse disclosures and found them to be credible because of R.M.'s advanced sexual knowledge and the sensory details she provided. Ms. Runyon stated:

> [S]he also describes, again, what we call sensory details. She can tell you what it feels like. She can't know what it feels like to have a penis inside of her from watching it on TV. At one point she describes the ejaculation as being wet and sticky. Again, that's a sensory detail that tells me she had to have experienced that to be able to describe it in the type of detail that she does.

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[4] Ms. Hogan did not provide the exact date upon which this recording was made, but testified "I believe the disclosures may have started in September" of 2006.

R.M. saw a psychologist, Dr. Sara Wyer, approximately twenty times beginning in the fall of 2006 and continuing through 2007. R.M. repeated the same allegations of being sexually abused by her mother and Jack Jones to Dr. Wyer. Dr. Wyer testified that she found R.M.'s disclosures to be credible "primarily based on the fact that she gave very detailed sensory descriptives. What things tasted like, looked like, felt like . . . I felt that she had had direct experience with that."

Based on these sexual abuse allegations, an Ohio County grand jury returned a 14-count indictment against Jessica M. on January 14, 2008. This indictment included one count of felony conspiracy in violation of *W.Va. Code* § 61-10-31, four counts of felony sexual assault in the first degree in violation of *W.Va. Code* § 61-8B-3(a)(2), five counts of felony sexual abuse by a parent or custodian in violation of *W.Va. Code* § 61-8D-5(a), and four counts of felony incest in violation of *W.Va. Code* § 61-8-12(b).

The defendant's trial began on October 8, 2008, and lasted for three days. R.M. testified at the trial, stating that her mother held her down while Jack Jones raped her. R.M. also testified that her mother put her fingers inside of her vagina, made R.M. touch her breast, performed oral sex on R.M., and made R.M. perform oral sex on her.

The State called a number of witnesses who corroborated R.M.'s testimony including R.M.'s foster mother, Sally Keefer; R.M.'s CPS worker, Michelle Hogan; Dr. Phillips, whose physical findings showed "clear evidence of a penetrating trauma"; Maureen Runyon who conducted the forensic interview, reviewed R.M.'s history of

sexual abuse disclosures and testified that she found R.M.'s allegations to be credible; and Dr. Sara Wyer, a psychologist who treated R.M. and found her allegations to be credible.

The State also called Connie Roy, a Licensed Professional Clinical Counselor at a residential treatment facility where R.M. spent five months receiving treatment.[5] Both Ms. Roy and a physician employed at the facility diagnosed R.M. with "post-traumatic stress disorder, chronic, and sexual abuse of child, focus on victim." Ms. Roy testified that the post-traumatic stress disorder was a result of the sexual abuse R.M. suffered. Ms. Roy further testified that R.M.'s behavior and the manner in which she made the sexual abuse disclosures were consistent with that of a child who has been sexually abused.

At the close of the State's case, the defendant moved for a directed verdict of acquittal on all fourteen counts in the indictment. The court dismissed counts five, ten, and fourteen of the indictment[6] and denied the defendant's motion as to the remaining eleven counts.

The defendant's case consisted of three witnesses. Jessica M. testified on her own behalf and denied the allegations her daughter made against her, stating that she never sexually abused her daughter and would not allow anyone else to sexually abuse her

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[5] R.M. was an in-patient at this facility from March through August 2008.

[6] These three counts charge the defendant with forcing R.M. to "penetrate the sexual organ of JESSICA M. with a foreign object for the purpose of gratifying the sexual desire of JESSICA M. . . ." The State failed to present sufficient evidence that this act occurred and conceded that these three counts were properly dismissed.

daughter. The defendant next called Dr. Michael Crabtree, an expert in psychology who testified that R.M.'s accusations were not credible and that the defendant did not fit the profile of a sex offender. The defendant's final witness was Dr. David Mosman, a pediatrician in Wheeling, West Virginia, who treated R.M. for a sore throat in November 2004. He testified that he only saw R.M. on one occasion and was not aware that R.M. had been sexually abused. On cross-examination, Dr. Mosman testified that he never performed a pelvic examination on R.M. because he was simply treating her for a sore throat.

The jury convicted the defendant on all eleven counts remaining in the indictment. On January 14, 2009, the circuit court sentenced the defendant to serve not less than 101 years, nor more than 235 years in the state penitentiary. The defendant appeals from this sentencing order.

II.
Standard of Review

Because the issues raised in the instant appeal require the application of separate and distinct standards of review, we incorporate such standards into our discussion of the issues to which they pertain.

III.
Discussion

The defendant raises four issues upon which she asserts the trial court committed reversible error: (1) allowing the State to introduce hearsay statements the alleged victim made to her foster mother, thereby violating the defendant's Sixth Amendment right to confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36, (2004); (2) incorrectly applying our rape shield law by prohibiting the defendant from asking the alleged nine-year-old victim: "How many different men did you have sex with?"; (3) denying defense counsel's request to inquire as to the alleged victim's competency to testify at trial; and (4) denying defendant's motion to disqualify the Ohio County Prosecuting Attorney's Office due to previous contact between the defendant and certain members of the prosecutor's office in a separate matter.

A.(1)
Hearsay Statements

The defendant first argues that the trial judge improperly permitted the State to introduce hearsay statements through the testimony of Sally Keefer, R.M.'s foster mother, about the sexual abuse disclosures R.M. revealed to her.

When reviewing a challenge to a trial court's admission of evidence, we apply the following standard of review: "'(r)ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 599

(1983)." Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983). *See also* Syllabus Point 1, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001).

In making a determination whether the testimony in question constitutes hearsay[7], we are guided by Syllabus Point 1 of *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990), which states:

> Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.

With these standards in mind, we turn to the defendant's argument. During direct examination, the State asked R.M.'s foster mother about a November 22, 2006, journal entry documenting R.M.'s sexual abuse disclosure and she testified as follows:

> She was just going on about her business, getting a bath. I was getting the other two out, drying them off, and she just looked at me, and said, "Sally, can I tell you something?" I said, "Yes." She said, "Jack did touch my privates."

Defense counsel objected to this testimony, arguing that it was impermissible hearsay. The trial judge initially agreed and stated that if it was being offered for the truth of the matter asserted, the objection would be sustained. The State

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[7] "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. W.Va.R.Evid. 801(c).

argued that it should be permitted to show the child's advanced sexual knowledge. The trial judge agreed with the State and gave the jury the following instruction:

> Ladies and gentlemen, please disregard the witness's last answer. These statements regarding what's in the journal, as I understand it, are not being offered for the truth of the matter asserted within the statements.

Based on this ruling, the State continued asking R.M.'s foster mother questions about the sexual disclosures R.M. made which were recorded in the foster mother's journal. The trial judge gave defense counsel a continuing objection to these questions,[8] gave two more instructions to the jury that this testimony was not to be considered for the truth of the matter asserted and instructed them, "(a)s I understand it, they are being offered to demonstrate sexual knowledge possessed by R.M."

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[8] An example of this line of questioning is as follows:

Q. So she had a code word for her private area?

A. Yes. I never told her nothing and you know, if I would've referred to anything with any of the children, it would've been their pee-bug or private area. She used the word "coochie" and penis.

Q. Okay. So "coochie" was not a term that you came up with?

A. No.

Q. So I think you said that she described her mother using her tongue?

A. Yes. And so I asked her, "What did your mother do with her tongue?" And she said that she would move it up and down and she would ask her if it felt good and did she like it. And R.M. said she said yes because she was scared to tell her mother no.

After reviewing the entire record, we conclude that the trial judge did not abuse his discretion by permitting Sally Keefer to testify regarding R.M.'s sexual abuse disclosures. In *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), and *State v. James B., Sr.*, 204 W.Va. 48, 511 S.E.2d 459 (1998), we addressed the admissibility of statements a child who had allegedly been sexually abused made to their mother or foster mother. In *Edward Charles L.*, we upheld the admissibility of this kind of statement under *West Virginia Rule of Evidence* 803(24), the catch-all exception to the hearsay rule, stating that:

> [T]he mother's testimony was properly admitted at trial by the lower court, since the children were present to testify and be cross-examined; the mother added nothing substantive to the children's direct testimony, and primarily related the child's statements not to prove the truth of the matter asserted, but to explain why she took them to the psychologist[.]

Edward Charles L., 183 W.Va. at 657, 398 S.E.2d at 139.

We further determined in *Edward Charles L.*, that "the statements comport to this hearsay exception and the general rules of evidence because they not only meet the relevancy and probativeness requirements but the fact that the children testified at trial and were subject to cross-examination ameliorates the real risks of admitting hearsay." *Id.* 183 W.Va. at 656, 398 S.E.2d at 138.

Similarly, in *James B., Sr.*, we reviewed testimony by a foster mother who testified about a child being made to perform sexual acts with his biological mother and stepfather, James B., Sr. This Court determined that the foster mother's testimony was not hearsay because it was offered not for the truth of the matter asserted, but to explain

why the foster mother contacted the authorities. In *James B., Sr.*, the trial court gave a limiting instruction to the jury and told them to consider the testimony for that limited purpose. As in *Edward Charles L.*, one of the main reasons this Court upheld the trial court's ruling in *James B., Sr.*, was that the child testified at trial, thus ameliorating the real risk of admitting hearsay.

In the present case, R.M. testified at trial. Consistent with *Edward Charles L.*, and *James B., Sr.*, this ameliorates the real risk of admitting the alleged hearsay statements made by R.M.'s foster mother. There was a thorough cross-examination as to the sexual abuse allegations R.M. made against her mother. We therefore find that the trial judge did not abuse his discretion by allowing R.M.'s foster mother to testify as to R.M.'s disclosures of sexual abuse recorded in her journal.

A.(2)
Alleged Crawford Violation

The defendant next argues that her Sixth Amendment right to confrontation was violated when the State was permitted to ask R.M.'s foster mother about her journal entries documenting R.M.'s sexual abuse disclosures. In support of her argument, the defendant relies on *Crawford v. Washington, supra*.

In *Crawford* the defendant was convicted of assault. The evidence used to support the conviction included a tape-recorded incriminating statement given to the police by the defendant's wife. *The defendant's wife did not testify at the trial*. The defendant argued that the statement should not have been admitted because he was not

afforded an opportunity to confront his wife regarding the statement. The trial court allowed the statement to be introduced. On appeal, the Washington Court of Appeals reversed on the grounds that the statement was improperly admitted into evidence. However, the Washington Supreme Court reversed after finding the statement was properly admitted.

The United States Supreme Court agreed to hear the case to determine whether introduction of the statement violated the defendant's Sixth Amendment right to confront witnesses against him. The Supreme Court found that the statement should not have been allowed into evidence, stating "[t]estimonial statements of witnesses *absent from trial* [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1369, 158 L.Ed.2d 177. (Emphasis added).

We interpreted *Crawford* in *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006), finding:

> Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement *by a witness who does not appear at trial*, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Syllabus Point 6, *State v. Mechling, supra*. (Emphasis added).

Mechling further explained that "only 'testimonial statements' cause the declarant to be a 'witness' subject to the constraints of the Confrontation Clause. Non-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause." 219 W.Va. at 373, 633 S.E.2d at 318.

In the case *sub judice*, the defendant argues that the trial court erred by failing to determine whether the statements recorded in R.M.'s foster mother's journal were testimonial or non-testimonial.[9] The defendant argues that these statements were testimonial and that her Sixth Amendment right to confront a witness against her was

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[9] *Crawford* did not provide a clear definition of 'testimonial statements', but it did provide examples of the types of statements that can be considered 'testimonial':

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions[;] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

Crawford, 541 U.S. at 51-52, 124 S.Ct. at 1364 (quotations and citations omitted).

violated. We disagree. Assuming, as urged by the defendant, that the statements recorded in the foster mother's journal are testimonial, the defendant's argument fails because R.M. was the out-of-court declarant and R.M. testified at trial. *Crawford* and *Mechling* bar the admission of a testimonial statement *by a witness who does not appear at trial*, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. The defendant's Sixth Amendment right to confront and cross-examine R.M. was satisfied because she testified and was cross-examined.

The defendant acknowledges that R.M. testified at trial, but argues that the trial judge severely limited her cross-examination of R.M. and would not allow defense counsel to ask her about the sexual abuse disclosures R.M. made to her foster mother. The trial judge limited the defendant's cross-examination of R.M. to "the areas that were brought up on direct examination."[10] During the State's direct examination of R.M., the following exchange took place:

> State: Okay. You talked to Sally, your foster mom, about these things that happened to you; right?
>
> R.M.: Yes.

Since the State inquired about R.M.'s discussions with her foster mother during direct examination, the defendant could have asked about these discussions during

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[10] The trial judge made this statement in the context of ruling on whether the defendant could ask R.M. "How many different men did you have sex with?" This will be discussed at length in section III. B. *infra*.

cross-examination. We therefore find that the defendant's cross-examination of R.M. was not substantially limited by the trial judge's ruling confining her to the areas that were brought up on direct examination.

B.

Rape Shield

The defendant's next argument is that the trial court abused its discretion when it sustained the State's objection to the following question defense counsel posed to R.M.: "How many different men did you have sex with?" The trial court determined that this question was prohibited by West Virginia's rape shield law, which encompasses both *W.Va. Code* § 61-8B-11 [1986][11]and *West Virginia Rules of Evidence* 404(a)(3)[1994][12].

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[11] *W.Va. Code* § 61-8B-11 [1986] states:

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible. In any other prosecution under this article, evidence of specific instances of the victim's prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such evidence heard first out of the presence of the jury is found by the judge to be relevant.
>
> (b) In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence

In this opinion we will refer to both the statute and the rule, considered *in pari materia*, as West Virginia's "rape shield law."

Our standard of review when considering a rape shield challenge is twofold. First, an interpretation of the *West Virginia Rules of Evidence* presents a question of law subject to *de novo* review. Second, a trial court's ruling on the admissibility of testimony is reviewed for an abuse of discretion, but to the extent the circuit court's ruling turns on

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> shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.
>
> (c) In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying.
>
> (d) At any stage of the proceedings, in any prosecution under this article, the court may permit a child who is eleven years old or less to use anatomically correct dolls, mannequins or drawings to assist such child in testifying.

[12] *West Virginia Rules of Evidence* 404(a)(3)[1994] states in pertinent part;

> (a) *Character evidence generally*. - Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except: . . .
>
> (3) Character of victim of a sexual offense. - In a case charging criminal sexual misconduct, evidence of the victim's past sexual conduct with the defendant as provided for in W.Va. Code § 61-8B-11; and as to the victim's prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice[.]

an interpretation of the *West Virginia Rules of Evidence*, our review is plenary. *State v. Sutphin*, 195 W.Va. 551, 560, 466 S.E.2d 402, 411 (1995).

Following the State's objection to the question, "How many different men did you have sex with?", the parties discussed the objection at the bench:

> State: This violated - violates the Rape Shield Statute. There's no - I mean, if he's - there's no reason to ask this question of this child, and to ask it about men - or how many she had sex with. There's no evidence in this case that she has had sexual relations with anyone. Certainly not consensual. Or whether she's been perpetrated by anyone else other than her mother. It's not admissible. If there's no claimed injury for which there has to be identification or a disease or such - I mean, it is what it is, your Honor.
>
> Defense Counsel: Your Honor, this child, according to the records the prosecutor's office provided to me, has named numerous individuals that's had sex with - that raped her.
>
> State: Your Honor, that's misrepresenting the evidence.
>
> Defense Counsel: You just cannot - you just can't bring a child - you just can't bring a child in here and ask a series of questions that the answer is yes, yes, yes, and then say, whoops, I can't probe this. I still contend that this child may be incompetent to testify. She'd look up while I'm asking the questions - she's obviously looking to Ms. Wood (prosecuting attorney).
>
> State: Oh, my. This has nothing to do with competency. It has to do with the truthful answers. She's nine.

> The Court: The objection is going to be sustained. You may inquire as to whatever conduct of a sexual nature she described in her direct testimony.
>
> State: Thank you.
>
> Defense Counsel: I can't go into her grandfather, her uncle, any of those people?
>
> State: Your honor, the scope of direct.
>
> The Court: You can - the sexual acts that she testified to on direct.

The defendant alleges that the trial court committed error when it "prohibited defense counsel from soliciting testimony and introducing evidence of the falsity of R.M.'s other accusations of sexual assault and abuse against different family members." In Syllabus Point 3 of *State v. Quinn*, 200 W.Va. 432, 490 S.E.2d 34 (1997), we set forth the procedure a defendant must follow in order to cross-examine an alleged sexual assault victim regarding other statements she has made about being the victim of sexual misconduct:

> A defendant who wishes to cross-examine an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct *must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution*, which presentation may in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged

> victim and effectuates the purpose of our rape shield law, *W.Va. Code* § 61-8B-11 [1986] and *West Virginia Rules of Evidence* 404(a)(3)[1994].

(Emphasis added).

In *Quinn*, the appellant was convicted of sexual misconduct by a custodian of a five-year-old child. The issue in *Quinn* was whether our rape shield law applied to bar the victim's alleged false statements of abuse by other perpetrators. The appellant sought to use this evidence to prove that the victim had falsely accused others in the same fashion that she falsely accused him. The appellant argued that the rape shield law did not apply to the victim's statements because they were false, and therefore were not evidence of the child's sexual conduct. Rather, they were evidence of the child's false statement of sexual abuse when there had been none. This Court set forth the following standard in Syllabus Point 2 of *Quinn* to determine whether such evidence fell outside the scope of our rape shield:

> Requiring strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law *W.Va. Code* § 61-8B-11 [1986] and *West Virginia Rules of Evidence* 404(a)(3) [1994], is not erroneously considered outside of its scope.

In the case *sub judice*, the defendant did not request a hearing outside the presence of the jury, as mandated by Syllabus Point 3 of *Quinn*, to present evidence demonstrating that R.M. had previously made false statements that she had been sexually

abused by other perpetrators.[13] The defendant never presented the trial court with any evidence that R.M. made *false* sexual abuse allegations against other people. Defense counsel failed to inform the trial judge during the discussion at the bench following the State's objection that his proposed line of questioning was intended to explore *false accusations* R.M. allegedly made. Instead, defense counsel simply stated, "this child, according to the records the prosecutor's office provided to me, has named numerous individuals that's had sex with - that raped her."[14]

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[13] Prior to trial, the defendant requested an *in camera* hearing to determine whether R.M. was "capable of testifying in a truthful, credible, reality based, factual, historically correct, delusionary free and mentally distorted free manor [sic]." As will be discussed at length in Section III. C., this proposed hearing was to determine whether R.M. was "competent and credible to testify at trial."

[14] Our review of the record indicates that there is little evidentiary support for the defendant's contention that R.M. "named numerous individuals that . . . raped her." The defendant asserts that R.M. accused her grandfather, her uncle, a boyfriend of her mother's named David Burch, and another man named William of sexually abusing her. The allegation against her grandfather and uncle did not come from R.M. Rather, when the police interviewed the defendant's boyfriend and co-conspirator, Jack Jones, he stated that R.M. had previously had sexual encounters with her uncle and her grandfather. The defendant fails to cite anywhere in the record where R.M. personally made this claim.

The defendant also discusses an alleged dream R.M. had in which the police officer who interviewed her handcuffed and raped her. Again, this allegation came not from R.M., but from the statement Jack Jones made to the police.

R.M. did discuss David Burch and William (no last name given), men her mother had previously dated. R.M. told her CPS worker that David Burch and William would "whoop my butt." When asked if these men did anything else to her, she replied no, "they would smack my butt though." R.M.'s foster mother asked her if anyone else ever touched her "privates," and she replied "Yes, David Burch did." R.M. does not elaborate on this answer and it is unclear from this exchange whether R.M. meant that Burch had done anything more than spanking her buttocks. R.M. told her psychologist, Sara Wyer, that Burch and William were boyfriends of her mother, but did not report that she had been sexually abused by either of them.

By contrast, R.M. made the allegations against her mother and Jack Jones to her foster mother, her CPS worker, her psychologist, and her counselor at the residential

This assertion, with no citation to the record, no proffer, affidavit or live witness to testify to R.M.'s alleged false prior accusations, falls far short of meeting the "strong and substantial proof of actual falsity" threshold we established in *Quinn*.

Despite her failure to comply with the *Quinn* threshold requirements, the defendant argues that the trial judge erred in view of the holding in *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008). *Barbe* held that, under the *Rock-Lucas*[15] principle, a state court ruling on the admissibility of evidence under a rape shield law must forgo the

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treatment facility, as well as testifying to these allegations in court.

We further note that while the defendant was not permitted to cross-examine R.M. about these alleged other individuals who raped her, the defendant explored this issue with numerous witnesses throughout the trial and discussed it during both opening and closing argument. The defendant explored this issue with Sara Wyer, R.M.'s psychologist; Dr. Joan Phillips, who conducted the physical examination; Maureen Runyon, who conducted the forensic interview; and Michelle Hogan, R.M.'s CPS worker. During opening argument, defense counsel stated:

> So there's a whole laundry list of people she's making these allegations on. Only two are being charged with anything, my client and her ex-boyfriend. Pap-Pap - if we're going to believe this child, if this child is not a liar - Pap-Pap is not charged with anything. David Burch isn't charged with anything. Michael, whoever that is, isn't charged with anything.

Defense counsel continued this theme in his closing argument, stating:

> I agree with Mr. Kahle (prosecutor) that this is a shame and this child should be innocent and, you know, she should be intact. I don't know why she's unintact. Maybe she put her own fingers in there. Maybe somebody else put fingers in there. Maybe William, David, all these names that were thrown around in this case had something to do with it.

[15] *Rock v. Arkansas*, 483 U.S. 44 (1987); *Michigan v. Lucas*, 500 U.S. 145 (1991).

application of any *per se* rule in favor of a case-by-case assessment of whether the relevant exclusionary rule "is arbitrary or disproportionate" to the State's legitimate interests. The defendant argues that the trial judge erred by failing to consider the specific facts of R.M.'s alleged other allegations and thereby violated *Barbe*.

Barbe is distinguishable from the instant case because the defendant herein failed to provide the trial court with an adequate evidentiary presentation alleging that R.M. previously made false accusations of sexual abuse against other perpetrators. *Barbe* was decided after *Quinn*, discussed our ruling therein and declined to cast doubt on our mandatory requirement that a defendant seeking to cross-examine an alleged victim about a prior false accusation must first present the court with an adequate evidentiary presentation outside the presence of the jury and with fair notice to the prosecution. In order for a trial court to comply with *Barbe* and conduct a case-by-case assessment of the facts to determine whether the relevant exclusionary rule is arbitrary or disproportionate to the State's legitimate interests, it must first be presented with an adequate evidentiary presentation.[16]

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[16] To summarize, three steps are required in determining whether a defendant may cross-examine an alleged sexual assault victim regarding other alleged false statements she has made about being the victim of sexual misconduct. First, the defendant must comply with Syllabus Point 3 of *Quinn* and present the court with a meaningful "proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim." If the defendant fails to comply with this requirement, the court can not perform steps two and three of this analysis.

The second step is for the court to determine whether the defendant has met the threshold set forth in Syllabus Point 2 of *Quinn* and presented "strong and substantial proof of the actual falsity of an alleged victim's other statements." If the defendant has met that threshold, then the false statements will not be excluded pursuant to our rape

Because the defendant in the instant case failed to make an adequate evidentiary presentation, as mandated by *Quinn*, we find that the trial court did not commit error. In view of the defendant's failure to follow *Quinn*, permitting defense counsel to ask R.M., "How many men have you had sex with?" would defy the letter and spirit of our rape shield law.

C.
Competency Issue

The defendant next alleges that the trial court "abused its discretion and created plain error when it prohibited defense counsel from questioning R.M. regarding certain facts that would demonstrate her inability to testify as a competent witness."

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shield law. If the court determines that a defendant has not met this threshold, it must move on to the third step of the analysis.

The third step, consistent with *Barbe*, is for a court that determines the falsity exception does not apply, to then conduct a case-by-case assessment and perform the balancing test we set forth in Syllabus Point 6 of *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999), to determine whether the exclusion of the proffered evidence under our rape shield law violates a defendant's due process right to a fair trial. Syllabus Point 6 of *State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999), states:

> The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

Our standard of review when examining whether a witness is competent to testify can be found in Syllabus Point 10 of *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001):

> "The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error." Syllabus Point 8, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Our rape shield law plainly states that, "[i]n any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying." *W.Va. Code* § 61-8B-11(c) [1986].[17]

We are also guided by *Wheeler v. United States*, 159 U.S. 523, 16 S.Ct. 93 (1895), in which the United States Supreme Court gave direction on how courts should evaluate the competency of a child witness:

> [T]here is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.

159 U.S. at 524-525, 16 S.Ct. at 93.

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[17] *W.Va. Code* § 61-8B-11 [1986] is quoted in full in footnote 11.

Consistent with this "clearly erroneous" standard, this Court has consistently held that the decision to allow or to refuse to allow a child's testimony is within the sound discretion of the trial judge and will not be reversed on appeal unless there is a clear showing of abuse of discretion.[18]

Applying these principles to the instant case, we first note that before R.M. testified, the trial judge engaged in a conversation with her to determine if she was competent to testify. This examination revealed that R.M. had the capacity and intelligence to understand that she had the duty to be truthful.

Based on this conversation and a review of R.M.'s testimony, we find the trial court did not commit error by allowing R.M. to testify. R.M. testified about being sexually assaulted in detail, including the following exchange during cross-examination in which she describes her mother holding her down while Jack Jones raped her:

> Q. Now, R., you mentioned earlier somebody held you down; is that correct?
>
> R.M. Yes.
>
> Q. Okay. Who did that?
>
> R.M. My mom.
>
> Q. Okay. And why did she do that?
>
> R.M. (No response).

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[18] See, *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984); *State v. Carter*, 168 W.Va. 90, 282 S.E.2d 277 (1981); *State v. Ayers*, 179 W.Va. 365, 369 S.E.2d 22 (1988); *State v. Price*, 96 W.Va. 498, 123 S.E. 283 (1924).

Q. Let me ask you another question. What happened when she held you down?

R.M. I was screaming and kicking.

Q. Now, where were you when all this was happening?

R.M. At my mom's place, Hil-dar. . . . It was an apartment thing . . . the place where we lived in Hil-dar had an upstairs and a downstairs.

This exchange illustrates that R.M. was able to describe what happened to her, where it happened and how she responded. The only question she was unable to answer called for her to speculate on her mother's motivation for sexually abusing her ("And why did she do that?"). While there were other questions R.M. was not able to fully answer, a review of the entirety of her testimony reveals that she was competent to testify. On the occasions she had difficulty answering certain questions, this was an issue of credibility for the jury to weigh, not an issue of competency. We are satisfied that the trial judge was in the best position to evaluate R.M.'s competency and we find no abuse of discretion on this issue.

D.
Motion to Disqualify Ohio County Prosecutor's Office

The defendant's final assignment of error is that the trial court erred when it denied her motion to disqualify the Ohio County Prosecutor's Office. The trial court's order denying this motion sets forth the following facts:

> The motion is based upon past dealings between the Prosecuting Attorney's office and Jessica M. The first contact that Jessica M. had with the Prosecuting Attorney's office in the past was in the capacity as a victim of domestic violence. She sought assistance and advice from that office on more than one occasion, and was advised to seek a protection from domestic violence order. On several occasions, Assistant Prosecuting Attorney Gail Kahle personally met with Jessica M. regarding her allegations of domestic violence. Attorney Kahle is one of two Assistant Prosecuting Attorneys assigned to the Jessica M. criminal case.
>
> Additionally, the Prosecuting Attorney's office has been involved in abuse and neglect proceedings involving Jessica M. as a Respondent, as well as Respondent Jack Jones, who is the alleged perpetrator of domestic violence against Jessica M.

The defendant alleges that these contacts between herself and members of the prosecuting attorney's office created an appearance of impropriety. The defendant further alleges that the prosecuting attorney's office may have acquired evidence through these meetings that it used against her in the present criminal matter.

In Syllabus Point 1 of *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987), we stated,

> Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

This Court has also indicated that whether a trial court should disqualify a prosecutor, or his office, from prosecuting a criminal defendant is reviewed under an abuse of discretion standard. *State v. Keenan*, 213 W.Va. 557, 584 S.E.2d 191 (2003). *See also State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

The trial court conducted a hearing on this matter and issued a detailed order, addressing each of the defendant's arguments. The trial court concluded that while Prosecutor Kahle met with Jessica M., he never acted as her attorney. Rather, he was acting in his capacity as an assistant prosecutor, assisting the victim of an alleged crime. There was never an agreement stating that Prosecutor Kahle represented the defendant, nor did he ever appear in court on her behalf. One of the reasons the trial court was unwilling to conclude that a prosecutor advising an alleged domestic violence victim created an attorney-client relationship was that:

> To find otherwise would create a chilling effect that would negatively impact the willingness of attorneys working in Prosecuting Attorney's offices to assist the victims of domestic violence.

The trial court next determined that the defendant failed to demonstrate that her previous meetings with Prosecutor Kahle created the appearance of impropriety. The meetings between the defendant and the prosecutor's office resulted in domestic violence charges against Jack Jones. The trial court found that these domestic violence charges were unrelated to the sexual abuse charges Jessica M. faces in the instant case. Finally, the trial court determined that the defendant failed to show that she divulged anything to

Prosecutor Kahle during her interactions with him that would be adverse to her interests in the sexual abuse criminal proceedings.

Our review of the record indicates that the trial court did not abuse its discretion by denying the defendant's motion to disqualify the Ohio County Prosecutor's Office. Prosecutor Kahle assisted the defendant, an alleged domestic violence victim, in his capacity as an assistant prosecuting attorney. He later brought criminal charges against her when her daughter accused her of sexually abusing her. The defendant failed to show that the prosecutor's office acquired any information in its earlier meetings that were adverse to her interests in the instant case. In view of these circumstances, this Court cannot find that the trial court abused its discretion by refusing to disqualify the Ohio County Prosecutor's Office.

IV.
Conclusion

Based on the foregoing, the judgment of the Circuit Court of Ohio County is hereby affirmed.

Affirmed.

231 W. Va. 254, 744 S.E.2d 652

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No.12-0808

IN RE: JESSICA M. AND SHAWNTA M.

Appeal from the Circuit Court of Gilmer County
Honorable Jack Alsop, Judge
Case Nos. 09-JA-2 and 09-JA-3

REVERSED AND REMANDED WITH DIRECTION

Submitted: May 15, 2013
Filed: June 5, 2013

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "In the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

3. "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. Pt. 6, *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. " ' " 'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d [798] (1969)." Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).' Syl. Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W.Va. 710, 356 S.E.2d 464 (1987)." Syl. Pt. 2, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

Petitioner, Lucinda M. (hereinafter "Lucinda" or "mother"), appeals the June 13, 2012, order of the Circuit Court of Gilmer County terminating her parental rights to her children Jessica M. and Shawnta M.[1] The mother maintains that the lower court erred because the evidence shows both that she successfully complied with and utilized the services she was provided during the court-authorized improvement period, and made the changes necessary to assure the safety of her children in her care. Respondent, West Virginia Department of Health and Human Resources (hereinafter "DHHR"), is joined by the guardian ad litem[2] in arguing that the facts of this case support the termination of the mother's rights to satisfy the children's need for permanency and stability.

Following a complete examination of the record accompanying the appeal, we reverse the order of the circuit court and return the matter for development of a reunification plan consistent with this opinion.

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[1]Pursuant to Rule 40 of the *West Virginia Rules of Appellate Procedure*, the identities of juveniles are protected in Court documents. Initials or descriptive terms are used instead of full names to promote confidentiality.

[2]Three different lawyers have served as guardians ad litem for the children during the course of this case. As explained during oral argument by the guardian representing the interests of the children in this appeal, he was not directly involved with any of the proceedings below and his representations as to what occurred during those proceedings were limited to the contents of the record.

I. Factual and Procedural Background

Lucinda is the biological mother of two girls, Jessica and Shawnta. An abuse and neglect petition was filed on March 19, 2009, by the DHHR against Lucinda and her husband, Jesse M., the biological father of the children. The petition contained the allegation that Jessica and Shawnta, then aged three and two respectively, were abused and/or neglected children due to their exposure to domestic violence and drug use by the father in the home.

An adjudicatory hearing was held on May 29, 2009, at which the mother admitted to being the victim of domestic battery and to not removing the children from a home where the father used illegal substances in their presence. The father on the other hand denied all allegations. The circuit court determined the evidence established that the children were abused and neglected by the parents.

Soon after the adjudicatory hearing, the father voluntarily relinquished his parental rights. The court accepted the relinquishment and terminated the father's parental rights at a June 29, 2009, dispositional hearing. At a separate dispositional hearing, Lucinda was granted a six-month post-adjudicatory improvement period, which was extended by three months. Before the three-month extension expired, DHHR filed a motion to terminate the mother's parental rights, to which the guardian ad litem concurred. Following a hearing in March 2010, the circuit court denied the motion and granted Lucinda a one-year

rehabilitation period. The court found that Lucinda was meaningfully engaging in services and should receive the treatment recommended in her psychological evaluation. The mother apparently complied with and benefitted from the services provided as it is uncontested that the mother sought and received unsupervised, overnight supervision with the children in December 2010, and that the visitation was increased at a March 2011 hearing. When the court granted the mother additional visitation, it also ordered DHHR to develop a case plan for unification of the mother with the children. Although the guardian ad litem had concurred with reunification at an April 2011 status hearing, he moved to temporarily suspend visitation on May 6, 2011. According to the June 13, 2012, order terminating the mother's rights, the guardian's motion was "based on the fact the West Virginia DHHR reported sexualized behaviors being exhibited by the Infant Respondents in this matter." It appears from the briefs that the court suspended visitation and directed DHHR to conduct an investigation. DHHR filed an amended motion to terminate the mother's parental rights on May 24, 2011, and the matter was set for dispositional hearing.

The dispositional hearing was held on July 8, 2011. DHHR called three people to testify: a volunteer who worked at the school where the children attended pre-kindergarten classes, a man who had lived in a trailer near where the mother had moved, and the Child Protective Services (hereinafter "CPS") worker assigned to the case. The mother also called three witnesses: two workers who provided services to the mother involving

parenting, supervised visitation, and transportation, and the therapist who had been counseling the mother for a year and a half on a regular basis.

The school volunteer testified that she had discovered Jessica sitting on a commode in the school's bathroom closely examining her vagina with the lips of the vagina spread apart. The volunteer said that she did not ask the child what she was doing or why she was doing it either when she observed the child or after the child followed her out of the bathroom The only additional information the volunteer provided was that later the same day Jessica unexpectedly said during nap time that her mother had warned her "to watch these two boys that rides bicycles up to our house . . . that they might touch us."

The neighbor called by DHHR to testify was unable to place the mother at a bonfire gathering where attendees were drinking on May 9, 2011. He further denied telling the CPS worker that he saw her at this event. He said that he really did not know the mother, but his stepfather who lived in the same neighborhood did. The stepfather did not appear as a witness.

Before the CPS worker testified, DHHR moved to have the prior testimony regarding the observations and interview of a Maureen Runyon at some unspecified hearing incorporated into the record. The mother's counsel pointed out that she had objected to the admission of the Runyon report at a previous hearing at which Ms. Runyon was not in

attendance. The court stated, "The Court will take judicial notice of the prior testimony, but I – I – if you want Ms. Runyon's testimony in, you'll have to call Ms. Runyon as a witness." It became apparent from the CPS worker's testimony that Ms. Runyon was the DHHR employee who interviewed Jessica about the sexualized behaviors the child was exhibiting, behaviors the CPS worker called masturbation. The CPS worker had no firsthand information regarding what Jessica had said about her conduct, and the worker further said that Jessica "did not tell me she learned sexual behaviors from her mother."

The CPS worker also expressed concern with the mother's choice of people with whom she associated. The mother's husband[3] had been abusive and her chosen boyfriend also was inclined to violence. The CPS worker admitted that the mother had told him she stopped seeing the boyfriend. The CPS worker also was concerned that even though the mother followed the multidisciplinary team's advice to move to a different residence, he faulted the mother for choosing a new home without taking advantage of the assistance available from DHHR. He admitted the assistance from DHHR was not a court ordered requirement for relocation, and went on to testify that when he visited the home once the mother relocated, he completed a report saying it was a safe, proper and adequate home. He explained that he now had reservations with the new home because it was near the residence of at least one relative of the mother's former boyfriend. However, on cross-examination

[3]From general discussions during the dispositional hearing it was established that the mother had at some point divorced the husband.

the CPS worker said he had no evidence that the mother relied on anyone in the former boyfriend's family to find the new home, that she actually knew of any relationship between the former boyfriend and her neighbor, or that the boyfriend had been to the new home or knew where the mother had relocated. In response to the court's inquiry of how far away the boyfriend lived, the CPS worker said he lived in another county that would be a thirty-five to forty minute drive from where the mother had moved.

The CPS worker also faulted the location of the new home being situated in the same neighborhood as a man who was a registered sex offender. Jessica had told the CPS worker that she had seen a man standing at the edge of the mother's yard – which was explained to be a field – staring in the direction of the children. A man matching the description the child had given was located by the CPS worker. The worker said he believed the man was or had been a registered sex offender; no proof of this status was produced.

Although repeatedly expressing his concern that the mother was not always truthful with him, the CPS worker said that the mother had been successful in parenting classes and therapy sessions and had complied with everything that DHHR had asked of her. He did admit on cross-examination that he had no evidence that the mother harmed her children in any way.

Two service providers contracted by DHHR to provide services to the mother during the improvement period were called by the mother to testify. They each had worked individually with the family. One worker supervised visitations between the mother and the children and provided parenting classes to the mother. Regarding the visitations, the worker said that the children were excited to see their mother and the mother interacted with them appropriately. She testified that the mother did well with the parenting classes and became adept at applying the learned skills to new or changing scenarios. In addition to supervising visitations and teaching parenting skills, the other worker offered training on adult life skills and safety plans for the home. She testified that the mother always participated in the instruction and cooperated in making improvements as suggested.

The final witness the mother called to testify was the therapist who had treated her for a year and a half. The therapist said that he had both counseled the mother and had the opportunity to watch her interact with Jessica and Shawnta. Asked about his observations of the children with the mother, the therapist said "[t]he children were very caring toward their mother. They were not in the least bit intimidated. They were not afraid. They were . . . were very huggy, feely, touchy. She was constantly making sure that they were taken care of . . . . She was the epitome of – of a domestic figure." The therapist also said that the mother had complied with everything that he had requested of her during the sessions. He observed that the mother has come to the realization "that she doesn't necessarily need a man in her life, she's able to take care of herself . . . . Right now she

wants to focus on her children and their well-being and not a relationship nor any type of interaction with a male." When asked if the mother needed further counseling, the therapist said that he was taking a new job elsewhere, but he thought the mother would benefit from a new therapist who could be an objective third party to discuss any stressors in her life. However, the therapist made clear during cross examination that the mother was capable of providing a safe environment for her children by stating, "I'm absolutely certain she can protect her children."

The court inquired of the therapist about whether he was aware of the allegation that the mother had taught Jessica how to masturbate. The therapist said this issue had been discussed during the therapy sessions. The mother expressed deep concern with Jessica's self-gratifying behavior, and the mother questioned why it was occurring and how Jessica had learned of these things. In response to a follow-up question, the therapist said he had not had individual counseling sessions with Jessica.

When asked by the guardian ad litem whether he would be concerned for the safety of the children if a child disclosed that her mother taught her to masturbate, the therapist said he would if he believed the mother had done so. The therapist went on to say that based upon his interaction with the mother he had no doubt she was telling the truth. The court proceeded to ask the therapist if a parent's rights should be terminated if a child's disclosure that the parent taught the child to masturbate were true. The therapist said "[i]f

the disclosure is true . . . it is a[n] honest to goodness verifiable fact, then, yes, I would have concerns" which would warrant termination of parental rights.

The dispositional hearing concluded with the court taking the matter under advisement.

On July 29, 2011, the mother filed a motion requesting an evidentiary hearing in order to present new evidence that became available after the dispositional hearing. The evidentiary hearing was held on March 7, 2012.[4] The testimony offered at the hearing came from five people the mother called to testify. One person was a woman who had supervised visitation with the family on July 15, 2011; another was the new therapist the mother began seeing in August 2011; and three were involved in arranging and completing a neuropsychological evaluation of the mother to determine her cognitive abilities.

The worker who had provided supervised visitation services to this family from March 2011 to July 15, 2011, testified that she routinely made reports to the CPS worker after each visitation. Referring to her report of a July 15, 2011, visitation, the worker said that Jessica had come to the worker out of a swimming pool where she had been with

[4]The delay in holding the requested evidentiary hearing appears to be due to the guardian ad litem not submitting a written response requested by the court until February 2, 2012.

the mother and Shawnta. The worker said that Jessica was upset and essentially recanted the alleged initial statement about her mother teaching her about masturbation.

The new therapist who testified had only seen the mother a few times since assuming the case, but she said she had been familiar with the case prior to working directly with the mother and agreed with the former therapist's assessment. She further stated in response to questioning that she never saw anything in the mother's character during the counseling sessions that would indicate the mother was attempting to conceal, deceive, lie or be dishonest about anything. When questioned by the guardian ad litem as to whether it would surprise the therapist to learn that the mother had a history of making poor decisions regarding the care of her children she said, "It would now . . . . [even though] [i]t would not surprise me in the past."

Dr. Marc Warren Haut, a professor and clinical neuropsychologist at West Virginia University, testified about the results of the mother's neuropsychological evaluation. He said that the referral that was received asked for a determination of: (1) the extent of any brain problems the mother may have due to epilepsy and to a brain injury she had as an infant; and (2) whether these problems would have continuing effects on her psychological functioning. The doctor said the referral was made so that appropriate therapy could be provided. Dr. Haut said the conclusion he reached was that the mother had minor deficits due to her history of brain trauma but "her deficits were really pretty mild" and "she

was doing very well from a psychological standpoint also." He went on to say that from the perspective of her thinking skills there was "no deficit that would preclude her from raising her children."

At the conclusion of the testimony the court once again took the matter under advisement. On June 13, 2012, an order terminating the mother's parental rights was issued. With apparent reliance on the CPS worker's testimony at the dispositional hearing, the court determined that the mother "is a neglectful parent, as she has failed to provide a fit, apt, and suitable home and establish an appropriate environment for the infant children in this matter." The order reflects the court's findings that: the mother participated in rehabilitative services but failed to benefit from them in ways that would protect the children; Jessica was never called as a witness to recant "to the Court the assertion she made that her mother taught her about masturbation;" that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the future; and that termination of parental rights would be in the children's best interests. It is from this order of termination that the mother appeals.

II. Standard of Review

A compound standard of review is applied in appeals resulting from abuse and neglect proceedings. *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). That

compound standard is summarized in syllabus point one of *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), in the following manner:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

It is with these considerations in mind that we consider the matter before us.

III. Discussion

The thrust of the argument made by the mother through her counsel in this appeal is that the evidence relied upon by the circuit court to terminate the mother's parental rights did not rise to the requisite level of proof required to terminate her legal and protected right to parent Jessica and Shawnta. The mother's counsel maintains that the primary reason set forth in the order for terminating the mother's parental rights is that Jessica was not called to testify at the evidentiary hearing to recant a statement that was not introduced as evidence in this case. She asserts that the evidence DHHR presented did not demonstrate or prove that

the mother nor anyone else inappropriately touched Jessica and/or Shawnta, or that the mother provided inadequate care for her daughters. She points out that the only witness who provided unfavorable testimony about her efforts and progress was the CPS worker, which failed to rise to the level of clear and convincing proof that is required for termination of parental rights.

DHHR maintains the correctness of the decision to terminate the mother's parental rights. The agency maintains that the evidence showed the mother participated but did not fully avail herself of the services provided during her improvement period and failed to make the changes necessary to assure the safety of the children in her care. The guardian ad litem maintains that deference should be afforded to the circuit court's decision to terminate the mother's parental rights. He argues that the evidence in the appendix record sufficiently demonstrates that the mother could not reasonably correct the conditions leading to the filing of the original petition.

This Court has long recognized a constitutional dimension to a parent's right to the custody of his or her minor children. In syllabus point one of *In re: Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973), we stated:

> In the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and

> guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

The right is not absolute in that it can be limited or terminated by the State if a parent is proven unfit through proceedings affording the parent due process of law. Syl. Pt. 5, *Id.* Statutorily, termination is proper only when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and[] when necessary for the welfare of the child . . ." W. Va. Code § 49-6-5(a)(6). The phrase "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" is later defined in the statute as meaning "based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help." W. Va. Code § 49-6-5(b).

Given the significance of parental rights, a heightened level of evidentiary proof is necessary to warrant termination. "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. Pt. 6, *In re: Willis*.

In terminating the mother's parental rights in the present case the lower court made the following findings and conclusion:

> 1. The Court finds that dismissing the petition is totally inappropriate, in that the *circumstances out [of] which this petition arises, still exist* and to dismiss the petition would greatly endanger the health, safety and welfare of the children.

2. The Court finds that referring the children, the abusing parent, or other family members to a community agency for needed assistance and dismissing the petition is not appropriate in that the Respondent *Mother, has participated but has failed to benefit from services, including counseling or other rehabilitative services which would result in the reasonable steps necessary to cooperate with the Petitioner [DHHR] to attempt to remedy the problems out of which this petition arose*. Therefore, the Respondent Mother is unable, in a meaningful way, to properly engage and benefit from counseling or other rehabilitative services that would protect the children from being exposed to the abuse in the future.

3. The Court finds that returning the children to the home under the supervision of the state department is inappropriate, in that the *Respondent Mother has failed to benefit from intensive services that specifically address her poor decision making ability and ability to make informed decisions regarding the children.* Therefore, even with supervision from the state department, the children would not be adequately protected.

4. The Court finds that to order terms of supervision calculated to assist the children and any abusing parent which prescribe the manner of supervision is inappropriate, in that such disposition does not rehabilitate the parent so as to achieve a goal of return of the children, in that the Respondent *Mother has failed to take reasonably necessary steps to protect the children in the future from the acts of abuse that led to the filing of this petition. Further, the Respondent Mother has failed to adequately address her poor decision making skills and ability to protect the children, even after counseling and services to address these issues.*

5. The Court finds that the granting of custody of the children to the temporary custody of the state department, a licensed child welfare agency, or suitable person, who may be appointed guardian, is inappropriate, in that there is no reasonable likelihood that the conditions of neglect, out of which this petition arose, will be substantially corrected in the

> foreseeable future. Therefore, *the temporary placement in the state department is contrary to the best interest of the children and would only further delay the ultimate disposition of termination of parental rights in this matter*.
>
> 6. The Court is of the opinion and so finds that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the future, in that the *Respondent Mother has failed to benefit from intensive services and remedy the actions which led to the filing of this petition.* Further, the best interest and welfare of the children requires permanent termination of the parental rights of the Respondent Mother in this case.
>
> **III. CONCLUSION**
>
> It is **ADJUDGED** and **ORDERED** that based on the above reasons there is no less restrictive alternative than termination of Respondent Mother's parental rights. The Court finds the evidence adduced at the evidentiary hearing on March 7, 2012, provided no evidence that there is a reasonable likelihood that the conditions out of which this abuse and neglect petition arose will be corrected within the reasonably foreseeable future. Respondent *Mother in this case has provided no credible evidence that she can and will make properly informed decisions regarding the children's welfare and best interest. The Court has given the Respondent Mother in this case numerous opportunities and the Respondent Mother has failed to meet the requirements to get her children returned to her. The Court finds the termination of Respondent Mother's parental rights is in the best interest of the two children involved in this matter. . . .*

Emphasis added. These determinations do not reflect the specific factual basis relied upon by the circuit court, nor does the record in this case supply justification for the determinations.

DHHR aptly summarized the circuit court's findings supporting termination as: (1) the mother participated but did not fully avail herself of the services provided during her improvement period; and (2) the mother failed to make the changes necessary to assure the safety of the children. It appears the only service to which the mother did not "fully avail herself" was taking DHHR up on its offer to help her find a place to live. Testimony established that the mother cooperated with the services which were provided to her, and was compliant and successful throughout the rehabilitation period. The professionals providing services to the mother indicated that she could successfully and safely parent her children. They also witnessed interactions between the children and the mother and found them to be positive and welcome interactions. Only the CPS worker expressed reservations with the mother's judgment and ability to parent or to tell the truth.

If evidence existed to support any of the suspicions the CPS worker voiced during his testimony, DHHR was sorely remiss in producing that evidence and making it part of the record. One of the most glaring examples of unsubstantiated evidence surrounds Jessica's sexualized behaviors. It appears that the circuit court gave improper emphasis to DHHR's unsubstantiated allegation that the mother taught the child how to masturbate. The only quote from the dispositional hearing transcript contained in the order of termination was that of the CPS worker responding to questions of the prosecutor representing DHHR, which reads in pertinent part as follows:

> THE WITNESS: In light of history, what has happened even since January, she consistently appears to gravitate towards people of character that she's been warned to stay away from. Her judgment, in my mind, is in question. I can – I question whether she can adequately protect these kids in the event that –
>
> I look at this child's behavior, and the most recent behaviors with – with –
>
> MR. HOUGH: This child being?
>
> THE WITNESS: Jessica. I'm sorry.
>
> MR. HOUGH: Okay.
>
> THE WITNESS: With – with the masturbation, and . . .

Further, there is the factual finding in the order stating:

> 22. The Infant Respondent, Jessica [], never recanted to the Court the assertion she made that her mother taught her about masturbation. No party ever called her as a witness.

The allegation that Jessica made statements about the mother teaching her self-gratifying behaviors was never corroborated by the testimony of the child or by the DHHR worker – Maureen Runyon – who purportedly conducted a forensic interview with the child and wrote a report. As noted earlier, the transcript of the disposition hearing reflects that Ms. Runyon was not present and also had not attended an earlier hearing. Moreover, the circuit court stated at the dispositional hearing: "[I]f you want Ms. Runyon's testimony in, you'll have to call Ms. Runyon as a witness." Even during oral argument before this Court, no one was able to identify how or when evidence of the child's alleged statements in this regard were actually made a part of the record. There is simply no documentary or testimonial

evidence in the record which verifies this allegation. Furthermore, the CPS worker who did testify said he had no firsthand information regarding what Jessica had said about her "sexualized behaviors," and the worker further said that Jessica had not told him that she learned sexual behaviors from her mother. Thus any reference this CPS worker made during his testimony about Jessica's sexual behaviors was hearsay. As to the trial court's concern with the child not being called to recant the "assertion," recantation presupposes that a statement is made in the first place. Again, no assertion or statement of the child is in the record.

The CPS worker also failed to corroborate other allegations he made, and DHHR did not introduce supporting evidence to substantiate the CPS worker's allegations. For example, neither the former boyfriend nor anyone from the former boyfriend's family testified at the dispositional hearing to validate the CPS worker's expressed suspicion that the mother was intending to resume a relationship with the former male companion and thus expose the children once again to a violent male figure. The testimony of the mother's therapist refuted the CPS worker's unsubstantiated concern by representing that the mother had come to the realization that she did not need men in her life in order to succeed. The therapist also said that the mother expressed her desire to be reunited with the children as her top priority, far outweighing her need for male companionship. Also, no documentation was in the record that confirmed the CPS worker's contention that a "registered sex offender" lived in the neighborhood and would be a threat to the children, or that there was anyone else

in the neighborhood who posed a direct threat to the children. Rather than complimenting or supporting the mother's efforts to become self-reliant for the sake of her children, the CPS worker criticized the mother when she showed initiative to make changes in her life by faulting her for locating a place to stay without depending on DHHR to do it for her. The CPS worker stated that there was no requirement that DHHR be involved in locating a suitable home. Furthermore, he said that he found the new home to be safe and adequate when he inspected it after the mother had moved.

Based upon our extensive review of the evidence contained in the record before us, we fail to see that neglect and parental unfitness have been established by clear, cogent and convincing evidence. Thus the order terminating the mother's parental rights to Jessica and Shawnta must be reversed on clear error grounds.

The evidence admitted at the dispositional hearing demonstrated that the mother visited and interacted well with her children, kept her therapy appointments, attended and was engaged in the parenting classes and appeared at all court hearings in order to be reunited with her children. Moreover, the continuing bond and affection between the mother and children was consistently observed during supervised visitations. Furthermore, the therapist who worked with the mother for a year and half testified that he believed the mother had gained a better understanding of her self-worth, and the importance of what she needed to do to be reunited with her children. As such, the evidence demonstrates that the

conditions of abuse and neglect have been substantially corrected and the family should be reunited. This result is in keeping with this Court's long-standing recognition that,

> " ' " '[a] parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d [798] (1969)." Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).' Syl. Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W.Va. 710, 356 S.E.2d 464 (1987)."

Syl. Pt. 2, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

It became clear during oral argument that the mother was not granted visitation pending the appeal, so a period of adjustment is needed for the children to be removed from their foster home placement and reunited with their mother. Therefore, a gradual change in permanent custodians needs to occur. With the goal of providing the least disruptive transitional process for the children's return to their mother, upon remand the circuit court should enter all orders necessary to afford a smooth reunification of the family. The concrete reunification plan over which the circuit court retains oversight should include the provision by DHHR of all necessary and appropriate counseling services for the mother and the children. *See In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000) (recognizing

the circuit court's continued responsibility in overseeing the implementation of reunification plans).

IV. Conclusion

For the foregoing reasons, the June 13, 2012, order of the Circuit Court of Gilmer County terminating the parental rights of Lucinda M. is reversed, and the case is remanded for entry of orders consistent with this opinion.

Reversed and remanded with direction.

191 W. Va. 302, 445 S.E.2d 243

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA, Plaintiff Below, Appellee

v.

JESSICA M., KENNETH E., JR., AND ANGELA E., INFANT(S) UNDER THE AGE OF 18 YEARS, Defendants Below, Appellants

KENNETH E. AND MARIA E., PARENTS OF SAID INFANTS, Appellees

JAMES M. AND CARRIE M., Intervenors Below

No. 21920
Submitted: May 3, 1994
Filed: May 31, 1994

SYLLABUS BY THE COURT

1. "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with child care." Syl. pt. 5, In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973).

2. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

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Per Curiam:
This case See footnote 1 was originally presented to this Court on March 2, 1994,See footnote 2 at which time the appellants, Jessica M. See footnote 3 and Kenneth E., Jr. See footnote 4, infants under the age of eighteen years, sought reversal of the April 30, 1993, order entered in Marion County Circuit Court, which granted their mother, Maria E., a six-month improvement period and which denied the termination of her parental rights. By order dated March 15, 1994, we held in abeyance our decision whether to terminate Maria's parental rights and, instead, ordered the Department of Health and Human Resources ("DHHR") to conduct a current investigation and home study of the maternal grandparents, intervenors James and Carrie M., with whom the children have resided since January 11, 1993. The order further directed the DHHR to appear before this Court on May 3, 1994, to discuss the results of the investigation and home study.

On May 3, 1994, counsel for the parties and the DHHR appeared before this Court See footnote 5, at which time the DHHR presented the results of the current investigation and home study and its ultimate recommendation as to the disposition of this case. See footnote 6 Upon consideration of the petition, the briefs and arguments of counsel and the results and recommendations of the DHHR's current investigation and home study of James and Carrie M., we conclude that this case should be remanded.

I

Seven-week old Angela E. died, according to the autopsy report, of "blunt force craniocerebral traumatic injuries," the result of a "homicide." The autopsy report further indicated that the infant Angela had also sustained five broken ribs, which were at various stages of healing, a broken clavicle and many bruises. Though Angela's parents, Maria and Kenneth, Sr., offered several explanations for Angela's injuries, none of them comported with the medical evidence.

Maria initially stated that she had placed Angela in her bassinet and had rolled her over the heating ducts at home. Maria believed that the jarring of the bassinet could have caused the extensive head injury. Maria further indicated that she had walked Angela through the hallways, zigzagging while walking and could have hit

Angela's head on the door frame or wall.

After Angela's death, however, her parents offered the following explanation: On June 18, 1992, several nights prior to Angela's death, Maria and Kenneth, Sr. were leaving the home of Kenneth, Sr.'s parents, when the baby carrier in which Angela was being carried, broke, jostling Angela around. Though Angela began to cry, Maria found nothing wrong with her. Angela cried and slept a good deal after this baby carrier incident, but her parents were not alarmed because she was a colicky baby who apparently cried a lot. In the early morning hours of June 21, 1992, Maria got up with Angela when she began to cry. Maria fed her and put her back to bed, not noticing any injuries to Angela at that time. Later, when Angela began to cry again, Kenneth, Sr. got up with her. Maria eventually got up to fix Angela another bottle. When she took Angela from Kenneth, Sr., Maria noticed dried blood in the baby's nose, though it is unclear whether Maria noticed the large knot on the left side of Angela's head. See footnote 7 Angela died on June 22, 1992.

James L. Frost, M.D., a forensic pathologist for the Medical Examiner's Office of the State of West Virginia, performed an autopsy on Angela and testified at the hearing to determine Maria's parental rights to Jessica and Kenneth, Jr., on July 6, 1993. According to Dr. Frost, Angela's autopsy revealed that she sustained recent head injuries, including "contusions of the brain in multiple locations, swelling of the brain and hemorrhage along the left optic nerve." See footnote 8 The autopsy further revealed a fracture of the right clavicle, or collar bone, and fractures of the posterior portion of the right seventh and eleventh ribs, as well as an enlargement of the posterior portion of the eight, ninth and tenth ribs. See footnote 9 Due to the callous formation in the fractures of the ribs and clavicle, Dr. Frost believed the fractures to be from ten days to three weeks old. See footnote 10 The injury to Angela's head, however, was recent, occurring one to two days before her death.

The explanations offered to account for Angela's injuries did not comport with the medical evidence. According to medical records, Angela's birth was unremarkable, with no complications. Thus, Dr. Frost had no reason to believe that Angela's injuries occurred during the birthing process. Furthermore, because Angela was only seven weeks old, she could not have inflicted the injuries to her clavicle, ribs and head herself. See footnote 11

As a result of the parents' explanation that Angela's injury may have been caused by the baby carrier incident, the baby carrier was retrieved from Wal-Mart for examination.See footnote 12 Dr. Frost indicated that the injury to Angela's head could not have occurred as described. With the handle of the baby carrier in the position in which it would be carried, it was shaken violently. Though the handle moved one notch, the handle did not slide. Thus, in Dr. Frost's opinion, Angela could not have slid out or otherwise have been harmed. Furthermore, Dr. Frost found no evidence of trauma along the side of the seat where Angela's head

would have been. Finally, because the baby carrier is raised, like a wing chair, Angela's head would have been supported by the padded interior if the baby carrier were bumped while Angela was in it.See footnote 13
When Angela was admitted to the hospital, on June 21, 1992, and it became evident that a credible explanation for her injuries was not forthcoming, the DHHR intervened and was granted custody of Jessica and Kenneth, Jr. See footnote 14 Upon subsequent examination of Jessica and Kenneth, Jr.'s See footnote 15 medical records, it was revealed that Kenneth, Jr. had healed anterior rib fractures, though the date of injury could not be determined. Maria testified that she was unaware that Kenneth, Jr. had any broken ribs. Medical records further revealed that Kenneth, Jr. had suffered a broken leg at age five weeks. Maria's initial explanation to Kenneth, Jr.'s physician was that she believed the knot that had developed on Kenneth, Jr.'s leg was the result of an insect bite. Maria later explained that Kenneth, Jr. had a cyst on the bone, causing it to break. Hospital records include a notation from Dr. Koay, suggesting that Kenneth, Jr. was possibly a victim of child abuse.

Jessica, the only child old enough to be interviewed by the DHHR, recounted the abuse she and her brother and sister suffered at the hands of Kenneth, Sr. She told counselors and other interviewers that she believed Kenneth, Sr. had hit Angela in the head with a hammer. She also saw Kenneth, Sr. hitting the younger Kenneth's head against the bed. However, her mother's only response to this was to tell her husband to stop. Jessica further told her counselor that it was Kenneth, Sr. who had broken her brother's leg.

In addition to describing how Kenneth, Sr. abused her siblings, Jessica also described the abuse that he inflicted upon her. If she sucked her fingers, Kenneth, Sr. would pull them back until they hurt. She also related to DHHR workers how he had hit her with a spoon and would hold her nose and put his hand over her mouth so that she could not breathe. Though Maria would sometimes be present when her husband abused her children, according to Jessica, her mother's only reaction would be to tell him to stop.

In its April 30, 1993, order, the trial court refused to terminate the parental rights of Maria, instead, granting her a six-month improvement period. At the end of the improvement period, the trial judge ordered a review hearing during which the court would examine written reports from psychologists and counselors with the aim towards family reunification if appropriate. The DHHR was ordered to retain legal custody of the children, while the maternal grandparents, James and Carrie M., were ordered to retain physical custody. Maria was given liberal visitation with her children on the condition that the visitations be supervised by at least one of the maternal grandparents.

On October 13, 1993, an evidentiary hearing was held wherein expert and lay testimony of the parties' then current situation was offered. See footnote 16 Dr. Jennifer Cummings, a clinical psychologist who counseled both Jessica See footnote 17 and her grandmother, Carrie M. See footnote 18, testified that Jessica is adjusting well in her current living situation and that she has no concerns about Carrie M.'s custodial care of Jessica and Kenneth, Jr. Though Dr. Cummings originally indicated that Maria failed to protect her children by not intervening and stopping the abuse of her children by her husband, Kenneth, Sr., she later testified, at the October 13, 1993 hearing, that the suicide of Kenneth, Sr., on January 23, 1993, altered her view. She stated that when Kenneth, Sr. was alive and involved in parenting, the children were at risk. However, Dr. Cummings believes that the death of Kenneth, Sr. eliminated that risk. Finally, she opined that it would be in the best interests of Jessica and Kenneth, Jr. to be returned to their mother. See footnote 19

Similarly, Dr. Ronald Pearse, a psychologist who has treated Maria since October 1992,See footnote 20 testified at the October 13, 1993 hearing that Maria does not represent a danger to her children and that it would be in the children's best interest to be returned to their mother. Dr. Pearse further testified that, though Maria's husband has been strongly suspected of abusing her children and causing the death of Angela, See footnote 21 Maria has never identified her husband as the abuser nor directly acknowledged his abusive behavior. Nevertheless, Dr. Pearse opined that there is little risk that Maria would fail to protect her children in the future.

Also testifying at the October 13, 1993 hearing was Mrs. Joyce Evans, Jessica's kindergarten teacher at Monongah Elementary School. Mrs. Evans testified that Jessica was one of her best students and appears to be happy and well-adjusted.

II

As indicated in our order of March 15, 1994, the primary issues on appeal concern the trial court's refusal to terminate Maria's parental rights to Jessica and Kenneth, Jr., in light of her failure to protect her children from the abuse inflicted upon them and upon Angela, by her husband, Kenneth, Sr., and her refusal to identify the abuser. We ordered the DHHR to conduct a current investigation and home study of the children's current living arrangements, keeping in mind that the results and recommendations the DHHR makes should protect the best interests of the children. See John D.K. v. Polly A.S., 190 W. Va. 254, 438 S.E.2d 46 (1993).

In syllabus point 5 of In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973), this Court stated: "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with child care." The current investigation and home study of the children's maternal

grandparents, James and Carrie M., revealed, according to the DHHR, a caring and loving environment. The DHHR workers found that James and Carrie M. have adequately provided for the children's physical, educational and spiritual needs, with no allegations of abuse or neglect. According to the DHHR, James and Carrie M. have complied with all aspects of the April 30, 1993, order. See footnote 22 It is the DHHR's concern, however, that both Maria and her parents have minimized or distorted Kenneth, Sr.'s abusive behavior towards the children, See footnote 23 thus, suppressing Jessica's recollection of what occurred. This "potential for emotional damage to the children" can only be thwarted, in the DHHR's view, by terminating the parental rights of Maria and by granting permanent custody of the children to the DHHR.

Jessica and Kenneth, Jr. are apparently thriving in their grandparents' care. Indeed, a powerful bond has been formed between them, as well as between the children and their mother, who has been active in their daily lives. While this Court is aware of the immeasurable harm which would undoubtedly occur to Jessica and Kenneth, Jr. See footnote 24 if they were to be abruptly removed from their grandparents' home, we are infinitely more concerned with the past abuse of these children, the death of their sister, Angela, Maria's failure to protect them from abuse and her refusal to identify the abuser.

In In Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985), this Court terminated a father's parental rights for his failure to protect his child. The father argued that he should be held blameless for his nonaction in protecting his child, even though he supported his wife's explanation for their 38-day old infant's life-threatening injuries. In Darla B., as in this case, the parents' testimony was inconsistent with all of the medical evidence as to the manner in which the infant's injuries occurred.

As we indicated earlier, it is further troubling to this Court that Maria has failed to acknowledge Kenneth, Sr.'s abusive behavior towards her children and to identify him as the abuser. In our recent decision of In re Jeffrey R. L., __ W. Va. __, 435 S.E.2d 162 (1993), we held in syllabus point 3 that "[p]arental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." See footnote 25
Guardian ad litem Susan Riffle acknowledged, before this Court, that Jessica and Kenneth, Jr. have formed important attachments to their mother, Maria, and to their grandparents, James and Carrie M. It is, thus, her concern that these young children may be irreparably harmed if they were to be removed from their present

environment. It is the recommendation of the DHHR, however, that it be granted permanent custody of Jessica and Kenneth, Jr., that physical custody of the children be returned to it, that the parental rights of Maria be terminated, that a hearing be set to determine the parental rights of Jessica's biological father, Frank Z., and that the permanent plan for the children be adoption.

The record of this case does not prescribe a simple solution. Considering the current living arrangements, which, for the most part, have been favorable to the children, vis-a-vis the past abuse of the children by Kenneth, Sr. and Maria's failure to acknowledge such abuse, and her potential to enter into another abusive relationship, we are unable to determine the placement that would best serve the interests of Jessica and Kenneth, Jr. We shall, therefore, require the DHHR to update its current investigation and home study of the maternal grandparents, James and Carrie M., within six months from the date of this opinion, for trial court review and decision. In the interim, legal custody of Jessica and Kenneth, Jr. shall remain with the DHHR. The maternal grandparents, James and Carrie M., shall retain physical custody of the children, with liberal visitation of the children given to their mother, Maria, with the stipulation that the visitations shall be supervised by one or both of the maternal grandparents.

Based upon the above, this case will be remanded to the Circuit Court of Marion County for further proceedings in accordance with W. Va. Code, 49-6-1, et seq. Upon receipt of the updated current investigation and home study, the circuit court shall promptly ascertain appropriate custody of Jessica and Kenneth, Jr., based upon current considerations.

Remanded.

Footnote: 1 Though Angela E. and Kenneth E., Sr.'s names appear in the style of the case, they are deceased. Angela died on June 22, 1992, while Kenneth, Sr. died on January 24, 1993.

Footnote: 2 Appearing before this Court on March 2, 1994 were Susan Riffle, guardian ad litem, on behalf of Jessica and Kenneth, Jr., James B. Zimarowski, on behalf of Maria E., and Patrick N. Wilson, on behalf of James and Carrie M. The DHHR did not appear.

Footnote: 3 Jessica apparently has no contact with her biological father, Frank Z. His whereabouts are unknown and his paternal rights are presently not at issue.

Footnote: 4 We adhere to our traditional practice of styling domestic relations and juvenile cases involving sensitive matters and do not use the last names of the

parties. See In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991); David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989).

Footnote: 5 Senior Assistant Attorney General L. Eugene Dickinson appeared on behalf of the DHHR.

Footnote: 6 Also submitted and considered by this Court were Maria E.'s Objection to Department of Health and Human Services' Home Study and Narrative Opinion Report and James and Carrie M.'s Objection to the Department of Health and Human Services Home Study and Investigative Report, which, among other things, questions the objectivity of the DHHR in this case and challenges the validity of the report in that neither Maria nor James nor Carrie M. were given the opportunity to cross-examine the DHHR workers who prepared the report. We emphasize that the DHHR's current investigation and home study were not dispositive of this Court's ruling. Rather, it was merely one of many factors considered by this Court.

Footnote: 7 While the hospital admissions records indicate that Maria told the nurses that she did not see the knot on Angela's head, Maria told police the next day that she did see the knot.

Footnote: 8 Dr. Frost further testified that a great deal of force would be necessary to cause the skull fractures sustained by Angela: "It would be not as much force as would be needed to do the same thing in an adult, because of an infant's skull being much thinner, but it's not a light tap or a light slap. It's a good, substantial blow."

Footnote: 9 Though the eighth, ninth and tenth ribs were not excised for histological study, Dr. Frost testified that they were also healing fractures.

Footnote: 10 Dr. Frost testified that the cause of the injuries to the clavicle and ribs was

> *a blunt force applied to that area of the body causing the rib fractures. It could be a blow or it could be -- of the ribs. It could be a blow to the body over those areas, the clavicle and the ribs, or those to the ribs could be to the body being held in the hand and the chest squeezed, or it could be pressure applied with the body on a hard surface, but I think I would favor the chest being held and squeezed.*

Footnote: 11 Dr. Frost indicated that a child with injuries such as Angela's would cry a lot due to pain, tend to favor one side over the other and would try to protect

the injured area. However, if the child was not taken to the doctor immediately, the pain would subside as healing of the injury progressed and it would be more difficult for the physician to find the injury. According to Maria, Angela saw a physician when she was three weeks and four weeks old.

Footnote: 12 Maria and Kenneth, Sr. returned the baby carrier to Wal- Mart, where it was purchased, believing it was defective.

Footnote: 13 Dr. Frost actually positioned Angela's body in the baby carrier during the autopsy.

Footnote: 14 W. Va. Code 49-6-3(c) [1992] provides, in relevant part:

If a child or children shall, in the presence of a child protective service worker of the division of human services, be in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in . . . [§ 49-1-3], . . . and if such worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered, the worker may, prior to the filing of a petition, take the child or children into his or her custody without a court order: Provided, That after taking custody of such child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or a juvenile referee of the county wherein custody was taken . . . and shall immediately apply for an order ratifying the emergency custody of the child pending the filing of a petition[.]

Footnote: 15 Jessica was born on October 27, 1987 and Kenneth, Jr. on June 16, 1991.

Footnote: 16 The trial judge deferred ruling on further placement of the children until this appeal is decided.

Footnote: 17 Jessica's counseling sessions with Dr. Cummings have ceased. According to Dr. Cummings, Jessica is no longer in need of therapy.

Footnote: 18 Dr. Cummings believed that Kenneth, Jr. was too young to benefit from psychotherapy. Carrie M. accompanied Jessica to her sessions with Dr. Cummings and participated in parent training, or parent education. According to Dr. Cummings, Carrie M. did everything asked of her.

Footnote: 19 Dr. Cummings testified that Maria's failure to adequately explain the cause of the injuries to her children "raises questions" and that she would have

inquired into those issues had Maria been her patient. While Dr. Cummings' recommendation that Jessica and Kenneth, Jr. be returned to their mother was based on conversations with Maria's mother, Carrie M., Jessica, and one meeting with Maria herself, Dr. Cummings did not consult with Maria's therapist before making this recommendation.

Footnote: 20 Dr. Pearse first began treating Maria and her husband, Kenneth, Sr., both individually and jointly. Following Kenneth, Sr.'s death, Maria continued individual counseling sessions.

Footnote: 21 According to Marion County Sheriff Ron Watkins, initially, Maria and Kenneth, Sr. were suspects in the investigation of Angela's death. However, following the suicide of Kenneth, Sr., Maria was no longer a focus of any investigation into Angela's death.

Footnote: 22 As we noted earlier, Maria was granted liberal visitation of her children, on the condition that her visits be supervised by at least one of the maternal grandparents. The record indicates that Maria visits her children daily and has fully complied with the conditions of visitation.

Footnote: 23 For instance, in the DHHR's interview with Jessica, she stated that Kenneth, Sr. "didn't know how to play" when he would choke her and when he banged Kenneth, Jr.'s head against the baby bed.

Footnote: 24 The tender age of Kenneth, Jr., who is now two years and eleven months old, is of particular concern to this Court. As we noted in In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991) (citing White, The First Three Years of Life at v. (1985)), the experiences of the first three years of a child's life form the foundation for all his later development. Id. at 375. It cannot be ignored that Kenneth, Jr. has been in his grandparents' care since he was one and one-half years old.

Footnote: 25 Notably, our decision in In re Jeffrey R.L. was rendered June 14, 1993, after the trial court's April 30, 1993 order, which granted Maria a six-month improvement period.

190 W. Va. 254, 438 S.E.2d 46

Supreme Court Of Appeals Of West Virginia

JOHN D.K., Petitioner Below, Appellee

v.

POLLY A.S., Respondent Below, Appellant

No. 21777

Submitted: September 28, 1993

Filed: November 23, 1993

SYLLABUS BY THE COURT

1. In the absence of any statutory limitation to the contrary, a circuit court may review a recommended order of a family law master even though no exceptions were filed.

2. When a circuit court reviews a recommended order of a family law master and discovers that certain evidence that may have affected the outcome of the case was either not considered or was inadequately developed, the court may recommit the matter with instructions to the family law master or proceed to take additional evidence on its own.

3. "'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syl. Pt. 2, Funkhouser v. Funkhouser, 158 W. Va. 964, 216 S.E.2d 570 (1975)." Syllabus Point 4, Judith R. v. Hey, 185 W. Va. 117, 405 S.E.2d 447 (1990).

4. "'A change of custody should not be based only upon speculation that such change will be beneficial to the children.' Syl. pt. 6, Holstein v. Holstein, 152 W. Va. 119, 160 S.E.2d 177 (1968)." Syllabus Point 3, Rowsey v. Rowsey, 174 W. Va. 692, 329 S.E.2d 57 (1985).

5. In domestic cases involving allegations of abuse and neglect, a circuit court or family law master may order that a home study be performed to investigate the allegations under Rule 34(b) of the Rules of Practice and Procedure for Family Law.

6. Under W. Va. Code, 49-6A-2 (1992), it is mandatory for any circuit judge, family law master, or magistrate having reasonable cause to suspect abuse or neglect to immediately report the same to the Division of Human Services of the Department of Health and Human Resources.

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Miller, Justice:
This appeal is brought by the respondent below and appellant, Polly A.S., See footnote 1 from a final order entered by the Circuit Court of Grant County. By order entered July 10, 1992, the circuit court awarded custody of the appellant's twenty-one-month-old son, Jonathan C.K., to the child's natural father who was the petitioner below and appellee herein, John D.K. Polly A.S. asserts on appeal that the circuit court erred in reviewing this case because John D.K. did not file exceptions to the family law master's recommended order finding that she should retain custody of Jonathan. She also asserts that the circuit court erred in making material findings of fact that were not supported by the evidence and in finding that she was an unfit parent to have permanent custody of her infant son. See footnote 2

I.

The parties were never married. After Jonathan's birth on October 2, 1990, the mother applied for welfare benefits which resulted in a paternity suit being brought against the father for the payment of child support. John D.K. admitted paternity after blood tests did not exclude him from being Jonathan's biological father. He began paying child support and was awarded visitation in July of 1991. Until that time, it is undisputed that the mother was the primary caretaker. In fact, the father admits that he virtually had no contact with Jonathan until paternity was established.

On August 23, 1991, John D.K. filed a petition in circuit court alleging that it would be in the best interest of Jonathan for the circuit court to transfer custody from the mother to him. No reasons were given in the petition as to why John D.K. believed such a custody change would be to Jonathan's benefit. Instead, the main focus of the petition was in regard to the father's alternate request that the circuit court modify his visitation rights. He complained that visitations were difficult because the mother would harass him when he went to see Jonathan. To rectify the situation, John D.K. asked the court to allow him specific and exclusive visitation with Jonathan in the home of his parents. See footnote 3

The matter was heard before a family law master on November 14, 1991. At the hearing, Polly A.S. agreed that John D.K. could have visitation at the paternal grandparents' home from 1:00 p.m. to 5:00 p.m. on Sundays. As to the custody question, very little evidence was offered on the issue. John D.K. made a general statement that he desired custody. The father's lawyer See footnote 4 informed the family law master that John D.K. did not dispute that Polly A.S. was the primary caretaker, but, instead, he was alleging that she neglected Jonathan. The family law master asked the mother if she had taken care of Jonathan since his birth, i.e., provided him clothes, food, and medical care. She stated that she had and that Jonathan was in good health. The father was never asked, nor did he present any evidence, as to why he believed Jonathan was being neglected.

The family law master sent a recommended order to the circuit court and gave the parties until December 30, 1991, to file exceptions. The recommended order set forth, inter alia, the agreed upon visitation and denied the father's request for custody -- finding the mother was a fit and proper person to have the permanent care, custody, and control of the child.

On February 25, 1992, the circuit court entered an order setting the matter for a pretrial hearing on March 9, 1992. At the hearing, counsel for the mother stated that he was unaware of the reasons why the case was before the circuit court because he did not have any record of exceptions being filed to the family law master's recommended order. He objected to the circuit court setting the matter for hearing without any exceptions being taken.

The circuit court noted the objection, but, nevertheless, set the case for a hearing on April 24, 1992.See footnote 5

A hearing was held on April 24, 1992, in which the circuit court heard evidence that Polly A.S. was neglecting Jonathan. John D.K., his wife, his parents, and a friend all testified about Jonathan's health and living conditions. The more serious allegations of neglect included evidence that Polly A.S. and Jonathan lived in a trailer that did not have electricity for several weeks during March and April of 1992. During this time, the trailer lacked hot water, refrigeration, a usable oven, and, except for one kerosene heater and a wood stove that was described as being improperly installed and a "fire hazard", the trailer lacked adequate heat. The circuit court also heard evidence that the child always was extremely unclean and smelled, always had a cold, and had a very severe diaper rash. In addition, John D.K. testified that one day he witnessed Jonathan sitting on the floor of the trailer playing beside dog manure, and that he saw Polly A.S. and Jonathan outside one night in the rain.

The evidence presented by John D.K. was controverted by Polly A.S. and her

mother. They both testified that Jonathan was kept clean. Polly A.S. admitted that she did not have electricity for a period of time, but she said that it was because the electric company had to install a new pole before service became available. Polly A.S. stated that even when she did not have electricity, she would bathe Jonathan at a neighbor's trailer or carry hot water to her own trailer. She admitted that Jonathan was outside in the rain, but added that it was during the time she did not have refrigeration and she needed to go to the store to get milk. She also admitted that John D.K. saw Jonathan on the floor with the dogs, but stated that it only occurred once, and that she no longer owned the dogs.

Polly A.S. testified that she regularly took Jonathan to the doctor for checkups and vaccinations. She said that a health care worker told her that Jonathan's colds were from allergies and his rash was from an allergy to disposable diapers and diaper rash cream. Polly A.S. stated that she now uses different diapers and a different diaper rash cream to correct the problem. It was generally agreed that Jonathan was well behaved and seemed happy.

By order entered July 10, 1992, the circuit court awarded custody of Jonathan to John D.K. and awarded Polly A.S. supervised visitation. The circuit court found that Polly A.S. had abused and neglected Jonathan and that there was clear and convincing evidence that she was not a fit and proper person to retain custody of Jonathan. The circuit court continued by indicating that it was familiar with the deplorable living conditions of Polly A.S. and that it was not within her ability to improve those conditions. The judge further stated that he personally had observed the child as being unkempt and dirty, and had seen the child with a broken arm while in the custody of Polly A.S.

On July 21, 1992, Polly A.S. filed a motion for reconsideration with the circuit court. The circuit court denied the motion by order dated July 27, 1992. The circuit court granted Polly A.S. an extension on November 30, 1992, until March 27, 1993, to file her petition for appeal with this Court because the transcript of the prior proceedings was not prepared. The petition was filed in March, and, on June 9, 1993, this Court accepted the petition and issued a stay of the July 10, 1992, order of the circuit court.

Subsequently, John D.K. filed a motion to lift the stay, but this motion was denied by this Court on June 23, 1993. On June 30, 1993, John D.K. filed another motion, this time requesting this Court to remand the case to the circuit court for further evidentiary hearings. Polly A.S. filed a response requesting that the motion be denied. By order dated July 8, 1993, this Court denied the motion.

II.

yPolly A.S. argues that John D.K. waived his right to have the circuit court review the family law master's recommended order because no exceptions were filed as required under W. Va. Code, 48A-4-7 (1990), which states, in part: "Failure to timely file the petition shall constitute a waiver of exceptions[.]" (Emphasis added). Although it is true that under the foregoing Code section John D.K. waived his right to file exceptions in this case, we do not believe that the circuit court erred in reviewing the recommended order and in holding a hearing on the neglect allegations.

In State ex rel. Dillon v. Egnor, 188 W. Va. 221, ___, 423 S.E.2d 624, 628-29 (1992), we recognized the limited role of the family law master's recommended order:

> "The family law master's recomm ended or der does not ha ve the force and effect of law until it is approved by the circuit court. Indeed, except with re gard t o tem porary pr ocedural or ders and pendente lite custody and s upport orders, the family law master has no power to enter an enforceable order affecting the rights and obligations of the part ies. Under W. Va. C ode, 48A-4-5 (1990), t hat power is reserved to the circu it court." (Foot note and citation omitted).See footnote 6

The language of W. Va. Code, 48A-4-10(c) (1990), that provides for the review of the family law master's recommended order is not limited to only those recommended orders to which exceptions have been filed. See footnote 7 Moreover, we are not cited nor have we found any situation that limits a circuit court's right to review a recommended order of a family law master. Such a provision would be inconsistent with W. Va. Code, 48A-4-5, which makes a family law master's order unenforceable until approved by a circuit court. We conclude that in the absence of any statutory limitation to the contrary, a circuit court may review a recommended order of a family law master even though no exceptions were filed.

Under W. Va. Code, 48A-4-10(d) (1990), when a circuit court reviews a recommended order of a family law master and discovers that certain evidence that may have affected the outcome of the case was either not considered or was inadequately developed, the court may recommit the matter with instructions to the family law master or proceed to take additional evidence on its own. See footnote 8 In this case, the circuit court was authorized to hold a hearing because the family law master did not consider the evidence of neglect.

After the circuit court makes its review, we recognized in Higginbotham v. Higginbotham ___ W. Va. ___, ___, 432 S.E.2d 789, 791-92 (1993), "that under

W. Va. Code, 48A-4-10(c) (1990), a circuit court 'may, in its discretion, enter an order upon different terms, as the ends of justice may require.'" In Syllabus Point 1 of Higginbotham, we stated:

> "W. Va. Code, 48A-4-10(c) (1990), lim its a circuit judge's ability to overturn a fam ily law m aster's findings and c onclusions unless they fall within one of the six enumerat ed statutory criteria containe d in this section. Moreover , Rule 52(a) of the We st Virginia Rules of Civil Procedure requires a circuit court which changes a family law master's recom mendation t o m ake known it s factual findi ngs a nd conclusions of law." See footnote 9

Therefore, in the present case, the circuit court had full authority to review the record, to review the order, to take necessary additional evidence, and to enter an order on different terms so long as the circuit court made the appropriate findings of fact and conclusions of law.

The problem with the circuit court's decision in this case stems from the factual findings that it made in determining that the mother was not a fit and proper person to have the permanent care, custody and control of Jonathan. The circuit court incorporated information into the findings of fact that was not offered into evidence at any hearing. For instance, the circuit court, in speaking of the parents of Polly A.S., said:

> "That the Court knows th e m other, Mildre d [W] . 'Step-and-a-half', and father, Harol d [W]. ' Cannonball', of the Responde nt, P olly [A.S.]; the Responde nt's lack of m ental, physical, and em otional capacity to provide for her children is not entirely her fault -- it is inherited; it will not improve, but will get worse."

The record contains no professional psychological or medical evidence to support this statement.

The circuit court also went beyond the scope of the record in stating in the findings of fact that Jonathan suffered a broken arm while in the custody of his mother. Besides its mention in the final order, there is no evidence of when or how Jonathan suffered this serious injury. In fact, given the allegations that were made, it is very disturbing to this Court that no professional testimony exists as to Jonathan's condition nor as to the mother's or father's ability to care for him.

It is apparent that the circuit court relied on its personal, out-of-court knowledge of the respondent and her family in making these statements. We consistently have held that a custody decision by a circuit court will not be set aside unless the court

abuses its discretion or makes a clearly erroneous application of the law as outlined in Syllabus Point 4 of Judith R. v. Hey, 185 W. Va. 117, 405 S.E.2d 447 (1990):

> "'The exercise of discretion by a tr ial court in awardi ng custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the tr ial court's ruling does not reflect a discretionary decision but is ba sed upon an erro neous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syl. Pt. 2, Funkhouser v. Funkhouser, 158 W. Va. 964, 216 S.E.2d 570 (1975)."

The case at bar bears some analogy to Rowsey v. Rowsey, 174 W. Va. 692, 329 S.E.2d 57 (1985), where we set aside a change of custody which had been awarded by the trial court based on unproven assertions that the ex-wife was living with a lesbian. We stated in Syllabus Point 3 of Rowsey:

> "'A change of custody shoul d not be based only upon speculati on that such change will be benefici al to the children.' Syl. pt. 6, Holstein v. Holstein, 152 W. Va. 119, 160 S.E.2d 177 (1968)."

In the present case, we conclude that the circuit court abused its discretion not only by considering facts not in evidence, but also by displaying a preexisting, negative attitude towards the mother. Moreover, given the circumstances, we are dismayed that no one presented any evidence from any neutral, third-party witnesses as to Jonathan's condition. See footnote 10

We find the evidence that was presented to be highly contested by the parties and unclear. Therefore, we reverse and remand the entire custody issue for a fuller inquiry. In addition, we direct that the matter be reassigned by an appropriate administrative order to another judge to prevent a recurrence of the problems that exist in this case. See Judith R. v. Hey, 185 W. Va. at 124, 405 S.E.2d at 454 (upon remand, assigning case to another judge because the first judge abandoned his neutral role in a child custody decision); State v. Buck, 173 W.Va. 243, 248, 314 S.E.2d 406, 411 (1984) (ordering the designation of another circuit judge for resentencing of a criminal defendant).

Upon remand, Jonathan's best interests must be served by determining whether his mother, who is acknowledged to have been the primary caretaker, is a fit person to have custody of him under the principles contained in Syllabus Point 5, in part, of David M. v. Margaret M., 182 W.Va. 57, 385 S.E.2d 912 (1989):

> "To be considered fit , the prim ary caretaker parent must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child a buse, and other sim ilar vices; and (5) refrain from immoral behavior under cir cumstances that w ould affect the child."

Allegations of abuse are always troubling and must be examined thoroughly, although certainly lack of child support from the father the first nine months of the child's life cannot be ignored when considering such issues as lack of adequate living conditions.

III.

In domestic cases involving allegations of abuse and neglect, a circuit court or family law master may now order that a home study be performed to investigate the allegations under Rule 34(b) of the Rules of Practice and Procedure for Family Law. See footnote 11 Furthermore, under W. Va. Code, 49-6A-2 (1992),See footnote 12 it is mandatory for any circuit judge, family law master, or magistrate having reasonable cause to suspect abuse or neglect to immediately report the same to the Division of Human Services See footnote 13 of the Department of Health and Human Resources.

The circuit judge appointed to hear this case should order the Division of Human Services to perform a home study. Hopefully, a thorough home study will either disclaim or substantiate the allegations of neglect so that a proper determination of custody can be made. In custody cases where the evidence of abuse or neglect is not clear and is highly controverted, and the parties do not offer any neutral, third-party professional opinions to refute or substantiate the allegations, the circuit court should order a home study to ensure that any conclusions it makes will protect the best interests of the child.

We further order both the circuit court and the Division of Human Services to expedite this matter so that Jonathan is provided with a permanent and secure home. See In Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). In the meantime, we conclude that Polly A.S. should retain custody of Jonathan unless the circuit court finds that Jonathan is at a present or future risk of neglect and abuse.

For the foregoing reasons, the judgment of the Circuit Court of Grant County is reversed, in part See footnote 14, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed, in part, and remanded.

Footnote: 1We follow our traditional practice in domestic relations and other cases which involve sensitive facts and do not use the last names of the parties so as not to stigmatize them or their child. See, e.g., State ex rel. Div. of Human Serv. by Mary C.M. v. Benjamin P.B., 183 W. Va. 220, 395 S.E.2d 220 (1990); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987).

Footnote: 2Polly A.S. also has a seven-year-old son who resides with her.

Footnote: 3At the time the petition was filed John D.K. was living with his parents. He is now married and lives in a trailer with his wife and her young son.

Footnote: 4John D.K. has a different lawyer on appeal.

Footnote: 5The record is confusing as to whether exceptions were actually filed. At the pretrial hearing, it was suggested that exceptions were attached improperly to the recommended order, so it was withdrawn and a new recommended order without exceptions was filed. In its order entered on July 10, 1992, the circuit court stated that John D.K. appeared in person, without counsel, and expressed his desire to appeal the recommended order. However, in his brief to this Court, John D.K. asserts that his father spoke with the circuit court judge and told the judge of John D.K.'s intent to appeal. As will later be discussed, the controversy surrounding the exceptions is irrelevant under the specific facts of this case.

Footnote: 6W. Va. Code, 48A-4-5 (1990), provides:

"With the exception of pendente lite support and custody orders entered by a master in accordance with the provisions of section three [§ 48A-4-3] of this article, and procedural orders entered pursuant to the provisions of section two [§ 48A-4-2] of this article, an order imposing sanctions or granting or denying relief may not be made and entered except by a circuit court within the jurisdiction of said court and as authorized by law."

The current counterpart to this Code section is contained in W. Va. Code, 48A-4-15 (1993).

Footnote: 7For the complete text of W. Va. Code, 48A-4-10(c), see note 9, infra.

Footnote: 8W. Va. Code, 48A-4-10(d), specifically provides:

"In making its determination under this section, the circuit court shall review the whole record or those parts of it cited by a party. If the circuit court finds that a master's recommended order is deficient as to matters which might be

affected by evidence not considered or inadequately developed in the master's recommended order, the court may recommit the recommended order to the master, with instructions indicating the court's opinion, or the circuit court may proceed to take such evidence without recommitting the matter." (Emphasis added).

This Code section now appears at W. Va. Code, 48A-4-20(d) (1993).

Footnote: 9W. Va. Code, 48A-4-10(c), in its entirety, reads:

"The circuit court shall examine the recommended order of the master, along with the findings and conclusions of the master, and may enter the recommended order, may recommit the case, with instructions, for further hearing before the master or may, in its discretion, enter an order upon different terms, as the ends of justice may require. The circuit court shall not follow the recommendation, findings, and conclusions of a master found to be:

"(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in conformance with the law;

"(2) Contrary to constitutional right, power, privilege, or immunity;

"(3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(4) Without observance of procedure required by law;

"(5) Unsupported by substantial evidence; or

"(6) Unwarranted by the facts."

This section now is located at W. Va. Code, 48A-4-20(c) (1993).

Footnote: 10Only one witness who was not related to the involved parties testified. She testified for the father and was characterized in his brief as a "friend of both parties[.]" However, the record reveals that this witness was not neutral and was to babysit for the father if he was awarded custody.

Footnote: 11The Rules of Practice and Procedure for Family Law were adopted by this Court on July 21, 1993, and became effective on October 1, 1993. Rule 34(b) specifically provides:

"Allegations of Abuse and Neglect. When there are allegations that either one or both of the parties have abused or neglected the other party or any child of the parties, the family law master or circuit judge may, sua sponte or on motion of either party, order an investigation or home study of one or both of the parties. The family law master or circuit judge may apportion the costs of the home study or home studies, or order the department of health and human resources or other social service agency to perform the investigation. When a family law master or circuit judge finds that a child has been neglected or abused,

the family law master or circuit judge shall report the abuse in accordance with the provisions of chapter 49, article 6A, section 2 of the Code of West Virginia."

Footnote: 12W. Va. Code, 49-6A-2, was amended in 1992 to include the members of the clergy, circuit judges, family law masters, and magistrates. The relevant section of W. Va. Code, 49-6A-2, provides:

"When any medical, dental or mental health professional, Christian Science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services personnel, peace officer or law-enforcement official, member of the clergy, circuit court judge, family law master or magistrate has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately, and not more than forty- eight hours after suspecting this abuse, report the circumstances or cause a report to be made to the state department [division] of human services: Provided, That in any case where the reporter believes that the child has been seriously physically injured or sexually abused or sexually assaulted, the reporter shall also immediately report, or cause a report to be made to the department of public safety, and any law-enforcement agency having jurisdiction to investigate the complaint[.]"

Footnote: 13Although W. Va. Code, 49-6A-2, refers to "the state department [division] of human services," the Executive Reorganization Act of 1989 redesignated this body as the Division of Human Services under the newly created Department of Health and Human Resources. See W. Va. Code, 5F-1-1 (1992); W. Va. Code, 5F-2-1(d) (1992); W. Va. Code, 9-2-1a.

Footnote: 14Prior to the final order, the parties agreed that Jonathan's last name would be changed from S. to K. As part of its final order, the circuit court entered this change. We find no reason, nor does either side present any argument, that would be grounds for reversing this part of the order.

198 W. Va. 716, 482 S.E.2d 893

Supreme Court Of Appeals Of West Virginia
IN RE: JONATHAN G.
No. 23465
Submitted: November 19, 1996
Filed: December 18, 1996

SYLLABUS BY THE COURT

1. The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

2. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

3. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

4. "'Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984).' Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987)." Syl. Pt. 3, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

5. " In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement

period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. Pt. 4, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

6. "The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

7. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syl. Pt. 6, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

8. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 3, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

9. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

10. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, is he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

11. A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child.

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Prosecuting Attorney of
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For Johnny G.:

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For Lisa Knighton:

Robert Schiavoni
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For Department of Health and Human Services:

Barbara L. Baxter
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For Amicus Curiae:

Jane Moran
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Workman, Justice:

Appellants Kenneth and Patricia Stem, as prior long-term foster parents of the infant Jonathan G., See footnote 1 appeal from the October 23, 1995, decision See footnote 2 of the Circuit Court of Berkeley County denying them permanent visitation rights with Jonathan G. The Stems assert additional error with regard to the circuit court's failure to permit them to participate meaningfully in the termination proceedings that occurred on June 21 and 22, 1994; the circuit court's decision to return Jonathan G. to his biological parents; and the circuit court's decision to remove the West Virginia Department of Health and Human Resources ("DHHR") from this case. DHHR cross-assigns as error the circuit court's decision to return Jonathan G. to his parents, the prosecuting attorney's improper representation of DHHR, and the circuit court's removal of DHHR from the case. Upon a thorough review of this matter, we See footnote 3 affirm the circuit court's order restoring permanent custody to the natural parents, but remand this case for further proceedings to determine whether it would be in Jonathan G.'s best interest to have continued contact with the Stems.

I. Factual and Procedural Background

Jonathan G. was born to Johnny G. and Lisa K. on April 23, 1990. While his parents are hearing impaired, See footnote 4 Jonathan G. has no hearing problems. In June of 1990, Jonathan G. suffered a spiral break of his left femur, which was subsequently determined by the treating physicians to be accidental in nature. Then on December 8, 1990, Jonathan G.'s mother took him to the emergency room for what was later diagnosed as "shaken baby syndrome." The shaking incident actually occurred a day earlier. As a result of the shaking, Jonathan suffered intercranial hemorrhaging. The severity of his injuries required immediate transfer to Johns Hopkins in Baltimore, Maryland, for treatment.

On December 19, 1990, DHHR filed an abuse and neglect petition pursuant to West Virginia Code § 49-6-1 (1996), seeking temporary custody of Jonathan G. See footnote 5 A hearing was held on the abuse and neglect petition on December 28, 1990, and the circuit court found that DHHR had demonstrated probable cause concerning the abuse of Jonathan G. The circuit court granted DHHR custody of Jonathan G. for sixty days, ordered supervised visitation for Jonathan G.'s parents, and further directed that the natural parents were to submit to psychological examinations. Through this same order, See footnote 6 the court ordered DHHR to develop a family case plan in accordance with the provisions of West Virginia Code § 49-6D-3 (1996) and to make all reasonable efforts in assisting Jonathan G. to remain in his home. The Stems, as foster parents, were awarded physical custody of Jonathan G. on December 29, 1990, when he was ten months old. Jonathan G. continued in their care and custody until September 2, 1994, when he was over four years old.

An adjudicatory hearing was held on February 19, 1991. During this hearing, the circuit court received the psychological report of Hal Slaughter. The order reflecting the findings of this proceeding states that:

> Upon motion by the State, the Counsel for the natural parents and infant child, as well as the State, agreed to stipulate that the report of Hal Slaughter was acceptable and should be entered in the record.
>
> The Court then notified the parties that the mother within the report had admitted that she was in fact the party who had abused the child. The mother acknowledged in the affirmative. The Court accordingly accepts the stipulation of the parties to Mr. Slaughter's report.

As a result of the adjudicatory proceeding, the circuit court concluded that Jonathan G. was an abused and neglected child; continued the custody of the infant child with DHHR; ordered DHHR to develop a family case plan; ordered supervised visitation for the natural parents; and directed that the natural parents participate in counseling programs as directed by DHHR. The order further provided that the natural parents were to be permitted to use the services of an interpreter to assist them in cooperating with the circuit court's directives.

A dispositional hearing was held on May 13, 1991, resulting in the circuit court's continuation of custody with DHHR. The circuit court again directed that the natural parents were to participate in counseling programs after finding "no improvement from the prior hearing." The circuit court further directed the child's parents to cooperate with DHHR "and with the Family Case Plan filed in this matter."

On June 11, 1992, DHHR filed a motion for termination of parental rights, asserting that the biological parents deny any abuse of Jonathan G. and that counseling has resulted in "very little progress." The petition further provides that DHHR has permitted the natural parents to have weekly visitation during the entire seventeen-month period that Jonathan G. has been in the custody of foster parents.

On July 16, 1992, the circuit court ordered Dr. Townsend, a psychologist, to perform an independent evaluation of Jonathan G. and his natural parents. On July 28, 1992, the circuit court granted the State's motion to continue the termination proceedings based on the "recent development" concerning the availability of "services that might have been provided to hearing impaired parents of hearing children which were not provided due to two opposing expert philosophies." See footnote 7

Dr. Townsend sent the circuit court a letter dated October 9, 1992, indicating that Lisa K. "has shown progress" and referencing the viability of the improvement plan previously discussed with the court. Another letter, dated October 16, 1992, from Randy Henderson, a licensed professional counselor, sets forth that both

natural parents "have shown progress in our therapy sessions." During a hearing before the circuit court on November 30, 1992, the natural parents moved for increased visitation with Jonathan G. While the circuit court denied an increase in the frequency of the visitation, it ordered that "the length of each visit should be gradually increased" and further provided for "[a]t least one unsupervised visit . . . around Christmas." The circuit court ordered expanded visitation for the natural parents at a hearing on January 15, 1993. The order from this proceeding indicates that following "a two hour session between the parents, child and third party [,visitation] then shall be expanded to a two hour session twice weekly then shall be expanded to five hour sessions" and further states the court's intention "that unsupervised visitation of very short periods of time may be arranged in the future."

By January 4, 1993, Jonathan G. had been in the Stems' custody and care for more than two years, and they filed a petition seeking leave to make an appearance in these proceedings. See footnote 8 As support for their intervention, the Stems averred that DHHR "has been largely unsuccessful" in its efforts to "prevent the termination of the parental rights" and in its "effort[s] to reunify the family." The Stems stated that their intention was "to appear in a hybrid relationship of physical custodian of the child and as the child's representative in loco parenti." As statutory authority for their involvement, the Stems cited West Virginia Code §§ 49-6-5 and -8 (1996).See footnote 9 After requesting briefs from the parties on the issue of the Stems' involvement in these proceedings, See footnote 10 the circuit court heard arguments concerning this issue on February 4, 1993. Finding that "there is no clear statutory provision for automatic standing of a foster family[,]" the circuit court initially denied the Stems' petition for intervention. However, by order entered July 8, 1993, the circuit court "granted [the Stems] standing in this matter, in order to present another perspective on the best interests of the minor." See footnote 11 The order granting standing expressly admonishes the Stems "that their involvement in these proceedings should not create the false impression that they have parental rights equivalent to Johnny G. or Lisa K., nor coequivalent rights of any sort with regard to Jonathan G."

On May 6th and 7th, 1993, the circuit court held a hearing on a petition filed by the natural parents, seeking a finding of contempt against DHHR. See footnote 12 The circuit court found that DHHR was "in contempt of the prior Orders of this Court regarding preparation of a case plan for the purpose of reunification[.]" The circuit court declared that DHHR "is unable to continue to manage this case objectively with a view towards possible reunification of the family herein, and accordingly must be removed as the primary case manager but should remain as a party throughout these proceedings." Responsibility for the "development and implementation of a case plan consistent with the expressed goals of reunification previously contained in the prior Orders of the Court[]" was delegated to an

independent agency. The private agency utilized in the stead of DHHR was Action Youth Care, Inc. ("Action Youth"). The order reflecting the contempt proceedings makes it clear that while DHHR was "removed from its role as case manager," the circuit court directed that DHHR "shall remain a party to these proceedings and will be represented by counsel of its choice." See footnote 13

On June 7, 1993, the circuit court ordered that this matter be continued for six months See footnote 14 "at which time the Court shall review the efforts of . . . Action Youth Care, Inc. to determine whether or not the parents and the child can be successfully reunited or the parental rights [should be] terminated." In November 1993, the circuit court enlisted the services of Dr. Paul Kradel, as friend of the court, to perform a psychological study and family assessment of the parties. In the report dated February 3, 1994, that Dr. Kradel submitted to the circuit court, he states that Lisa K. "provided me with no definitive answer about who might have done the shaking." See footnote 15 He concluded that "it is my estimation that it will take a minimum of another three (3) years of intensive social and therapeutic services to bring the biological family to a point of skill where they can function as an independent family unit."

In the monthly progress report submitted to the circuit court by Action Youth dated March 7, 1994, the natural parents were noted to have completed their in-home preservation/reunification program as of January 17, 1994. The report further states:

> Action Youth Care is of the opinion that this family is very aware of its obligation to this child and are capable of parenting this child in a safe, consistent, self-respecting, and definitely loving atmosphere. We do not suspect this child to be in any sort of physical or mental danger while in the biological home nor have we witnessed anything that would indicate otherwise.

We feel that permanency for this child is the utmost importance at this time.

On April 19, 1994, the State See footnote 16 filed a petition to terminate the parental rights of the natural parents. As grounds for its petition, the State cited the mother's denial of her earlier admission of the abuse and the lengthy period of time Dr. Kradel estimated it would take before the family could function independently. A two-day hearing was held on the State's termination motion on June 21 and 22, 1994. Before concluding the presentation of its evidence, however, the State withdrew its petition when it realized it was unable to meet its burden of proof. See footnote 17 The circuit court's order reflects that "[t]he State further requested that reunification efforts continue and that within a six month time frame the infant child shall be returned to the physical custody of the biological parents" and "the plan outlined by Dr. Paul Kradle [sic] should be implemented." The order finds, inter alia, that:

1. The facts and evidence in this case are insufficient to support termination.

2. Once appropriate services were provided the family improved.

3. The safety of the child is not an issue.

4. The foster family has been a valuable resource in this case and have provided excellent care for this child.

5. The Court agrees that closure is needed.

6. The Court agrees that in six months that the child should be physically reunited with the biological parents.

On August 1, 1994, the Stems presented arguments on their Rule 60(b) motion for relief See footnote 18 from the circuit court's order entered in connection with the termination proceedings. Relying on the Bowens case, the Stems argued that they were denied meaningful participation at the termination proceeding. The Stems' motion was opposed by the guardian ad litem, the State, and the natural parents. After hearing arguments regarding the Stems' lack of participation at the termination proceedings, See footnote 19 the circuit court ordered the parties to submit briefs on this issue. After reconsidering this issue at a hearing on August 24, 1994, the circuit court denied the Stems' motion for relief, finding that:

> the case of Bowen[s] v. Maynard, 324 S.E.2d 145 (W.Va. 1984) is distinguishable from this case primarily due to the fact that custody was given to the Petitioner in Bowen[s] by the natural parents and in this case the Intervenors' [Stems'] custody was given to them by the Department of Health and Human Resources who in fact have custody and were allowed to fully participate in the hearing on June 21 and 22, 1994 . . . .

At the conclusion of this same proceeding, the circuit court ordered that Jonathan G. was to be returned to his natural parents' household on September 2, 1994, and provided for the foster parents to have visitation on alternating weekends and on alternating holidays, beginning on September 9, 1994.

Although the termination proceedings had reached their conclusion on June 22, 1994, at which time the petition seeking termination was dismissed pursuant to joint motion of the State and DHHR, the circuit court continued jurisdiction in this matter "because of the special needs that are present in this case." The circuit court reviewed the status of this matter periodically. See footnote 20 By letter dated April 24, 1995, Dr. Kradel reported to the circuit court that "[f]or the most part

things are going well. The biological parents have independently provided the majority of care for their son for nearly eight months with no major problems."

The final hearing held in this case occurred on October 23, 1995, at which time Jonathan G. was returned to the legal custody of his natural parents. While finding that "both biological and foster parents are 'psychological parents'" of Jonathan G., the circuit court concluded, "that it does not believe that it has the authority to order visitation rights to the foster parents; however, if he had the power he would do so." The natural parents agreed to voluntary visitation, which continued until the Stems filed their petition for appeal with this Court.

II. Discussion

A. Procedural Delays

We face yet another case where the delays in resolving the underlying allegations of abuse, in developing an effective improvement plan, in resolving whether the family could be reunified, and in bringing permanency to this child's life are totally unacceptable.

Upon reviewing another egregiously delayed abuse and neglect case chronology in In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991) we said:

> Certainly many delays are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied overnight. The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them.
>
> The bulk of the most aggravated procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children--the most voiceless segment of our society--aren't left to languish in a limbo-like state during a time most crucial to their human development.
>
> Id. at 623, 408 S.E.2d at 375.

Since the Carlita B. case in 1991, this Court has consistently urged upon the circuit courts that they must accord abuse and neglect cases the highest priority and must not let them languish during the critical formative years in a child's life. We urged

this point again in State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996), while recognizing how difficult it can be for courts to recognize that the time is ripe for decision:

> A circuit judge overseeing a case such as this has an immensely difficult task, for in many abuse and neglect cases there is a genuine emotional bond as well as the natural biological bond between parent and child which courts are understandably hesitant to break if there is hope of meaningful change. In most abuse and neglect cases, the parent(s) may have redeeming qualities that create such hope that they will be able to make the necessary changes to become adequate parents.
>
> . . . .
>
> Although it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.
>
> Id. at __, 470 S.E.2d at 214.

Despite this Court's emphasis on the level of attention that should be given to abuse and neglect cases, lawyers and judges continue to allow these cases to lag on without prompt resolution. While fault for the delays experienced in the instant case can be assessed against various entities, our goal is not to point the finger of fault but to seek once again to capture the circuit courts' attention on this issue. Hopefully, this Court's adoption of the new Rules of Procedure for Abuse and Neglect Proceedings, on December 5, 1996, will create progress in this very difficult arena.

B. Role of Foster Parents at Termination Proceeding

The Stems argue that they were denied the right to meaningful participation at the termination hearing. Their counsel was permitted to be present, but was not permitted to present or cross-examine witnesses. See footnote 21

This Court recognized in syllabus point one of Bowens that "[i]f a party has lawful physical custody of a child, she has the right to service of process and to be heard in any proceeding that concerns the child." 174 W. Va. at 184-85, 324 S.E.2d at 145. We further held that "[i]f a party having lawful physical custody of a child is not served with process of a proceeding concerning that child she has the right to intervene in that proceeding." Id. In that case, we determined that an individual who had been granted physical custody of the children by written agreement of the natural mother prior to the initiation of abuse and neglect proceedings was entitled to notice of the proceedings pursuant to West

Virginia Code § 49-6-2(c) and was wrongly denied the right to intervene in the abuse proceedings. In deciding Bowens, the Court first looked to the definition of custodian found in West Virginia Code § 49-1-5(5) (1981)See footnote 22 which provides that "'[c]ustodian' means a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceedings[.]" This Court then examined the language of West Virginia Code § 49-6-2(c) (1984),See footnote 23 which stated that "[i]n any proceeding under this article, the party or parties having custody of the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses."

In denying the Stems' motion for relief, the circuit court reasoned that the involvement of DHHR, as Jonathan G.'s custodian, precluded the applicability of the Bowens ruling. While DHHR was clearly the legal custodian of Jonathan G., however, it was not his physical custodian. Thus, the circuit court's attempt to distinguish Bowens from the present case on that basis does not survive scrutiny under the statutory definition of custodian. See W. Va. Code § 49-1-5(5). Bowens, however, was decided in the factual context of an individual who was a lawful custodian prior to the initiation of abuse and neglect proceedings, which clearly is the type of custodian contemplated by the provisions of West Virginia Code § 49-6-2(c). The more difficult issue that we face here is whether foster parents enjoy the statutory rights of notice and participation extended by West Virginia Code § 49-6-2(c) when their status as a child's custodian results from the filing of abuse and neglect charges and exists subject to and under the auspices of the DHHR's role as the child's legal custodian. An examination of the law of other jurisdictions is helpful.

The Court of Appeals of Minnesota determined in In re Welfare of C.J., 481 N.W.2d 861 (Minn. App. 1992), that because the statutory definition of custodian See footnote 24 included foster parents, the foster parents involved in that case were permitted to intervene under Minnesota's statutory language which parallels that of West Virginia Code § 49-6-2(c).See footnote 25 481 N.W. 2d at 862-63. The Minnesota court expressly rejected the argument that the foster parents are merely agents for the county and therefore cannot intervene as of right. The court held: "The intervention statute, however, does not require a party have legal custody; instead the party must only be a lawful custodian. Here the foster parents fall under the definition of custodian and therefore they have the right to participate in the termination proceedings." Id. at 863. Like the Minnesota court, we conclude that the absence of a statutory provision requiring that only legal custodians have a right to participate in termination proceedings negates the argument that DHHR's involvement, as the child's legal custodian, is all that is authorized by West Virginia Code §49-6-2(c).

Numerous tribunals have permitted foster parents to intervene and participate in at least part of the termination proceedings, depending on applicable statutory provisions. See

Custody of a Minor, 432 N.E.2d 546, 554 (Mass. App. 1982) (finding no error in trial court's decision to permit foster parent involvement in termination proceedings despite lack of constitutional right to such participation); In re Kimberly J., 595 N.Y.S.2d 146 (N.Y. App. Div. 1993) (holding that foster parents had no statutory right to intervene in fact-finding stage of termination proceedings, but did have right to intervene in dispositional phase of proceeding given custody nature of proceeding); In re Baby Boy Scearce, 345 S.E.2d 404, 410 (N.C. App. 1986) (discussing statutory right of foster parents to participate in review proceedings concerning child's placement after termination of parental rights and noting "[a]t the very least, foster parents have the right for an opportunity to be heard, a right which derives from the child's right to have his or her best interests protected"); see also Berhow v. Crow, 423 So.2d 371 (Fla. Dist. Ct. 1982) (finding that foster parents had liberty interest arising from relationship with child that entitled them to notice and meaningful opportunity to be heard in adoption proceedings).

Many of those courts that permit foster parents to participate in termination proceedings recognize a need to limit the scope of their involvement in such proceedings. In In re D.L.C., 834 S.W.2d 760 (Mo. Ct. App. 1992), the appellate court held that the foster parents' participation in everything but name in a parental rights termination proceeding was reversible error. See footnote 26 Id. at 768. Rather than relying on language within a termination statute as grounds for participation, however, the foster parents in D.L.C. looked to the provisions of a foster parent statute which permitted them "to present evidence for the consideration of the court." See footnote 27 834 S.W.2d at 767 (quoting 1985 Mo. Laws § 211.464). In castigating the full- blown participation of the foster parents in the termination proceeding, the Missouri appellate court cited the United States Supreme Court's observation in Santosky v. Kramer, 455 U.S. 745 (1982), that: "'However substantial the foster parents' interests may be, they are not implicated directly in the factfinding stage of a state-initiated permanent neglect proceeding against the natural parents.'" 834 S.W.2d at 767 (quoting Santosky, 455 U.S. at 761 and citation omitted).

In the instant case, it is difficult not to be sympathetic to the Stems' effort to participate, not only because they had Jonathan G. with them for so long, providing him with love, constancy, and care in his earliest years; but also because the significant issues relating to a child's life and fate must not be decided in some artificial procedural vacuum, and the Stems, after the passage of so much time, probably were absolutely more knowledgeable than anyone as to this child's needs. What makes balancing their right to participate, and the extent of such participation, against the natural rights of the biological parents, as well as the statutory objective of reunifying Jonathan G. with them, so difficult is that both sets of parents, foster and biological, obviously loved and wanted this child. As a result of this love, and their strong commitment to this child, the two sets of parents became adversaries during these proceedings. As an aside, we must comment that scenarios such as the one before us would discourage most people from ever embarking on the noble

work of foster care. Since the Stems were a constant in Jonathan G.'s life for such a long period of time and during his formative years, it would seem to go against not only all principles of fairness and equity, but also against all values of human relationship and compassion to deny them the right to be heard as to Jonathan G.'s best interests during these proceedings.

While we recognize that the statutory language of West Virginia Code § 49-6-2(c), when viewed in conjunction with the Bowens case, certainly appears to afford foster parents a right to participate in abuse and neglect proceedings, we believe sound public policy and the overall purposes of both statutory and case law regarding abuse and neglect proceedings dictate that such participation have its limits. Perhaps the healthiest balance we can achieve is to hold that the foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified. When foster parents are involved in these proceedings, however, the circuit court must assure that the proceeding does not evolve into a comparison of the relative fitness of the foster parents versus the biological parents. See footnote 28 See In re Trapp, 593 S.W.2d 193, 205-06 (Mo. 1980), appeal dismissed, 456 U.S. 967 (1982) (overruling trial court's granting of foster parents' motion to intervene in neglect proceedings, noting that foster parents' presence would "interject the false issue of the fitness of the foster parents to have custody of the children" and observing that children cannot be removed from their parents on grounds that they would be "better off" in another home).

We do not reverse the circuit court on this issue of denial of meaninful participation, but direct that on remand the Stems should be given a full opportunity to be heard concerning Jonathan G.'s interests and their desire to have a continued relationship with him.

C. Failure to Terminate Parental Rights

Both the Stems and DHHR See footnote 29 argue that the circuit court erred by not terminating the parental rights of the natural parents. In support of this assignment, these parties cite in In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993), in which we held that:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator

> of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

Id. at 25-26, 435 S.E.2d at 163-64, Syl. Pt. 3. They question whether Lisa K. properly acknowledged that she committed an abusive act towards Jonathan G. The record reveals that during the adjudicatory hearing on February 19, 1991, the circuit court expressly incorporated the report of the psychologist, Hal Slaughter, to whom Lisa K. admitted that she had committed the act resulting in Jonathan G.'s "shaken baby" diagnosis. The circuit court's order further states "[t]he mother acknowledged in the affirmative." While it is somewhat unclear from this language whether the circuit court was referencing an in-court affirmation by Lisa K. regarding the act of abuse, nonetheless, the parties stipulated to the admission of Mr. Slaughter's report which contained the admission of abuse.

The facts of this case simply are not the equivalent of those present in In re Jeffrey R.L. While Lisa K. did vacillate when subsequently questioned regarding the act of abuse during therapy, Dr. Kradel suggests an explanation in his report of February 3, 1994: "In some instances individuals have emotional blockages where traumatic experiences are removed from conscious awareness and they truly do not remember what has happened to them or what they have done." Another explanation provided by the signing counselors, according to the prosecutor's brief, is that "the mother could no longer recount the abuse . . . because in therapy they had moved beyond that point and progressed toward positive interaction with the child." While Lisa K. may have shown some ambivalence about her earlier admission of abuse, See footnote 30 the original acknowledgment was nonetheless made. See footnote 31 Moreover, both the natural parents cooperated with therapeutic intervention, that was ultimately deemed beneficial.

The termination proceedings ended on the State's motion to withdraw the petition with DHHR joining in this decision. We find no abuse of discretion regarding the circuit court's granting of that motion based on its finding that the evidence presented at that time was not sufficient to justify termination. Apparently, the circuit court, the State, and DHHR all agreed that the evidence, at this time, did not support a finding that the conditions that led to the abuse could not be substantially corrected. The record reveals that the guardian ad litem had no objection to the withdrawal of the termination petition. See footnote 32

D. Removal of DHHR

While DHHR argues that it was removed from this case by virtue of the circuit court's ruling during the May 6-7, 1993, contempt proceedings, a careful review of the record does not support this position. The circuit court removed DHHR as the case manager due to its conclusion that DHHR was "in contempt of the prior Orders regarding preparation of a case plan for the purpose of reunification." The order entered in connection with this proceeding states clearly that DHHR "should remain as a party throughout these proceedings."

The circuit court apparently felt that it had no choice but to involve an independent agency like Action Youth, given DHHR's failure to obey the circuit court's repeated directive to develop and follow a case plan for the purpose of reunifying Jonathan G. with his natural parents. DHHR, as a party to this case (usually by its agent, an individual child protective services worker), has the right and responsibility to advocate whatever position it determines proper under the law and in the best interests of the child. However, DHHR also has the duty to follow the court's directives in working on the case from the perspective of the delivery of social services. In a case, such as this, where DHHR refuses to comply with court directives, a circuit court may appoint an agency independent of DHHR to assist in case management. DHHR, however, as the circuit court clearly recognized by virtue of its directive that DHHR remain a party, was not absolved of its statutory duties to Jonathan G. despite its removal as the case manager.

E. Role of Prosecuting Attorney

The duties of the prosecuting attorney in regard to prosecution of abuse and neglect proceedings are set forth in West Virginia Code § 49-6-10 (1996):

> It shall be the duty of every prosecuting attorney to fully and promptly cooperate with persons seeking to apply for relief under the provisions of this article in all cases of suspected child abuse and neglect, to promptly prepare applications and petitions for relief requested by such persons, to investigate reported cases of suspected child abuse and neglect for possible criminal activity and to report at least annually to the grand jury regarding the discharge of his or her duties with respect thereto.

In the amicus brief submitted in this case by Jane Moran, she states that "[t]he relationship between the DHHR and the Prosecuting Attorney . . . appears to have been mutually supportive from the original taking of Jonathan in December, 1990 through July 1992." Ms. Moran suggests that the problem began when the prosecutor sought a continuance on the grounds that "'there are services that might have been provided to hearing impaired parents of hearing children which were not provided due to two opposing expert philosophies.'" Apparently, there was a meeting between the prosecutor and the foster care workers and assigned supervisor on January 25, 1993, during which it became apparent that the prosecutor did not support DHHR's decision to seek a termination of parental rights.

The record, as well as the oral arguments presented in this case, evidence that vitriolic discord existed between DHHR and the prosecuting attorney, all of which stemmed from a difference in views regarding the resolution of this matter. The prosecutor apparently believed that reunification was possible, whereas DHHR fervently believed that termination of parental rights was in Jonathan G.'s best interests. See footnote 33 Herein lies the problem. Should the role of the prosecutor be comparable to her role in criminal proceedings, requiring her to independently weigh the evidence before proceeding on a

complaint, or should it be that of a traditional lawyer/client relationship, requiring her to present evidence in accord with the client's wishes within the confines of the law?

Guidance on this issue is provided by West Virginia Code § 49-7-26 (1996), which states that "[t]he prosecuting attorney shall render to the state department of welfare [division of human services], without additional compensation, such legal services as the department may require." This statutory provision supports the view that the prosecuting attorney stands in the traditional role of a lawyer when representing DHHR in connection with abuse and neglect proceedings. Indeed, the prosecuting attorney cites no authority to the contrary. In the analogous decision of Manchin v. Browning, 170 W. Va. 779, 296 S.E.2d 909 (1982), this Court held that "[t]he Legislature has thus created a traditional attorney-client relationship between the Attorney General and the state officers he is required to represent." Id. at 790, 296 S.E.2d at 920. Based on our conclusion that the prosecuting attorney's role as related to DHHR in an abuse and neglect proceeding is that of a traditional attorney-client, we further determine that a prosecuting attorney has no independent right to formulate and advocate positions separate from its client in these cases. See footnote 34

This case presents a difficult and confusing scenario regarding the prosecuting attorney's role. See footnote 35 According to the amicus brief, the prosecutor advised the circuit court following the filing of the contempt petition by the natural parents against DHHR that she had a conflict in representing her client in the contempt proceedings, but would not withdraw "from any other part of this case." The Attorney General was brought into the case at the prosecutor's request See footnote 36 and upon the circuit court's direction. See footnote 37 Although the prosecuting attorney had a questionable role in these proceedings, the representations in her brief illustrate the difficulties encountered by the prosecutor in connection with her representation of DHHR. See footnote 38

Jane Moran, as amicus curiae, suggests that DHHR was prevented by the actions of the prosecutor from presenting its point of view to the circuit court. We do not find that to be the case. While DHHR has a right to determine and advocate a position that comports with its statutory responsibilities, it must nonetheless follow the court's directives even if such directives conflict with its position. All the orders clearly reflect the circuit court's awareness of DHHR's view towards termination rather than reunification. In addition, DHHR had the benefit of the Attorney General's counsel. Upon review, we find the Department was not restricted from full participation in the proceedings, but only in its management of the case. Although the prosecutor's role in this case appears to have exceeded the boundaries of a traditional lawyer/client relationship, we find no reversible error with regard to the prosecutor's involvement in these proceedings under the facts of this case. See infra note 38.

F. Failure to Develop Case Plan

The circuit court's orders are replete with directives to DHHR to develop a case plan. Yet, we cannot determine from a review of the record whether such a plan was ever developed and submitted to the circuit court. DHHR is statutorily obligated by West Virginia Code § 49-6-5 (1996) to prepare the case plan immediately after a child is adjudicated as abused or neglected. See footnote 39 Since this Court's decision in Carlita B., we have repeatedly admonished lawyers and the circuit courts regarding the critical need for prompt resolution of child abuse and neglect proceedings, as well as the importance of a promptly prepared and thorough case plan geared toward meaningful improvement and reunification. We recognized in Carlita B., that

> 1. Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. . . .
>
> 3. "Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984)." Syl. Pt. 3, State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).
>
> 4. In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.
>
> 5. The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.
>
> 6. At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.
>
> 185 W. Va. at 615-16, 408 S.E.2d at 367-68, Syl. Pts. 1, in part, 3-6.

While this case presents an unusual scenario in that DHHR was ordered removed as the case manager and Action Youth appointed in its stead, the obligation to prepare a case plan was initially imposed on DHHR at the conclusion of the adjudicatory hearing on February 19, 1991, when the circuit court expressly ordered DHHR to develop a family case. DHHR remained as the case manager in this case until May 7, 1993, when the circuit court removed it from such role, due to DHHR's failure to comply with the court's directives regarding "the preparation of a case plan for the purpose of reunification." For more than two years before its removal as case manager, DHHR was obligated to prepare a case plan. Because the circuit court makes several references to requiring DHHR to update its case plan, case plans may have been submitted to the trial court, and just not filed as a matter of record. See footnote 40 However, given the circuit court's complete dissatisfaction with DHHR regarding its failure to submit a case plan dealing with reunification, we can only conclude that the plans submitted by DHHR either did not comply with the statutory requirements of West Virginia Code § 49-6-5 and/or the court's directives, or that DHHR's execution of the case plan was determined by the circuit court to be inadequate. Even after Action Youth was assigned the role of case manager, we believe that DHHR nonetheless retained its statutory responsibility with regard to the filing of a case plan with the court under West Virginia Code § 49-6-5.

To be very clear, the position of DHHR that the parental rights should have been terminated is not without merit. Jonathan was a victim of shaken baby syndrome, which has frequently been the cause of serious permanent injury, or even death, of infants. Once the court made the determination that reunification was the goal, however, DHHR should have worked diligently to accomplish that goal, or filed a petition for a writ of prohibition if they believed the record justified it. See Syl. Pt. 2, Amy M., 196 W. Va. at __, 470 S.E.2d at 207 (holding that prohibition was available to restrain courts from granting improvement periods of greater extent and duration than permitted statutorily); see also State ex rel. West Virginia Dep't of Health and Human Resources, 185 W. Va. 318, 406 S.E.2d 749 (1991) (granting writ of prohibition to DHHR to prevent enforcement of circuit court order directing blood testing seven years after jury determination of paternity).

G. Visitation Rights

The circuit court incorrectly determined that it had no basis upon which to order continued association between the foster parents and Jonathan G. Beginning with this Court's decision in Honaker v. Burnside, 182 W. Va. 448, 388 S.E.2d 322 (1989), we have recognized the need to consider whether a child, whose custodial arrangements are being altered, should be permitted to have continued contact with individuals with whom an emotional bond has been formed. In that case, we held that the circuit court should provide for visitation rights between a child and her stepfather and half-brother. Id. at 452, 388 S.E.2d at 326. Later in James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), an abuse and neglect case resulting in termination of parental rights, we held:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.
>
> In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.
>
> Id. at 649, 408 S.E.2d at 401, Syl. Pts. 3, 4.

More recently in In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995), we recognized that visitation rights may be afforded in some circumstances to a parent who is found to have abused the child, even though his parental rights have been terminated:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, is he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.
>
> Id. at 448, 460 S.E.2d at 694, Syl. Pt. 5.

The guiding principle relied upon by this Court in recommending consideration of continued contact with a child is whether a strong emotional bond exists between the child and an individual such that cessation in contact might be harmful to the child, both in its transitory period of adjusting to a new custodial arrangement and in its long-term emotional development. We find no reason to except individuals, like the Stems, who have had a successful long-term relationship with a foster child and have been found, in fact, to be psychological parents to Jonathan G., from consideration for such continued association.

The court in In re Custody of H.S.H.K., 533 N.W.2d 419 (Wis. 1995), cert. denied sub nom. Knott v. Holtzman, __ U.S. __, 116 S.Ct. 475 (1995), observed that while "[t]here is little uniformity in the case law concerning nonparental visitation over the objection of a biological or adoptive parent, . . . some courts have observed a judicial trend toward

considering or allowing visitation to nonparents who have a parent-like relationship with the child if visitation would be in the best interest of the child." Id. at 435, n.37 and cases cited therein. The trial court was held to have abused its discretion in denying visitation rights to the foster parents where a foster family had been the custodial family since birth of a five- year-old child. In re Ashley K., 571 N.E.2d 905 (Ill. App. 1991). The court upheld the trial court's decision to grant visitation rights to the non-successful adoptive foster parents in In re Adoption of Francisco A., 866 P.2d 1175 (N.M. App, 1993), relying on the best interests of the child standard. The court recognized that such visitation rights may be reconsidered "[i]f at some time the visitation is no longer in the child's best interests." Id. at 1181; see also In re John T., 538 N.W.2d 761, 772 (Neb. App. 1995) (refusing to remove child from foster parent who had AIDS, observing that lack of biological connection between foster parent and child was inconsequential in assessing child's best interests); Sorensen v. Sorensen, 906 P.2d 838 (Or. App. 1995) (applying statute that permits any person including a foster parent "who has established emotional ties creating a child-parent relationship" to petition court for visitation rights).

Based on the principle of a child's right to continued association previously enunciated by this Court, we hold that a child has a right to continued association with individuals with whom he has formed a close emotional bond, See footnote 41 including foster parents, provided that a determination is made that such continued contact is in the best interests of the child. Accordingly, we remand this matter for further proceedings to determine whether continued contact with the Stems would be in Jonathan G.'s best interest. Due to the lengthy period of time that Jonathan G. has now resided exclusively in the home of his natural parents, the assessment of such continued contact may be different from what it might have been immediately following the transfer of physical custody.

Based on the foregoing, the decision of the Circuit Court of Berkeley County is remanded for further proceedings to consider whether continued association between Jonathan G. and his former foster parents is in his best interests.

Remanded.

Footnote: 1 Consistent with our prior practice, we identify the infant and his parents by initials due to the sensitive nature of this case. See In re Jonathon P., 182 W. Va. 302, 303, 387 S.E.2d 537, 538 n.1 (1989).

Footnote: 2 The order reflecting the circuit court's decision was not entered until October 2, 1996.

Footnote: 3 The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996, and continuing until further order of this Court.

Footnote: 4 Johnny G. is completely deaf, whereas Lisa K. has 40% hearing in one ear.

Footnote: 5 The petition avers that DHHR believes the father of Jonathan G. was responsible for his head injuries.

Footnote: 6 The order reflecting the circuit court's findings at the December 28, 1990, hearing was entered nunc pro tunc on May 8, 1991.

Footnote: 7 The record does not provide any additional information regarding the nature of the two opposing philosophies referenced in this letter.

Footnote: 8 The Stems had previously filed a document on November 11, 1992, styled "Notice of Appearance," which indicated that Scott A. Ollar was their counsel of record.

Footnote: 9 West Virginia Code § 49-6-5 deals with the disposition of neglected or abused children. West Virginia Code § 49-6-8 concerns foster care review that is to be initiated by the state, and provides that the circuit court shall give notice to and permit the appearance of foster parents in such review proceedings.

Footnote: 10 The natural parents submitted a joint memorandum, arguing that the provisions of West Virginia Code §§ 49-6-5 and -8 provide no authority for the involvement of foster parents. They further argued that "intervention by the foster parents would compromise the ability of the State to provide a meaningful improvement period."

Footnote: 11 This order followed a motion for reconsideration filed by the Stems in which they informed the circuit court of this Court's holding in Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984), that "a party [that] has lawful physical custody of a child, . . . has the right . . . to be heard in any proceeding that concerns the child." Id. at 184-85, 324 S.E.2d at 145, Syl. Pt. 1, in part.

Footnote: 12 As grounds for their petition for contempt against DHHR, the natural parents averred, inter alia:

1. That the undisputed evidence in the instant case shows more particularly, since October, 1992, that the natural parents herein have made great improvements and advances in acquiring those skills and attributes needed to become good, caring, and nurturing parents, and although these parents may not as of yet be ready for reunification with their infant child, they have demonstrated to the Court that they have willingly cooperated with DHHR in the development of a reasonable family case plan designed to lead to reunification and that they have responded and followed through with such a plan of action and other rehabilitative efforts through social, medical, mental health and other rehabilitative agencies . . . . 2. That the aforesaid efforts of the natural parents were not the result of any family case plan prepared or advocated by DHHR, but were the result of intervention by the Court at the insistence of their respective counsel when the Court was made aware of the underlying flaw in the manner in which DHHR was attempting to seek rehabilitation and reunification for this family, to-wit, not using counselors and personnel trained in sign and the culture of the deaf community; and that once this flaw was corrected and appropriately trained personnel and agencies intervened, great improvement was noted by both natural parents as aforesaid. 3. That as a matter of law, there exists sufficient evidence before the Court to justify a finding that "there is a reasonable likelihood that the conditions of neglect or abuse can be substantially corrected by the natural parents herein." 4. That despite such improvement by the natural parents herein, DHHR has directed a course of conduct against said parents to prevent them from engaging in any meaningful improvement period by restricting visitation between the parents and their child, and by advocating for termination of their parental rights, even in the face of the improvements aforesaid.

Footnote: 13 Due to the fact that DHHR and the prosecuting attorney were in disagreement regarding the issue of termination of parental rights and because the prosecuting attorney perceived the existence of a potential conflict of interest with regard to her continued representation of DHHR, see infra note 36, the prosecuting attorney requested that the Attorney General's office be involved in these proceedings to represent DHHR. An attorney from the Attorney General's office appeared at the May 7, 1993, contempt proceedings on behalf of DHHR. Even after the prosecuting attorney sought the involvement of the Attorney General because of the contempt proceedings, the prosecutor continued to appear and take an active role in these proceedings. From the contempt proceedings forward, it appears that the Attorney General's office represented DHHR and the prosecutor appeared on behalf of the State's interest. DHHR states in its brief to this Court, that "at

hearings before and after the contempt hearing, the role of the prosecutor was unclear."

Footnote: 14 The case had been before the circuit court for more than two and one-half years at this time. We observe, additionally that it had been two years and four months since an adjudication of abuse, even though the statute in effect at that time provided that a post- adjudicatory improvement period could not exceed twelve months. See W. Va. Code § 49-6- 5(c) (1992) **.**

Footnote: 15 Dr. Kradel notes in his report that "[i]t is Mr. Slaughter's opinion that if [D]HHR would have built a solid treatment program based on that original confession [to him] that this matter would have been successfully resolved with the family being much closer to reunification than it is now."

Footnote: 16 By the State, we are referring to the prosecuting attorney. At times, the prosecutor appears to have continued to represent DHHR and at other times, the prosecutor seems to have represented her own views with regard to the issues herein.

Footnote: 17 The circuit court concurred with the State's assessment of the evidence, stating in its order that "if the State had rested its case, upon motion of any other party, a motion of directed verdict against the State would have issued."

Footnote: 18 The Stems sought to have the circuit court set aside its order entered in connection with the termination hearing and further sought a stay of all proceedings.

Footnote: 19 The record indicates that the circuit court advised the parties to confer prior to the termination proceedings for the express purpose of resolving the role that the Stems' counsel should have at the termination hearing.

Footnote: 20 Review hearings were held before the circuit court on September 25, 1994; November 17, 1994; April 19, 1995; and August 14, 1995.

Footnote: 21 The circuit court did permit the Stems' counsel to state his position with regard to effecting the reunification of Jonathan G. with his natural parents and also with regard to immediate removal of Jonathan G. from the Stems following the termination hearing. See infra note 32.

Footnote: 22 The current statutory definition of "custodian" is identical to the one set forth in the 1981 statute relied upon in Bowens. See 174 W. Va. at 186, 324 S.E.2d at 147; cf. W. Va. Code § 49-1-5(5) (1996).

Footnote: 23 The current version of this statute reads: "In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W. Va. Code § 49-6- 2(c) (1996).

Footnote: 24 Custodian was defined under Minnesota law as "'any person who is under a legal obligation to provide care and support for a minor or who is in fact providing care and support for a minor.'" In re C.J., 481 N.W.2d at 863 (quoting Minn. Stat. § 260.015, subd. 14 (1990)).

Footnote: 25 The Minnesota statute delineating who has the right to participate in termination proceedings provided: "A child who is the subject of a petition, and the parents, guardian, or lawful custodian of the child have the right to participate in all proceedings on a petition." In re C.J., 481 N.W.2d at 863 (quoting Minn. Stat. § 260.155, subd. 1a (1987)).

Footnote: 26 The foster parents participated through counsel, as though a party to the proceedings, and "[t]he trial court did not confine Hickle's [their counsel's] role to presenting evidence relevant to the termination issue." 834 S.W.2d at 768. The foster parents' counsel presented evidence of their education and their affection for the child, which evidence, the appellate court stated, "had nothing to do with whether one or more grounds existed for termination of . . . parental rights. . . ." Id.

Footnote: 27 The statute, in its entirety, states:

Where a child has been placed with a foster parent, with relatives or with other persons who are able and willing to permanently integrate the child into the family by adoption, if the court finds that it is in the best interests of the child, the court may provide the opportunity for such foster parent, relative or other person to present evidence for the consideration of the court.

1985 Mo. Laws § 211.464.

Footnote: 28 The natural parents in this case aver that they were improperly and unknowingly sent to a psychologist, whose report was then used to compare them to the foster parents.

Footnote: 29 Since it joined in the State's motion to withdraw the termination petition, we find the DHHR's assertion of this assignment of error to be without a proper procedural basis.

Footnote: 30 It is well-documented that where there is no acknowledgement of abuse nor an acknowledgement of a failure to protect, it generally does not bode well for future improvement from a therapeutic perspective.

Footnote: 31 We observe additionally that Dr. Kradel, in his February 3, 1994, report, refers to an interview with psychologist Stephen Townsend on January 24, 1994, during which Mr. Townsend told Dr. Kradel "that Lisa had 'signed' to him that she shook the baby."

Footnote: 32 The only concerns raised by the guardian ad litem pertained to his concurrence with the recommendation of Dr. Kradel and Mr. Henderson that Jonathan G. be removed from the Stems and placed in another foster home with individuals trained in signing and that the reunification efforts be expedited. While there was discussion at the conclusion of the termination proceedings regarding the removal of Jonathan G. from the Stems, this removal was apparently never effectuated. The guardian ad litem's position with regard to this appeal is that the identity of Jonathan G.'s perpetrator of harm was identified and as such, cannot be relied upon as the basis for reversing the termination proceeding. Furthermore, the guardian ad litem observes that the Stems assented to the return of Jonanthan G. to his natural parents during the October 23, 1995, hearing, stating that they were only seeking visitation rights. With regard to visitation rights, the guardian ad litem takes the position that the Stems do not have standing to seek such rights.

Footnote: 33 To be fair to the prosecuting attorney, she did proceed to draft and file a petition for termination, even when she thought that reunification efforts had not been fully and properly attempted by DHHR. Moreover, she, along with counsel from the Attorney General's office, sought a termination of parental rights during the two-day hearing that occurred on June 21 and 22, 1994.

Footnote: 34 While Manchin supports the prosecutor's role in terms of a traditional lawyer/client relationship, we acknowledged that the Attorney General, as discussed in that decision, has no law enforcement powers. Id. at 787, 296 S.E.2d at 917. In contrast, the prosecutor clearly has law enforcement powers. Moreover, the same statute that directs the prosecutor to assist in the prosecution of child abuse and neglect laws also authorizes the prosecutor "to investigate reported cases of suspected child abuse and neglect for possible criminal activity." W. Va. Code § 49-6-10. These investigatory and enforcement rights are clearly outside the scope of the traditional lawyer/client relationship. Thus, the prosecutor, unlike the Attorney General, clearly has a dual role in the area of civil/criminal abuse and neglect cases that requires him or her to provide representation to those seeking to file child abuse and neglect complaints and also to investigate and enforce child abuse and neglect laws of this State. Thus, the

prosecutor's authority is more limited by the client's position within the civil arena of abuse and neglect proceedings as compared to the criminal side of such proceedings.

Footnote: 35 Indeed, the prosecuting attorney stated at the oral argument of this case that she had no client and was appearing in connection with DHHR's allegations in its brief concerning her commission of unethical conduct.

Footnote: 36 Among additional reasons cited by the prosecutor for the involvement of the Attorney General was a potential conflict of interest in the event criminal contempt proceedings were brought against DHHR, and violation of Rules 1.2(d) and 1.6(b) of the Rules of Professional Responsibility. Given the parameters of this appeal, we do not further discuss the ethical concerns raised in conjunction with the prosecutor's representation of DHHR.

Footnote: 37 The circuit court ordered that the petition for contempt be sent to the office of the Attorney General for assignment of counsel.

Footnote: 38 Among the problems the prosecutor encountered was the discovery that, while DHHR represented to the circuit court that it was providing the natural parents with appropriate counseling services, the services were often rendered inadequate because considerations necessary for providing effective services to the hearing impaired, such as interpreters and special technological devices, were either not consistently provided or were not being utilized. The prosecutor, in her brief, states: What was very troubling to the State at the time and remains so today is that the Romney School for the Deaf is the state facility for deaf persons. It is where these parents were educated. For the Department not to know about specialized signing services that could have helped this family earlier is incomprehensible. Departmental workers claimed that they looked for deaf services in this area and found none. But within an approximate twenty-five mile radius of Berkeley County there exist more than twenty agencies and programs who directly deal with deaf parents who need the skills that the Circuit Court ordered.

The prosecutor states additionally that DHHR "refused to accept the progress reports of the signing counselors" and that "[t]here is some indication that they [DHHR] were not paying the bills of these counselors." The prosecutor further indicates that upon her review of records and communication with service providers, she discovered facts that differed greatly from what she was being told by DHHR. She learned that Jonathan G. "was not being taught to

communicate with his parents, especially his father as ordered by the Court." She discovered that with regard to the natural parents' visitation, the foster parents were being given priority as to the time periods they were permitted to spend with Jonathan G. Yet another discovery was that the Stems maintain they had been promised from almost the time of placement that Jonathan G. would be eligible for adoption by them. In addition, the prosecutor states she learned "that if certain witnesses were called to the witness stand, that they might commit perjury to further the case."

Footnote: 39 Case plans can also be required by a circuit court in the pre-adjudicatory phase pursuant to West Virginia Code § 49-6-2(b), when an improvement period is granted.

Footnote: 40 In reviewing the record, Dr. Kradel's notes also refer to numerous DHHR service plans.

Footnote: 41 The length of time that the child has remained with the foster parents is a significant factor to consider in determining this issue.

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Supreme Court Of Appeals Of West Virginia

IN RE: JONATHAN MICHAEL D.

NO. 22732

Submitted: May 2, 1995
Filed: May 18, 1995

SYLLABUS BY THE COURT

1. "'W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3, In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988)." Syllabus Point 2, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

2. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus Point 6, In Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

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Per Curiam:

Sherry D., See footnote 1 the respondent below and appellant herein, appeals a final order entered July 25, 1994, by the Circuit Court of Wood County, which terminated her parental rights to her son, Jonathan Michael D. She asserts the circuit court erred because there was no evidence she knowingly allowed her husband, Jonathan Brett D., to abuse their child; the evidence established she

complied with the terms of her improvement period; and the West Virginia Department of Health and Human Resources (Department) made no reasonable efforts to reunify the family. After reviewing the record, we find no reversible error and affirm the decision of the circuit court.

I.
FACTS

In February, 1993, Karol Walton, a child protective services worker with the Department, filed a petition pursuant to W. Va. Code, 49-6-1 (1992),See footnote 2 alleging five-month-old Jonathan Michael D. was an abused and/or neglected child according to W. Va. Code, 49-1-3 (1992).See footnote 3 The petition set forth the following facts:

> "On February 4, 1993, the above-named child was taken to St. Joseph's Hospital and treated for a spiral fracture in right femur which injury was sustained when father was placing the child in a swing and allegedly pulled the child's leg and heard a snap. The respondent father reports that the child has been bruised on three previous occasions. In addition, the father has a history of mental illness and poor impulse control. Further, the respondent-mother is aware of said abuse by the respondent-father and has failed to adequately supervise said child and does nothing to prevent said abuse."

The circuit court determined that Jonathan was in imminent danger and ordered temporary custody placed with the Department. See footnote 4 The child was placed with his great-aunt and continues to reside in her home.

A preliminary hearing was held on February 11, 1993. Adjudicatory hearings were held on March 26, 1993, and April 26, 1993. At the conclusion of the April 26, 1993, hearing, the circuit court determined the Department had proved by clear and convincing evidence that Jonathan was subject to child abuse: "The totality of the evidence here shows a continuing and reoccurring injuries to a child which are not normal and are inconsistent with the father's explanation of any of the things that happened according to the medical testimony." A dispositional hearing was held May 21, 1993, and a twelve-month improvement period was granted. On November 18, 1993, the circuit court reviewed the progress of the improvement period and determined temporary custody should remain with the Department. A final hearing was held on July 14, 1994. By order entered July 25, 1994, Sherry D.'s and Jonathan Brett D.'s parental rights were terminated. See footnote 5 The evidence taken at the hearings is summarized as follows.

Ms. Walton testified she filed the petition after receiving information from the hospital that Jonathan received a fracture to his right leg. Further examinations were conducted at the hospital because child abuse was suspected, and an old injury to the right arm and three old left rib fractures were revealed. The Department also received telephone calls indicating the child was observed on at least three occasions with bruises on his face, back, and his bottom near his scrotum.

Jonathan Brett D. testified his son was fussy the night before the incident occurred and he had awakened very early the next morning. He took Jonathan downstairs and put him in the child swing. The baby's legs were folded up and he had to pull them down through the leg holes in the swing. He testified he heard the leg crack when he pulled it through. He stated that he asked Sherry D.'s stepmother, a registered nurse, to examine the baby and she believed his leg was alright. See footnote 6 Jonathan Brett D. explained the rib injuries probably occurred when he fell down a flight of stairs while holding the baby and they both hit the wall. He attributed the arm injury to an accident that occurred when he lifted the baby out of a playpen and the baby fell back against the side of the playpen and fell to the floor. He went on to relate the bruises to Jonathan's bottom to an incident where he bounced the baby on his knee. He explained that other bruises may have occurred when the baby rolled around on their waterbed. Jonathan Brett D. denied ever intentionally hitting his son.

Of particular significance is the fact that Jonathan Brett D. admitted he was a victim of child abuse. He had undergone counseling sessions with James D. Wells, a counselor at the Worthington Center in Parkersburg, to help him work through his anger toward his mother and father. He discontinued seeing Mr. Wells when he lost his medical card because he could not afford the therapy. Mr. Wells testified he counseled Jonathan Brett D. briefly when the baby was approximately two months old. Mr. Wells identified impulse control problems and diagnosed Jonathan Brett D. as experiencing major depression.

At the April 26, 1993, hearing, Sherry D. testified she never witnessed her husband abusing their son. She supported his explanation for the baby's injuries. She testified again at the final hearing held July 14, 1994, and admitted that Jonathan's injuries were serious. However, she denied any responsibility for the injuries. Sherry D. went so far as to say it may have been possible her husband intentionally caused the injuries, but she was not certain. She still maintained it was possible the baby was injured accidently. Eventually, she claimed to have separated from Jonathan Brett D. and filed for divorce because she could not be absolutely sure her son would be safe in the same house as his father.

Jonathan's foster mother, Elizabeth M., testified Sherry D. told her she was going to "play the game" with the Department and tell them what they wanted to hear in order to get her son back. The couple then planned to reunite and move to Ohio. Sherry D. denied making those particular statements, although she admitted she would do anything to regain custody. Sherry D. testified Elizabeth M. offered her $10,000 to relinquish her parental rights to Jonathan. Elizabeth M. denied such offer.

Dr. Min Liu, a pediatrician, testified the skeletal survey report showed a nondisplaced spiral fracture of the right leg, See footnote 7 old fractures of the left 5th, 6th, and 7th ribs, and evidence of a healing right upper arm bone. It appeared to Dr. Liu that the bone scan only evidenced a broken leg; however, she admitted a radiologist is better trained to interpret these results. She testified these injuries were suspicious and may be an indication of child abuse. Otherwise, her examination revealed a healthy, well-nourished baby.

Dr. Anthony Twite, an orthopedist, testified the bone scan showed abnormalities only in the leg and the X-rays showing prior injuries to the ribs and upper right arm "may be called into question" because the bone scan is a more accurate method of detecting fractures. See footnote 8 However, his conclusions were discredited by Dr. Paul VanDyke, a diagnostic radiologist who possessed more training and experience in evaluating bone scans and X-rays.

Dr. VanDyke testified the X-ray skeletal survey illustrated an old injury to the right humerus (upper arm) which indicated a "good manifestation of trauma to the bone that didn't result in fracture but resulted in injury to the bone[.]" He opined the baby's rib injuries and right arm injury were in the process of healing and could have been sustained anywhere from weeks to months earlier. Furthermore, the spiral fracture of the right femur was the type of injury that would require "significant trauma" to inflict because an infant's bones are more flexible than an adult's. When questioned about the difference in the bone scan and X-ray results, Dr. VanDyke explained the two reports were actually consistent. A close examination of the bone scan revealed the type of injuries more readily apparent from the X-ray. The rib fractures were not as apparent from the bone scan because the injury occurred much earlier and the ribs were in a later stage of healing. Therefore, one would not expect to see heavy activity at that site.

Dr. VanDyke further testified that the parents' explanation for the baby's leg injury would be inconsistent with the medical evidence because the amount of force used to effectuate the fracture would necessarily be much more momentous than simply pulling the leg through the hole in a baby swing. He noted the injuries were clearly out of the range of expected injuries based on a five-month-old's limited activity

and lack of mobility. He found the fact the baby suffered major injuries at different sites at different times significant.

Joan George, a child protective services worker with the Department, prepared a case report in June of 1994 and testified at the final hearing held July 14, 1994. She recommended termination of parental rights. Her primary concern was the parents' failure to accept any responsibility for the baby's injuries. She believed they minimized the seriousness of the problems. Furthermore, Sherry D. and Jonathan Brett D. continued to insist the injuries were not intentionally inflicted, but were caused by accidents. Ms. George testified the parents were inconsistent with following through with their need for counseling. Sherry D. attended less than ten counseling sessions during the course of the one-year improvement period. The parents also demonstrated no ability to be self-sufficient. They did obtain various employment, but lost their jobs and had to live with relatives for most of the year.

On cross-examination, Ms. George admitted Sherry D. essentially performed the tasks set forth in the family case plan. However, she felt because Sherry D. failed to acknowledge responsibility for her son's injuries, the issue could not be addressed and worked on during the improvement period. In this regard, she felt Sherry D. and Jonathan Brett D. had not attempted to correct the behavior that caused the injuries. Accordingly, Ms. George was unable to conclude that Sherry D.'s level of functioning improved to the point that the safety of the child could be ensured.

Cynthia Beck, the psychologist who evaluated Sherry D., reiterated the fact that Sherry D. continued to deny responsibility for her son's injuries. Ms. Beck, however, did not recommend termination of parental rights. She prepared a report recommending Sherry D. submit to counseling and undergo an evaluation to determine if she should be placed on medication.

At the final hearing, the circuit court determined there was no reasonable likelihood the conditions of neglect or abuse resulting in the baby's injuries could be substantially corrected in the future. Accordingly, parental rights were terminated. The circuit court found the numerous injuries could not have been inflicted accidentally and neither parent had accepted responsibility for the baby's injuries. The circuit court found that in the two months preceding the final hearing, Sherry D.'s cooperation with the Department was not sincere. Furthermore, the circuit court found her testimony was not credible. It stated Sherry D. was "only going through the motions and playing a little game with the department until such time when she gets her child back, and then she's going to reunite with the father."

II.

STANDARD OF REVIEW

When an action is tried upon the facts without a jury, the circuit court "shall find the facts specially and state separately its conclusions of law thereon . . . [and these] [f]indings . . . shall not be set aside unless clearly erroneous[.]" W.Va.R.Civ.P. 52(a). "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Board of Educ. of County of Mercer v. Wirt, ___ W. Va. ___, ___ n.14, 453 S.E.2d 402, 413 n.14 (1994), quoting U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed.2d 746, 765-66 (1948). However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm "[i]f the [circuit] court's account of the evidence is plausible in light of the record viewed in its entirety[.]" Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). Finally, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings[.]" 470 U.S. at 574, 105 S. Ct. at 1512, 84 L.Ed.2d at 529. Applying these principles to the facts of this case, we are of the opinion that the circuit court's findings were not clearly erroneous.

III.
FINDING OF ABUSE

Sherry D. first contends there was no evidence in the record to support the circuit court's initial finding that her conduct constituted child abuse or neglect. This Court has held that parental rights may be terminated on account of abuse even if the parent did not personally inflict the injuries. Syllabus Point 2 of In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993), sets forth the standard for when parental rights may be terminated for failure to prevent abuse:

> "'W. Va. Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3, In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988)."

The circuit court found that Jonathan Brett D. intentionally abused his son and that Sherry D. was aware of the abuse and did nothing to prevent it. As we previously stated, this Court accords deference to such findings of fact. See footnote 9

A review of the record does not reflect the circuit court's findings were clearly erroneous. The medical evidence shows the baby suffered three major injuries

within the first five months of his life, not to mention the numerous bruises about his back, face, and bottom. Sherry D. may not have been present when the abuse occurred, as she claims, but it could reasonably be inferred she possessed knowledge the abuse was occurring. Other family members questioned how the baby sustained the bruises and reported their suspicions to the Department. Sherry D. was aware her husband had received counseling for impulse control problems after the birth of their son. See footnote 10 Standing alone this factor is not determinative. However, considering the other evidence in this case, we find the circuit court's determination that Sherry D. was aware the abuse was occurring was substantially supported by the record.

Courts oftentimes must rely upon circumstantial evidence in finding a parent liable for failing to protect his or her child from abuse even though he or she never actively participated in the abuse. Should the parents choose to support each other's version of what transpired, there may be no direct evidence to the contrary. Particularly when the victim of the abuse is a baby, as in this case, he or she cannot testify. In State v. Adams, 89 N.M. 737, 557 P.2d 586 (1976), the Court of Appeals of New Mexico affirmed the defendant's criminal conviction of child abuse resulting in the death of his twenty-eight-month-old daughter. The Adamses had a rationalization for all the child's bruises and injuries--from her playing with her brother to being accidently hit on the head with a glider. The defendant supported his wife's explanation for how their child was injured and eventually died. The court found his claims to be unconvincing. The circumstances leading to the child's death supported the inference that the father knew the abuse was occurring and failed to take action to stop it. See footnote 11 See also State v. Williquette, 129 Wis. 2d 239, 385 N.W.2d 145 (1986) (mother failed to protect seven- and eight-year- old children from their father's abuse after they reported the abuse to her); but see Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (defendant's child abuse conviction reversed because she was not within the class of persons specified by the statute, i.e., a parent or guardian, even though she witnessed a friend beat her baby to death and did nothing to stop it).

IV.
TERMINATION OF PARENTAL RIGHTS

Sherry D. contends the circuit court erred in terminating her parental rights because she complied with the terms set forth in the family case plan during the improvement period. See footnote 12 Ms. George admitted Sherry D. performed the required tasks. However, the recommendation to terminate parental rights was due to the fact that Sherry D.'s attitude and beliefs did not change during the improvement period. She never accepted responsibility for Jonathan's injuries and only during the last few months of the improvement period did she admit even the possibility that Jonathan Brett D. intentionally inflicted the injuries. The family case plan specifically provided "goal achievement will be measured by the level of

change effectuated by participation in the identified tasks and not by mere compliance." Furthermore, this Court has recognized it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting." W. Va. Dept. of Human Serv. v. Peggy F., 184 W. Va. 60, 64, 399 S.E.2d 460, 464 (1990).

The assessment of the overall success of the improvement period lies within the discretion of the circuit court "regardless of whether or not the individual has completed all suggestions or goals set forth in family case plans." In Interest of Carlita B., 185 W. Va. 613, 626, 408 S.E.2d 365, 378 (1991). Syllabus Point 6 of Carlita B. states:

> "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child."

Of particular concern to the circuit court was the fact that Sherry D.'s behavioral change during the last few months of the improvement period was an attempt to deceive the Department. There was evidence she was merely going through the motions to appease the Department while her true intentions were to reunite with Jonathan Brett D. and move out of the State. The circuit court was particularly concerned about the baby's safety should Sherry D. reunite with her husband. Thus, the circuit court found there was no substantial likelihood the conditions had changed. The circuit court is in the best position to judge a witness's credibility, and we find nothing in the record to lead this Court to a different conclusion.

On the issue of the improvement period, we sua sponte address an issue of particular concern to this Court. We have stated: "During the improvement period, the status of the child(ren) and the progress of the parent(s) in satisfying the conditions of the improvement period should be monitored by the circuit court on a monthly basis. To the extent possible, such review should also incorporate the multi-disciplinary approach, with social workers and other helping personnel present in the court with attorneys and parties to review progress and assure the program is being followed and improvement being made." Carlita B., 185 W. Va. at 625, 408 S.E.2d at 377. (Emphasis added). The improvement period was ordered in June of 1993. On November 18, 1993, the circuit court conducted its only hearing reviewing the progress of the parents before the final hearing was held on July 14, 1994. It must be emphasized that at that point the child had spent

more than half of his life in foster care. A single six- month review of a one-year improvement period is woefully inadequate, especially where such a young infant is involved. Frequent monitoring enables a speedy return of the child should the parents demonstrate substantial improvement. "[T]he significance of a six-month period in the first three years of life must once again be viewed as an extremely vital time in the course of a child's human development." Carlita B., 185 W. Va. at 624, 408 S.E.2d at 376. It also allows the circuit court to see to it that the Department is making reasonable efforts toward the goal of family reunification and to assure the child is receiving all necessary services.

We do not, however, find reversible error in the circuit court's lack of diligence in monitoring this case. We are not convinced that additional proceedings before the circuit court would have made any difference in the final outcome of this case because Sherry D. failed to ever acknowledge that Jonathan was an abused child. Without such revelation, the circuit court found it unlikely Sherry D. would take steps to prevent further abuse from occurring.

V.

DUTY OF DEPARTMENT

Sherry D.'s final argument is that the Department failed to make a reasonable effort to reunify the family pursuant to W. Va. Code, 49-6-5 (1992). This assignment of error is without merit. The Department promptly prepared the family case plan, See footnote 13 submitted the plan to the circuit court in May of 1993, and took immediate steps to offer services. Sherry D. failed to take advantage of the opportunity to work with the Department until the end of the improvement period and even then did not truly accept the fact that the abuse occurred. The failure to reunify the family in this case does not lie with the Department.See footnote 14 Sherry D. failed to bear the responsibility of demonstrating to the Department and the circuit court sufficient progress and improvement in order to regain custody.

VI.

CONCLUSION

For the foregoing reasons, we find the Circuit Court of Wood County did not abuse its discretion in terminating the parental rights of Sherry D. Accordingly, the judgment is affirmed.

Affirmed.

Footnote: 1 We follow our traditional practice in child abuse and neglect matters and other cases involving sensitive facts and do not use the last names of the parties. See, e.g., Matter of Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991);

State ex rel. Div. of Human Serv. by Mary C.M. v. Benjamin P.B., 183 W. Va. 220, 395 S.E.2d 220 (1990).

Footnote: 2 W. Va. Code, 49-6-1(a), states, in part:

"If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child."

Footnote: 3 W. Va. Code, 49-1-3(a), defines an "abused child":

"'Abused child' means a child whose health or welfare is harmed or threatened by:

"(1) a parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or mental or emotional injury, upon the child or another child in the home; or

"(2) Sexual abuse or sexual exploitation; or

"(3) The sale or attempted sale of a child by a parent, guardian, or custodian[.]"

W. Va. Code, 49-1-3(g)(1), defines a "neglected child":

"'Neglected child' means a child:

"(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

"(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]"

The statute was amended in 1994. The minor changes do not affect our determination of this case.

Footnote: 4 See W. Va. Code, 49-6-3 (1992), which states, in part:

"(a) Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible relative, which may include any parent, guardian or other custodian pending a preliminary hearing, if

it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child[.]"

Footnote: 5 Jonathan Brett D.'s petition for appeal to this Court was denied.

Footnote: 6 Barbara M., Sherry D.'s stepmother, testified Jonathan Brett D. was concerned about his son's injury and asked her to look at the baby's leg. Barbara M. failed to recognize the leg was broken and attributed the child's behavior to constipation. Nevertheless, Sherry and Jonathan Brett D. transported the baby to the hospital.

The family lived with the stepmother when these incidents took place. As a registered nurse, she felt confident she would have noticed any indications of child abuse, and she felt none were present.

Footnote: 7 A nondisplaced spiral fracture means the leg bone sustained a break but was still in proper alignment.

Footnote: 8 Dr. Paul VanDyke, a diagnostic radiologist at St. Joseph's Hospital, explained that in a bone scan, a radioactive label is used on a substance that goes to the bone and illustrates the entire skeletal system at one time. The substance accumulates at the sites of osteoplastic activity (where bone cells are laying down bone to repair injuries). By using the information from the X-rays and the bone scan, medical professionals are able to identify bone fractures and traumas and estimate how long ago the injury occurred.

Footnote: 9 As we recognized in In re Elizabeth Beth H., ___ W. Va. ___, ___, 453 S.E.2d 639, 642 (1994):

"Consistent with our cases in other areas, we give appropriate deference to findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law."

Footnote: 10 Studies indicate that victims of child abuse are at a greater risk of becoming perpetrators of abuse to their own children. Child abusers that were victims themselves liken abuse with proper parenting skills. See Dean M. Herman, A Statutory Proposal to Prohibit the Infliction of Violence Upon Children, 19

Fam.L.Q. 1, 20-21 (1985) (parents justify the abuse they inflict on their children by the treatment they received and such justifications are very difficult to overcome).

Footnote: 11 In Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993), the Supreme Court of New Mexico held the application of the civil negligence standard went beyond the intended scope of the criminal child abuse statute. Mr. Adams' conviction was not reversed, however, because the court declined to retroactively apply the criminal negligence standard.

Footnote: 12 The family case plan submitted by Ms. George in May of 1993 outlined numerous goals and tasks for Mr. and Mrs. D. They were to read booklets entitled All That a Child Can Be and Toddlers and prepare various reports for the Department. For instance, they were required to prepare reports detailing the reasons they felt the Department removed the baby from their care and explain their understanding of what must be accomplished in order for them to regain custody. Sherry D. was required to participate in individual therapy sessions on a monthly basis and apprise her social worker of her efforts to comply with the case plan.

Footnote: 13 The purpose of the family case plan "'is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.'" State ex rel. W. Va. Dept. of Human Serv. v. Cheryl M., 177 W. Va. 688, 693, 356 S.E.2d 181, 186 (1984), quoting W. Va. Code, 49-6D-3(a) (1984).

Footnote: 14 Victor I. Vieth in The Mutilation of a Child's Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse, 20 William Mitchell L. Rev. 727, 731 (1994), recognizes the arduous task faced by social services in attempting to reunite the family:

"It is often difficult, however, to reunite victims of physical or sexual abuse with their offending parents. Parents charged with abuse or neglect of a child 'are not candidates for quick change' and often require 'long-term treatment and long-term support in order to achieve any measure of success.' One study concludes that the success rate of treating abusive parents may be as low as forty percent.

"For social workers, the greatest challenge may be to help a nonoffending parent accept the fact that abuse has taken place. Typically, '[n]on-offending parents tend to lie to cover for the guilty parent because of their emotional ties to that person.'" (Emphasis in original; footnotes omitted).

Although there is generally a strong public policy in favor of encouraging loyalty in one spouse to the other, a parent's first commitment must be to the protection of his or her child.

182 W. Va. 302, 387 S.E.2d 537

Supreme Court of Appeals of West Virginia
In the Matter of JONATHAN P.
No. 19229
Nov. 30, 1989

SYLLABUS BY THE COURT

1. W.Va.Code, 49-6-3 (1984), authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by the Department of Human Services when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child.

2. "W.Va.Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syllabus Point 2, *State ex rel. W. Va. Dep't of Human Serv. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

3. Under W.Va.Code, 49-6-2(b) (1984), a request for an improvement period must be made "prior to final hearing."

4. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code,* 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code,* 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Dana R. Shay, Fairmont, for Mother.

Susan K. McLaughlin, Roger Williams, Fairmont, for infant.

J. Montgomery Brown, Pros. Atty., Rucco Fucillo, Asst. Pros. Atty., Fairmont, for State.

MILLER, Justice:

This is an appeal by Marilyn P. from an order of the Circuit Court of Marion County, entered on August 25, 1988, terminating her parental rights to her infant son, Jonathan P. See footnote 1 Marilyn P. contends that the trial court erred in: (1) finding that there was sufficient evidence of child neglect; (2) failing to grant an improvement period; (3) terminating her parental rights on the ground that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected; (4) admitting the

testimony of a social worker from the Department of Human Services (DHS); and (5) allowing the former prosecuting attorney to represent the infant child. We do not find reversible error, and, accordingly, the order of the Circuit Court of Marion County is affirmed.

Jonathan was born on September 20, 1986. On April 7, 1987, a temporary custody order was issued granting custody of Jonathan to DHS. See footnote 2 On April 14, 1987, a hearing was conducted to determine whether custody of Jonathan should remain with DHS. At that hearing, Nancy Riley, a worker for DHS, testified that Marilyn refused all help offered to her by DHS. The social worker testified that Marilyn did not have formula to feed Jonathan and that she expressed no concern about sleeping in a car with Jonathan despite the cold temperature. At the conclusion of the hearing, the circuit court granted temporary custody of Jonathan to DHS under the conditions set forth in the social summary prepared by Ms. Riley.

On June 25, 1987, the court issued its order granting a sixty-day assessment period based on the recommendations made at the April 14, 1987 hearing. During this assessment period, the court ordered custody to remain with DHS while Marilyn underwent psychological evaluation and counseling. The court further ordered Marilyn to contact DHS to arrange for visitation with Jonathan.

By order entered on September 22, 1987, pursuant to a joint motion of the parties, the circuit court continued this matter until completion of Marilyn's psychological evaluation and ordered that custody remain with DHS until a further hearing could be held.

On May 23, 1988, a hearing was held to determine whether Marilyn's parental rights should be terminated. By order entered on August 25, 1988, the circuit court terminated her parental rights and placed permanent custody of Jonathan with DHS. It is from that decision that Marilyn now appeals.

I.

Marilyn first contends that the temporary custody order initially removing Jonathan from her care failed to allege specific conduct which would show imminent danger to his physical well-being, as defined in W.Va.Code, 49-1- 3(e) (1984). The State contends that the circuit court's finding that the child was nutritionally deprived is specifically recognized in this section as a ground for removal. See footnote 3

W.Va.Code, 49-6-3 (1984), authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by DHS when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child. *State v. Carl B.*, 171 W.Va. 774, 301 S.E.2d 864 (1983). In *State ex rel. Miller v. Locke,* 162 W.Va. 946, 253 S.E.2d 540 (1979), we observed that

W.Va.Code, 49- 6-3, allows a taking only in an emergency situation in which the welfare or the life of the child is endangered.

In its temporary custody order, the circuit court found that there was imminent danger to Jonathan's physical well-being "by reason of lack of cooperation from mother to provide adequate food and shelter for the child." The order concluded that there were no reasonably available alternatives to removal of the child since "the mother has refused any supportive services and fails to recognize the dangers she is exposing him to." See footnote 4

The evidence in the record supports the circuit court's findings. Marilyn and her son had been sleeping in a car with temperatures outside as low as 30 degrees. Marilyn had no formula to feed her son. Instead, she was feeding him regular milk which was causing him to have diarrhea. Although the social worker advised Marilyn how to obtain an emergency food voucher in order to get formula for Jonathan, she refused to accept the assistance offered.

Here, there clearly existed an imminent danger to Jonathan's physical well- being, and there was sufficient evidence to warrant the circuit court's issuance of a temporary custody order. The extremely young age of the child, who was six months of age at the time of the petition, is a significant factor. As we mentioned in Syllabus Point 1, in part, of *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980), "children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults[.]"

II.

Marilyn next contends that the circuit court failed to grant her an improvement period and unlawfully continued to allow custody of Jonathan to remain with DHS. The State argues that Marilyn was given a sufficient period of time to improve her present conditions and that the court did not commit error by denying an improvement period.

We explained in Syllabus Point 2 of *State ex rel. W. Va. Dep't of Human Serv. v. Cheryl M.,* 177 W.Va. 688, 356 S.E.2d 181 (1987), that our statute does not automatically require an improvement period and that the parent must request such an improvement period:

> "W.Va.Code, 49-6-2(b) (1984), perm its a parent to m ove the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." See footnote 5

The circuit court's order dated June 25, 1987, granting DHS custody of Jonathan for a sixty-day evaluation period, provided that Marilyn should contact DHS to arrange for

visitation with Jonathan. By order entered on September 22, 1987, the initial sixty-day assessment period was extended by agreement of all the parties. The September 22, 1987 order in effect extended the assessment period and Marilyn's visitation privileges for another year. During this time, Marilyn did not move for an improvement period.

Even after the extension, Marilyn did not request an improvement period. The record shows that Marilyn visited her son four times during the period from June to December, 1987, and had no contact after December, 1987, until the May 23, 1988 hearing.

According to Marilyn's testimony, she had been hitchhiking in New York, New Jersey, North Carolina, Virginia, Florida, Texas, New Mexico, and Arizona. During this time, she testified that she was doing psychical research. She stated that she had been "thinking ahead to this case" and had decided to do "a little bit of my own investigation" into the areas of extrasensory perception and clairvoyance. Marilyn stated that she thought she may have a "sixth or seventh sense," and she wanted to be tested for this before the May 23, 1988 hearing.

Marilyn also had, at best, a sporadic work history along with this itinerant lifestyle. She testified that she worked approximately four weeks from December 23, 1987, until May 23, 1988. Two of those weeks she worked in Virginia Beach, but she testified that she "just couldn't handle it anymore." Marilyn testified that she worked in a warehouse in Florida for two weeks and also "did some cleaning" to make "a few dollars here and there." Marilyn stated that she received "a lot of charity from friends."

Marilyn did request an improvement period on June 29, 1988. However, this request was made after the May 23, 1988 final hearing to terminate her parental rights and approximately fourteen months after the initial temporary custody order was entered. Under W.Va.Code, 49-6- 2(b) (1984), a request for an improvement period must be made "prior to final hearing." In view of this delay and of the failure to make a timely request, we find that the trial court did not err in refusing an improvement period.

III.

Marilyn also contends that the circuit court should not have terminated her parental rights since there was insufficient evidence of no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected. We have acknowledged this principle in Syllabus Point 2 of *In re R.J.M., supra* :

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the dispos ition of neglected children, *W.Va.Code,* 49-6-5 [1977] m ay be em ployed wit hout the use of intervening less restrictive alternatives when it is found that there is no reasonable

> likelihood under *W.Va.Code,* 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected."

We find sufficient evidence to support the circuit court's finding that there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected. William J. Fremouw, Ph.D., conducted a psychological examination of Marilyn. See footnote 6 Dr. Fremouw diagnosed Marilyn as suffering from schizophrenia. In his report, Dr. Fremouw observed that "[a]lthough [Marilyn] is not currently psychotic she has a condition which under stress will produce psychotic symptoms. Her suspicions would easily become fully developed delusions and could lead to more extreme behavior which could endanger herself or a child." Dr. Fremouw opined that Marilyn did not have the psychological stability to function as Jonathan's primary caretaker.

Additionally, the trial court had before it evidence showing Marilyn's failure to provide proper food and shelter for her son, her lack of concern for Jonathan's welfare by failing to visit him regularly, and her itinerant lifestyle. Accordingly, we find sufficient evidence to support the trial court's termination of her parental rights.

IV.

Marilyn next asserts that the trial court erred by allowing the testimony of the social worker from DHS on the ground that she did not have any personal knowledge of the case. Marilyn maintains that the social worker's testimony was hearsay under Rule 602, W.Va.R.Evid., which provides:

> "A witness may not testify to a ma tter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge m ay, but need not, consist of the testimony of the witness him self. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses."

The social worker who testified on behalf of DHS in this case had observed visits between Marilyn and her son and had reviewed the records in the case. Moreover, the social worker was available for cross-examination. See footnote 7 Thus, we find no reversible error. See footnote 8

V.

For the above stated reasons, the judgm ent of the Circuit Court of Marion County is affirmed.

Affirmed.

Footnote: 1 *We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not use the last names of the parties. See, e.g., State ex rel. W. Va. Dep't of Human Serv. v. Cheryl M., 177 W.Va. 688, 689 n. 1, 356 S.E.2d 181, 182 n. 1 (1987); West Virginia Dep't of Human Serv. v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985); State v. Ellsworth J.R., 175 W.Va. 64, 66, n. 1, 331 S.E.2d 503, 505 n. 1 (1985).*

Footnote: 2 *The forthwith custody order was issued pursuant to W.Va.Code, 49-6-3 (1984), which provides, in pertinent part:*
"Upon the filing of a petition, the court may order that a child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible relative, pending a preliminary hearing, if it finds that: (1) there exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody."

Footnote: 3 *W.Va.Code, 49-1-3(e), provides:*
" 'Imminent danger to the physical well-being of the child' means an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health or life of any child in the home: (1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a babysitter or other caretaker; or (2) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome; or (3) Nutritional deprivation ; or (4) Abandonment by the parent, guardian, or custodian; or (5) Inadequate treatment of serious illness or disease; or (6) Substantial emotional injury inflicted by a parent, guardian or custodian." (Emphasis added).

Footnote: 4 *The mother was from out of state, had no relatives in this state, and had been living in her car. She also testified that she and Jonathan had been abandoned by the child's natural father.*

Footnote: 5 *W.Va.Code, 49-6-2(b), provides:*
"In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such

improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter."

Footnote: 6 Marilyn argues that Dr. Fremouw's testimony that her parental rights should be terminated was impermissible under Rule 704 of the West Virginia Rules of Evidence because such a statement is a legal opinion. Rule 704, W.Va.R.Evid., provides that: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." See State v. Smith, 178 W.Va. 104, 107 n. 1, 358 S.E.2d 188, 191 n. 1 (1987). This proceeding was not tried before a jury. We have said that, in such an instance, even if the evidence was improper, it is not error for the court to hear it. This is based on the premise that the judge is fully competent to disregard inadmissible evidence. In re E.H., 166 W.Va. 615, 276 S.E.2d 557 (1981); Farley v. Farley, 136 W.Va. 598, 68 S.E.2d 353 (1951). In this proceeding, the trial judge indicated that he would make the ultimate decision as to the termination of Marilyn's rights notwithstanding Dr. Fremouw's conclusions.

Footnote: 7 These facts differ from those in In Interest of S.C., 168 W.Va. 366, 284 S.E.2d 867 (1981), where DHS chose not to introduce any testimony from the social workers who prepared the reports incorporated into the neglect petition. The mother in that case argued that DHS's decision not to call these social workers to testify or to offer their reports into evidence violated her statutory right to cross-examine witnesses. We held that there was no statutory requirement that DHS call any or all social workers involved in the case nor was DHS's decision not to call these witnesses a violation of the mother's statutory right to cross-examine witnesses.

Footnote: 8 Marilyn asserts that the court erred in allowing the former assistant prosecuting attorney to represent Jonathan as his guardian ad litem. There is nothing in the record that indicates the former assistant prosecuting attorney was in office or had anything to do with representing the State in the initial stages of this case. Nor is there any specific assertion of a conflict of interest or prejudice resulting from such representation, except the vague charge that the attorney had at one time handled neglect cases for DHS. We find no merit in this argument.

199 W. Va. 438, 485 S.E.2d 176

Supreme Court Of Appeals Of West Virginia

IN RE: JOSEPH A. AND JUSTIN A.

No. 23780

Submitted: January 15, 1997
Filed: March 26, 1997

SYLLABUS BY THE COURT

1. """"W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994).' Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)." Syllabus Point 1, *West Virginia Department of Health and Human Resources ex rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996).

2. "'W.Va. Code, 49-6-2 (b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.' Syllabus Point 2, *State ex rel. W.Va. Dep't of Human Serv. v. Cheryl M.*, [177] W.Va. [688], 356 S.E.2d 181 (1987)." Syllabus Point 2, *Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

3. W.Va. Code, 49-6-2(c) (1996), provides parties having custodial or parental rights the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present during the testimony of a child witness and is given the opportunity to fully cross-examine the witness.

4. Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings, which were approved by this Court on December 5, 1996, controls the procedure for taking testimony from children in abuse and neglect proceedings in future cases.

Ira Haught, Esq.
Harrisville, West Virginia
Guardian Ad Litem

Ernest M. Douglass, Esq. Joanna Bowles, Esq.
Douglass and Douglass Assistant Attorney General
Parkersburg, West Virginia Charleston, West Virginia
Attorney for the Appellant Attorney for the Appellee

Maynard, Justice:
This is an appeal by Glen A., Jr. from an order of the Circuit Court of Wood County, West Virginia, entered on May 21, 1996, denying the father an improvement period and continuing legal custody of Justin A. and Joseph (Joey) A. See footnote 1 in the Department of Health and Human Resources (DHHR) for placement in long-term foster care. Glen A. contends the trial court erred in: (1) finding abuse by clear and convincing evidence; (2) denying an improvement period; and (3) excluding Glen A. during the testimony of Justin A. at the adjudicatory hearing. We find no reversible error; therefore, the order of the Circuit Court of Wood County is affirmed.

Appellant, Glen A., a widower, is the father of Justin A. and Joey A. At the time the juvenile neglect petition was filed in January 1996, Justin was fourteen years old and Joey was eight years old. The appellant is also the father of two older children, Stacy and Scott, who have reached the age of majority and are emancipated.

According to the juvenile neglect petition, the appellant threw a glass ashtray at Joey on January 17, 1996, resulting in a one to one and one-half inch laceration on the back of Joey's head. At school, two days later, Joey was sent to the school nurse, Diane Fuchs, who testified at the adjudicatory hearing and described a gaping and deep laceration with dried blood that needed sutures. Since the family had no telephone, Ms. Fuchs took Joey home. She explained Joey's medical needs to the appellant, including the possibility of needing sutures. The appellant answered that his car had a flat tire, so Ms. Fuchs offered to take the appellant and Joey to the emergency room. The appellant declined the offer. It was obvious to Ms. Fuchs that the appellant was not going to take Joey to the emergency room, so she offered advice on how to care for the laceration in lieu of medical treatment. She told him to keep the area clean, shave around the cut, and pull it together with steri-strips to promote faster healing.

Ms. Fuchs testified the appellant explained Joey's injury by stating the child fell against a box in the bedroom. Without any accusation from Ms. Fuchs, the appellant defensively and emphatically denied playing any role in Joey's injury.

The appellant recalled the visit somewhat differently. He testified at the dispositional hearing that the nurse gave him the option of taking Joey to the

hospital or treating the wound himself with steri-strips. He informed Ms. Fuchs he had some steri-strips. See footnote 2

The weekend passed, and on Monday, January 22, 1996, Joey had not yet received medical attention for the deep cut on his head. A family member took Joey to the DHHR and showed the laceration to Ms. Spiker, a Child Protective Service Worker with whom the family was already involved. Ms. Spiker later testified the laceration was matted with dried crusted blood and contained yellow areas suggesting that infection was present. She also testified Joey's hair did not appear to have been washed since the nurse's visit, three days earlier. See footnote 3

Ms. Spiker testified that she asked the family member to take Joey to the hospital while she and another social worker went to the appellant's home. When asked if he knew what had happened to Joey's head, the appellant told Ms. Spiker the child fell on a wooden box while playing in his bedroom. When asked why he had not followed Ms. Fuch's recommendations regarding treatment, the appellant answered "he didn't do anything to the laceration because he didn't want his neighbors to call the welfare on him." When Ms. Spiker informed the appellant that lack of medical attention could have caused medical problems for Joey, he again responded "he didn't want the welfare to be called on him." According to defense counsel, the appellant believed the referral in this case came about as a result of his having had an affair with his neighbor and his neighbor's husband had reported the abuse "to get back at him."

The referral regarding Joey and Justin also alleged the appellant owned a number of pornographic movies, which were easily accessible to his sons. When the appellant was questioned about having pornographic movies, he answered there were none in the home. Ms. Spiker opened the television stand, and the first three movies she removed were pornographic in nature. She recognized the movies as pornographic by the titles and by the accompanying filing cards which described the contents of the films. The movies were titled The First Nudie Musical, Hollywood Uncensored, and Slammer Girls. The appellant informed the social workers that Slammer Girls was an R rated prison movie, so Ms. Spiker insisted that they view a few moments of the movie. The social workers witnessed four to five women having sex with one another. Ms. Spiker found at least one tape which contained both children's cartoons and adult movies. When confronted with the fact that he had not been truthful about owning these movies, the appellant responded that his sons had been told they were not allowed to watch those movies. See footnote 4

The petition filed by Ms. Spiker additionally alleged that the appellant stored gunpowder in a can in the kitchen. The social worker noted during her testimony that the appellant had shown her the can with gunpowder in it, while Justin

testified the gunpowder was kept in a cardboard peanuts can and stored in a cabinet by the refrigerator. He testified he and Joey had played with the gunpowder by taking it outside and lighting it.

The petition also stated the appellant kept a loaded pistol in a location which was accessible and known to the children. During Ms. Spiker's visit to the home, the appellant led her to his padlocked bedroom and showed her the gun. When asked if the gun was loaded, the appellant took the bullets from the gun and tossed both the gun and the bullets on the bed. Justin testified his dad told him he kept some guns in his bedroom, but Justin had never seen them. The appellant told Ms. Spiker the room was padlocked when the children were home alone, and they were not allowed in the room.

During Justin's testimony, he further testified that his father had mood swings and had threatened to kick him out of the house if he kept missing the bus after school and walking home. The petition alleged the appellant had threatened on numerous occasions to give Joey to the Department.

Justin was cross-examined regarding the events that happened the evening Joey was injured. Justin stated their father wanted to see what Joey had in his hands. Joey showed him the hand in which he was holding a piece of metal, but not the hand in which he was holding a screwdriver. Justin then heard the ashtray hit Joey, who started crying. Justin was asked by the appellant's counsel if the ashtray was thrown "overhand, underhand, side-armed." He answered he was not watching when his father threw the ashtray because he was watching television. He did not see it strike his brother except out of the corner of his eye. He testified this was not the first time the appellant had thrown the ashtray at Joey.

The DHHR traced the history this family has had with the department, beginning in May 1989, shortly after the death of the children's mother in November 1988. The report prepared by Child Protective Service Worker, Joan George, states that initially Justin exhibited behavioral and hygiene problems and concerns were raised regarding fifteen-month old Joey because there was no running water in the home. The appellant was provided services regarding budgeting and was taught to utilize community resources. Justin was provided counseling regarding his mother's death. In October 1989 social services were discontinued.

In March 1991 the DHHR substantiated allegations of neglect and emotional abuse. Stacy, only sixteen years old at the time, was caring for both her siblings and was maintaining the house. Stacy was having suicidal thoughts and was afraid her father would kill her. Counseling was initiated. A social worker assisted the appellant by offering parenting skills education along with problem solving and

discipline techniques. These services were being provided when Stacy disclosed in April 1992 that the appellant had sexually abused her.

Pursuant to the filing of a petition, the three children were adjudicated to be abused and neglected, and the appellant was charged with criminal sexual abuse. The appellant was acquitted of the criminal charges in March 1993. The court granted a post-adjudicatory improvement period beginning April 15, 1993. In August 1994 Stacy was eighteen years old and emancipated. At that time, the boys were returned to the appellant's home. Action Youth Care provided reunification services, which were closed in June 1995, when it was believed that all possible progress with the appellant had been made.

The DHHR next received a referral regarding the physical abuse of Joey in December 1995. Joey denied the abuse and there was no apparent physical evidence of abuse. Then, in January 1996 the incident involving the cut on the back of Joey's head precipitated the filing of the instant petition.

The trial court held an adjudicatory hearing on March 29, 1996. The court adjudicated the children to have been abused. A dispositional hearing was held on May 16, 1996. In its final order, the court denied the appellant's motion for an improvement period and placed the children in long-term foster care. It is from this order that the appellant appeals.

On appeal, the appellant contends the evidence in this case is legally insufficient to find abuse by clear and convincing evidence. He argues the evidence is insufficient because Justin did not actually see him throw the ashtray, and no medical testimony was presented to invalidate the appellant's explanation that Joey fell against a box. He also argues no evidence was presented to verify that the school nurse's suggested treatment was necessary or that Joey's well-being was harmed by the lack of medical care. The appellant further contends that no expert testimony was presented which showed that the children's exposure to pornography harmed their safety and well being. The DHHR argues the court properly found a long and substantial history of abuse and neglect by the appellant.

In Syllabus Point 1 of *West Virginia Department of Health and Human Resources ex rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996), we said:

> """W.Va. Code, 49-6-2(c)[1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition...by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or

> evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994). Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Although W.Va. Code 49-6-2(c) was amended by the West Virginia Legislature in 1996 and the Department of Human Services is now known as the Department of Health and Human Resources, these changes do not alter the fundamental holding that proof of abuse and neglect must be by clear and convincing evidence. Here, not only was evidence presented that the appellant seriously injured his son, Joey, but he then forced Joey to wipe up his own blood. He clearly refused to give or to allow Joey to receive any medical attention with the excuse that he did not want the welfare department to be called.

Appellant criticizes the DHHR for not presenting testimony by a psychologist that the children were harmed by viewing pornographic movies. He claims he did not encourage the children to watch the videos and they did not watch the movies with him or with his knowledge. We do not believe it is necessary for the trial court to require the DHHR to present the testimony of an expert in order to conclude that watching pornography has harmful effects upon minor children. See footnote 5 Given the long history of this family and the more recent events involving Joey's serious head injury, the lack of needed medical care, the presence of gun powder in the home, and keeping and allowing the children to have access to pornographic videos in the home, we believe the trial court properly found that this appalling misconduct constituted clear and convincing proof of abuse and neglect.

The appellant next contends the trial court erred in denying his motion for an improvement period. Even though the appellant acknowledges the court may deny parents an improvement period if compelling circumstances justify denial, he argues that since he achieved reunification once before, there is no reason to believe he could not do so again. The appellant admits his temper is not under control, but seems to argue the DHHR should offer him counseling. The guardian ad litem stated the appellant was given in excess of three years to improve the situation in which he was raising these two boys, but failed to make substantial improvements.

The DHHR asserts the lower court properly denied an improvement period because of the appellant's history during the previous abuse and neglect proceeding. The department also maintains that the appellant continues to exhibit behavior that is in sharp contrast to the internalization of proper parenting skills

and argues the lower court did not err in failing to grant a post-adjudicatory improvement period on the basis that reunification was previously achieved.

After Justin and Joey were adjudicated to be abused and neglected, the court held a dispositional hearing where counsel for the children offered his opinion, by stating, Your Honor, I've discussed these matters with Justin, who's the oldest (sic) of the two boys, and it's my opinion that Mr. A. does, in fact, throw things at the boys and he did inflict this injury upon Joseph, as Justin testified to at the adjudicatory hearing, and I do not believe that there's any reason to grant him an additional improvement period, don't believe it would be beneficial. The boys don't have any interest in visiting their father, let alone living with him.

In his argument to the court at the dispositional hearing, appellant's counsel stated, "I don't believe that this incident was so serious that it would constitute a compelling reason to deny the improvement period." The court pointed to behavior of the appellant which transcended the thrown ashtray, the child's injury, and the failure to seek or provide medical treatment. The court described as "pretty significant" the content of some letters the appellant wrote to his older son, Scott. The court stated:

> What nobody's mentioned, of course, is one thing I think is pretty significant, is these letters which he wrote to his children. Even though Mr. A. says he didn't mean what they clearly say, I don't see how you can read them any other way than being some kind of a veiled threat. And they clearly state that the reason he wants them back is because he needs the money that the State would pay him for having his children to be able to pay his own rent....

These letters are a clear threat to do something, something pretty bad obviously. He said, "I will have to turn from Doctor Jekyll to Mr. Hyde. All I want is for you to come home and sit down like a man and talk to me face to face. That's all I'm asking. What I am thinkin I will do --" underscored "-- as long as I have the kids back before the 29th of this month I will not do --" I will not do, and it's underscored "-- what I already will do or thinking about. It's all up to you, Scott." He even give a deadline. "You only have until this weekend --" and he underscores that "-- for me not to do it."

And he says, " If you don't come this weekend, expect me to do something. I will have to turn from Doctor Jekyll to Mr. Hyde." There's no other way to read that than a threat to do something outrageous, because Mr. Hyde was certainly an outrageous person, he did outrageous things, and this is what he's threatening to do. Nothing specific, but something outrageous.

And he says, "This is your last warning." A warning. "I hope you don't upset me by not showing up or not calling. This will be my last letter to you until I see you or see or hear from you, and if you don't think I have something to work by that, you'd better be prepared for the worst."

I don't see any reason to grant this man another improvement period. He's had one before. He went through the motions and apparently pulled the wool over the eyes of the department and they put the children back in his care, which was probably a mistake, but, you know, everybody's human and makes mistakes. The fact the department put them back with him and thought he had completed the improvement period satisfactorily doesn't mean that he did. And then this other abuse took place. It clearly was abuse. And these letters are very revealing of the character of Mr. A.

I'm not going to grant him an improvement period. I'm going to follow the recommendation of the department and the recommendation of Counsel for the children and put these children in long-term foster care under the jurisdiction of the department. That's all.

During the pendency of this action, W.Va. Code 49-6-2(b) (1992), stated in pertinent part:

> In any proceeding under this article, any parent or custodian may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof[.] See footnote 6

This statute does not automatically require that a parent be granted an improvement period. In Syllabus Point 2 of the *Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989), this Court said, "'W.Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.' Syllabus Point 2, *State ex rel. W.Va. Dep't of Human Services v. Cheryl M.*, [177] W.Va. [688], 356 S.E.2d 181 (1987)." We reiterated in *In re Lacey P.*, 189 W.Va. 580, 433 S.E.2d 518 (1993), that there is no absolute right to an improvement period in this State.

In *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987), the trial court did not grant an improvement to Cheryl M. As a result, the Department of Human Services (DHS) did not present a family case plan to the court. The DHS took the position from the beginning of

their involvement with Cheryl M., prior to any parenting assistance being offered, that her parental rights should be terminated. This Court found the DHS had provided little relevant assistance and had made no good faith effort toward developing a rehabilitative plan. A counselor with the local mental health agency testified that Cheryl M. cooperated during counseling sessions on parenting skills and progressed in her skill level. The counselor testified that it was her opinion that there was no imminent danger in reunifying Cheryl M. with her child. This Court concluded that under these circumstances the mother was entitled to a meaningful improvement period to demonstrate her ability to care for her child.

Obviously, the facts in the case at bar are very different. Apart from the abuse and neglect discussed above, the appellant did not successfully complete the tasks enumerated in the family case plan that was submitted when he was granted a prior improvement period. There is no evidence in the record nor was any testimony presented to establish the appellant's attendance at weekly therapy sessions or participation in a substance abuse assessment. The appellant was provided with reunification and family preservation services as well as individual social worker counseling and education, group education and support, in-home modeling of appropriate parenting behavior, individual therapy and psychological services, and intensive family education. Yet, all of these services failed to prevent the incidents which gave rise to these proceedings. There is also evidence Justin and Joey were deliberately socially isolated from outside influences and peer relationships, possibly to protect family secrets of abuse. Therefore, we cannot say the trial court in this case improperly found compelling circumstances existed that justified denying an improvement period.

After being removed from the home, the children had three supervised visits with their father. Ms. George concluded after the third visit:

> Each of these visits with Mr. A. was emotionally stressful and of no benefit to the children. Justin has stated that he has no particular interest in visiting his father. Joey has been disappointed and hurt with each contact. In consideration of the affect (sic) visits with Mr. A. have had on these children, visits are arranged only upon request from the children.

Evidence was also presented that there was no indication the children lived in their father's trailer; the toys and the children's clothes had been locked away in an "irrational attempt to disguise a rather sadistic ploy to control[.]" Apparently no further visits were requested, because the appellant testified that he had visited with his sons on three occasions since their removal. In view of the circumstances listed above, we find the trial court did not err in refusing to grant to this appellant a second improvement period.

On appeal, the appellant also alleges the trial court erred in excluding him from the *in camera* adjudicatory hearing when his son, Justin, testified. The DHHR requested that Justin be permitted to testify out of the presence of his father. The court granted the motion, and the appellant appeared to acquiescence and only asked if he could use the restroom. However, appellant's counsel "object[ed] to the procedure, just for the record." There was no request for appellant's counsel to leave the room. Appellant's counsel was present during all of Justin's testimony and was afforded the opportunity to fully cross- examine Justin. In fact, the attorney exercised this opportunity and did indeed fully and completely cross-examine Justin.

W.Va. Code 49-6-2(c)(1996), is controlling on this issue and states in pertinent part:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

The requirement of cross-examination was satisfied by the presence of the appellant's counsel and the meaningful cross-examination which ensued after Justin was questioned by the DHHR. The approach used here is permissible under the new Rules of Procedure for Child Abuse and Neglect Proceedings, which were not yet in effect when this case was tried, but which this Court approved on December 5, 1996. Rule 8(b) See footnote 7 controls the procedure for taking testimony from children in abuse and neglect proceedings in future cases. The result we reach today would be reached under the new rules; thus, we find no reversible error.

Lastly, the appellant argues the permanency plan, also called the child's case plan or the family case plan, is inadequate because the plan fails to state how or when a permanent home will be achieved for these children. The DHHR states the case plan is adequate in that permanency has not yet been determined and the plan specifically addresses the long-term foster care in which the children currently are placed.

W.Va. Code 49-6-5(a)(1996), states in pertinent part,

> The term permanency plan refers to that part of the case plan which is designed to achieve a permanent home for the child in the lease restrictive setting available....If reunification is not the permanency plan for the child, the plan must state why reunification is not

> appropriate and detail the alternative placement for the child to include approximate time lines for when such placement is expected to become a permanent placement.

At the time of the writing of the children's case plan on May 13, 1996, Justin and Joey were living with their sister, Stacy, and her family. The plan recites the inadequacy of the placement as a long-term arrangement. However, the plan also addresses the alternative placement of the children by noting that "long term foster care with optimal contact between these siblings will be in the best interest of all family members." The plan goes on to state "[l]ong term foster care with a permanent placement commitment from a foster family is the permanency plan ... in the event custody remains with the Department." The department reports the children are no longer living with their sister, who is now married with two children of her own, but have been placed together in a foster home with the anticipation that the foster parents will welcome Justin and Joey as permanent placements.

The plan specifically states in detail why reunification with the appellant is not appropriate, most notably the appellant's failure to maintain any gains in coping skills or in his beliefs and attitudes about parenting during the three years he was given to improve. When we look at the facts of this case and the procedural status of this action at the time the permanency plan was written, we believe placement with a family member and later in a foster home by long-term foster care is the least restrictive alternative available. Given that custody and permanency still remain unresolved at this time, we cannot say the plan is inadequate.

For the above stated reasons, the judgment of the Circuit Court of Wood County is affirmed.

Affirmed.

Footnote: 1 We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. See In re Jeffrey R. L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

Footnote: 2 The appellant finally found the steri-strips, to use in treating Joey's wound, on Monday, January 22, 1996, after he found out "the kids were not coming home from school."

Footnote: 3 During a prior abuse and neglect proceeding, the appellant had been granted a post-adjudicatory improvement period. At that time, Christine Spiker, a Child Protective Service worker, became involved with the family. She worked

with the appellant for approximately one and one-half to two years as overseer of the improvement period.

Footnote: 4 Justin testified during the adjudicatory hearing that his father kept adult movies in their home:

Q Does your dad keep dirty movies in the house?
A Yeah, he has a couple.
Q Have you seen some of those movies yourself?
A A couple of them.
Q Does he keep them in a place that you have access to; I mean, can you get them pretty easy if you want to see them.
A Yeah, most of them.
5. In her report to the court, Joan George, a Child Protective Service Worker, wrote to the trial judge:

In the Department's five years of service to this family Mr. A. has consistently maintained a very closed family system. Mr. A. expected all the needs of the individuals to be met by the family. Influence from outside the family was not desirable. The children were restricted from developing peer relationships, confined to the home and socially isolated in part to protect family secrets of abuse. This manner of relating remains unchanged.

It is difficult to know to what degree the children are abused and neglected in this system of rigid control where secrecy is valued above all else. We have known, however, since 1992, with Stacey's disclosure, that she was being sexually abused from at least as far back as 1989. We also know, that there have been numerous incidents of unreported physical abuse to Justin and Joey. Sexually explicit videos remain in the home, easily accessible to these children. Exposure to adult sexual activities can have far reaching effects on the personality and behavior of child victims. To assume that Justin and Joey because of their gender, are not at risk of sexual abuse may be at their peril. It is obvious from their history that neither would be readily able to protect themselves by requesting help with a secret of such magnitude.

Mr. A. has continued to deny any abusive behavior towards his children, while presenting a very descriptive scenario of events in stark contrast to reality. Additionally, Mr. A. has written several letters to his son, Scott A., attempting to bribe, intimidate, and threaten him into lying about the abuse so he, Mr. A., could have his children returned and be eligible for AFDC.

Footnote: 6 This Code section was amended by the West Virginia Legislature in 1996.

Footnote: 7 Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings states:
(b) Procedure for taking testimony from children. The presiding judicial officer may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the presiding judicial officer determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the presiding judicial officer shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the presiding judicial officer may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in camera interview of a child, the presiding judicial officer may, before the interview, require the attorneys to submit questions for the presiding judicial officer to ask the child witness rather than allow the attorneys to question the child directly, and the presiding judicial officer may require the attorney to sit in an unobtrusive manner during the in camera interview.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

No. 31221

FILED
November 3, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: JOSEPH G.

Appeal from the Circuit Court of Harrison County
Honorable John Lewis Marks, Jr., Judge
Child Abuse and Neglect No. 92-J-25-1

AFFIRMED

Submitted: September 23, 2003
Filed: November 3, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'It is the province of the Court, and not of the jury, to interpret a written contract.' Syl. Pt. 1, *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937)." Syllabus point 1, *Orteza v. Monongalia County General Hospital*, 173 W. Va. 461, 318 S.E.2d 40 (1984).

2. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syllabus point 1, *Berkeley County Public Service District v. Vitro Corporation of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

3. "Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syllabus point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002).

4. "Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be

considered to alter the legal effect of or to engraft stipulations upon language which is clear and unambiguous." Syllabus point 5, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

Per Curiam:

The appellant herein, the West Virginia Department of Health and Human Resources [hereinafter referred to as "DHHR"], appeals from an order entered April 29, 2002, by the Circuit Court of Harrison County. In that order, the circuit court ruled that DHHR was obligated to pay the appellee herein, Stepping Stone, Inc. [hereinafter referred to as "Stepping Stone"], a per diem rate for Joseph G.'s care equal to the amount to which Stepping Stone would have been entitled under Medicaid. On appeal to this Court, DHHR disputes that it is obligated to pay these monies to Stepping Stone. Upon a review of the parties' arguments, the pertinent authorities, and the record designated for appellate consideration, we affirm the decision of the Harrison County Circuit Court.

I.

FACTUAL AND PROCEDURAL HISTORY

In February, 1992, DHHR assumed custody of Joseph G. as a result of an abuse and neglect proceeding. After numerous unsuccessful placements, and in light of his various behavioral problems, Joseph was housed at Stepping Stone, a nonprofit corporation which operates a nine-bed child care residential facility, on June 29, 1999. Since his placement at this facility, Joseph has progressed remarkably, no longer exhibits behavioral problems, and does well in school. In light of the success of this placement,

Joseph's multidisciplinary team[1] recommended that his permanency plan should continue his placement at Stepping Stone until such time as he would be eligible to enter an independent (transitional) living program[2] at the end of the 2001-2002 school year, *i.e.*, May 28, 2002. During his placement at Stepping Stone, DHHR and Stepping Stone had a contractual arrangement whereby DHHR paid a per diem fee for Joseph's room, board, care, and supervision.[3] Additionally, because Stepping Stone provides certain medical services to its residents, it generally is entitled to an additional Medicaid rate per client per

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[1]Multidisciplinary teams "assist courts in facilitating permanency planning, following the initiation of judicial proceedings, to recommend alternatives and to coordinate evaluations and in-community services." W. Va. Code § 49-5D-1(a) (1998) (Repl. Vol. 2001). Typically, a multidisciplinary treatment team is comprised of

> the child's custodial parent or parents, guardian or guardians, other immediate family members, the attorney or attorneys representing the parent or parents of the child, the guardian ad litem, if any, the prosecuting attorney or his or her designee and any other person or an agency representative who may assist in providing recommendations for the particular needs of the child and family. The child may participate in multidisciplinary treatment team meetings if such is deemed appropriate by the multidisciplinary treatment team.

W. Va. Code § 49-5D-3(b) (2003) (Supp. 2003).

[2]Typically, state and federal guidelines require a juvenile to be seventeen years old before he/she may enter an independent living arrangement. Joseph turned seventeen on May 16, 2002.

[3]This rate is approximately $92.78 per day and is paid by the Office of Social Services [hereinafter referred to as "OSS"].

day.[4] The specific time period during which Stepping Stone is entitled to receive these Medicaid monies for Joseph's care is the source of the present controversy.

Pursuant to a scheduled review of juveniles within DHHR's custody and the Medicaid services they were receiving, an Administrative Services Organization[5] [hereinafter referred to as "ASO"] determined, in January, 2002, that Joseph no longer required the services of Stepping Stone and, thus, that he was no longer entitled to the same. Moreover, the ASO made this determination retroactive finding that Joseph's Medicaid eligibility for said services had ceased on November 1, 2001. In order to permit Joseph to nevertheless remain at Stepping Stone, his counsel moved the court, in February, 2002, for an order to that effect. Ultimately, DHHR, Stepping Stone, and Joseph's counsel acquiesced to an agreed order whereby DHHR would waive the independent living age requirement and expedite efforts to place him in such a setting; in the meantime, Joseph would remain at Stepping Stone. Because Joseph was not entitled to Stepping Stone's Medicaid services, however, the instant controversy ensued as to whether Stepping Stone could nonetheless recover such Medicaid monies from DHHR for the period from

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[4]This amount is approximately $38.18 per day and is paid by the Bureau for Medical Services [hereinafter referred to as "Medicaid"].

[5]DHHR represents that the function of an Administrative Service Organization, or ASO, "is to review and ensure that appropriate services are being utilized [by] Medicaid clients. The ASO in advance must approve and authorize continued treatment by a facility to [permit it to] be compensated."

November 1, 2001, until his discharge from Stepping Stone on April 17, 2002.[6]

On November 1, 1998, DHHR and Stepping Stone entered into a Child Care Agreement [hereinafter referred to as "Agreement I"]. Pertinent to the instant controversy, this contract provided that "the Office of Social Services shall pay the treatment rate established by the Office of Audits, Research, and Analysis for those youth for whom treatment was provided but which cannot be billed to Medicaid because [the] child was not eligible for the service under Medicaid regulations." Agreement I, at Article XV. Agreement I remained in force and effect through December 31, 2001. In light of the above-quoted language, DHHR concedes that it is obligated to pay the Medicaid monies to Stepping Stone for the contract period Joseph was housed at Stepping Stone but was not eligible for Medicaid services, *i.e.*, November 1, 2001, through December 31, 2001, which sum is approximately $2,328.98.[7]

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[6]Following his discharge and placement in an independent transitional living program, Joseph reverted back to the behavioral and social problems he exhibited prior to his initial admission to Stepping Stone. Consequently, Joseph was determined to once again be medically eligible for the Medicaid services Stepping Stone provides; his independent living program was terminated; and he was re-admitted to Stepping Stone in order to receive such services. Joseph's current permanency plan envisions that he will remain at Stepping Stone until six months after his eighteenth birthday, which was on May 16, 2003. Payment for this period of Joseph's residency at Stepping Stone is not disputed and is not at issue in the present appeal.

[7]The sum of $2,328.98, for which DHHR accepts responsibility under Agreement I, represents the cost of the Medicaid services Joseph received at Stepping Stone from November 1, 2001, until December 31, 2001, when Agreement I ended.

Thereafter, DHHR and Stepping Stone entered into a Group Residential Provider Agreement [hereinafter referred to as "Agreement II"], which replaced Agreement I, and remained in force and effect from January 1, 2002, through December 31, 2002. Unlike the parties' prior Agreement I, Agreement II does not contain any language to indicate who is responsible for the payment of Medicaid monies if a Stepping Stone resident is deemed to be ineligible for such services. Therefore, the parties disagree as to who is liable for such Medicaid payments for Joseph's residence at Stepping Stone from January 1, 2002, until his discharge on April 17, 2002. At the per diem Medicaid rate of $38.18, the total amount in controversy is approximately $4,085.26.[8]

By order entered April 29, 2002, the Circuit Court of Harrison County determined DHHR to be liable to Stepping Stone for the theretofore unreimbursed Medicaid monies for Joseph's residence at that facility:

> The Court . . . finds that based upon the intent of the parties, as evidenced by other contractual terms, Stepping Stone was no longer obligated to keep Joseph at its facility, absent a court order, once Joseph failed to meet the target population admission criteria and the ASO determined that treatment provided by Stepping Stone was no longer medically necessary.
>
> The Court further finds that although Joseph no longer met the target population admission criteria and treatment provided by

[8]The sum of $4,085.26, the payment of which is in controversy in this case, represents the cost of the Medicaid services Joseph received at Stepping Stone from January 1, 2002, until his discharge from Stepping Stone on April 17, 2002.

> Stepping Stone was no longer medically necessary, the Department, Stepping Stone and the MDT agreed that Joseph's best interests would be served by his continued placement at Stepping Stone rather than an alternative placement.
>
> The Court further finds that Stepping Stone had the right to condition Joseph's continued placement at its facility upon payment by the Department because, under the Current Agreement [Agreement II], Stepping Stone was not required to keep Joseph at its facility once he failed to meet the target population admission criteria and treatment was deemed no longer medically necessary.

From this ruling of the circuit court, DHHR appeals to this Court.

II.

STANDARD OF REVIEW

The sole issue presented by the instant appeal requires us to interpret the contract entered into by DHHR and Stepping Stone. We previously have held that "'[i]t is the province of the Court, and not of the jury, to interpret a written contract.' Syl. Pt. 1, *Stephens v. Bartlett*, 118 W. Va. 421, 191 S.E. 550 (1937)." Syl. pt. 1, *Orteza v. Monongalia County Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984). This is so because "the determination of what constitutes a contract under our relevant cases is a question of law. . . ." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 62 n.18, 459 S.E.2d 329, 339 n.18 (1995). *Accord* Syl. pt. 1, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968) ("The question as to whether a contract is ambiguous is a question of law to be determined by the court."). Accordingly,

"[w]hether a contract is ambiguous is a legal question reviewable by this Court *de novo*." *Williams*, 194 W. Va. at 65 n.23, 459 S.E.2d at 342 n.23 (citation omitted). *See also id.*, 194 W. Va. at 62 n.18, 459 S.E.2d at 339 n.18 ("[I]n interpreting a contract, a court determines the existence of an ambiguity as a matter of law." (internal quotations and citations omitted)). Mindful of this standard, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, we are asked to interpret the contractual agreement entered into by DHHR and Stepping Stone to determine whether DHHR is obligated to pay a per diem rate for Joseph's care equivalent to the amount to which Stepping Stone would have been entitled had Joseph been Medicaid eligible to receive Stepping Stone's services.

In support of its assignment of error, DHHR contends that the language of Agreement II is plain and easily resolves the instant controversy. Unlike Agreement I, Agreement II is silent as to who is responsible for the payment of Medicaid monies once a resident child is no longer eligible for said Medicaid services. Because Agreement II further states that it "contains all the terms and provisions relating to the subject matter hereof and there are no other understandings, oral or otherwise," Agreement II, at Article XIV, § 4, DHHR asserts that the circuit court should have applied, rather than construed,

the parties' contract. *Citing* Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962) ("A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.").

Stepping Stone responds by stating that the circuit court correctly determined DHHR to be responsible for the Medicaid monies at issue herein. Under the terms of Agreement II, the prior provisions of Agreement I were revised in order to prevent a situation such as the one at issue here by permitting Stepping Stone to accept only those youth who are medically eligible for the Medicaid services it provides. Because Agreement II does not resolve the situation at hand, where a resident is deemed to be medically ineligible for Medicaid services but nevertheless continues to be housed at Stepping Stone, Stepping Stone urges the Court to look outside the parameters of the contract in order to resolve this dispute. *Citing* Syl. pt. 2, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968) ("Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important[.]"). In this regard, Stepping Stone contends that this Court should be instructed by the terms of Agreement I in resolving this dispute as Joseph was admitted to Stepping Stone under those terms.

The sole issue presented by the instant appeal requires us to determine whether the parties' contractual agreement required DHHR to pay Stepping Stone the monies to which it claims to be entitled. Ordinarily, "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). However, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. pt. 1, *Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

In making such a determination of contractual ambiguity, we consider whether the subject contract is capable of more than one interpretation. Thus, "[c]ontract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syl. pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002). Once we have determined a contract to be ambiguous, we look to the parties' relationship to glean the parties' intent in entering into the agreement under scrutiny. "Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be considered to alter the legal effect of or to

engraft stipulations upon language which is clear and unambiguous." Syl. pt. 5, *Cotiga*, 147 W. Va. 484, 128 S.E.2d 626.

Having reviewed the contract in question, we find it to be ambiguous insofar as it does not clearly indicate which party is responsible for payment of the Medicaid funds to which Stepping Stone would have been entitled had Joseph been eligible for such services from January 1, 2002, until April 17, 2002. Given the parties' prior dealings under Agreement I, DHHR clearly would have been required to reimburse Stepping Stone.[9] Upon execution of Agreement II, however, the parties attempted to prevent the present scenario by specifically providing that "[y]outh admitted to group residential program(s) shall meet the targeted population admission criteria for the level of treatment offered by Provider as established by the Bureau for Medical Services." Agreement II, at Article I, § 3.06. Thus, Agreement II does not contemplate a situation such as the one presented herein because every child housed at Stepping Stone would first have to have been certified as medically eligible to receive the facility's services.

Despite this strategic wording, the fact nevertheless remains that a non-medically eligible child, namely Joseph, was, in fact, housed at Stepping Stone while Agreement II was in force and effect. That said, some party is responsible either for

[9]*See supra* Section I.

paying for the Medicaid services Joseph received while in residence at Stepping Stone or for absorbing such costs. We find, based upon the parties' prior agreement addressing similar situations, that DHHR is the party responsible for such costs. To find otherwise would, in short, be unjust and inequitable, particularly when, under the parties' second agreement, Stepping Stone was prohibited from discharging Joseph because no other placement plan had been devised, much less implemented, for him. *See* Agreement II, at Article I, § 5.01 ("Provider shall not discharge a youth meeting targeted population criteria without an appropriate plan and living arrangement agreed upon by the child's MDT except in the event of court ordered discharges and as allowed in Section XIII.3.03(1-4)."). Accordingly, we affirm the circuit court's ruling imposing such liability upon the West Virginia Department of Health and Human Resources.

IV.

CONCLUSION

For the foregoing reasons, the April 29, 2002, order of the Circuit Court of Harrison County is hereby affirmed.

Affirmed.

201 W. Va. 764, 500 S.E.2d 877

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24580

STATE OF WEST VIRGINIA, Petitioner Below, Appellant,

V.

JULIE G., NATURAL MOTHER OF EMILY G., AN INFANT; AND JOHN F., NATURAL FATHER OF EMILY G., AN INFANT, Respondents Below, Appellees

EMILY G., AN INFANT, Appellant.

Submitted: December 2, 1997

Filed: December 17, 1997

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Guardian *ad Litem* for the Appellant

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JUSTICE DAVIS delivered the Opinion of the Court.

CHIEF JUSTICE WORKMAN and JUSTICE STARCHER dissent and reserve the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. In making a determination of whether a child is an abused and/or neglected child as defined in W. Va. Code § 49-1-3 (1994) (Repl. Vol. 1996), a court must consider evidence of a parent's progress, or lack thereof, during the pre-adjudication improvement period. However, pursuant to W. Va. Code § 49-6-2(c) (1996) (Repl. Vol. 1996), such evidence is proper only if it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were alleged in such petition.

Evidence regarding a parent's pre-adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

3. """W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990).' Syllabus Point 1, *In re Beth*, 192 W. Va. 656, 453 S.E.2d 639 (1994)." Syllabus Point 3, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

4. Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

Davis, Justice:

In this child abuse and neglect action, Emily G., See footnote 1 an infant, through her Guardian *ad Litem*, appeals an order of the Circuit Court of Hancock County finding that she was not a neglected child as defined in West Virginia Code § 49-1-3(g)(1)(A). We find that the circuit court failed to consider relevant evidence developed during Emily's mother's improvement period. Thus, its conclusion that Emily G. was not a neglected child was clearly erroneous.

I. FACTUAL AND PROCEDURAL HISTORY

In March of 1995, the West Virginia Department of Health and Human Resources [hereinafter "DHHR"] received a call from an individual expressing concern that Julie G. was neglecting her then fourteen-month-old daughter Emily G. The caller informed DHHR that Julie's parental rights to her two other children had been terminated by the

State of Ohio, and that John F., Emily's father, had a serious criminal record and presented a potential risk of harm to the child.

Subsequent to this call, two DHHR protective service workers visited Julie at her mobile home on the afternoon of March 22, 1995. They found the home to be in a deplorable condition. It was dirty, had a foul odor and was cluttered. The only source of heat was a kerosene heater that was sitting precariously on top of a dresser in the bedroom. The kerosene heater was surrounded by papers, clothing and other flammable materials. The home had no running water, and the cooking stove did not work. The protective service workers expressed to Julie their concerns about the condition of the home. Julie explained that she was in the process of moving from a nearby mobile home, and that she expected her new land lord to quickly correct the problems with her new home. The workers learned that Julie's rent for her former residence was paid until the end of the month. They encouraged Julie to return to her former home until the problems with her new home were corrected. She declined.

The workers discussed Julie's financial resources with her, and Julie explained that she received Supplemental Security Income [hereinafter "SSI"], food stamps, a medical card, and a welfare check from the State of Ohio, where she had lived prior to moving to West Virginia earlier that month. Julie explained that she was also anticipating aid from a community utility resource agency. In addition, Julie stated that she had applied for West Virginia welfare benefits, but her application had been denied because she was still receiving benefits from Ohio. The workers instructed Julie on how to terminate her Ohio benefits so that she could receive West Virginia benefits.

Also during their visit, the protective service workers observed Julie's interactions with Emily. They perceived that Julie roughly handled Emily and seldom spoke to her. The workers further observed that Emily was drinking from a bottle, but appeared hungry. Julie was feeding Emily bites of scrambled eggs and toast from a plate she had prepared for herself. The workers asked Julie if Emily had eaten anything else that day to which Julie responded that she could not remember. Upon inspection, the workers noticed that there was little food in the home. Julie explained that her food supply had not yet been moved from her former home. The workers also found that Emily had dried feces on her bottom, and explained to Julie the importance of keeping Emily clean.

Finally, the workers questioned Julie about John F., who was not present during the visit. They expressed their concern regarding his criminal history. Julie stated that she knew that John F. had gone to prison for killing his wife, and that he had killed his prison cell-mate. She also stated that she had heard rumors that John had a history of child molesting, but she did not know if the rumors were true. See footnote 2 Julie explained that John rarely visited her and that he was never left alone with Emily. At the conclusion of their visit, the workers provided Julie with their phone number, offered their assistance and departed.

The following day, March 23, 1995, the workers received a call from Julie informing them that water service had been turned on at her new residence; however, she still did not have running water due to a plumbing problem. The workers encouraged Julie to

notify her landlord. In addition, they once again urged her to return to her former home pending resolution of the problems in her new home. Julie again declined.

On March 24, 1995, the protective service workers visited Julie a second time. They found that there had been no improvement in the conditions of the mobile home. During this visit, they asked Julie how she was able to bathe Emily without running water. Julie responded that she left Emily unattended while she went to her former home to retrieve water. The workers also observed Julie changing Emily's diaper. Upon noting redness and apparent tenderness, they explained the proper method of changing a diaper and again stressed the importance of keeping Emily clean.

The protective service workers then asked to examine the mobile home from which Julie was moving so they could determine its suitability as a home. The workers found that the former home had heat, running water and a working cook stove, and appeared to be in better condition than her present home. They again encouraged Julie to return to her former home until the problems with her new residence were resolved. Julie once again declined. Also during this visit, Julie admitted that she was living with John F., and that she had moved to her current residence because it was larger. After returning to Julie's present home, the workers asked her to remain there until she heard from them.

The protective service workers then initiated the filing of an abuse and neglect petition through the Office of the Prosecuting Attorney for Hancock County. The petition was filed that day, March 24, 1995. The petition alleged that Julie's parental rights to her two other children had been terminated for neglect and abuse; that Emily was residing with Julie G. and John F. in a trailer without water, heat or a working cook stove; that Julie G. left Emily unattended in a mobile home containing a running kerosene heater; that Julie G. had demonstrated a lack of parenting skills; and that Julie G. and John F. had a history of lacking parenting skills. See footnote 3 That same day, the Honorable Judge Fred Riscovich issued an order authorizing DHHR to take emergency custody of Emily G. The workers returned to Julie's residence, also on March 24, and found that Emily had been taken to the home of her paternal grandmother in Ohio. The workers explained to Julie that criminal action could be taken if Emily was not immediately returned to West Virginia. Emily was returned, and DHHR took custody of her. Julie waived a preliminary hearing regarding the court's award of emergency custody of Emily to DHHR.

Subsequent proceedings in this case were presided over by the Honorable Judge Ronald E. Wilson. At a hearing on May 8, 1995, Julie requested a pre-adjudication improvement period. During the same hearing, a case plan was tendered to the court by the DHHR protective service workers. The court then granted Julie a 60-day pre-adjudication improvement period. Thereafter, the court periodically extended Julie's improvement period and, on one occasion, modified her case plan. During this time, the court frequently held hearings to review Julie's progress. Each hearing was followed by an order. In these orders, the court occasionally noted that Julie was making progress with respect to her improvement period. Many of the orders addressed Julie's problems. The court noted on one occasion that Julie had missed two appointments for nutrition counseling by WIC, See footnote 4 and a later order noted that the counseling had been

terminated. See footnote 5 Another court order required Julie to refrain from having animals in her home, and to keep a gate closed to prevent Emily from having access to a stairway. Several orders addressed Julie's continued contact with John F. The record reveals that Julie continued to receive visits from John even after the court entered orders prohibiting such visits. Julie's conduct was also contrary to an amended case plan See footnote 6 that had been approved by the circuit court on August 17, 1995, and which remained in effect until Julie's pre-adjudication improvement period was finally terminated. See footnote 7

During Julie's improvement period, she was given a psychological evaluation by Dr. William Hewitt, a clinical and forensic psychologist. Dr. Hewitt determined that Julie functioned at the bottom of the low-average range of intelligence. He diagnosed Julie as suffering from Mild Depression, Mild Anxiety, Severe Personality Disorder with Avoidant, Dependent, Narcissistic, Negativistic, and Paranoid Features. Dr. Hewitt opined that Julie may be able to manage an infant and a child or children if she is in the company of a reasonably responsible companion, male or female, or with live-in supervision and help. But otherwise she probably won't be able to safely care for, manage, nurture, or adequately parent an infant or child.

And as long as Mr. [F.] is in the picture she is unlikely to link up with either a responsible male or female companion. Dr. Hewitt noted that Julie expressed a desire to live with John F. and have additional children with him. Dr. Hewitt's report concluded "[i]f [Julie G.] does not respond adequately to the requirements of her improvement period then consider termination of parental rights and adoption of her daughter."

A report filed on September 16, 1996, by the West Virginia Youth Advocate Program related that "[Julie G.] failed the *Parent/Child Relationship Inventory*, scored in the severe range of Depression, is inconsistent in keeping her home environment clean and hygienic, and poorly manages her finances." The report also detailed that, while Julie expressed love for Emily, Julie "demonstrate[d] significant impairment in providing a nurturing, safe life/environment for Emily. We have witnessed borderline abusive behaviors (physical and emotional) at times by [Julie G.]" Finally, the report expressed the organization's concern regarding Julie's involvement with John F. and another man who was suspected of being a child molester.

Several court summaries filed by DHHR protective service workers also reported Julie's lack of progress during her pre-adjudication improvement period. There were multiple reports of contact between Julie and John F. In addition, Julie repeatedly expressed a desire to continue a relationship with John F. and to have additional children with him. There were also reports of Julie's irresponsible spending, failure to take medicine prescribed to treat her depression, inability to maintain a neat and clean home, inability to maintain personal hygiene and failure to keep Emily on a regular eating and sleeping schedule.

In April, 1996, Emily's guardian *ad litem* moved for termination of the pre- adjudication improvement period. The circuit court, by order entered on May 21, 1996, and without explanation, denied the motion and continued Julie's improvement period. In

September, 1996, Emily's guardian *ad litem* filed a second motion to terminate Julie's improvement period. This motion was granted at a hearing held on October 17, 1996. A corresponding order was entered on November 7, 1996, wherein the circuit court announced its finding that "no substantial improvement in [Julie's] circumstances has occurred under the pre-adjudicatory improvement period [sic] and the Court was of the opinion that she will not substantially improve within a short period of time."

Following its termination of Julie's pre-adjudication improvement period, the court held an adjudicatory hearing on January 17, 1997. After hearing testimony presented by the two protective service workers who initially visited Julie G., and Julie's own testimony, the circuit court determined that Emily was not a neglected child as defined by W. Va. Code § 49-1-3(g)(1)(A). It is from this order, which is more thoroughly discussed below, that Emily G. now appeals.

II. DISCUSSION

A. Standard of Review

In this appeal, we are asked to reverse an order of the circuit court finding that Emily G. was not a neglected child. Generally, we give plenary review to a circuit court's resolution of questions of law, while factual determinations made by the circuit court are reversible only when they are clearly erroneous. Justice Cleckley recently explained the appropriate standards in Syllabus point 1 of *In the Interest of: Tiffany Marie S.*, wherein this court held:

Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

196 W. Va. 223, 470 S.E.2d 177 (1996). Justice Cleckley further explained that: [w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) [of the West Virginia Rules of Civil Procedure] demands even greater deference to the trial court's findings[.] . . . Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties.

Tiffany Marie S., 196 W. Va. at 231, 470 S.E.2d at 185 (internal quotations and citations omitted). We have thoroughly reviewed the record submitted in this case with due

consideration for the standards set forth above and, as hereinafter explained, we are left with the definite and firm conviction that a mistake has been committed.

B. Adjudication of Neglect

Emily G., through her Guardian *ad Litem*, argues that the circuit court erred in concluding that she was not a neglected child as defined by W. Va. Code § 49-1-3(g)(1)(A) (1994) (Repl. Vol. 1996). See footnote 8 We agree.

On January 17, 1997, the circuit court conducted a hearing to determine whether Emily G. was an abused or neglected child. Testimony was received from the two DHHR protective service workers who visited the mobile home where Julie and Emily were residing at the time the abuse and neglect petition [hereinafter sometimes referred to as "petition"] was filed. Testimony was also received from Julie G. Following the hearing, the court entered an order, dated May 13, 1997, concluding that Emily G. was not an abused or neglected child.

Comments included in the May 13, 1997, order indicate that the circuit court accepted Julie G.'s testimony explaining the conditions that existed at her home at the time the petition was filed, as well as her assertions that such conditions were quickly corrected. The court relied upon Julie's testimony in spite of the fact that evidence which came to light during her lengthy improvement period indicated otherwise. For example, Julie testified that she had corrected the heat, water and stove problems by Sunday, March 26, 1995, which date was two days following Emily's removal from her home. In addition, Julie asserted that her mobile home was dirty and disorderly due only to her recent move.

Conversely, a case plan dated May 5, 1995, more than one month after Emily's removal, included, as one of the goals to be met, "[i]mprove living conditions, i.e., sufficient heat and water service. Also, maintain a clean and safe living environment." The inclusion of this goal indicates that the heat and water problems had not yet been resolved. Furthermore, it appears that once the problems were resolved, Julie continued to have trouble maintaining an appropriate home environment. A status review report dated June 16, 1995, related that "[a]t this time, Julie has no heating or cooking fuel in her trailer. This prohibits her from preparing meals and bathing. She has stated that she cannot remedy this before she receives her SSI check on 7-1-95. She has exhausted community resources for assistance." At the conclusion of this evidence, the circuit court found that Julie's living conditions were "in a significant way caused by a lack of financial resources." The court opined that "SSI, food stamps, a medical card and the possibility of welfare benefits may have seemed adequate to [Julie], but those resources would provide a budget balancing challenge to the best financial planner." Notwithstanding the fact that Julie may not have had an excess of funds, the record evidence demonstrates that during her improvement period she failed to utilize the limited funds available to her to provide necessities for herself and Emily (who was present only during scheduled visits) and, instead, spent her money on expensive luxuries. See footnote 9 Moreover, the record reveals that Julie was unable to

consistently maintain a clean and safe home environment during her improvement period.

The court further recognized, in its order of May 15, that Julie's parenting skills proved to be inadequate during the improvement period:

as we all learned from the prolonged (but justified) pre- adjudicatory improvement period granted in this case, the [DHHR Protective Service] Workers were correct in their initial questioning of [Julie G.'s] ability to make rational choices. *But this Court's findings must be based upon conditions existing at the time of the filing of the Petition.*

(Emphasis added). Having made this observation, the court nevertheless concluded that Emily was not a neglected child at the time the abuse and neglect petition was filed. We find the court's conclusion in this respect to be inconsistent with its observations. See footnote 10 Apparently, as indicated by the above quote, the court believed that information discovered during a pre- adjudication improvement period may not properly be considered in assessing the conditions that existed at the time of the filing of an abuse and neglect petition. We find that the circuit court misinterpreted the relevant statute.

W. Va. Code § 49-6-2(c) (1992) (Repl. Vol. 1995) See footnote 11 provides for a hearing before the circuit court to determine whether a particular child is abused or neglected. That section of the Code states:

(c) In any proceeding under this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. *Where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.*

(Emphasis added).

While W. Va. Code § 49-6-2(c) requires that a circuit court's findings "must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof," the statute also provides that:

Where relevant, the court *shall* consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court *shall* make a determination *based upon the evidence* and shall make findings of fact and conclusions of law as to whether such child is abused or neglected . . . .

(Emphasis added). This language is mandatory. *See* Syllabus point 3, *Ruble v. Office of Secretary of State*, 192 W. Va. 134, 451 S.E.2d 435 (1994) (per curiam) (""The word 'shall' in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969).' Syl. pt. 5, *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986)."). Thus, the legislature has clearly provided that a circuit court must consider facts developed during the improvement period where relevant. See footnote 12

The case *sub judice* is a striking example of the inconsistent results which can be reached when relevant evidence has not been included in the circuit court's determination of neglect. At the time the DHHR protective service workers first visited Julie G.'s residence, they found that necessities such as heat, food and water were not present. The home was observed to be unclean and in disarray during both of the visits that preceded the abuse and neglect petition. Julie appeared to be inattentive to Emily and demonstrated an inability to properly clean and feed her. In addition, Julie admitted to having left Emily unattended on one occasion when she went to her former mobile home to retrieve water. The workers were also concerned that the kerosene heater was a fire hazard due to the clutter in the home, and that it also presented a danger to Emily. Although Julie was encouraged by the workers to return to her former home, which had heat, running water and a working cook stove, she consistently refused. Finally, the workers expressed concern regarding contact between Emily and John F. Julie first asserted that John had very little contact with Emily and was never left alone with her, but later admitted that she and John F. resided together. See footnote 13

Responding to these allegations, during her testimony at the January 17, 1997, hearing, Julie G. represented that her mobile home was equipped with heat, water and a working cooking stove within two days of Emily's removal. She also explained that her home was cluttered because she was in the process of moving into the home. Julie further stated that Emily was well fed and that she took appropriate measures to see that Emily was prevented from coming into contact with the kerosene heater. In addition, she testified that she did not want to return to the first trailer because the pipes under the kitchen sink leaked and, contrary to what she had previously told the DHHR protective service workers, See footnote 14 because there was no heat in one room and the roof also leaked. See footnote 15

Julie's testimony was greatly contradicted by her performance during the pre-adjudication improvement period. During the improvement period she was unable to maintain her home as a clean and safe environment for a young child. She refused to cooperate with a nutrition program provided by WIC, to such a degree that the program was canceled. Also during part of her improvement period, Julie lived in an apartment with stairs. Although she had a gate to prevent Emily from falling down the stairs, she failed to keep it closed. See footnote 16 While Julie insisted that she had appropriate funds and assistance to provide for herself and Emily, she was unable to manage those funds to provide necessities and, instead, spent her money on expensive luxuries. Moreover, despite repeated efforts by the protective service workers, and others providing services to Julie during her improvement period, to convince Julie to eliminate

all contact with John F., she failed to do so. By permitting John to visit her home, frequently when Emily was present, Julie violated a court order, or contributed to the violation of a court order, See footnote 17 directing her and John to refrain from having contact with each other. Julie's consistent refusal to discontinue contact with John F. was also contrary to the amended case plan developed by the DHHR and approved by the circuit court. In addition, it appeared that Julie had no intention of complying with the court orders and her case plan, as she often expressed her desire to have a future with John and to have additional children with him.

The circuit court obviously believed that it must disregard facts that supported the initial concerns of the protective service workers, because such facts were not discovered until after the filing of the petition. In this regard, the court stated:

In March 1995, had the Workers visited Julie [G.'s] home *without* the information about John [F.'s] criminal history and *without* the information that Julie [G.] had been a neglectful mother, they would have found a mother and a child in a mobile home where the living conditions, while uncomfortable, *were not life threatening* and were being addressed by the mother. In deciding whether an emergency Order removing the child was necessary, they would or should have considered that the mother moved to a new trailer primarily for safety reasons and that this was evidence of her concern for Emily. The Workers would have or should have tempered their concern that Emily was hungry, with the observation that she was well-nourished and appeared to be in good health. As experienced child protection Workers, they would have acknowledged that the newly occupied mobile home, while messy and not as clean as they liked, did not constitute child neglect. That Emily could have been cleaner, while desirable, would not justify a finding of child neglect or a finding that there existed imminent danger to the physical well-being of the child.

(Third emphasis added). See footnote 18

Had the circuit court properly evaluated the conditions that existed at the time of the filing of the petition in light of Julie's performance during the pre-adjudication improvement period, as required by W. Va. Code § 49-6-2(c), we believe that it could have reached only one conclusion. That Emily was a neglected child within the meaning of W. Va. Code § 49-1-3(g)(1)(A).

We note, however, that W. Va. Code § 49-6-2(c) (1992) (Repl. Vol. 1995) directs, in mandatory language, that the court consider evidence related to DHHR's attempts to remedy conditions *alleged in the petition*, where relevant. See footnote 19 Thus, such evidence can only be considered to the extent that it relates back to the conditions that existed at the time of the filing of the petition and that were alleged in the petition. We therefore hold that, in making a determination of whether a child is an abused and/or neglected child as defined in W. Va. Code § 49-1-3 (1994) (Repl. Vol. 1996), a court must consider evidence of a parent's progress, or lack thereof, during the pre-adjudication improvement period. However, pursuant to W. Va. Code § 49-6-2(c) (1996) (Repl. Vol. 1996), such evidence is proper only if it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were

alleged in such petition. Evidence regarding a parent's pre- adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. See footnote 20 We hold further that, under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

The burden of proving that a child is abused or neglected is placed upon the DHHR. In this regard, we have held:

"'"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W. Va. 656, 453 S.E.2d 639 (1994). Syllabus Point 3, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995). We believe DHHR met its burden in this case. The court below misinterpreted the law with regard to the proper evidence to be considered in determining whether a child is abused or neglected. Therefore, the court's findings of fact in this case were improperly limited to a specific point in time at which the facts had not been adequately developed. We have thoroughly reviewed the record presented on appeal and have considered all of the relevant facts, and we are left with the definite and firm conviction that a mistake has been committed. Consequently, we find that the circuit court's conclusion that Emily G. is not a neglected child is clearly erroneous. We reverse the May 13, 1997, order of the Circuit Court of Hancock County. See footnote 21 We further find that Emily G. is a neglected child as defined in W. Va. Code § 49-1-3(g)(1)(A), and that Julie G. is an abusing parent as defined in W. Va. Code § 49-1-3(b) (1994) (Repl. Vol. 1996). See footnote 22

III. CONCLUSION

For the foregoing reasons, we reverse the May 13, 1997, order of the Circuit Court of Hancock County, and remand this case for further proceedings.

Reversed and Remanded.

Footnote: 1 We follow our past practice in domestic and juvenile cases involving sensitive facts and do not use the last names of the parties. See, e.g., State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996).

Footnote: 2 A court summary prepared by DHHR protective service workers, dated June 16, 1995, reported that John F. was "registered in the state [sic] of Ohio as a convicted child sexual abuser." The record further indicates that John F. had twice been charged with child molestation in the State of Arizona. On one occasion he apparently plead guilty to a lesser charge. On another occasion the charge was dismissed, possibly as part of a plea agreement. The record further indicates that John F. has a lengthy criminal history, including charges of public indecency, felonious assault, escape and aggravated assault.

Footnote: 3 An amended petition was filed on May 15, 1998, which included allegations against John F. that were not included in the original petition. While the amended petition re-stated the allegations previously asserted against Julie G., it did not supplement or modify those allegations. John F.'s parental rights were subsequently terminated by the circuit court's order of April 10, 1996.

Footnote: 4 WIC is a special supplementary food and health program for women, infants and children. See generally W. Va. Code § 16-2G-1 (1991) (Repl. Vol. 1995); *Baugh v. Merritt*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op.(dissent) at 8 (No. 23783 July 3, 1997) (per curiam) (Maynard, J., dissenting).

Footnote: 5 A letter from the WIC nutritionist working with Julie indicated that Julie was not cooperating and continuation of the program was not recommended.

Footnote: 6 The first case plan that was accepted by the circuit court was dated May 5, 1995, and included goals for John F. (i.e., to get a psychiatric evaluation, to attend parenting classes and to maintain a regular schedule of supervised visitation with Emily). However, it quickly became apparent that John F. had no intention of participating in court proceedings regarding Emily G. or of cooperating with the case plan. Consequently, the case plan was modified on July 21, 1995. The modified case plan, which was approved by the circuit court, suggested that Julie needed to "end all physical and emotion contact from John [F.] as recommended by Dr. C. William Hewitt."

Footnote: 7 While we ultimately reverse this case based upon our finding that the circuit court misapplied the relevant statute, we must commend the circuit court's efforts in its handling of this case. The court regularly and frequently reviewed Julie's progress and amended her case plan, without delay, when various needs became apparent. The court truly handled this case with the type of priority that child abuse and neglect cases deserve, but of which they are all too often deprived.

Footnote: 8 Pursuant to W. Va. Code § 49-1-3(g)(1)(A) (1994) (Repl. Vol. 1996), a neglected child is a child

[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary

food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]

(Emphasis added).

Footnote: 9 Julie purchased a tread mill costing more than $600.00, entered into an agreement to purchase $145.00 worth of portraits of Emily, contracted to rent a color TV for $54.00 per month and bought, and then returned, a $1,500.00 reclining chair equipped with a massager and a telephone. During these periods of extravagant spending, Julie's telephone service was disconnected for failure to pay overdue charges when, according to one report, Julie needed to maintain phone service due to seizures Emily was having, and Julie received a shut-off notice from the power company for lack of payment. She entered into an installment agreement to remedy her past due account with the power company, but had to be reminded to pay the installments. W. Va. Code § 49-1-3(g)(1)(A) excludes from the definition of a neglected child a child who is deprived of certain necessities due to a lack of financial means. However, the failure on the part of a parent to properly manage his or her finances does not constitute a lack of financial means.

Footnote: 10 We note a further inconsistency between the circuit court's finding that Emily G. was not a neglected child and its order of November 7, 1996, which terminated Julie G.'s pre-adjudication improvement period. In the order of November 7, the circuit court observed that "no substantial improvement in the said respondent's [Julie G.'s] circumstances has occurred under the pre-adjudicatory improvement period [sic] and the court was of the opinion that she will not substantially improve within a short period of time."

Footnote: 11 While the 1992 version of W. Va. Code § 49-6-2(c) is applicable to the case at bar, we note that this provision was amended in 1996. However, the changes to subsection (c) were merely stylistic. Thus, our observations regarding subsection (c) also apply to the 1996 amended version of that subsection.

Footnote: 12 We have frequently held:

"'"Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968).' Syllabus point 1, *Courtney v. State Dept. of Health of West Virginia*, 182 W. Va. 465, 388 S.E.2d 491 (1989)." Syllabus point 3, *Francis O. Day Company, Inc. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

Syl. pt. 5, *Walker v. West Virginia Ethics Comm'n*, ___ W. Va. ___, ___ S.E.2d ___ (Nos. 23881, 23890 July 15, 1997).

Footnote: 13 All of these concerns were addressed in the abuse and neglect petition filed in this case.

Footnote: 14 The protective service workers represented that when they encouraged Julie to return to the first mobile home, she refused to do so because the second mobile home had more room to accommodate herself, John F. and Emily, and her clothes had already been moved into the second mobile home. Julie also informed the workers of the leaking pipes. They suggested that a bucket placed under the sink would catch any leaking water.

Footnote: 15 Interestingly, Julie chose not to return to a mobile home that had a working stove, heat, except for one room, and running, though leaking, water, in favor of a mobile home that had a portable source of heat, which, at best, warmed only one room, and that had no working stove and either no running water or only cold running water.

Footnote: 16 An order entered by the circuit court on March 12, 1996, warned that if Julie did not "keep the stairgate in position to prevent her child from climbing the steps during visitation with her said child, then such visitation shall terminate and end."

Footnote: 17 An order resulting from a hearing held on December 12, 1995, and entered on April 4, 1996, directed that John F. "shall not contact Julie [G.], and, in the event he does, he shall be in contempt of this order of the court." At a subsequent hearing on March 15, 1996, the circuit court noted that Julie had admitted, in open court, to having contact with John F. Consequently, the court ordered that Julie have no contact with John F. either directly or indirectly.

Footnote: 18 In addition to our discussion below, we note at this juncture that the standard for neglect indicated by the court in the immediately preceding quote does not comport with the standard set forth in W. Va. Code § 49-1-3(g)(1)(A), which requires only that a child's "physical or mental health" be "harmed or threatened" (emphasis added). It is not necessary to find that the child is presently harmed or that the conditions in which the child lives are "life threatening."

Footnote: 19 In determining what evidence is relevant, the circuit courts must look to Rule 401 of the West Virginia Rules of Evidence, which rules apply as explicitly stated in W. Va. Code § 49-6-2(c). Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." For the purposes of a hearing under W. Va. Code § 49-6-2(c), facts that are "of consequence to the determination of the action," as provided in Rule 401, are facts "based upon conditions existing at the time of the filing of the petition" as required by W. Va. Code § 49-6-2(c). See 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 4-1(A), at 199 (3d ed. 1994) (explaining that "[u]nder Rule 401, for evidence to be relevant in the broad sense it must satisfy the two requirements of relevancy and materiality"); *id.,* § 4- 1(B), at 200 (stating that materiality "is determined by considering what issues have been raised either *by the law governing the case* and/or the pleadings") (emphasis added); *id.,* § 4-1 (C), at 201 (defining relevancy as involving circumstantial evidence, which is "evidence of some subordinate fact from which the existence of some ultimate fact in dispute is sought to be inferred").

Footnote: 20 Rule 19 of the W. Va. Rules of Procedure for Child Abuse and Neglect states:

The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment. After the final adjudicatory hearing begins, a petition may be amended if the amendment does not prejudice an adverse party. If the petition is amended after the conclusion of a preliminary hearing in which custody has been temporarily transferred to the Department or a responsible person, it shall be unnecessary to conduct another preliminary hearing.

Footnote: 21 Emily also complains that the circuit court erred in permitting Julie G.'s pre-adjudication improvement period to continue for more than a year when Julie G. exhibited no substantial improvement. Because we have granted the relief requested by Emily, and because W. Va. Code § 49-6-12 (1996) (Repl. Vol. 1996), which became effective shortly before Julie's improvement period was terminated, now limits a pre-adjudication improvement period to three months, we need not address this issue. See also W. Va. R. Proc. for Child Abuse & Neglect, Rule 23(b) (Preadjudicatory Improvement Period Status Conferences).

Footnote: 22 Pursuant to W. Va. Code § 49-1-3(b) (1994) (Repl. Vol. 1996), "'[a]busing parent' means a parent, guardian or other custodian, regardless of his or her age, whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to constitute child abuse or neglect."

Workman, Chief Justice, dissenting:

I take issue with the majority's conclusion that evidence relating to a pre- adjudicatory improvement period is only "proper"(whatever that means) See footnote 1 for a circuit court's consideration if it relates back to conditions that existed at the time of the filing of the petition and that were actually alleged in the petition. The majority takes a far too narrow and technocratical view of what evidence can properly be considered by the circuit court in an abuse and neglect proceeding. While the source of the majority's reasoning is clearly West Virginia Code § 49-6-2(c) (1995), that same statute also provides that the rules of evidence are applicable to abuse and neglect proceedings. Thus, any determination as to the admissibility of evidence in an abuse and neglect petition is governed by Rule 401 of the West Virginia Rules of Evidence. See footnote 2 Clearly, even the statutory language at issue which states that the circuit court's "findings must be based upon conditions existing at the time of the filing of the petition" does not preclude a circuit court's consideration of other relevant evidence concerning a parent's performance during a court-ordered improvement period, especially in light of the clear language and substantive tenor of abuse and neglect law the last ten years.

While I am not suggesting that evidence concerning matters not alleged in the original petition could alone support an adjudication of abuse and neglect absent an amendment, such evidence is clearly relevant insofar as it would "tend[] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." W. Va. R. Evid. 401. Moreover, as we recognized in Teter v. Old Colony Co., 190 W. Va. 711, 441 S.E.2d 728 (1994), "it is clear that a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid." Id. at 726, 441 S.E.2d at 743. Thus, if a conflict arises between a statute and a rule relating to evidence, then the rule of evidence prevails. See id. Furthermore, whenever a child appears in court, he is a ward of that court. W. Va. Code § 49-5-4 (1996); Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them. As Justices Cleckley and Albright stated in West Virginia Department of Health and Human Resources ex. rel. Wright v. Brenda C., 197 W. Va. 468, 475 S.E.2d 560 (1996), "[a]bove all else, child abuse and neglect proceedings relate to the rights of an infant. Id. at 477, 475 S.E.2d at 569. We have also recognized on more than one occasion that a circuit court should have before it all relevant evidence, which would clearly include evidence adduced after the petition's filing concerning any court-ordered improvement period. See In re Carlita B., 185 W. Va. 613, 626, 408 S.E.2d 365, 378 (1991) (recognizing that court's determination at the conclusion of the improvement period in an abuse/neglect case involves a decision regarding "whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child") (emphasis supplied). Moreover, this approach is consistent with the whole tenor of the case law as enunciated by this Court over the last ten years. See Carlita B., 185 W. Va. at 625, 408 S.E.2d at 377. Otherwise, we are asking judges to be like ostriches with their heads in the sand. See footnote 3

The majority opinion faults the circuit court for its failure to consider all the relevant evidence, while at the same time holding that such evidence is not "proper" unless it relates back to the allegations set forth in the petition. Further, the majority (which should be functioning as an appellate body, not a fact-finder) actually makes its own determination of abuse and neglect sufficient to terminate the parental rights of Julie G See footnote 4 essentially on the basis of a cold and dirty trailer and on the mother's inability to manage her money well. Despite the fact that I have historically been rather rabid about the protection of abused and neglected children, I hope we have not reached the Orwellian day where parental rights are terminated for dirty housekeeping and lack of judgment with money. These problems can be corrected with educational intervention and homemaker services. But evidence of a truly significant parental deficit arose when it became clear that Julie G. was unwilling or unable to comport with the clear objectives of her improvement period by affording her child protection from a man with a record of violence and child molestation.

The primary purpose of the statutory requirement of West Virginia Code § 49-6-2(c) that the court's "findings must be based upon conditions existing at the time of the filing of the petition" is to assure that one whose parental rights are on the line has adequate notice of the allegations and to provide him/her with an adequate opportunity to meet those charges. Once a parent, fully represented by legal counsel, is placed on an improvement period by court order, they are clearly on notice with respect to what is expected of them. Their level of compliance is clearly relevant, at a minimum to circumstantially show the degree of willingness to remedy the circumstances leading to the abuse and neglect changes.

Lastly, this case points out that it is absolutely incumbent upon petitioners and guardian ad litems in abuse and neglect proceedings to formally amend the petition when additional facts evidencing abuse or neglect which are substantial in nature arise subsequent to the filing of the initial petition. The instant case should have been remanded to the circuit court with directions that it consider evidence relating to the mother's compliance (or lack thereof) with the improvement period, and that the court make competent findings of fact and conclusions of law with regard thereto.

For the foregoing reasons, I respectfully dissent.

Footnote: 1 The meaning of the term "proper" in this context is unclear, but I take it to mean admissible. Evidence is admissible when it is authentic, relevant and competent. See 1 Franklin D. Cleckley, Handbook of Evidence for West Virginia Lawyers § 1-5(B) at 22 (3rd ed. 1994).

Footnote: 2 West Virginia Rule of Evidence 401 provides that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Footnote: 3 This ostrich-like stance is reflected by the dramatic inconsistency in the circuit court's finding in its order of November 7, 1996, "that no substantial improvement in the said respondent's [Julie G.'s] circumstances has occurred under the pre-

adjudicatory improvement period" as the predicate to its termination of the improvement period, and the court's almost simultaneous finding during the January 17, 1997, adjudicatory proceeding that Emily G. was not an abused or neglected child.

Footnote: 4 The majority remands for further proceedings, but does not specify what sort of proceedings remain under this holding.

235 W. Va. 254, 773 S.E.2d 20

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

FILED
April 10, 2015
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-0363

IN RE K.H.

Appeal from the Circuit Court of Kanawha County
The Honorable Carrie Webster, Judge
Civil Action No. 07-FIG-142

AFFIRMED IN PART; REVERSED IN PART; AND
REMANDED WITH DIRECTIONS

Submitted: January 28, 2015
Filed: April 10, 2015

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.
Justice BENJAMIN, deeming himself disqualified, did not participate in the decision of this case. Judge NIBERT, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "'"The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).' Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008)." Syl. Pt. 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011).

2. "In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

3. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).

4. "A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In the Interest of Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

5. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

6. "A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment

or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960).

Workman, Chief Justice:

This is an appeal by Glenna. H. (hereinafter "grandmother")[1] from an order of the Circuit Court of Kanawha County affirming an order of the family court terminating the grandmother's eight-year guardianship of her granddaughter, K.H. The family court granted full custody to Anthony B., the child's father (hereinafter "father") with no ongoing visitation granted to the grandmother. On appeal, the grandmother contends that the family court erred in failing to recognize her as the psychological parent of the child; failing to properly consider the child's best interests or material changes in circumstances; and failing to grant any ongoing visitation to the grandmother.

Subsequent to a thorough review of the appendix record, the parties' briefs, and oral arguments of counsel, this Court affirms the family court and circuit court orders terminating the grandmother's guardianship of the child, but we remand this matter with directions to the circuit court to remand to the family court for a hearing on the issue of visitation and the entry of an order granting liberal visitation rights to the grandmother, the specific contours of which are to be fashioned by the family court.

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[1]Because this case involves sensitive facts, we protect the identities of those involved by using the parties' first names and last initials, and we identify the child by using her initials only. *See State ex rel. W.Va. Dept. of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

I. Factual and Procedural History

K.H. was born in June of 2006. The father had no contact with the child during the first year of her life and requested multiple paternity tests. He first saw the child on August 1, 2007. The child's mother and brother died in an automobile accident on September 15, 2007, and the maternal grandmother, petitioner Glenna H., thereafter filed for guardianship of the child on September 27, 2007. By order dated October 30, 2007, the family court appointed the grandmother as guardian of the child. The father appeared at the guardianship hearing and did not object to the grandmother's appointment.

On November 6, 2008, the father filed a petition to establish custodial responsibility for the child. This action resulted in an April 2009 agreed order granting primary custody to the grandmother with parenting time to the father every other weekend and one night per week. The father also began paying child support. On November 18, 2010, the father filed a petition to revoke or terminate the grandmother's guardianship. This action resulted in a 2011 agreed order granting the father additional parenting time. The father and grandmother also agreed to refrain from seeking further modification of the custody arrangements until December 31, 2012.

On January 16, 2013, the father filed another petition to terminate the

grandmother's guardianship of the child.[2] By order dated April 11, 2013, Attorney Woody Hill was appointed as the guardian ad litem for the child. Subsequent to his investigation, Mr. Hill opined that the child should be placed in the custody of the father.[3] Mr. Hill reported that he considered the child's best interests and determined that the father was capable of providing a stable environment for the child, with no further need for guardianship.

On July 16, 2013, the grandmother filed a motion with the family court seeking to be designated as the child's "psychological parent" and also objected to the termination of her guardianship of the child. The family court held hearings in July, October, and November, 2013. In addition to the parties and the guardian ad litem, Dr. Timothy Saar, a psychologist retained by the grandmother, testified that the grandmother and the child have

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[2]The appendix record indicates that the father is employed by the State of West Virginia and pays his daughter's health insurance and private school tuition, fees, books, etc. He is also on active status in the National Guard and has ample room in his residence for the child.

[3]The guardian ad litem also reported that the grandmother had permitted the child to remain in the custody of her friend, Franklin Newsom, a few days a week. Mr. Newsom is a seventy-six-year-old man who had served a sentence for marijuana distribution and had been convicted for making threats to murder an Assistant United States Attorney who had prosecuted him. Mr. Newsom was also charged with battery in 1999 and DUI in 2011. The DUI charges were later dismissed. According to the father, the grandmother placed Mr. Newsom's name on school records as the contact individual and was reluctant to give the father access to the daughter's school records. After the issues regarding Mr. Newsom's background were brought to the attention of the family court, the court entered an order prohibiting overnight visitation with Mr. Newsom and also prohibited Mr. Newsom from being alone with the child.

a significant bond and that the child honestly views the grandmother as "mom." Dr. Saar did not meet with the father.[4]

By order dated December 18, 2013, the family court terminated the grandmother's guardianship and denied her motion to be considered a psychological parent. The grandmother appealed to the Circuit Court of Kanawha County on January 17, 2014. The circuit court refused the appeal, and the grandmother thereafter appealed to this Court.

II. Standard of Review

This Court has held that the standard of review in custody decisions, including guardianships, is as follows:

> "'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989)." Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008).

Syl. Pt. 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). We have also

[4]The family court order states that Dr. Saar did not draft or produce a report for the court.

explained as follows:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004). Guided by these standards, we now consider the parties' arguments.

III. Discussion

A. West Virginia Code § 44-10-3, Best Interests, and Changed Circumstances

The grandmother asserts that the family court and lower court erred in the consideration of the father's petition to terminate the guardianship by failing to properly evaluate the best interests of the child and the existence of changed circumstances. In so arguing, the grandmother raises the issue of the legislative amendments to the requirements articulated in West Virginia Code § 44-10-3 that became effective between the father's filing of the petition for termination of the guardianship and the court's hearings on the matter.[5]

---

[5]The pre-July 9, 2013, version, the relevant portion of which was articulated in § 44-10-3(c)(4), provided as follows:

> (c) The court, the guardian or the minor may revoke or terminate the guardianship appointment when:
>
> (4) A petition is filed by the guardian, the minor,

The grandmother contends that the family court erred by applying the version of the statute in effect at the time of the filing, rather than the amended version. The primary distinction between the prior and amended versions is the addition of the requirement for consideration of the best interests of the child and a material change in circumstances supporting the need to terminate the guardianship.

> an interested person or upon the motion of the court stating that the minor is no longer in need of assistance or protection of a guardian.

The requirements of that guardianship statute were amended, effective July 9, 2013, approximately six months after the father's petition but before the hearings on the petition. That amended statute, in relevant portion, provides as follows:

> (i) The court, the guardian or the minor may revoke or terminate the guardianship appointment when:
>
> > (4) A petition is filed by the guardian, the minor, a parent or an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian *due to changed circumstances and the termination of the guardianship would be in the minor's best interest*.
>
> (j) For a petition to revoke or terminate a guardianship filed by a parent, the burden of proof is on the moving party to show by a preponderance of the evidence that there has been a *material change of circumstances and that a revocation or termination is in the child's best interest.*

W.Va. Code § 44-10-3(i)(4) and 44-10-3(j) (emphasis supplied).

This Court's review of the record reveals that the family court recognized the existence of the statutory amendment in its order, but it did not specifically identify the statutory underpinnings for its conclusion that the grandmother's guardianship should be terminated. It simply stated that the father had filed his petition for termination under West Virginia Code § 44-10-3(c)(4), and it thereafter proceeded to articulate its findings. The family court did, however, address the issue of the best interests of the child and the change in circumstances that had gradually occurred in the father's level of participation in his daughter's life. The family court observed that "striking a balance between a biological parent's constitutional rights and the child's best interests can be difficult." The court also recognized the immeasurable importance of the child's best interests, as discussed by this Court in *In re Antonio*. 228 W.Va. at 388, 719 S.E.2d at 858. The court explained that the "record clearly reflects that throughout the years Father has continually stepped up to care for his child and has willingly assumed additional and substantial parental responsibilities as well as all caretaking functions for his minor daughter."

This Court finds the parties' arguments regarding deficiencies in the application of the statute to be unavailing. Beyond any statutory requirement for consideration of best interests and changed circumstances, this Court has emphatically declared the requirement for a thorough consideration of the best interests of the child and changed circumstances in all matters relating to altering custody of children. The substantive

law in effect at *both* the time of filing of the petition and the time of hearings on the matter required such consideration. This Court addressed these requirements in the specific context of a termination of guardianship in *In re Haylea G.*, 231 W. Va. 494, 745 S.E.2d 532 (2013), and has consistently required analysis of best interests and changed circumstances in matters involving custody of children. *Id*. at 498, 745 S.E.2d at 536. A child's best interests have been heralded as the paramount consideration by which all custody determinations should be made. We have repeatedly held that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) (internal citation omitted); *see also* Syl. Pt. 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children."); Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.").

We find that the family court, while not clearly specifying the statutory basis for its conclusions regarding termination of the guardianship, satisfactorily considered both K.H.'s best interests and the change in circumstances that had occurred over the several years in which the father's level of participation had increased. Moreover, the family court also considered the advice and conclusions of the guardian ad litem, formulated subsequent to a

thorough investigation. In his January 2015 update on the current status of the child, the guardian ad litem specifically informed this Court that the child reported a preference to live with her father and also expressed a desire to spend additional time with her grandmother. This Court finds neither clear error nor abuse of discretion in the family court's conclusion that the guardianship should be terminated and custody granted to the father.[6]

B. Psychological Parent

The grandmother also contends that the family court and circuit court erred by failing to recognize her as the psychological parent of the child based upon her eight-year guardianship and the relational bonds created during that time. The "psychological parent" concept, as employed in this state, was originally associated with an individual's right to intervene in child custody matters pursuant to West Virginia Code § 48-9-103 (2014).[7] As

[6]The father contends that the grandmother raised this issue of erroneous application of the statute for the first time on appeal. The appendix record reveals, however, that the grandmother repeatedly argued that there had not been a change of circumstances and that termination of the guardianship was not in the child's best interest. This Court also notes the exception to the general rule of prospective statutory application, as addressed in *Shanholtz v. Monongahela Power Co.*, 165 W.Va. 305, 270 S.E.2d 178 (1980). "[W]here an amended statute incorporates common law that had existed before the amendment to the statute, the statute may be applied retroactively." *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 650, 434 S.E.2d 7, 10 (1993).

[7]The general legal principles associated with the psychological parent concept were addressed in a 1995 Wisconsin case, and the criteria enumerated in that four-element test have now become incorporated within the definitions of the psychological parent doctrine utilized by most reviewing courts. *See In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis.), *cert. denied sub nom. Knott v. Holtzman*, 516 U.S. 975 (1995). These four elements include the following:

enunciated in syllabus point three of *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005),

> A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In the Interest of Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified.

In establishing those parameters for the psychological parent concept in *Clifford K.*, this Court specifically warned:

> With the announcement of this holding we also wish to make it abundantly clear that the mere existence of a psychological parent relationship, in and of itself, does not automatically permit the psychological parent to intervene in a proceeding to

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> (1) that the biological or adoptive parent consented to, and fostered, the [third party's] formation and establishment of a parent-like relationship with the child; (2) that the [third party] and the child lived together in the same household; (3) that the [third party] assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the [third party] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. at 421.

> determine a child's custody pursuant to W. Va. Code § 48-9-103(b). Nothing is more sacred or scrupulously safeguarded as a parent's right to the custody of his/her child.

217 W. Va. at 644, 619 S.E.2d at 157; *see also* Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973) ("In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions."); Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960) ("A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts."). Recognizing the inherent rights of a biological parent to his or her child, this Court observed in *Clifford K.* that "the limited rights of a psychological parent cannot ordinarily trump those of a biological or adoptive parent to the care, control, and custody of his/her child." 217 W. Va. at 644, 619 S.E.2d at 157; *see also Honaker v. Burnside*,182 W.Va. 448, 452, 388 S.E.2d 322, 325 (1989) (stating that "[a]lthough we recognize the attachment and secure relationship" between a child and a psychological parent, "such bond cannot alter the otherwise secure natural rights of a parent[.]").

This Court also addressed the concept of psychological parent in *In re Visitation & Custody of Senturi N.S.V.*, 221 W. Va. 159, 652 S.E.2d 490 (2007), and observed:

> In the cases in which this Court has determined a person to be a psychological parent to a child, that person typically has resided in the child's household and interacted with the child on a daily basis. *See, e.g., In re Clifford K., id.; In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *Simmons v. Comer*, 190 W.Va. 350, 438 S.E.2d 530 (1993); *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989). Moreover, a psychological parent is one who essentially serves as a second parent to a child and is a relationship to which the child's parent has consented. *See generally In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138; *Simmons*, 190 W.Va. 350, 438 S.E.2d 530; *Honaker*, 182 W.Va. 448, 388 S.E.2d 322."

221 W.Va. at 167, 652 S.E.2d at 498. In *Senturi*, the Court was also deliberate in its recognition of the potential for the concept of psychological parent to be inappropriately extended.

> Obviously, a child will hold in high esteem any person who looks after him/her, attends to his/her needs, and lavishes him/her with love, attention, and affection. However, simply caring for a child is not enough to bestow upon a care giver psychological parent status. Were this the law of the State, any person, from day care providers and babysitters to school teachers and family friends, who cares for a child on a regular basis and with whom the child has developed a relationship of trust could claim to be the child's psychological parent and seek an award of the child's custody to the exclusion of the child's parent. Clearly, this is not the result contemplated by this Court's prior holding [in *Clifford K.*] . . . .

Id. at 168, 652 S.E.2d at 499.

This Court also exhibited reluctance to apply the psychological parent concept in a manner that would unnecessarily detract from the rights of the natural parents in *In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011):

> Simply because a person is found to be a child's psychological parent, however, does not translate into the psychological parent getting custody of the child. Rather, this Court has only gone so far as to hold that the status of "psychological parent" entitles the individual to intervene in a custody proceeding, "when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." . . . Thus, custody determinations regarding a child or children are still controlled by what is in the best interests of the child(ren).

227 W.Va. at 469, 711 S.E.2d at 291 (quoting *Clifford K.*, 217 W.Va. at 640, 619 S.E.2d at 153).

This Court had occasion to speak to the psychological parent issue again in *In re Antonio*. In that case, the child's maternal grandmother had filed a petition for guardianship, and the child's biological mother had objected. In appealing the denial of her petition, the grandmother argued that she had been the psychological parent to the child for ten years. 228 W.Va. at 384, 719 S.E.2d at 854. This Court held that the statutory scheme granting a trial court discretion to appoint a nominee selected by a minor over the age of fourteen did not obligate the trial court to appoint the grandmother as guardian, over the mother's objection and absent a showing of the mother's unfitness. *Id*. at 388, 719 S.E.2d at 858. The grandmother in *Antonio* argued that she should be appointed as Antonio's

guardian. However, Antonio had been living with his mother for the three years preceding the filing of the guardianship petition. "While [the grandmother] might have been able to succeed under this theory during the approximately ten years that Antonio lived with her, at this point in time, this Court cannot find that [the mother] has voluntarily transferred or relinquished custody of Antonio." *Id*. at 392, 719 S.E.2d at 862.

The Court recognized Antonio's desire to have a continued relationship with his grandmother, and found that while the guardianship should be terminated, Antonio would be entitled to have visitation with his grandmother. In so ruling, this Court relied upon *Honaker* for the proposition that the best interests of the child may, in certain cases, necessitate visitation with other parties: "[a]lthough custody of minor child should be with the natural parent absent proof of abandonment or some form of misconduct or neglect, the child may have a right to continued visitation rights with the stepparent or half-sibling." 182 W.Va. at 451, 388 S.E.2d at 325, syl. pt. 2.

In *In re A.C.*, No. 13-1120, 2014 WL 2782131, at *1 (W. Va. Supreme Court, June 19, 2014) (memorandum decision), this Court affirmed the lower court's determination that a non-parent had served the role of a psychological parent and observed that the family court had

> made detailed findings regarding the child's living situation with Brooke B. in Kanawha County, detailing how, for example,

> Brooke B. maintained A.C.'s school papers, how A.C. celebrated holidays in the Kanawha County home, how friends of A.C. dropped her off at the home, how Brooke B.'s address was A.C.'s official school address, and how Brooke B.'s authority to give consent for medical treatment of A.C. was never challenged.

2014 WL 2782131, at *1. This Court affirmed the order appointing the psychological parent as the guardian and granted custody to the psychological parent while the biological father was incarcerated. *Id.*

In the case sub judice, the family court found that the grandmother was not the psychological parent of K.H. because she failed to satisfy the second two elements of the "psychological parent" test. Specifically, it found that her guardianship was only temporary and was not begun with the consent of the father. Upon review of the record, this Court finds that the family court clearly erred. The grandmother had custody of this child for eight years, albeit increasingly a shared-custody arrangement as the father became gradually more involved in the life of his daughter and sought additional custodial responsibilities. The child's mother, prior to her death, had sought assistance from her mother and had encouraged the relationship between grandmother and grandchild. The father, while not involved in the child's life for over a year, consented to the guardianship arrangement and entered into agreed orders resolving custody issues in favor of joint custody arrangements with the grandmother. From the child's birth and over the course of the next eight years, the grandmother has served as a parent to K.H. in every conceivable capacity. Such relationship

is not properly characterized as temporary. This was a significant relationship that unquestionably qualifies as a psychological parenting situation under this Court's definition in *Clifford K.*, as well as the subsequent cases chronicled above. We consequently find that the family court erred in finding that the grandmother's relationship with K.H. was temporary and that it was begun without the consent of her parents. We find that the grandmother is a psychological parent to K.H.

C. Right of Psychological Parent to Continued Association

The psychological parent doctrine is an equitable theory and judge-made construct which permits courts, under appropriate circumstances, to recognize an individual who has maintained a parent-like relationship with a child and consequently has a right to continued visitation with that child. *See* Nicole M. Onorato, Note, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 Whittier J. Child & Fam. Advoc. 491, 519-20 (2005) (explaining the psychological-parent doctrine).[8] In such instances, a court will evaluate the issue of whether

[8]Prior to recent attempts to articulate a legal standard for this theory, proponents of the concept analyzed it from a psychological perspective and explained that "[i]t is this psychological parenthood, rather than the biological events which may precipitate such a relationship, which many psychologists identify as the sine qua non of successful personality development." Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151, 158 (1963). Child psychoanalyst and Yale professor, Anna Freud, opined that the term "psychological parent" denotes "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent." Joseph Goldstein, Anna Freud, and Albert J.

an adult has formed a bonded relationship with a child and whether the continuation of such relationship is in the best interests of the child.[9]

These principles are consistent with this Court's approach to the right of a child to continued association, as expressed quite concisely in *Honaker*. In that case, this Court determined that the natural father had a right to custody of his child, but also considered whether it was in the child's best interests to maintain a continued relationship with her stepfather and half-brother. 182 W.Va. at 452, 388 S.E.2d at 325. This Court stated:

> [u]ndoubtedly, . . . [the child's] best interests must be the primary standard by which we determine her rights to continued contact with other significant figures in her life. Clearly, "these interests are interests of the child and not of the parent. Visitation is, to be sure, a benefit to the adult who is granted

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Solnit, Beyond the Best Interests of the Child, 17, 98 (1973); *see also* Joseph Goldstein, Anna Freud, and Albert J. Solnit, Before the Best Interest of the Child, 39, 46-48 (1979) (advocating the use of the psychological parent doctrine where child was separated from biological or adoptive parents for a long period of time and proposing "maximum intervals beyond which it would be unreasonable to presume that a child's . . . ties with his absent [natural] parents are more significant than those that have developed between him and his longtime caretakers").

[9]In some states utilizing the psychological parent concept, a court finding the existence of such a relationship will generally "treat the third party as equal to the natural parent and will apply the 'best interests of the child' standard to decide visitation, much the same as if two biological parents were vying for visitation or custody in a divorce proceeding." Lindsy J. Rohlf, Note, *The Psychological-Parent and DeFacto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 Iowa L. Rev. 691, 700 (2009); *see also V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) ("Once a third party has been determined to be a psychological parent to a child, . . . he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard . . . ." (citation omitted)).

> visitation rights with a child. But it is not the adult's benefit about which the courts are concerned. It is the benefit of the child that is vital." "Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well being by permitting partial continuation of an earlier established close relationship." *Looper v. McManus*, 581 P.2d 487, 488 (Okla. Ct. App.1978).

Honaker, 182 W.Va. at 452, 388 S.E.2d at 325 (footnotes omitted). In *Honaker*, this Court also explained:

> The best interests of the child concept with regard to visitation emerges from the reality that "[t]he modern child is considered a person, not a sub-person over whom the parent has an absolute and irrevocable possessory right. The child has rights. . . ." Another concern is "the need for stability in the child's life. . . . [T]ermination of visitation with individuals to whom the child was close would contribute to instability rather than provide stability.["]

Id., 388 S.E.2d at 326 (footnotes omitted). "[C]ontinuity and stability in a child's life most certainly count for something . . . . Children are not dogwood trees, to be uprooted, replanted, then replanted again for expediency's sake." *Guardianship of Kassandra H.*, 64 Cal.App.4th 1228, 1238 (Cal. App. 1998).

As apparent from the extensive line of cases decided by this Court, the rights of K.H. to continued association with her grandmother must be a vital part of this equation. The father emphasizes the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), and the fundamental right of a parent to make decisions concerning the

care, custody, and control of his or her children. In *Troxel*, the United States Supreme Court held that awarding visitation to a non-parent, over the objections of a parent, is subject to constitutional limitations. The Court in *Troxel* invalidated a Washington statute authorizing "any person" to petition for visitation rights "at any time[,]" and described the statute as "breathtakingly broad." *Id*. at 67.[10] This Court has examined the *Troxel* case, noting that it "instructs that a judicial determination regarding whether grandparent visitation rights are

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[10]A legal commentator analyzed the effect of *Troxel* on children's constitutional rights and concluded as follows:

> Before *Troxel*, it was abundantly clear that under the U.S. Constitution children possessed rights to equal protection, to due process, and to privacy in a wide variety of settings. After *Troxel*, it appears that at least six of the justices would weigh children's interest in protection of intimate relationships in the balance of constitutional rights.
>
> As the least powerful of groups and most vulnerable of persons, children are arguably most in need of rights. In a conceptual scheme in which adults have rights and children have mere interests, children's interests too often are trumped by the more powerful notion of rights. Judges and legislatures are increasingly unwilling to view the rights of parents as paramount . . . . The Supreme Court has recognized children's rights in many different settings, from juvenile justice to education. After *Troxel*, it seems clear that in a properly presented custody case, the Court can be expected to recognize children's rights to due process, equal protection, and privacy in the context of custody as well. The challenge for scholars (and for judges) is to acknowledge children's rights in custody cases in a manner that does not treat them like small adults, that takes account of their essential difference, and that respects their complex needs for nurture, protection, identity, and connection.

Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision Making*, 36 Fam. L.Q. 105, 113-14 (2002) (footnotes omitted).

appropriate may not be premised *solely* on the best interests of the child analysis." *Cathy L.M. v. Mark Brent R.*, 217 W.Va. 319, 327-28, 617 S.E.2d 866, 874-75 (2005) (emphasis supplied). Instead, this Court emphasized in *Cathy L.M.* that the evaluating court "must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis." *Id.* That is the gravamen of the *Troxel* decision; the true failing of the Washington statute in *Troxel* was "not that the [trial court] intervened, but that when it did so, it gave no special weight at all to [the parent's] determination of her daughters' best interests." 50 U.S. at 69.

As this Court explained in footnote seven of *In re Visitation of A.P.*, 231 W. Va. 38, 743 S.E.2d 346 (2013):

> Although *Troxel* does not define "special weight," state courts attempting to interpret and apply *Troxel* have reasoned that "special weight" indicates considerable deference. In *In re M.W.*, 292 P.3d 1158 (Colo. App. 2012), for instance, the Colorado Court of Appeals explained that "[g]iving special weight means that the presumption favoring the parent's decision can be rebutted only by clear and convincing evidence that granting parental responsibilities to the nonparent is in the child's best interests." *Id*. at 1161.

231 W.Va. at 42 n.7, 743 S.E.2d at 350 n.7. In *State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 551 S.E.2d 674 (2001), this Court held that the West Virginia grandparent visitation statute was constitutional because it is much narrower than the Washington statute evaluated in *Troxel*. *Id*. at 760, 551 S.E.2d at 682. This Court, in *Brandon L*, did not identify "the

amount of weight that should attach to the factor of parental preference . . . ." *Id.* at 763, 551 S.E.2d at 685. We noted, however, that "in light of the *Troxe*l decision it is clear that 'the court must accord at least some special weight to the parent's own determination' provided that the parent has not been shown to be unfit." *Id*. (quoting *Troxel*, 530 U.S. at 70).[11]

An enlightening discussion regarding *Troxel* was included a dissenting opinion in *In re Marriage of Winczewski*, 72 P.3d 1012 (Or. Ct. App. 2003) (Brewer, J., dissenting), as follows:

> When the competing rights of child and parent are pitted against each other, a balancing of interests is appropriate. That notion finds support in the *Troxel* test. As discussed, *Troxel* teaches that a court cannot award parenting time to a nonparent over the objection of a fit parent based solely on best interest considerations. *Troxel*, 530 U.S. at 69, 120 S.Ct. 2054 (O'Connor, J., plurality opinion). However, the presumption

[11]Even states adhering to a strict scrutiny methodology in evaluating nonparent child access statutes recognize the *child's* interest in the preservation a relationship with a nonparent. In *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), for instance, the Maine Supreme Court, based upon the theory that a compelling state interest is required to justify intervention in the context of Maine's nonparent parenting time statute, observed that the interest in continued access "springs not from any common law right of the grandparent to visitation with the child, but from the *child's* significant need to be assured that he or she will not unnecessarily lose contact with a grandparent who has been a parent to that child." *Id.* at 301-02; *see also Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) ("There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies-the child."). It is therefore imperative to acknowledge that "the understanding of visitation as a parental right, which marginalizes the nurture and care of children and disregards their relational interests, is incompatible with a relational understating of visitation." Ayelet Blecher-Prigat, *Rethinking Visitation: From A Parental to A Relational Right*, 16 Duke J. Gender L. & Pol'y 1, 2 (2009).

> that must be applied before best interests are considered focuses solely on the parent's ability to act in the child's best interests. In other words, the presumption relates to the very factual determination that must be made if it is rebutted. Because, in a real sense, the *Troxel* presumption blends with the best interests test, there is a certain circularity to the Court's analysis. That circularity leaves one to wonder whether there is less to the presumption than initially meets the eye. As one commentator has observed:
>
> > The significance of *Troxel* lies in its subtlety, not in any rigid analysis of recognized and established constitutional law doctrine. The opinion marks an evolution in parental autonomy protection by what it pronounces as well as by what it avoids. By balancing the State's interest in protecting the child with the parent's interest in making child-rearing decisions free from unnecessary State interference, the Court no longer accords blind, unquestioning deference to the decisions of presumptively fit parents. Ideally, when courts decide to balance the competing interests equally, the child's needs will be served and will prevail.
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> Sandra Martinez, The Misinterpretation of *Troxel v. Granville*: Construing the New Standard for Third Party Visitation, 36 Fam. L.Q. 487, 499 (2002). In sum, *Troxel* neither requires nor presages a strict scrutiny analysis of rights in nonparent custody and parenting time cases; instead, the deference to parental prerogative that it requires entails a balancing of distinct family interests.

72 P.3d at 1057-58 (Brewer, dissenting).

A fundamental principle, properly gleaned from the scholarly writings and legal opinions reviewed by this Court, is that the pronouncements of *Troxel* do not predispose

every case to an ultimate determination favoring the natural parent in a complete and conclusive manner.[12] An assessment of the specific circumstances of each case is still required, and while the reviewing court must accord special weight to the preferences of the parent, the best interests of the child are not to be ignored and must be included as a critical component of the dialogue regarding visitation or custody.

As the New Jersey Supreme Court in *Moriarty v. Bradt*, 827 A.2d 203 (N. J. 2003), concisely stated, "[t]he possibilities are as varied as the factual scenarios presented." 827 A.2d at 224. These possibilities should be deliberated in a manner conducive to the protection of the child. The Supreme Court of Pennsylvania summarized the process aptly in *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006): "[W]e refuse to close our minds to the possibility that in some instances a court may overturn even the decision of a fit parent to

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[12]It has been noted that "[b]ecause the various opinions in *Troxel* prevented the Court from speaking with a clear and unified voice, its decision is subject to misinterpretation." *Winczewski*, 72 P.3d 1012, 1056 (Brewer, dissenting). As insightfully explained by the New Jersey Supreme Court in *Moriarty v. Bradt*, 827 A.2d 203 (N. J. 2003):

> The [*Troxel*] Court avoided the basic issue of the appropriate level of scrutiny and the standard to be applied. It also stopped short of invalidating nonparental visitation statutes per se and declined to define "the precise scope of the parental due process right in the visitation context" because "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied" as "much state-court adjudication in this context occurs on a case-by-case basis."

827 A.2d at 216-17 (quoting *Troxel*, 530 U.S. at 73-74).

exclude a grandparent from a grandchild's life, especially where the grandparent's child is deceased and the grandparent relationship is longstanding and significant to the grandchild." *Id*. at 886-87.[13]

The father in the present case contends that the family court allowed for a gradual transition and that nothing further is necessary. In reality, the family court order only provided for a limited period of gradual transition, the terms of which have now expired.[14]

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[13]In a concurrence in *Hiller*, the writer addressed the issue of according proper deference to the requirements of *Troxel* and noted as follows:

> [T]he due process right that the Supreme Court affirmed in *Troxel* is important but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. *Troxel* goes no further.

904 A.2d at 902 (Newman, J., concurring).

[14]The family court order stated as follows:

> Th[e] following schedule or gradual transitional period shall be followed:
> a. Commencing November 21, 2013 through January 31, 2014 the minor child shall be with Grandmother every other weekend (Friday after school or at 3pm until Sunday evenings at 5). The minor child shall also be with Grandmother every Wednesday after school or 3pm through Thursday morning at 8am or drop

(continued...)

No further visitation is delineated in the family court order. While the grandmother has apparently continued to exercise visitation during the pendency of this appeal, the family court order did not actually require any ongoing visitation.

Based upon a thorough evaluation of the appendix record, this Court finds that K.H. and her psychological parent/grandmother are entitled to continued visitation. This Court is confident that such visitation can be structured in a manner which will not substantially interfere with the parent-child relationship or adversely affect the father's fundamental rights to custody of K.H.

IV. Conclusion

For the foregoing reasons, this Court finds that the family court did not abuse its discretion by terminating the grandmother's guardianship of K.H., and the decision terminating the guardianship is consequently affirmed. However, due to the grandmother's status as psychological parent to the child, the grandmother and the child are entitled to continued association with one another. Thus, we remand this matter for the entry of an order, consistent with this opinion, specifying a liberal visitation schedule to permit

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[14](...continued)

> off at school or any other night that the parties may agree.
> b. Commencing February 1, 2014 through the last day of the minor child's school the minor child shall be with Grandmother every other weekend (Friday after school or at 3pm until Sunday evenings at 5).

significant and meaningful opportunity for the grandmother to interact with K.H. In formulating such arrangement, the family court must also be cognizant of the grandmother's recent filing of a petition for grandparent visitation rights under West Virginia Code §§ 48-10-101 to-1201 (2014), and the two separate and distinct methods of seeking relief initiated by the grandmother should be merged for consideration by the family court.[15]

The court must also be cognizant of the need to formulate a visitation schedule "as expeditiously as possible[,]" as this Court explained in *Honake*r. 182 W.Va. at 453, 388 S.E.2d 326. Transitions in the life of a child should be fashioned in a manner which minimizes the trauma to the child. The plan "should give due consideration to both parties' work and home schedules and to the parameters of the child's daily school and home life, and should be developed in a manner intended to foster the emotional adjustment" of the child "while not unduly disrupting the lives of the parties or the child[]." *Id.* As this Court in *Honaker* advised:

> No matter how artfully or deliberately the trial court judge draws the plan for these coming months, however, its success and indeed the chances for [the child's] future happiness and emotional security will rely heavily on the efforts of these two [caretakers]. The work that lies ahead for both of them is not without inconvenience and sacrifice on both sides. Their energies should not be directed even partially at any continued rancor at one another, but must be fully directed at developing

[15]As of the date of oral argument in this case, the family court had not yet issued a written order on the grandmother's petition for grandparent visitation rights.

> compassion and understanding for one another, as well as showing love and sensitivity to the [child's] feelings at a difficult time in all their lives.

Id. at 453, 388 S.E.2d at 326-27.[16]

Affirmed in part; reversed in part; and remanded.

[16]As in other child custody matters, the visitation schedule will be subject to modification as circumstances warrant.

233 W. Va. 547, 759 S.E.2d 778

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

No. 13-0884

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: K.L.

Appeal from the Circuit Court of Wetzel County
The Honorable David W. Hummel, Jr., Judge
Civil Action No. 12-JA-6

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: April 9, 2014
Filed: June 5, 2014

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record reviewed in its entirety." Syl. pt. 1, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "[This Court] may, sua sponte, in the interest of justice, notice plain error." Syl. pt. 1, in part, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998).

3. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

4. "[T]he burden of proof in a child neglect or abuse case does not shift from the State Department of [Health and Human Resources] to the parent, guardian or custodian of the child. It remains upon the State Department of [Health and Human Resources] throughout the proceedings." Syl. pt. 2, in part, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).

5. "The presence of one of the factors outlined in *W. Va. Code*, 49-6-5b(a)(3) [1998] merely lowers the threshold of evidence necessary for the termination of parental rights. *W. Va. Code*, 49-6-5b(a)(3) [1998] does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W. Va. Code*, 49-6-2 [1996]." Syl. pt. 5, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000).

6. "To be 'plain,' the error must be 'clear' or 'obvious.'" Syl. pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

7. "Assuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the [petitioner]. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court . . . ." Syl. pt. 9, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

8. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

9. "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. pt. 6, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

10. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).

Per Curiam:

Petitioner Ashley L. appeals the August 21, 2013, order of the Circuit Court of Wetzel County that terminated her parental rights to her daughter, K.L.[1] Because this Court finds plain error in the proceedings below, we reverse the circuit court's order and remand for proceedings as directed in this opinion.

I. FACTS

On or about July 17, 2012, Respondent Department of Health and Human Resources (hereinafter "DHHR" or "the Department") filed a petition to institute abuse and neglect proceedings against Petitioner Ashley L. regarding her child K.L. The petition was filed pursuant to W. Va. Code § 49-6-5b(a)(3) (2006), which requires the DHHR to file such a petition when the parental rights of the parent to a sibling of the subject child have been terminated involuntarily.[2] The petition alleged, *inter alia*, that on May 6, 2008, in Marion County, the petitioner's parental rights were terminated as to child C.W., a sibling of K.L.[3]

[1] As is customary in cases involving children and sensitive facts, this Court uses initials to identify the parties.

[2] West Virginia Code § 49-6-5b(a)(3) provides in pertinent part: "(a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights . . . (3) [if] the parental rights of the parent to a sibling have been terminated involuntarily."

[3] The petition also indicated that the petitioner voluntarily relinquished her parental rights to three other children in 2010.

The DHHR's petition against the petitioner was based solely on the prior involuntary termination. The DHHR requested in the petition that K.L. be placed in the legal custody of the Department and that the physical custody remain with the petitioner pending further proceedings. After a subsequent hearing, the circuit court found in its adjudication order that the petitioner admitted that there was a prior involuntary termination of her parental rights, and therefore the petition was substantiated. The circuit court ordered that K.L. remain in the legal custody of the Department and the physical custody of the petitioner.

In February 2013, the petitioner was the victim of domestic violence when Curtis L., her husband and K.L.'s father, beat the petitioner. Curtis L. was arrested, and the petitioner shortly thereafter filed for divorce. As a result of this domestic violence incident, K.L. was removed from the petitioner's physical custody.

The circuit court held the disposition hearing on the abuse and neglect petition against the petitioner on August 2, 2013. At the beginning of the hearing, the circuit court noted that "the unique posture of [the case] is that the burden of proof is upon the parents to prove a substantial change in circumstances such that their parental rights should not be terminated." At the close of the hearing, the circuit court found as follows:

> I believe it's West Virginia 49-6 and 5; burden is upon, not the Department, being represented by the Prosecuting

> Attorney, but upon the parents in this instance, Curtis and Ashley [L.] to prove substantial change in circumstances.
>
> I would suppose and would believe that the burden of proof would be by clear and convincing evidence insofar as that's what the burden of proof is on the Department to prove that, at an adjudication, abuse and/or neglect, but even if I lowered the standard to preponderance of the evidence, the Court is not satisfied that Curtis and Ashley [L.] have, with all due respect, met their burden of proof to satisfy the Court that they have substantially changed their circumstances as since having previously been involuntarily terminated from the parental rights of prior children.
>
> With that, the burden does not shift to the Department then to put on a case to prove otherwise.[4]

(Footnote added). Accordingly, by order dated August 21, 2013, the circuit court terminated the petitioner's parental rights to K.L. after finding that the petitioner failed to meet her burden of showing a change in her circumstances since the termination of her parental rights to C.W.[5] The petitioner now appeals this order.

II. STANDARD OF REVIEW

In this case, we are asked to review an order that terminated the petitioner's parental rights. Our applicable standard of review is as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of

[4] This burden of proof was reiterated in the circuit court's disposition order which stated: "Whereupon, the Court further found that even if he lowered [the burden of proof] to just preponderance that the Court would not be satisfied that a change in circumstances had occurred since the involuntary relinquishment of the other children."

[5] The circuit court's order also terminated the parental rights of Curtis L., K.L.'s father, to K.L.; however, he is not a party to this appeal.

> law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record reviewed in its entirety.

Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Our decision in this case hinges on an issue of law which we review *de novo*.

III. DISCUSSION

The petitioner's sole assignment of error is that the circuit court erred in terminating her parental rights to K.L. because the evidence did not meet the standard required for termination of parental rights under our law. The DHHR and the guardian ad litem posit that the petitioner's parental rights were properly terminated. This Court finds, however, that the parties' arguments are not dispositive of our decision in this case. Instead, we find that the circuit court committed reversible error below by shifting the burden to the petitioner to show a change in her circumstances since the previous involuntary termination of her parental rights. Even though the petitioner did not raise this issue in her appeal, this Court *sua sponte* notices plain error in the circuit court's burden shifting.[6]

[6] Although the practice of noticing plain error *sua sponte* is usually applied in criminal cases, it is not exclusive to such cases. Recently, in *Cartwright v. McComas*, 223

In syllabus point 1, in part, of *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), we held that "[this Court] may, sua sponte, in the interest of justice, notice plain error." Our plain error analysis involves a four-step test. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). This Court finds that the circuit court's burden-shifting below constitutes error, in that it deviated from a rule of law of this Court. *See* Syl. pt. 8, in part, *Id.* (holding that "[a] deviation from a rule of law is error unless there is a waiver" which is "a knowing and intentional relinquishment or abandonment of a known right"). The rule of law from which the circuit court deviated is found in syllabus point 2, in part, of *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981), which holds that "the burden of proof in a child neglect or abuse case does not shift from the State Department of [Health and Human Resources] to the parent, guardian or custodian of the child. It remains upon the State Department of [Health and Human Resources] throughout the proceedings."

More recently and more specific to the instant case, this Court held in syllabus point 5 of *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000):

> The presence of one of the factors outlined in *W. Va. Code*, 49-6-5b(a)(3) [1998] merely lowers the threshold of

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W. Va. 161, 672 S.E.2d 297 (2008), this Court applied the doctrine in an appeal involving a claim of medical malpractice. In that case, we cited, *inter alia*, 2A Fed. Proc., L.Ed. § 3:860 (acknowledging the power of federal courts to apply the plain error doctrine in appeals of civil as well as criminal cases).

> evidence necessary for the termination of parental rights. *W. Va. Code*, 49-6-5b(a)(3) [1998] does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W. Va. Code*, 49-6-2 [1996].

This Court made clear in *In re George Glen B., Jr.*, that "while the Department does have a mandatory duty to file a petition, a circuit court may not terminate parental rights without additional evidence of abuse or neglect of the current child." *Id.*, at 350, 532 S.E.2d at 68. Therefore, under our law, it is clear that the DHHR retains the burden of showing by clear and convincing evidence, even in a case in which there has been a prior termination of parental rights, that the subject child is neglected or abused.[7]

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[7] With regard to neglect and abuse cases involving prior termination of parental rights, this Court has held:

> Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the four factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.

Syl. pt. 2, *In re George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999). In addition, we have held:

> When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental

In addition, this Court finds that the error is plain. "To be 'plain,' the error must be 'clear' or 'obvious.'" Syl. pt. 8, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. The circuit court stated clearly on the record that under the facts of this case the burden shifted to the petitioner to show a substantial change in circumstances since the previous termination of her parental rights. Thus, the circuit court's error is obvious to this Court.

Finally, "[a]ssuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the [petitioner]. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court . . . . " Syl. pt. 9, in part, *Id.* There can be no doubt that the circuit court's burden shifting prejudiced the substantial rights of the petitioner. This Court has recognized that

> [i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

> rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

Syl. pt. 4, *In re George Glen B., Jr.*, *supra.*

Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). As a result, "[t]he standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syl. pt. 6, *Id.* Significantly, this burden of proof is a constitutional imperative. In *Santosky v. Kramer*, 455 U.S. 745, 747 (1982), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment of the Federal Constitution demands more than a showing of "a fair preponderance of the evidence" to extinguish the parent-child relationship." Instead, opined the Court, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations [of abuse and/or neglect] by at least clear and convincing evidence." 455 U.S. at 747–48. Thus, we find that the circuit court below violated the petitioner's constitutional due process rights when it shifted the burden to her to show a change in circumstances since the previous termination of the petitioner's parental rights to another child.

Further, this Court has held that "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). In the instant case, the constitutional error in burden shifting was not harmless beyond a reasonable doubt. Significantly, the circuit court did not require the DHHR to adduce evidence or provide testimony at the dispositional hearing that the petitioner abused or neglected K.L. Moreover, the circuit court's termination of the petitioner's

parental rights to K.L. clearly was based on the fact that the petitioner failed to meet *her* burden of showing a change in circumstances. Therefore, this Court finds that the circuit court violated the petitioner's due process rights when it shifted the burden of proof to the petitioner, and that this violation clearly prejudiced the petitioner.

Finally, this Court notes the legally unsound arguments of the DHHR and the guardian ad litem before this Court to the effect that despite any procedural irregularities in the proceedings below, the dispositive factor in this case is the best interests of K.L. First, terminating the parental rights of the petitioner to K.L. based on shifting the burden of proof to her to show that she did not neglect and or abuse K.L. is not a mere procedural irregularity, but rather a constitutional due process error. Second, the best interests of the child do not become paramount until the child's parents are found to be unfit. Until that time, the best interests of the parents and children are presumed to be the same. As the Supreme Court said in *Santosky*, it is not until "[a]fter the State has established parental unfitness . . . that the interests of the child and the natural parents do diverge. . . . [U]ntil the State proves parental unfitness, the child and his [or her] parents share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760 (footnote omitted). Indeed, if a parent's unfitness did not have to be shown prior to considering a child's best interests, the State could simply dispense with due process procedures and simply remove children from fit parents who may be poor or uneducated and place them with fit parents who may be more affluent and or better educated based on the State's belief that it knows what is best for a child.

In sum, this Court finds that the circuit court committed reversible error in shifting the burden to the petitioner in the instant abuse and neglect case. As noted above, the burden of proof never shifts from the DHHR to the parent throughout a case involving allegations of child abuse and neglect. Upon remand of this case, if the DHHR chooses to go forward in alleging abuse and neglect against the petitioner, we direct the circuit court to follow the points of law set forth by this Court in *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000). Specifically, the burden remains with the DHHR to show by clear and convincing evidence that the petitioner committed abuse and/or neglect of K.L. in addition to showing the previous termination of the petitioner's parental rights to a sibling of K.L. As noted above, the DHHR's petition against the petitioner was based solely on the prior involuntary termination, without further allegations. There must be specific allegations and evidence of abuse or neglect of K.L., which could include demonstrating that K.L. was abused and/or neglected by showing the petitioner failed to correct the conditions that led to the prior termination of her parental rights and/or that other circumstances exist which would establish abuse and/or neglect.

Consequently, on remand, if such circumstances exist, the DHHR should file an amended abuse and neglect petition that includes any developments subsequent to the filing of the original petition that are relevant to the petitioner's fitness as a parent to K.L., including anything that occurred during the petitioner's improvement period. However, the circuit court must remain mindful that

> [i]n making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

Syl. pt. 4, *In Re B.H.*, 233 W. Va. 57, 753 S.E.2d 743 (2014). Because the child is in placement, such petition should be filed within sixty days of this opinion. If no such petition is filed and if the child is to be returned to the mother, the lower court should develop a plan of gradual transition, pursuant to *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991),[8] calculated to minimize emotional trauma to the child.

IV. CONCLUSION

For the reasons set forth above, this Court reverses the August 21, 2013, order of the Circuit Court of Wetzel County that terminated Petitioner Ashley L.'s parental rights to K.L., and we remand this case to the circuit court for proceedings as directed in this opinion.

Reversed and remanded with directions.

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[8] Syllabus point 3 of *James M.* provides as follows:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

235 W. Va. 221, 772 S.E.2d 914

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

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OF WEST VIRGINIA

No. 14-0895

IN RE: K.P., I.C., G.C., AND I.C.

Appeal from the Circuit Court of Marion County
The Honorable Michael J. Aloi, Judge
Civil Action Nos. 13-JA-40, 13-JA-41, 13-JA-42, 13-JA-43

REVERSED AND REMANDED
WITH DIRECTIONS

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JUSTICE LOUGHRY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.' Syl. Pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996)." Syl. Pt. 2, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002).

3. "'''''W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994).' Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)." Syl. Pt. 3, *In re F.S.*, 233 W.Va. 538, 759 S.E.2d 769 (2014).

4. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994)." Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

LOUGHRY, Justice:

The joint petitioners, the West Virginia Department of Health and Human Resources ("DHHR") and Rebecca Tate, guardian ad litem ("GAL") for all of the minor children in this abuse and neglect case, appeal the "Amended Final Adjudication Order Dismissing Petitions" entered by the Circuit Court of Marion County on September 3, 2014. The circuit court dismissed an abuse and neglect petition that was filed against the respondents herein, R.C. and A.C.,[1] upon concluding that the DHHR failed to prove the allegations in the petition by the requisite standard of clear and convincing evidence. Based upon this Court's thorough review and consideration of the appendix record, arguments of counsel, and applicable precedent, we reverse the circuit court's order and remand this case for further proceedings consistent with this opinion.

I. Factual and Procedural Background

On July 1, 2013, K.P., a thirteen-year-old girl, disclosed that her stepfather, the respondent R.C., had engaged in sexual misconduct against her. Following an investigation, the DHHR filed a petition in the circuit court initiating the underlying abuse and neglect case

[1]Because this case involves children and sensitive matters, we follow our practice of using initials to refer to the children and their parents. *See* W.Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W.Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990). Two of the minor children who have the same initials are referred to herein as I.C.-1 and I.C.-2.

pursuant to the provisions of West Virginia Code §§ 49-6-1 to -12 (2014).[2] The DHHR removed all of the children from the home.[3] The initial petition filed in this matter alleged that R.C. sexually abused K.P., and that K.P.'s mother, the respondent A.C., failed to protect K.P. from the abusing parent. Subsequently, after additional information was obtained, the DHHR amended its petition to add allegations that A.C. committed acts of emotional abuse against K.P.

In multiple interviews conducted for purposes of this abuse and neglect proceeding, K.P. consistently made the following assertions.[4] On the morning of July 1,

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[2]During the 2015 Regular Session, the West Virginia Legislature repealed West Virginia Code §§ 49-1-1 through 49-11-10 and recodified these statutes, with some revisions, into West Virginia Code §§ 49-1-101 through 49-7-304. The references in this opinion are to the statutes as they existed during the pendency of the proceedings below.

[3]On July 1, 2013, K.P. lived in the home of her mother and stepfather, A.C. and R.C. Other children in the home were four-year-old I.C.-1, who is the daughter of R.C. and A.C.; and ten-year-old I.C.-2 and fourteen-year-old G.C., who are R.C.'s children from a prior relationship. K.P. was placed with her biological father; I.C.-1 was placed with an aunt; and I.C.-2 and G.C. were placed with their biological mother with whom they resided during the school year.

[4]Regarding her allegations of abuse, K.P. was interviewed by Detective Jeanette Williamson of the Marion County Sheriff's Department, Child Protective Services Worker Stacy Miller, Psychologist Dr. Adrienne A. Bean, and, upon the respondents' motion, Psychiatrist Dr. Bobby A. Miller. All four of the interviewers testified at the adjudicatory hearing, and video recordings of the interviews conducted by Ms. Miller and Dr. Miller are in the appendix record. Finding that the information K.P. gave in each of the interviews was "consistent with no discrepancies," and that forcing the child to testify in court could be detrimental to her psychological well-being, the circuit court quashed a subpoena that would have required K.P. to testify. Accordingly, for purposes of adjudication, the circuit court relied upon K.P.'s statements made in the interviews.

2013, she was texting from her cellular telephone while lying on her bed in the home she shared with her mother, stepfather, and other family members. Her mother was not home. At approximately 10:00 a.m., her stepfather R.C. entered her bedroom and began rubbing her back both over and under her shirt. When she rolled over, he rubbed her stomach, lifted her shirt, and rubbed her breasts. She was not wearing a bra. R.C. also rubbed K.P.'s vaginal area over her clothes, going back and forth between rubbing her vaginal area and breasts. He then asked if he could lick her breasts, to which K.P. responded "no." K.P. asked him to leave the bedroom, but he remained for approximately thirty minutes longer and rubbed her back. K.P. communicated via text messages with a friend who told her to lock herself in a room and telephone her parents for help.[5] After R.C. left the bedroom, K.P. tried to call her mother, her biological father R.P., and R.P.'s wife A.P. She was able to reach A.P., who agreed to immediately come and remove K.P. from the house. As K.P. was packing some personal belongings and waiting for her stepmother, R.C. returned to her bedroom, begged her not to tell anyone what had happened, and offered to buy her whatever she wanted if she kept the events secret. He followed K.P. into the kitchen, making the same pleas. He said that she would ruin his life, he would go to jail, and he would be unable to see his other kids. When K.P. told him that A.P. was on the way, R.C. said that he needed to get out of there because he was going to jail.

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[5]No text messages were offered into evidence in the adjudicatory hearing. However, A.C. testified that she saw these texts on K.P.'s telephone.

K.P. also revealed that R.C. had touched her in this manner on multiple occasions throughout the previous year.[6] She indicated that in the initial occurrences, he had just rubbed her back and she had not realized that the touching was sexual. In later episodes, R.C. rubbed additional areas of her body including her breasts, her buttocks, and her vaginal area both over and under her clothes but without penetration. She reported that this misconduct occurred both at home and when she traveled with her stepfather for his work. K.P. explained that she had not previously disclosed her stepfather's actions because she was "creeped out" and did not know what to do. She felt that her mother would not believe her and would take her stepfather's side. She also had some fear that her stepfather might hurt her.[7] K.P. explained that the episode on July 1, 2013, was the first time R.C. had ever asked to lick her breasts, and she worried that this request could lead to sexual intercourse. K.P. indicated that it was the request to lick her breasts that convinced her of the need to tell someone.

The stepmother, A.P., testified that when K.P. called her on July 1, 2013, K.P. was crying and unable to speak about what had happened. K.P. agreed to explain the problem in a text message. A.P. testified that after reading the text message, she told K.P.

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[6]K.P. gave consistent reports about what her stepfather did to her in the prior incidents. However, as discussed below, the circuit court found that K.P. gave varying accounts regarding the frequency of the prior abuse.

[7]Both K.P. and I.C.-2 revealed in their respective interviews that R.C. had hit A.C. in the past. However, A.C. testified that R.C. had never hit her.

to pack a bag because she would immediately leave work and pick K.P. up. A.P. testified that when she arrived at the home, which was about a one-hour drive from her workplace, K.P. was outside and hiding behind a neighbor's house. A.P. observed that K.P. had been crying, had a shaky voice, and was upset.

A.P. drove K.P. to a nearby gas station where she had arranged to meet K.P.'s father, R.P. Meanwhile, the respondent mother A.C., having received calls on her cellular telephone from both R.P. and the respondent R.C., also arrived at the gas station. A.C. brought K.P. into her parked car and began questioning K.P. while recording the conversation on her telephone. The recording was later played for the investigating sheriff's deputy and a child protective services ("CPS") worker, but was not offered into evidence at the abuse and neglect adjudicatory hearing. Reportedly, during this conversation A.C. told her daughter that she was going to ruin R.C.'s life, that A.C. herself had been sexually abused, and that sexual abuse "is something you just live with in shame." K.P. says that A.C. also "fake cried" and expressed concern that the allegations could hurt A.C.'s job. A.P. testified that when K.P. got out of the parked car, K.P. was upset that her mother did not believe her.

After K.P.'s father, R.P., arrived at the gas station, they all proceeded to the Marion County Sheriff's Department to file a report. Sheriff's Deputy, now Sheriff's

Detective, Jeanette Williamson conducted an initial interview of K.P. At Detective Williamson's request, R.C. was telephoned and came to the police station. However, he refused to speak with police without a lawyer. Detective Williamson referred the matter to CPS for a further interview of the child.

A CPS worker, Stacy Miller, interviewed K.P. the next day, July 2, 2013. During the adjudicatory hearing Ms. Miller testified about this interview, including K.P.'s description of the sexual abuse and A.C.'s reaction to her daughter's report. Ms. Miller also testified that she observed K.P. lose eye contact and shy away when telling about R.C.'s request to lick her breasts. Ms. Miller did not perceive that K.P. was exaggerating her allegations. Detective Williamson testified that K.P.'s disclosures to Ms. Miller, which were videotaped and which Detective Williamson observed from another room, had no major differences or elaborations from the initial report.

During the course of the abuse and neglect investigation, K.P. underwent an interview and diagnostic testing by psychologist Dr. Adrienne A. Bean. Dr. Bean testified at the adjudicatory hearing and recounted K.P.'s allegations of sexual abuse. Dr. Bean also provided information that K.P. revealed about her mother, including that A.C. obsessed about K.P.'s weight and placed limits on the food K.P. could have. K.P. said that while she and her parents were at the gas station and she was reporting the sexual abuse, A.C. was more

concerned that K.P. had eaten macaroni and cheese that morning. K.P. also told Dr. Bean that A.C. hit her, called her vulgar names such as "f***ing fat a**" and "c***sucker," and told K.P. that she would rather be dead than have K.P. as a daughter.

Dr. Bean reported that the test results showed K.P. to be slightly defensive, but there was nothing to indicate she is untrustworthy, deceitful, or has delinquency issues. The psychologist found K.P. to be very insightful and mature with good self esteem. Dr. Bean also felt that K.P. was being open and honest about the things she had been through, and found she was consistent in describing the alleged abuse. K.P. was not exhibiting any mental health or social-emotional symptoms, but Dr. Bean explained that not all child victims exhibit such symptoms and these issues may develop later. Dr. Bean concluded that K.P. is resilient and has been able to cope using her current skills.

R.P. testified that on July 1, 2013, he spoke with his wife on the telephone and learned of the allegations. He immediately called the respondent A.C. According to R.P., even though A.C. had not yet talked to their daughter, A.C. disputed that any sexual abuse had occurred. Rather, A.C. suggested that R.C. had merely rubbed the child's shoulders. A.C. arrived at the gas station before R.P. did. R.P. recalled that when he arrived, instead of focusing on the report of molestation, A.C. was more concerned that K.P. had been talking to a boy online and had eaten macaroni and cheese. R.P. testified that after K.P. told him

about her stepfather's actions, he made the decision that they would immediately go to the sheriff's office to make a report. He said that his daughter is well-behaved and truthful with him.

R.P. also testified that he had witnessed A.C. engage in inappropriate parenting in the past, including calling K.P. derogatory names and obsessing about their daughter's diet. Both R.P. and A.P. testified about a bruise they saw on K.P.'s foot, which K.P. said was inflicted by A.C. Furthermore, A.C.'s sister testified that she saw A.C. smack K.P. in the mouth a few times when the child was younger.

The respondent stepfather, R.C., who was also facing criminal charges for the alleged sexual conduct against K.P., did not testify in the abuse and neglect adjudicatory hearing. However, his lawyer presented the testimony and report of psychologist Dr. William Fremouw, who had administered diagnostic tests to R.C. According to Dr. Fremouw, the test results indicate that R.C. lacks the two most common characteristics of convicted sex offenders: an antisocial-psychopathic personality combined with the presence of cognitive schemas or attitudes that justify adult-child or adult forced sexual interactions. Nonetheless, Dr. Fremouw made clear that his evaluation could not prove whether R.C. did, or did not, commit the alleged abuse.

The respondent mother, A.C., did testify at the adjudicatory hearing. She denied abusing K.P., denied calling K.P. vulgar names or calling her fat, and asserted she only restricted unhealthy food from K.P.'s diet. She denied engaging in any physical abuse, stating she had only spanked K.P. when the child was younger. A.C. admitted, however, that two or three months before these allegations, she had "smacked" K.P. in the mouth after repeatedly telling her to "shut up." A.C. indicated that K.P. has behavioral issues, lies, and is difficult to parent. A.C. testified that on July 1, 2013, her husband called her at work to say that K.P. was alleging inappropriate touching. Although she did not yet know any specific information about the allegations, A.C. immediately thought that R.C. had just rubbed the girl's back, something she had seen him do in the past. At the adjudicatory hearing, A.C. acknowledged that she does not believe her daughter's allegations of sexual abuse, finding the allegations to be unlikely and illogical. She testified that she knew K.P. was lying on July 1, 2013, by the look on her daughter's face.

A.C. asserted that K.P. was upset over the recent death of K.P.'s maternal grandmother, who was K.P.'s primary caretaker for many years. A.C. related that she and K.P. often argued, and K.P. did not like that she placed limits on junk food and access to electronic devices. According to A.C., K.P. fabricated the abuse allegations because she wanted to move to her father's home. A.C. indicated that K.P. prefers her father, and her father imposes fewer restrictions.

Dr. Amy Wilson Strange performed a parental fitness evaluation on A.C. and testified on A.C.'s behalf. Dr. Strange concluded that A.C. possesses the qualities and abilities needed to appropriately parent her daughters and has a very low risk of maltreating her children or allowing another person to do so. However, Dr. Strange admitted that she knew little about the allegations in this case, and all of her information came from interviewing and testing A.C.

Finally, upon the motion of the respondent parents, K.P. was interviewed and tested by psychiatrist Dr. Bobby A. Miller. Dr. Miller concluded that K.P. is an adolescent who believes she can manage herself better than the adults in her life; that her allegations are "very simple" and impossible to physically prove or disprove; that K.P.'s presentation was a reaction to her grandmother's death; and that this legal proceeding is actually about K.P.'s mother and K.P.'s desire to not live in her mother's home. Dr. Miller admitted, however, that K.P.'s allegations are consistent and there are no indications that she is untrustworthy.

After a multi-day adjudicatory hearing, the circuit court concluded that the DHHR had not met its burden of proving that K.P. was abused by either of the respondents.[8] The court also found that R.C.'s refusal to testify and rebut the abuse charges could not be used as evidence against him. Accordingly, the circuit court dismissed the abuse and neglect

[8]The circuit court's rationale is discussed below.

petition in an amended final order entered on September 3, 2014. It is from this order that the DHHR and GAL jointly appeal.[9]

II. Standard of Review

For appeals of abuse and neglect orders, "we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). These standards were announced in syllabus point one of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we turn to the parties' arguments.

[9]On September 17, 2014, this Court stayed the circuit court's order pending appeal.

III. Discussion

A. Respondent R.C.'s Silence

We begin our analysis with the issue of the respondent stepfather's refusal to testify at the abuse and neglect adjudicatory hearing. The DHHR and GAL argue that R.C.'s failure to respond to the evidence offered against him should be considered as affirmative evidence of his culpability. R.C. disagrees, arguing that the circuit court correctly ruled that a respondent parent's silence during the adjudicatory stage of an abuse and neglect proceeding is not evidence of misconduct.

This legal issue was squarely addressed in *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996). In *Doris S.*, an adult referred to as David E. was living in the household of a child who died as a result of shaken baby syndrome. Although David E. was not the deceased child's parent and was not accused of inflicting the fatal injuries, an abuse and neglect petition was filed against him alleging that he knowingly allowed the abuse to occur. *See* W.Va. Code § 49-1-3(1)(A) (2014) (defining "abused child" to include one whose parent, guardian, or custodian knowingly allows another person to commit abuse in the home). David E. chose to remain silent in the abuse and neglect proceeding, thereby failing to take steps to identify the perpetrator who caused the child's death. Ultimately, we affirmed the circuit court's order terminating David E.'s parental rights to his own children, recognizing that his actions in

failing to identify the abuser created such a hostile and unsafe atmosphere that it effectively placed his children in jeopardy had they remained in his custody. *Doris S.*, 197 W.Va. at 499, 475 S.E.2d at 875.

With regard to David E.'s silence, we found "[t]here is no basis in law for requiring that a court be disallowed from considering a parent's or guardian's choice to remain silent as evidence of civil culpability." *Id.* at 497, 485 S.E.2d at 873. In reaching this conclusion, this Court reasoned as follows:

> [A]s the United States Supreme Court stated in *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), "the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause*.'" *Id.* at 318, 96 S.Ct. at 1558 (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961); *see* 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 5–2(B)(1) (3rd ed. 1994). Moreover, "aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred by the Due Process Clause." 425 U.S. at 319, 96 S.Ct. at 1558. "'Silence is often evidence of the most persuasive character.'" *Id.* (quoting *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–54, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923)).

Doris S., 197 W.Va. at 498, 475 S.E.2d at 874 (footnote omitted). We also recognized the remedial, non-punitive, purpose of abuse and neglect proceedings and determined that the

invocation of silence by a parent or guardian goes to the very heart of the issue of whether the situation is treatable. *Id.* Accordingly, we held the following:

> Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

Id. at 492, 475 S.E.2d at 868, syl. pt. 2.

We acknowledged in *Doris S.* that a parent or guardian might decide to remain silent because he or she is also facing criminal charges. However, even if he or she makes that choice, the silence can nonetheless be considered in the abuse and neglect proceeding. The rights of the criminally accused are sufficiently protected by various statutory protections. *Id.* at 497-98 n. 22, 475 S.E.2d at 873-74 n. 22.[10]

[10]The statutes cited in *Doris S.* as providing protections for a parent or guardian who is also charged criminally include West Virginia Code § 49-6-4(a) (1995), prohibiting evidence acquired as the result of a person's medical or mental examination from being used against that person in a subsequent criminal proceeding, and West Virginia Code § 57-2-3 (1966), providing that in a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination. *See also In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002) (discussing statutory protections accorded persons accused of both civil and criminal abuse and neglect).

The situation of a parent or guardian facing simultaneous criminal charges was discussed more fully in a subsequent abuse and neglect case, *In re Daniel D.*, 211 W.Va. 79, 562 S.E.2d 147 (2002). In *Daniel D.*, the circuit court adjudicated a father as abusive for engaging in sexual conduct against his daughter. The father had elected to remain silent in the abuse and neglect proceeding because of related criminal charges. He argued that he faced a "Hobson's Choice" in the abuse and neglect case because he could not satisfy a post-adjudication improvement period without obtaining sex offender treatment, but no provider would provide this treatment unless he admitted committing sexual abuse. *Id.* at 83-84, 562 S.E.2d at 151-52. The father contended he was being required to admit to criminal conduct in violation of his Fifth Amendment privilege against self-incrimination. *Id.* Unpersuaded by the father's arguments, we reaffirmed syllabus point two of *Doris S.* as being "soundly supported by the authorities and . . . consistent with the policy of this State which encourages prompt hearing of abuse and neglect cases and a paramount concern for the best interests of the children involved in such proceedings." *Id.* at 87, 562 S.E.2d at 155. We reiterated that "[a]s applied to the issue of culpability, the rule simply confronts the accused parent with a choice: Assert the privilege against self-incrimination with the risk that silence will be considered in the civil proceeding as evidence of culpability, or waive the privilege and offer

such evidence as the accused may alone possess to refute the charge of abuse and neglect." *Id.*[11]

Despite our clear holdings in *Doris S.* and *Daniel D.*, the circuit court in the case *sub judice* found that R.C.'s silence could *not* be considered as evidence that he sexually abused K.P. In the amended order dismissing the abuse and neglect petition, the circuit court attempted to distinguish our case law with the following analysis:

> Neither *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.* . . . nor *In re Daniel D.* . . . controls here. In both [*Doris S.*] and *Daniel D.*, the court held that a parent's or guardian's silence in the face of an affirmative remedial duty may be considered as substantive evidence in terminating parental rights. In [*Doris S.*], the parent's silence evinced his failure "to cooperate in the identification of the person responsible for the homicide" of his [sic] child. . . . Similarly, in *Daniel D.*, the parent's silence evinced a "failure to comply with an order to obtain meaningful therapy or rehabilitation" *after* the trial court had definitively found that the parent had in fact abused the child. . . . In neither case, however, was silence considered substantive evidence that criminal abuse *actually occurred*. In fact, in *Daniel D.*, the court acknowledged "a very fine, although very important, distinction between terminating parental rights based upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent's failure to comply with an order to obtain meaningful

[11]This Court did afford the father in *Daniel D.* some relief by remanding the abuse and neglect case with directions that he could obtain a protective order to prevent his statements made during a court-ordered medical, psychological, or psychiatric examination from being used in the criminal case. *Id.* at 90-91, 562 S.E.2d at 158-59. This protective order was to effectuate the protections afforded by West Virginia Code §§ 49-6-4 and 57-2-3. *See supra* note 10.

> therapy or rehabilitation . . . . The latter is constitutionally permissible; the former is not." 563 S.E.2d at 152-53 (quoting *In re Clifford M.*, 577 N.W.2d 547 (Neb. 1998)). Because [R.C.] is under no duty to comply with a remedial order or affirmative duty under law, this case falls on the other side of the "fine line" drawn in *Daniel D.*

The circuit court's analysis is plainly wrong and reflects a misunderstanding of the law. We expressly held in syllabus point two of *Doris S.*, as reiterated in *Daniel D.*, that a court may properly consider silence as affirmative evidence of *culpability* for civil abuse and neglect. Contrary to the circuit court's discussion, our holding was not dependent upon the existence of a remedial order or some affirmative duty that the parent or guardian may have in the abuse and neglect proceeding. Moreover, although the circuit court found that R.C. had a basis for remaining silent because he was also facing criminal charges, that was the precise issue in *Daniel D.*, wherein we reaffirmed our holding in *Doris S.*

The circuit court's reliance on the "fine line" discussed in the Nebraska case, *Clifford M.*, is similarly misplaced. In the *Daniel D.* opinion, we discussed *Clifford M.* and other out-of-state cases in the context of examining how various jurisdictions have reconciled competing interests when parents charged with abuse and neglect will not participate in therapy due to concerns about self-incrimination in related criminal cases. *Daniel D.*, 211 W.Va. at 84-86, 562 S.E.2d at 152-154. We proceeded to address that issue by holding that under our West Virginia statutory law, the parent or guardian in an abuse and neglect case is entitled to a protective order for statements given during a court-ordered examination. *Id.*

at 90, 562 S.E.2d at 158 (stating that "[o]ur review of the statutes, corresponding case law of this state, and authority from other jurisdictions compels our conclusion that West Virginia Code § 49-6-4 was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination . . . ordered in conjunction with abuse and neglect proceedings."). The discussion of *Clifford M.* in no way modified our holding in *Doris S.* that silence may be evidence of civil culpability. Indeed, after discussing *Clifford M.*, we emphasized that *Doris S.* remained viable law. *Daniel D.*, 211 W.Va. at 87, 562 S.E.2d at 155.

We also reject R.C.'s suggestion that culpability may not be deduced from silence during the adjudicatory phase of an abuse and neglect proceeding. He argues that the application of *Doris S.* and *Daniel D.* should be limited to the disposition phase. Presumably, this suggestion is based upon the fact that the father in *Daniel D.* had already been adjudicated as an abusing parent and was confronted with his so-called "Hobson's Choice" in the context of the disposition. *See* W.Va. Code § 49-6-5 (2014) (pertaining to disposition after circuit court adjudicates child as being abused or neglected). However, nothing in *Doris S.* or *Daniel D.* restricted a court's consideration of a parent or guardian's silence to the disposition stage. Syllabus point two of *Doris S.* expressly addresses "culpability," and culpability for abuse and neglect is the focus of the adjudicatory stage.

Indeed, in *Doris S.*, this issue was discussed with regard to David E.'s *adjudication* as an abusing parent.

Accordingly, we conclude that the circuit court erred as a matter of law when ruling that silence absent an affirmative remedial order or duty cannot constitute evidence of civil culpability for abuse and neglect. The circuit court's legal conclusion is contrary to syllabus point two of *Doris S.* *See* 197 W.Va. at 492, 475 S.E.2d at 868. Furthermore, the circuit court should have considered R.C.'s silence as evidence that he abused K.P. As discussed herein, K.P. gave multiple consistent statements about how her stepfather touched her breasts, buttocks, and vaginal area, and about his request on July 1, 2013, for oral sexual gratification. R.C. utterly failed to respond to those allegations.

B. Evidence of Abuse

Next we examine whether the circuit court erred in concluding that the DHHR did not present clear and convincing evidence that the respondents R.C. and A.C. committed abuse. With regard to the DHHR's burden, we have repeatedly held that

> "'"'W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W.Va.

> 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990).' Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994)." Syl. Pt. 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 3, *In re F.S.*, 233 W.Va. 538, 759 S.E.2d 769 (2014). Sexual abuse may be proven solely with the victim's testimony, even if that testimony is uncorroborated. Syl. Pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).[12]

1. The Respondent Stepfather R.C.

Although the circuit court found that K.P. gave consistent statements regarding the sexual abuse, the court nonetheless found reasons to question K.P.'s veracity. Our review of the entire record leaves us with the definite and firm conviction that those reasons were unfounded. *See Tiffany Marie S.*, 196 W.Va. at 225-26, 470 S.E.2d at 179-80, syl. pt. 1 (explaining that finding of fact is clearly erroneous when, although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction mistake was committed). The lack of testimony from R.C. further highlights the questionable grounds upon which the circuit court based its decision to disregard K.P.'s assertions.

[12]*Beck* was a criminal case requiring proof beyond a reasonable doubt, which is a higher burden of proof than the clear and convincing standard applicable to abuse and neglect cases.

First, the circuit court found that K.P.'s strained relationship with her mother and strong desire to live with her father provided an "alternate explanation" for the allegations of abuse. The DHHR and GAL dispute that K.P. would fabricate these allegations so she could move out of her mother's home. During the interview with Dr. Bean, K.P. explained her understanding that as soon as she turned fourteen years old, she could choose the parent with whom she would reside. Her father, R.P., confirmed that this was also his understanding and that he and K.P. had discussed it. When K.P. disclosed the sexual abuse, her fourteenth birthday was just seven weeks away. The petitioners argue that K.P. would have no reason to fabricate the allegations so close in time to when she thought she could elect where to live. Moreover, K.P. acknowledged the seriousness of the allegations, and there was evidence that she and her stepfather otherwise got along well. The petitioners assert that K.P.'s credibility is supported by the manner in which she disclosed the sexual abuse without embellishing or dramatizing the nature of what occurred.

Second, the circuit court found an inconsistency in K.P.'s reports regarding the frequency of the abuse she alleged had occurred throughout the year leading up to July 1, 2013. The circuit court made this finding despite having previously ruled, when quashing a subpoena for K.P.'s testimony, that her statements were all consistent. According to the circuit court, the inconsistency was that K.P. told CPS Worker Miller that the abuse occurred

"every other day for a year"; she told Dr. Bean that it occurred "at least a couple times a week" for a year; and she told Dr. Miller that it occurred "around fifty times."

Contrary to the circuit court's ruling, we observe that K.P.'s statements concerning the frequency of the prior abuse are not appreciably different. For instance, "every other day" is analogous to a "couple times a week," particularly to a young person. Moreover, a review of the record shows that K.P.'s statements about the frequency of the prior occurrences were not as specific as the circuit court's findings suggest. In her videotaped interview with CPS Worker Miller, K.P. said the abuse occurred, "I don't know, like every other" night. In her videotaped interview with Dr. Miller, she said that "some weeks" the abuse occurred "like two times," while other weeks it did not happen at all. In fact, it was Dr. Miller who suggested the number fifty to her, and she agreed that it was "probably something like" fifty times and "maybe" fifty times. Importantly, K.P. never claimed to be able to state the exact number of prior occurrences.[13] K.P.'s inability to be more specific is readily attributable to the frequency of the conduct, that the conduct occurred throughout an entire year, and because the conduct escalated over time.[14]

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[13]Dr. Miller was apparently not troubled by this alleged inconsistency. At the adjudicatory hearing, he was asked, "You talked about inconsistencies and consistencies. She has stated that this sexual abuse occurred about every other day. She told you about 50 times. That would – that's not consistent; is it?" Dr. Miller responded, "It's not inconsistent – [that] doesn't necessarily bother me. . . ."

[14]During the videotaped interview, K.P. told Dr. Miller that her stepfather's conduct throughout the preceding year was not the same, rather, "it kinda got more touchy

Third, although the circuit court found that the remainder of K.P.'s information was consistent across the several interviews, the court described her allegations as "very simple" and lacking witnesses or corroborating evidence. In a subsequent order denying a motion to stay, the circuit court elaborated on what it meant by "very simple" by comparing K.P.'s report to that of the child victim in *In re F.S.*, 233 W.Va. 538, 759 S.E.2d 769 (2014). The victim in *F.S.* provided vivid accounts of sexual molestation, complete with "distinct graphic sensory details" about her abuser's ejaculations. *Id.* at 545-46, 759 S.E.2d at 776-77. The circuit court found that the account in *F.S.* was "a far cry from the account of abuse presented in this case, an account one examining psychiatrist [Dr. Miller] described as 'very simple.'"

The circuit court's reasoning about the "simple" nature of K.P.'s allegations is wholly unfounded. Not all sexual abuse of children involves the same type or degree of wrongful conduct. Fortunately, K.P. was not subjected to penetration or ejaculation, as was the child in *F.S.* Just because K.P. did not report being subjected to more graphic forms of sexual abuse, does not mean she fabricated the report of her stepfather fondling her and seeking oral sexual gratification.

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throughout." She said that the first couple of times, R.C. just touched her back, but subsequently he touched her "butt" and other areas. She had not realized the initial occurrences were meant to be sexual. Other times, he rubbed her vaginal area, which she did realize was sexual, but she was afraid to tell anyone.

A review of the testimony of the individuals who interviewed K.P., and of the video recordings in the appendix record, confirms the circuit court's finding that K.P. was consistent in describing the abusive conduct. Even when the respondents' expert Dr. Miller challenged her, K.P. did not change her report.[15] Moreover, while K.P.'s report of the sexual abuse on July 1, 2013, was not particularly graphic in nature, it was detailed. She described exactly where she was and what she was doing when her stepfather began touching her; described where he touched her; and repeated what he said to her. K.P. also provided a detailed recounting of what both R.C. and A.C. said when trying to convince her not to reveal the misconduct. R.C. rebutted none of K.P.'s statements. Moreover, it is evident that

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[15]For example, Dr. Miller raised the issue of K.P. texting private photographs to an online boyfriend. She admitted having done so, and that it was a mistake. Dr. Miller asked her,

> Like you said, you know, you weren't thinking and you'll never do it again. What if [R.C.] just does the same thing? [He] wasn't thinking and will never do it again . . . Why can't we just leave it at that? It's good enough for you, it should be good enough for him. Know what I'm saying? I mean we all make mistakes. You made some mistakes. Nobody can have the best judgment all the time. Nobody really got hurt. I mean what you did didn't, nobody died. So why can't he just have the benefit of this, he made a mistake and he wasn't thinking and he won't do it again?

Later, Dr. Miller said "it's really not so much about [your stepfather], it's really about your mom?" When K.P. tried to explain that it was about both of them, Dr. Miller insisted that it could not be about both of them. Despite these challenges, K.P. did not back down from her report of abuse.

something occurred on July 1, 2013, to cause R.C. to telephone his wife and volunteer that he had not inappropriately touched the child.

Although K.P. does not exhibit any indications of psychological trauma, Dr. Bean explained that not all victimized children do.[16] Finally, the absence of witnesses to the abuse is not a basis to disbelieve K.P. It is axiomatic that most sexual abuse of children is not committed in front of an audience.

In considering the evidence in the case at bar, we are assisted by our discussion in *F.S.* about the measure of proof necessary to prove civil abuse and neglect:

> This is a classic case of the inability of a trial court to ascertain, with complete certainty, the truth of the allegations of abuse. As indicated by the circuit court's adjudicatory order, one could quite effortlessly compile an inventory of doubts and skepticism based upon the evidence presented. The evidence is simply not crystal clear, beyond all doubt. However, that is not the standard to be employed in an abuse and neglect case. In reviewing the entirety of the evidence, this Court must adhere to the appellate standard of review . . . according significant weight to the circuit court's credibility determinations while refusing to

[16]Dr. Miller testified that K.P.'s lack of a psychological diagnosis and symptoms is "clinically difficult to understand." He testified, "in my experience an individual who has been profoundly, persistently, systematically and severely abused for over a decade is not an individual [who] would be asymptomatic." However, neither the DHHR nor K.P. claimed that the abuse was as severe as what Dr. Miller insinuated in this testimony. Moreover, K.P. did not reside with A.C. and R.C. for all of the prior decade, having lived with her grandmother for several years.

> abdicate our responsibility to evaluate the evidence and determine whether an error has been committed.
>
> It is imperative to note that the evidence in an abuse and neglect case does not have to satisfy the stringent standard of beyond a reasonable doubt; the evidence must establish abuse by clear and convincing evidence. This Court has explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Brown v. Gobble*, 196 W.Va. 559, 564, 474 S.E.2d 489, 494 (1996) (internal citations omitted). We have also stated that the clear and convincing standard is "intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cramer v. W.Va. Dept. of Highways*, 180 W.Va. 97, 99 n. 1, 375 S.E.2d 568, 570 n. 1 (1988); see also *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1984) (holding that party with burden of persuasion may prevail only if he can "place in the ultimate factfinder an abiding conviction that the truth of [his] factual contentions are 'highly probable.'").

F.S., 233 W.Va. at 546, 789 S.E.2d at 777. The same considerations are present in the instant case. Although the circuit court may have viewed the evidence as less than certain, the DHHR did not need to meet the higher standard of a criminal case. All that was required was clear and convincing evidence.

After carefully considering the evidence in the entire record, and taking into account R.C.'s silence in the face of these serious allegations, we conclude that the circuit court erred in finding a lack of clear and convincing evidence that R.C. sexually abused his

stepdaughter. Accordingly, we find that the circuit court erred by not adjudicating K.P. as an abused child and R.C. as an abusing parent. *See* W.Va. Code §§ 49-1-3, 49-6-2(c).[17]

2. The Respondent Mother A.C.

Turning to the allegations against A.C., the DHHR asserted she failed to protect K.P. and engaged in emotional abuse of K.P. There is no evidence that A.C. knew, or had sufficient facts to know, of the sexual abuse before K.P. disclosed it. As such, A.C. should not be adjudicated as abusive for a failure to protect her daughter from sexual abuse in the time period before the disclosure was made.[18] The circuit court erred, however, in failing to recognize that A.C.'s actions after the disclosure constituted emotional abuse of K.P. West Virginia Code § 49-1-3 defines "abused child" to include a child whose health

[17]West Virginia Code § 49-1-3(1) provides, in relevant part, that

> "Abused child" means a child whose health or welfare is harmed or threatened by:
> (A) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; [or]
> (B) Sexual abuse or sexual exploitation[.]

[18]*See Doris S.*, 197 W.Va. at 492, 465 S.E.2d at 868, syl. pts. 3, 4, and 7 (explaining that statutory definition of "abused child" includes child whose parent, guardian, or custodian "knowingly" allows another person to commit abuse, and "knowingly" means having sufficient facts from which to recognize that abuse occurred.).

or welfare is harmed or threatened by a parent who "inflicts [or] attempts to inflict . . . mental or emotional injury, upon the child[.]"[19]

Once K.P. revealed the allegations of sexual abuse, A.C. undertook a course of action directed at preventing K.P. from reporting the abuse to the authorities. Even before talking to her daughter about the allegations, A.C. claimed that R.C. had only rubbed the child's shoulders. Then, during the discussion in the car at the gas station, A.C. tried to persuade K.P. to keep quiet by pretending to cry, by threatening that the allegations would ruin R.C.'s life and hurt A.C.'s job, and by saying that sexual molestation is something that the victim "must live with in shame." Moreover, at the sheriff's office, A.C. asked if lie detector tests could be administered and disclosed to the detective that K.P. had texted pictures of herself to an online boyfriend. A.C. engaged in intimidation and psychological tactics in an effort to procure her daughter's silence. In short, when issues arose regarding the safety and well-being of her daughter, A.C. chose to protect her husband instead of her daughter–a position she has maintained throughout these proceedings.

The post-disclosure conduct of a parent, guardian, or custodian may constitute abuse and neglect. *See Doris S.*, 197 W.Va. at 492, 475 S.E.2d at 868, syl. pt. 1 (stating that statutory definition of "abused child" implicitly includes child whose health or welfare is

[19]*See supra* note 17.

harmed or threatened by parent who fails to cooperate in identifying perpetrator of abuse). Moreover, we have recognized that

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

In re Charity H., 215 W.Va. 208, 217, 599 S.E.2d 631, 640 (2004) (quoting *Doris S.*, 197 W.Va. at 498, 475 S.E.2d at 874).

Such issues were recently addressed in *In re K.C.*, No. 14-0493, 2014 WL 6634520 (W.Va. Supreme Court, Nov. 24, 2014) (memorandum decision). In *K.C.*, a mother adamantly denied the allegations of sexual abuse that her daughter made against the mother's boyfriend. For approximately one and one-half years after the disclosure, the mother did not support her daughter, failed to believe the disclosure, and did nothing to assist the State in investigating or developing a case against the child's abuser. *Id.* at *3. The mother's conduct led a therapist to conclude that there was an irreparable break in the relationship between the mother and child. *Id.* Ultimately, we affirmed the circuit court's conclusion that the mother's conduct was also abusive.

In addition, the testimony of K.P.'s father, R.P., corroborated that A.C. called their daughter vulgar and hurtful names and obsessed about what the child ate. Moreover, A.C. admitting smacking K.P. in the mouth a few months earlier. The circuit court concluded that the name-calling and the physical striking, even if true, were isolated events that did not rise to the level of parental abuse and neglect. Furthermore, the circuit court found no evidence that K.P. was denied necessary food, noting that one parent's "obsession" can be another parent's "balanced diet." If we were to view this conduct in a vacuum, we might agree with the circuit court. However, when considering the entire record, including A.C.'s behavior when her daughter revealed the sexual abuse, A.C.'s prior conduct constitutes further evidence that she emotionally abused K.P.

Accordingly, we conclude that the circuit court erred in finding a lack of clear and convincing evidence that A.C. emotionally abused K.P. and, therefore, erred by failing to adjudicate A.C. as an abusing parent. *See* W.Va. Code §§ 49-1-3, 49-6-2(c).

3. I.C.-1, G.C., and I.C.-2

There are no allegations that R.C. or A.C. directly abused the other three children in the home, all of whom are R.C.'s biological children. However, West Virginia

Code § 49-1-3(1)(A) defines "abused child" to include "another child in the home" and "a child whose health or welfare is harmed or threatened[.]"[20] We have held that

> [w]here there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994).

Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Because the respondents are abusing parents with regard to K.P., the health and welfare of the other children in the home is also at risk. Accordingly, the circuit court erred by refusing to adjudicate I.C.-1, G.C., and I.C.-2 as abused children.

IV. Conclusion

For the reasons set forth above, the circuit court erred when failing to adjudicate R.C. and A.C. as abusing parents and K.P., I.C.-1, G.C., and I.C.-2 as abused children. Therefore, we reverse the circuit court's September 3, 2014, order and remand this case to the circuit court for entry of adjudication orders consistent with this opinion, and for post-adjudication proceedings and disposition.[21]

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[20]*See supra* note 17.

[21]Many of the cases cited in this opinion addressed both the adjudication and the ultimate disposition. However, only the issue of adjudication is before us in the appeal *sub judice*. Any post-adjudicatory requirements and the disposition will be matters for the circuit court to address on remand, and nothing in this opinion should be construed as directing the

Reversed and remanded with directions.

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circuit court as to how it should rule on those issues.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

FILED
February 16, 2010
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35450

IN THE INTEREST OF KAITLYN P., ARIANNA C.,
CHRISTOPHER C., RYAN C. & MADYSEN C.

Appeal from the Circuit Court of Raleigh County
Honorable H. L. Kirkpatrick, III, Judge
Civil Action Nos. 08-JA-135-K, 08-JA-136-K, 08-JA-137-K,
08-JA-138-K, and 08-JA-145K

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 27, 2010
Filed: February 16, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 59 (1996)." Syllabus Point 1, *In re: Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002).

2. "'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W. Va. 86, 459 S.E.2d 363 (1995).

Per Curiam:

This case is before this Court upon appeal of a September 24, 2009, order of the Circuit Court of Raleigh County which granted a six-month post-adjudicatory improvement period to the appellees and respondents below, Samantha and Christopher C.[1] In this appeal, the appellant and petitioner below, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), contends that the circuit court erred by granting the improvement period because neither parent has identified who abused their son, Ryan C., nor even admitted that he was abused, despite uncontroverted medical evidence to the contrary.

This Court has before it the petition for appeal and the entire record.[2] For the reasons set forth below, the order of the circuit court is reversed, and this case is remanded to the circuit court with directions to terminate the post-adjudicatory improvement period and hold a disposition hearing immediately.

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W. Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2]Samantha and Christopher C. did not respond to the petition for appeal or file a brief.

I.

FACTS

On September 6, 2008, the DHHR was notified that a child, Ryan C., born June 22, 2007, was brought to the emergency room of Raleigh General Hospital in Beckley, West Virginia, with a spiral fracture of his right femur. A Child Protective Services ("CPS") worker responded to the call and spoke with the child's mother, Samantha C., at the hospital. The explanation given by Samantha C. regarding what happened to Ryan C. was inconsistent with the child's injury. The emergency room physician opined that the injury was the result of non-accidental trauma. Ryan C. had to be transferred to Charleston Area Medical Center in Charleston, West Virginia, for treatment by a pediatric orthopedic surgeon.

The next day, the DHHR obtained emergency custody of Ryan C. and his sisters and brother, Kaitlyn P., Arianna C., and Christopher C., Jr., and they were placed in foster care on September 8, 2008. A petition to institute abuse and neglect proceedings was filed by the DHHR in the Circuit Court of Raleigh County on September 10, 2008. The DHHR alleged that Ryan C. had been physically abused and there was imminent danger to the physical well being of all the children. The petition noted that the family had been receiving in-home services from the DHHR since 2005, that prior abuse and

neglect proceedings had been instituted in 2007,[3] and that the children were adjudicated as abused and neglected on July 16, 2007. The prior abuse and neglect proceedings had just concluded two weeks before Ryan C. was injured. The circuit court had returned legal and physical custody of the children to the parents on August 26, 2008.

On September 19, 2008, Samantha and Christopher C. waived their right to a preliminary hearing. The court found that probable cause was established and placement was proper. An adjudicatory hearing was scheduled for October 22, 2008. Two days before that hearing, Samantha C. gave birth to another child, Madysen C. The DHHR immediately filed an amended petition to include the child in the proceedings.

The adjudicatory hearing began on October 22, 2008, but was continued several times to allow for the testimony of additional witnesses.[4] The adjudicatory hearing

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[3]Abuse and neglect proceedings were instituted in 2007 after Samantha C. threatened to remove Christopher Jr. from the hospital. Christopher had been diagnosed with RSV (respiratory syncytial virus) and had near death vital signs. Christopher's doctor reported that he was underweight, had not been receiving his immunizations timely, and had rashes and redness indicating that he had not been cleaned and changed regularly. That petition also noted that, at different times, red marks and bruises had been observed on other children in the home, there had been at least one incident of domestic violence where both parents had been arrested, and the parents were suspected of using drugs.

[4]It appears that the continuances were in part the result of Samantha C. requesting approval for the employment of a pediatric orthopedic specialist to possibly rebut the opinions of the physicians who testified on behalf of the DHHR that Ryan C.'s spiral fracture was the result of child abuse.

was finally concluded in August 2009, and an order was entered on August 26, 2009. In that order, the circuit court found that there was clear and convincing evidence that Ryan C.'s spiral fracture was the result of non-accidental trauma. The circuit court concluded that Ryan C. and the other children in the home were abused. Thereafter, Samantha and Christopher C. made motions for a six-month improvement period. The DHHR objected, but the circuit court granted the motions by order entered on September 24, 2009. This appeal followed.

II.

STANDARD OF REVIEW

This Court has explained that "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000). In addition, this Court has held:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the

> reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With these standards in mind, the issue presented in this case will be considered.

III.

DISCUSSION

The DHHR contends that the circuit court erred in granting Samantha and Christopher C. a post-adjudicatory improvement period because they failed to present evidence that they were likely to fully participate in the improvement period as required by W.Va. Code § 49-6-12 (1996) (Repl. Vol. 2009). The statute provides that a six-month post-adjudicatory improvement period may be granted when:

> The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period[.]

W.Va. Code § 49-6-12(b)(2). The DHHR argues that Samantha and Christopher C. did not satisfy this requirement because they have not identified who abused Ryan C., nor even admitted that he was abused. In other words, the DHHR reasons that Samantha and

Christopher C. could not fully participate in an improvement period when they have not even acknowledged that abuse occurred, despite uncontroverted medical evidence to the contrary.[5] We agree.

This Court has explained that "an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged." *In re Emily*, *supra*, 208 W. Va. at 334, 540 S.E.2d at 551.

Therefore,

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

West Virginia Dept. of Health and Human Resources v. Doris S., 197 W. Va. 489, 498, 475 S.E.2d 865, 874 (1996).

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[5]The adjudicatory order indicates that Samantha C. did present a written report from Donald Getz, M.D., to rebut the testimony David Ede, M.D., one of the doctors who testified on behalf of the DHHR. However, that report is not included in the record, and Dr. Getz was not present at the adjudicatory hearing to present testimony or be cross-examined. Further, the circuit court found that Dr. Getz failed to adequately rebut Dr. Ede's testimony that Ryan's spiral fracture could not have been caused by the scenarios reported by his mother to Ryan's doctors and CPS workers.

As discussed, neither parent in this case has acknowledged that Ryan C. was abused. Yet, it is undisputed that Ryan C. was in the care and custody of Samantha and Christopher C. when his leg was broken. According to Samantha C., she and Christopher C. were in the kitchen cooking dinner when she heard Ryan scream. She has stated that she went into the living room and discovered two-year-old Christopher, Jr., on top of Ryan. She claims that Ryan seemed fine and that she then took the kids to pick apples and Ryan was walking around and playing. After they were back home, Ryan starting screaming again. She told her husband that she thought his leg was broken and called her grandmother to come and take them to the hospital.

During the adjudicatory hearing, David Ede, M.D., Ryan's treating orthopedic surgeon, testified in response to questions from the attorney for the DHHR as follows:

> Q: And what type of an injury would cause a spiral fracture of a femur of a child of this age?
> A: Anybody of any age sustaining a spiral fracture would be from a twisting of the bone.
>
> . . . .
>
> Q: Well, what I'm saying is that there was a description given that this two-year-old fell on this child's leg and thereafter, this child walked out and picked apples for a period of time and came in. If he had had [sic] the spiral fracture from that, would that child have been able to walk?
> A: No. That's inconsistent with the pattern of fracture.
>
> . . . .

> Q: Okay. Doctor, do you have an opinion as to whether or not – if the description of how this injury occurred was a child – another child fell on top of his leg or he fell from a couch, do you have an opinion as to whether or not those descriptions would be consistent with the type of fracture that this child sustained?
>
> A: In my opinion it is inconsistent.
>
> Q: And do you have an opinion based upon the information that you have been provided as to whether or not this would likely be the result of child abuse?
>
> A: Child abuse occurs when a child is harmed as a result of an action taken on that child. What we have is a patient who has an injury that's consistent with child abuse because spiral fractures in children are automatically – almost automatically considered to be child abuse in and of themselves.
>
> I did not have an opportunity to interview the biological mother or anyone that was there at that time. Based on what I see and the history that seems inconsistent, this is almost a classic example of child abuse.
>
> . . . .
>
> Q: And a two-year-old child would not be strong enough to have caused this type of fracture of this child's leg?
>
> A: No, not by themselves.

Based on all the above, this Court finds that the circuit court erred when it granted Samantha and Christopher C. a post-adjudicatory improvement period under these circumstances. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 59 (1996)." Syllabus Point 1, *In re: Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002). In other words, "'[i]n a contest involving the custody of an infant the welfare

of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W. Va. 86, 459 S.E.2d 363 (1995). In this case, the granting of a post-adjudicatory improvement period to Samantha and Christopher C. was not in the best interests of Ryan C. and his siblings. Ryan C. was clearly abused and his siblings were certainly at risk of being abused.[6] Absent the parents' acknowledgment of the abuse, the requirement for granting a post-adjudicatory improvement period as set forth in W.Va. Code § 49-6-12(b)(2) was not satisfied.[7]

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[6]*See* Syllabus Point 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995) ("Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).").

[7]This Court is deeply troubled by the guardian ad litem's limited participation in this appeal. The only document filed by the guardian ad litem in this case was a short letter response asking this Court to refuse the petition for appeal and stating that the improvement period would allow the parents to be reunited with their children. The guardian ad litem had a duty to file a brief and explain his position to this Court. "We again admonish guardians ad litem that it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings. This duty includes appearing before this Court to represent the child during oral arguments. In fact, the guardian ad litem's role to represent the child does not cease until permanent placement of the child is achieved. Syl. pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991)." *Christina L.*, 194 W.Va. at 454 n.7, 460 S.E.2d at 700 n.7. Given the clear evidence of abuse in this case and the history of these parents, the duties of a guardian are especially strong.

IV. CONCLUSION

Accordingly, for the reasons set forth above, the September 24, 2009, order of the Circuit Court of Raleigh County is reversed to the extent that it granted a post-adjudicatory improvement period to Samantha and Christopher C.,[8] and this case is remanded to the circuit court with directions to terminate the post-adjudicatory improvement period and hold a disposition hearing immediately. In conducting the disposition hearing, the circuit court should be mindful of this Court's holding in Syllabus Point 3 of *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), which states,

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

The mandate of this Court shall issue contemporaneously herewith.

Reversed and remanded with directions.

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[8]The DHHR did not appeal the other rulings of the circuit court in the September 24, 2009, order.

228 W. Va. 221, 719 S.E.2d 389

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2011 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-0203

IN RE: KASEY M., KRISTINA M., KALEB M., ROBERT M.C.,

CHRISTOPHER C., NICHOLAS C. and NOAH C.

Appeal from the Circuit Court of Kanawha County
Honorable Paul Zakaib, Jr., Judge
Civil Action Nos. 10-JA-72; 10-JA-73; 10-JA-74; 10-JA-75;
10-JA-76; 10-JA-77; 10-JA-78

REVERSED

Submitted: October 18, 2011
Filed: November 15, 2011

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The Opinion of the Court was delivered Per Curiam.

CHIEF JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syllabus point 1, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983).

Per Curiam:

This is an appeal by Robert C., petitioner/respondent below (hereinafter referred to as "Robert C."), from an order of the Circuit Court of Kanawha County that transferred custody of his son, C.C., to the child's biological mother, Christine L. In this appeal, Robert C. contends that the circuit court did not have authority to transfer custody of the child to Christine L., and that the evidence was insufficient to support such transfer of custody. After a careful review of the briefs and record submitted on appeal, and listening to the arguments of the parties, we reverse.

I.

FACTUAL AND PROCEDURAL HISTORY

The pertinent facts of this case began on April 22, 2010, when the West Virginia Department of Health and Human Resources (hereinafter referred to as "DHHR") filed an abuse and neglect petition against Robert C. and his wife Patricia C. The petition named seven children as being victims of abuse and neglect.[1] However, at the time the petition was filed, two of the children named therein, N.C. and N.C., were actually in the

[1]Robert C. and Patricia C. are the biological parents of one of the children, R.C. Robert C. is also the biological father of three of the other children, C.C., N.C. and N.C. Patricia C. is the biological mother of the three remaining children, K.M., K.M. and K.M. At the time of the abuse and neglect proceedings, the children ranged in age from four to thirteen years old.

custody of their biological mother, Christine L.[2] The allegations in the petition alleged that Robert C. intentionally wrecked his car and injured Patricia C.; that Robert C. once threatened to knock the children's teeth out with a baseball bat; that Robert C. and Patricia C. smoked marijuana and have offered the drug to K.M.; that Robert C. made inappropriate comments about K.M's. body and hugged her inappropriately; that K.M. was hospitalized due to self-inflicted injuries; and that Robert C. and Patricia C. failed to provide the children with food, clothing, supervision and housing.[3]

It appears that, after the abuse and neglect petition was filed, several hearings took place. However, the record on appeal contains only the transcript from the last hearing held on November 18, 2010. During that hearing, DHHR informed the court that it was going to dismiss the abuse and neglect allegations against Robert C. and release custody of all of the children except one, K.M. Also during that hearing, DHHR and the guardian ad litem for C.C. recommended that C.C. be placed with his biological mother, Christine L. Robert C. objected to transferring custody of C.C. to Christine L.

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[2]Christine L. lived at a separate residence with N.C. and N.C. There were no abuse and neglect allegations alleged against Christine L. in the petition. She was made a party to the proceeding only because she was the biological parent of three of the children named in the petition. *See* W. Va. Code § 49-6-1(b) (2005) (Repl. Vol. 2009) ("The petition . . . shall be served upon both parents[.]").

[3]The petition was drafted in extremely vague and general terms.

By order entered January 3, 2011, the circuit court dismissed the abuse and neglect charges against Robert C. and released custody of all of the children except K.M.[4] The order also transferred custody of C.C. to Christine L.[5] This appeal followed.

II.

STANDARD OF REVIEW

This is an appeal from an order of the circuit court that was entered in an abuse and neglect proceeding. The standard of review that governs appeals in abuse and neglect cases is set forth in Syllabus point 1 of *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996), as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

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[4]It appears that charges against Patricia C., as the biological mother of K.M., remained.

[5]The order additionally dismissed Christine L. as a party to the proceedings.

Accord Syl. pt. 2, *In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011). With the above principles in mind, we will address the issues at hand.

III.

DISCUSSION

The dispositive issue raised by Robert C. in this appeal is whether the circuit court had authority to transfer custody of C.C. to Christine L., in an abuse and neglect proceeding, when the allegations of abuse and neglect against him were dismissed. Before we address the merits of the issue, some background information is required regarding the status of Robert C., Christine L., and C.C. prior to the institution of the abuse and neglect proceedings.

The limited record in this case shows that Robert C. and Christine L. were previously married and appear to have resided in Florida during their marriage. Three children were born from the marriage: C.C., N.C., and N.C.[6] The couple was granted a divorce in Florida at some point prior to 2009. Additionally, the record indicates that the divorce decree awarded custody of C.C. to Robert C. and awarded custody of N.C. and N.C. to Christine L. The record further reflects that Robert C. moved to West Virginia in 2009

[6]C.C. was born on December 31, 2004. N.C. and N.C. are twins who were born on June 15, 2006.

with his new wife, Patricia C. The record does not indicate at what point Christine L. moved to West Virginia. When the abuse and neglect proceeding was filed in 2010, C.C. was in the custody of and living with Robert C.

As previously indicated in this opinion, during the abuse and neglect hearing held on November 18, 2010, DHHR informed the circuit court that the abuse and neglect petition would be dropped against Robert C. DHHR also informed the court that all of the children would be returned to the homes in which they resided prior to the petition being filed, except for C.C. and K.M.[7] DHHR informed the court that it was in the best interest of C.C. to be in the same home with his full siblings, N.C. and N.C.[8] The guardian ad litem and counsel for Christine L. also argued that it was in the best interest of C.C. to live with his full siblings. Other than the oral arguments of DHHR, the guardian ad litem and counsel for Christine L., no actual witness testimony[9] or other type of evidence was presented to the circuit court at the hearing.[10]

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[7]The status of K.M. is not before this Court in this appeal. K.M. was the oldest of the children, and she appears to have expressed a desire to not be returned to her home.

[8]After the abuse and neglect petition was filed, C.C. was removed from the custody of Robert C. and placed in the care of Christine L.

[9]During the hearing, Robert C. personally addressed the court in a plea for the return of C.C., but his statements were not made under oath.

[10]In the circuit court's order dismissing the petition against Robert C., it referenced to consideration being given to a report submitted by DHHR that was dated November 10, 2010. This report was not made part of the record in this appeal. Further, this report was not

Robert C., through counsel, objected to not having C.C. returned to him. Counsel pointed out to the court that the abuse and neglect charges against Robert C. had been dropped and that there was no finding that he was an unfit parent. Robert C. also informed the court that he was awarded custody of C.C. by a Florida court and that if Christine C. wished to have custody of the child, she was required to file a petition for custody modification with the family court. The circuit court rejected Robert C.'s arguments and ordered C.C. to be placed in the custody of Christine L. In this appeal, Robert C. contends that the circuit court did not have authority to modify the custody of C.C. We agree.

The disposition of children brought before a circuit court on a petition alleging abuse and neglect under W. Va. Code § 49-6-1(a) (2005) (Repl. Vol. 2009), is carefully crafted under W. Va. Code § 49-6-5 (2006) (Repl. Vol. 2009).[11] W. Va. Code § 49-6-5(a) provides, in relevant part, that:

> Following a determination pursuant to [W. Va. Code § 49-6-2] wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the

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submitted into evidence during the hearing held on November 18, 2010.

[11]Because the events giving rise to the instant abuse and neglect proceeding occurred before W. Va. Code § 49-6-5 was amended, we will apply the version of the statute that was in effect a that time. *Compare* W. Va. Code § 49-6-5 (2006) (Repl. Vol. 2009) with W. Va. Code § 49-6-5 (2011) (Supp. 2011).

> child. . . . The court shall give precedence to dispositions in the following sequence:
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> (1) Dismiss the petition;
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> (2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;
>
> (3) Return the child to his or her own home under supervision of the department;
>
> (4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
>
> (5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. . . .; or
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> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent.

See In re Beth Ann B., 204 W. Va. 424, 429, 513 S.E.2d 472, 477 (1998) ("[W. Va. Code § 49-6-5(a)] does not foreclose the ability of the parties, properly counseled, in a child abuse

or neglect proceeding, to make some voluntary dispositional plan."); *In re Lacey P.*, 189 W. Va. 580, 585 n.4, 433 S.E.2d 518, 523 n.4 (1993) ("Under W. Va. Code § 49-6-5(c), the legislature permitted the court to allow, as an alternative disposition, the parents a second chance at an improvement period not to exceed [six] months.").

This Court made quite clear in Syllabus point one of *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983) that,

> [i]n a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49-6-5, it must hold a hearing under W. Va. Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

See State v. C.N.S., 173 W. Va. 651, 656, 319 S.E.2d 775, 780 (1984) ("Once there has been a proper finding of abuse or neglect, the proceedings move into the dispositional phase, which is governed by W. Va. Code § 49-6-5.").

As shown above, before a circuit court may decide the permanent custody issue of a child in an abuse and neglect proceeding, it must make a finding that the child has been abused or neglected. In the instant proceeding, all parties agree that the circuit court did not find that C.C. was an abused or neglected child.[12] The parties agree that all allegations of

[12]As previously stated in this opinion, the circuit court did not find that any of the children were victims of abuse or neglect. The case remained open against Patricia C.

abuse and neglect against Robert C. were dismissed without a finding that he abused or neglected any of the children. The circuit court explained its reasoning for transferring custody of C.C. to Christine L. as follows:

> [C.C.] shall be placed in the permanent physical custody of his mother, Christine [L.] In transferring physical custody of [C.C.] from his father to his mother, the Court has considered a number of factors, including, but not limited to, the turmoil in the [paternal] family's home that occasioned the filing of this petition, the needs of the older children, the recommendations of the DHHR and the guardian ad litem and the positive experience [C.C.] has had while living with his mother and his two younger brothers since April. Placing [C.C.] in the permanent physical custody of his mother is in [C.C's.] best interests.

While this Court appreciates the grounds cited by the circuit court for transferring the physical custody of C.C. to his mother, the circuit court simply did not have authority to make such a transfer without first finding C.C. was an abused or neglected child. To the extent that the circuit court believed that C.C. should be removed from the custody of Robert C., it could have rejected DHHR's decision to drop all allegations against Robert C. and forced the case to be litigated on the merits to determine whether C.C. was an abused or neglected child. This was not done, and, consequently, the circuit court's authority was limited to ordering C.C. to be returned to Robert C.[13]

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because her biological daughter, K.M., did not wish to return to her home.

[13]Insofar as we have determined that the circuit court did not have authority to transfer custody of C.C., we need not address Robert C.'s second assignment of error concerning the sufficiency of the evidence.

IV.

CONCLUSION

In view of the foregoing, the circuit court's order of January 3, 2011, transferring custody of C.C. to Christine L. is reversed.

Reversed.

No. 110203 - In re: Kasey M., Kristina M., Kaleb M., Robert M.C., Christopher C., Nicholas C. and Noah C.

FILED
November 15, 2011
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Chief Justice, concurring:

I concur with the majority's decision because it reaches the proper legal conclusion in that W. Va. Code § 49-6-5(a) (2006) (Repl. Vol. 2009), governing abuse and neglect proceedings, precludes a transfer of custody absent a finding of abuse or neglect. While I agree with the circuit court that there were a number of factors in this case that indicated that it would be in C.C.'s best interests to be placed with his mother, the court did not have authority to order a transfer of custody without a finding of abuse or neglect.

The proper means of seeking the change of custody would be a petition for modification. It is important to note that during oral argument in this case, this Court was advised that Christine L. had filed a petition for modification in the family court seeking custody of C.C. This Court also learned that after the circuit court entered its order in the abuse and neglect case transferring custody of C.C. to Christine L., the family court entered a modification order adopting the findings and conclusions in the circuit court's order relating to the placement of C.C. in his mother's custody. However, the family court also made its ultimate decision on the requested modification contingent upon the outcome of this appeal. In that regard, the family court included a provision in its modification order stating

that if the circuit court's order "is modified pursuant to appeal, the resulting Order will be considered the Order of this Court." I am troubled by this order for two reasons.

First, the modification order purports to be a final appealable order, but it clearly is not because the family court's decision was made contingent upon the outcome of this case. How could either party have filed an appeal within the 30-day time limit prescribed by law when the appeal of the circuit court's decision was still pending at that time? Neither party would have been able to ascertain whether the family court order was adverse to him or her in the time frame required for appeal. Second, and even more troubling, is the fact that the family court allowed its decision on Christina L.'s motion for modification to be dictated by the outcome of the abuse and neglect proceedings. Pursuant to W. Va. Code § 48-9-401 (2001) (Repl. Vol 2009), a decision on a motion for modification of custody requires a determination of whether there has been a substantial change in the circumstances of the child or of one or both parents and whether a modification is necessary to serve the best interests of the child, obviously a completely different standard than a finding of abuse and neglect. The allegations of abuse and neglect certainly constituted a change in circumstances, and there were several other factors that indicated that it would be in C.C.'s best interests to be placed in the custody of his mother. Therefore, regardless of the outcome of the abuse and neglect case, it seems that the circumstances probably warranted a modification of custody pursuant to W. Va. Code § 48-9-401.

However, our review in this appeal was limited to the circuit court's disposition of the abuse and neglect petition. Accordingly, for the reasons previously stated, I concur with the majority's decision in this case. However, the family court order has left these parties (and even more importantly, this child) in legal limbo.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35138

IN RE: KATELYN T. AND JOEL T.

Appeal from the Circuit Court of Harrison County
Honorable James A. Matish, Judge
Juvenile Action Nos. 08-JA-66-3 and 08-JA-67-3

REVERSED AND REMANDED

Submitted: March 3, 2010
Filed: April 14, 2010

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "'"W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' . . . . Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990).' Syllabus Point 1, *In re Beth*, 192 W. Va. 656, 453 S.E.2d 639

(1994)." Syllabus point 3, in part, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

3. "'Termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991)." Syllabus point 5, *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996).

4. "'Implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.' Syllabus Point 1, *W. Va. Dept. of Health & Human Resources v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)." Syllabus point 2, *In re Harley C.*, 203 W. Va. 594, 509 S.E.2d 875 (1998).

Per Curiam:

The appellants herein, the guardian ad litem for the minor children (hereinafter "GAL") and the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), jointly appeal from a February 25, 2009,[1] order from the Circuit Court of Harrison County. By that order, the circuit court dismissed the abuse and neglect case against the appellee mother, April P.[2] (hereinafter "April" or "mother"), and her boyfriend, Michael A., Sr. (hereinafter "Michael" or "boyfriend"),[3] and ordered that the children, Katelyn T. (hereinafter "Katelyn") and Joel T. (hereinafter "Joel"), be returned immediately to their mother's custody. On appeal to this Court, the GAL and the DHHR argue that the circuit court rulings were in error. They contend that the clear and convincing evidence shows that the minor children were sexually abused by the mother's boyfriend and, further, that the mother's refusal to recognize the abuse illustrates her inability to protect them. Based on the parties' arguments, the record designated for our consideration, and the pertinent authorities, we reverse the rulings made by the circuit court, and remand the case for further proceedings consistent with this opinion.

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[1]While the written order was entered February 25, 2009, the lower court announced its ruling from the bench on February 18, 2009. On that same day, the GAL filed a motion for stay with this Court, which was denied. The circuit court then entered its February 25, 2009, written order, which is the subject of this appeal.

[2]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[3]The boyfriend, Michael A., Sr., was a party to the underlying action but does not appear before this Court.

I.

FACTUAL AND PROCEDURAL HISTORY

The minor children at issue in this case are Katelyn[4] and Joel,[5] born to biological parents April and Joshua T.[6] The evidence shows that the children had resided on the mother's family's farm for the majority of their lives. During their time on the family farm, the children lived mainly with their maternal grandmother, Charlotte P. (hereinafter "grandmother" or "Charlotte"), both with and without their mother. The maternal aunt, Janet P. (hereinafter "aunt" or "Janet"), was materially involved with the children's care and upbringing and lived at her own residence, also located on the family farm. At times, the children lived in Janet's home. April lived on this family property for much of the time until June 2007 when she left the farm and moved in with her boyfriend, Michael.[7] When April moved from the family farm, the children continued to reside primarily with their grandmother, Charlotte, at her residence. The testimony before the circuit court showed that April, the mother, would take the children for weekends initially, and that this time grew to

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[4]Katelyn's date of birth is June 8, 2004. At the time of the filing of the underlying petition alleging abuse, Katelyn was four years old.

[5]June 30, 2005, is Joel's birth date. Joel was three years of age at the time of the filing of the abuse and neglect petition.

[6]The February 25, 2009, order by the circuit court found that Joshua T. abandoned his children and, further, adjudicated him as a neglectful parent. The lower court terminated Joshua T.'s parental rights to both infant children. The termination of Joshua T.'s parental rights was not appealed.

[7]Michael is the accused sexual abuser identified by the children. During oral argument before this Court, it was reported that the mother, April, continues to live with Michael and, further, that the couple has a newborn child together.

be alternating weeks with the children spending a week at Charlotte's home, followed by a week with April at her boyfriend's house.[8]

The grandmother and the aunt first became concerned when the children were found, on two occasions, running around naked. When questioned about the behavior, the children stated that the mother's boyfriend had told them to take their clothes off. The aunt testified that she could no longer overlook the children's behavioral oddities after an incident at the end of March 2008 when Katelyn stated that the boyfriend's "pee pee" had white "milk" squirt from it, that she had touched it, and that it was big and ugly. On May 14, 2008, the aunt, Janet, sought an emergency protective order based on the allegations set forth by Katelyn.[9] The requested relief was granted, and a final hearing was held May 27, 2008. At this final hearing, April agreed to continue the matter so that the children could undergo a

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[8]Janet also testified that there were times when the children were in her and the grandmother's care, and April could not be found. It appears that there were also times when the grandmother and aunt needed items, such as the children's car seats, and April could not be located to provide such items.

[9]Prior to the filing of the emergency protective order, the aunt had attempted to find help through a "hotline." She had also attempted to involve the biological father and had him sign guardianship papers expressing an interest in the aunt caring for his children. Further, a referral was made to the DHHR alleging sexual abuse on May 12, 2008. The children were interviewed on May 16, 2008, and the child protective services worker reported that, while she had a difficult time obtaining any information from the children, Katelyn did state that toys come out of Michael's "pee wee" in the bathtub, but that she did not see it. The child protective services worker contacted Ms. Tordella, a licensed social worker and counselor who had been working with the children, in late August and was informed that Ms. Tordella was not getting very far with the children, but that Joel had reported that "milk" came out of Michael's "pee bug." The child protective services worker closed her file at that point.

sexual abuse evaluation, and she further agreed that the children could continue to live with the grandmother, with care also being provided to her children by the aunt. It was determined that Margaret Tordella would perform the evaluations.[10] A hearing was held on June 6, 2008, and the emergency protective order was reaffirmed. On November 10, 2008, during a hearing regarding the emergency protective order, the parties revealed the intent to file a private abuse and neglect petition. On that date, an order was issued terminating the emergency protective order, effective at the end of the day on November 14, 2008.

On November 10, 2008, a petition was filed by the maternal grandmother and maternal aunt, alleging abuse and neglect by the mother and biological father. The DHHR sought, and was granted, emergency custody of the children on November 14, 2008. The basis of the abuse and neglect allegations was that the children had been sexually abused by the mother's boyfriend, Michael A., Sr. Specifically, it was alleged that the boyfriend had been masturbating while the children were in his care and that he placed Matchbox cars in his pants and asked the children to retrieve them. Joel described "milk" coming out of the boyfriend's "pee bug," and Katelyn described the "dog hair" around his "pee bug" and the "milk" that would squirt from it. The mother informed the aunt and grandmother that, upon expiration of the emergency protective order, when the children would be returned to her care, she planned to leave the state with them. This threat prompted the filing of the instant

[10]*See supra*, note 9.

petition. Emergency custody was granted to the DHHR on November 17, 2008, and the children remained in the physical custody of the aunt.

An amended petition was filed on November 21, 2008, again by the aunt and grandmother, and now joined by the DHHR, and adding the mother's boyfriend, Michael, as a respondent. The petition contained the same allegations as the initial petition, with the addition that Katelyn had told Ms. Tordella, a licensed social worker and counselor, that the boyfriend had kissed her on the lips and that Joel told Ms. Tordella that the boyfriend placed cars in his own "butt" and that Joel had to retrieve them. He described the cars as being covered with "poop" when he retrieved them. Both children told Ms. Tordella that the boyfriend was mean to them, and that the boyfriend played with the Matchbox cars on his own "pee bug," and that the boyfriend's "pee bug" squirted "milk." The petition alleged that the children had been exposed to unsafe conditions, that the mother had subjected them to drug abuse, that the mother failed to provide Joel with appropriate medical care,[11] and that the mother knew or should have known that her children were being sexually abused and failed to protect them.

An adjudicatory hearing was held December 11, 2008, but had to be continued so that the children could undergo a second sexual abuse evaluation, performed by Chanin Kennedy, upon agreement of the parties. The adjudicatory hearing continued on January 22,

[11]This allegation stemmed from the fact that Joel has a lazy eye for which his mother was not seeking treatment in spite of having a medical card.

2009; February 2, 2009; and February 4, 2009. During the adjudicatory hearings, two expert opinions were introduced on behalf of the petitioners. The experts, Margaret Tordella and Chanin Kennedy, both testified on behalf of the children.

Margaret Tordella began working with the children prior to the filing of the abuse and neglect petition. In performing her evaluation, Ms. Tordella interviewed the children a total of seventeen times from May 30, 2008, through December 5, 2008. The interviews, with the exception of two occasions, occurred with the presence of both children because attempts to separate them for private sessions were unsuccessful.[12] During these sessions, the children revealed instances of inappropriate sexual behavior by Michael, the mother's boyfriend. At the June 10, 2008, session, Joel referred to a matchbox car that he saw on Ms. Tordella's desk. He offered that Michael put cars in Michael's "butt" and would have Joel retrieve them. Joel stated that they would have "poop" on them when they came out. On July 18, 2008, Joel disclosed to Ms. Tordella that Michael played with cars on his "pee-bug" and that "milk" then came out of Michael's "pee-bug." Katelyn was present and agreed that this occurred. Joel was able to differentiate between the yellow urine that comes out of his own penis as being different from the white "milk" that he saw coming out of Michael's "pee-bug." At a subsequent session, the children again referred to Michael playing in his "butt" and on his "pee-bug" with Joel's cars. Further, Katelyn stated that she saw hair on Michael's "pee-bug." On October 31, 2008, the children again discussed the

[12]Katelyn was able to attend a private session on two occasions because Joel was asleep during one meeting and uncooperative during the other session.

white "milk" that comes out of Michael's "pee-bug." According to Ms. Tordella, the children indicated that all of these incidents occurred at Michael's home. While there was testimony that the mother, April, was home during these occurrences, there was no indication that she was in the room during any of the events in question. During her testimony at the adjudicatory hearing, Ms. Tordella opined that the children's sexual knowledge was not appropriate for their ages. Importantly, she found the children's reporting to be consistent and credible, and further opined that she did not feel that the children had been coached.

Chanin Kennedy is a licensed psychologist who performed the sexual abuse evaluation after the institution of the abuse and neglect petition. She met with the children individually on January 8, 13, and 15, 2009. Even though she was able to separate the children for their sessions, Ms. Kennedy agreed that the children were resistant to being isolated from each other. Ms. Kennedy also met with the mother, April, on January 13, 2009, and with the aunt, Janet, on January 14, 2009. According to Ms. Kennedy's testimony during the adjudicatory hearings, both children were difficult to interview and both exhibited age-inappropriate sexualized behavior. During one of the sessions, Katelyn revealed that her mother's boyfriend, Michael, showed his "pee pee" to her and to her brother, and that it squirted "milk." In describing how his "pee pee" squirted "milk," Katelyn stated that Michael "shaked it himself with his hand." Joel, during his individual sessions with Ms. Kennedy, disclosed that Michael's "pee pee" squirts "milk" and that his sister, Katelyn, had touched Michael on his "pee pee." Ms. Kennedy reported that there was no evidence

presented by the children that the mother knew about any of the children's stories or that she was present in the room when any of the actions occurred. Based upon her evaluation, Ms. Kennedy also reported that she does not feel that the children are vulnerable to coaching by others and their reporting was credible. Ultimately, Ms. Kennedy determined that the children exhibited age-inappropriate sexual behavior and, further, that the children had, in fact, been sexually abused.

Ms. Kennedy also testified about her sessions with the mother and the aunt. As a result of those meetings, Ms. Kennedy was left with the impression that the mother did not believe that anything inappropriate had occurred. She further testified that April stated she was aware of the abuse allegations prior to the filing of the abuse and neglect petition. While April stated that she would leave Michael if a court order required her to do so, she also presented many excuses as to why she could not leave him. Ms. Kennedy found that the mother presented a high risk factor for returning to Michael even if ordered to separate for the benefit of the children. Further, Ms. Kennedy found that the aunt, Janet, sincerely was concerned for the health and welfare of the children and that she had no other motive for her allegations.

The children's mother, April, also testified at the adjudicatory hearings. She stated that she does not believe that her boyfriend, Michael, did anything sexually inappropriate with the children. To explain her children's knowledge of age-inappropriate

sexual acts, she offered that perhaps they had walked in on her boyfriend's adult son while he was watching cartoons with sexual content. April also suggested that Katelyn had walked in on Michael while he was urinating in the bathroom. Further, she testified that they had no matchbox-style cars in the home and that the only cars in the home were much larger than a matchbox car; thus, she did not believe that her son, Joel, had created the story of the cars being placed in Michael's rectum on his own but, rather, that someone had provided him such information. However, all of these possible explanations for the children's exposure to sexual knowledge were discounted and contradicted by the testimony of Michael's adult son, who also lives in the home. Michael's son testified that the cartoons he watched contained scenes of naked breasts, but no masturbatory scenes. Further, he testified that the family members always made it a practice to lock the bathroom door behind them. Most significantly, he testified that the house contained many matchbox-size cars, describing a car size that directly contradicted the children's mother's testimony. He also stated that Joel has a carrying case that holds at least thirty-two of the small matchbox-size cars.

The lower court issued its adjudicatory order orally on February 18, 2009,[13] followed by its written order of February 25, 2009, which order is the subject of this appeal. In its order, the lower court found that sexual abuse had not been shown by clear and convincing evidence. The order states that the children have told inconsistent statements to five individuals and, therefore, are not credible. Further, the circuit judge discounted the

[13]A motion to stay the underlying ruling was filed with this Court on February 18, 2009, which was denied.

findings of Ms. Tordella because she interviewed the children together instead of separately,[14] as would be normal protocol. Thus, the order reasoned that the children were already tainted by the time they met with Ms. Kennedy, and her opinions were discounted for that reason. The order also took issue with the legal maneuverings of the parties and suggested that the aunt and grandmother had used and manipulated the system.[15] Therefore, the lower court dismissed the case against the mother and the boyfriend and ordered that the children be returned to their mother that same afternoon. The appeal by the GAL and the DHHR is now before this Court.

II.

STANDARD OF REVIEW

This case is before this Court on appeal from the circuit court's order dismissing the abuse and neglect petition and finding a lack of clear and convincing evidence

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[14]Ms. Kennedy also expressed concern with Ms. Tordella's interview techniques. Ms. Tordella explained that the children were impossible to separate and would cry and cling to one another. Ms. Kennedy likewise found the children to be very difficult to interview and had to schedule additional sessions with them above and beyond the normal practice. Despite Ms. Kennedy's trepidation with Ms. Tordella's tactics, she ultimately arrived at the same conclusions that the children had been sexually abused, were credible, had experienced the instances firsthand, possessed sexual knowledge inappropriate for their ages, and did not exhibit signs of being coached.

[15]In addition to the emergency protective order and the private abuse and neglect proceeding, the aunt had also talked the biological father into filing a motion for custody so that she could intervene in the matter as she did not have standing on her own to file such an action. The lower court found that the aunt had been involved in five different court proceedings in an attempt to gain custody of the children.

of sexual abuse of the minor children. This Court has previously explained that, in the realm of an abuse and neglect case,

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Mindful of the applicable standards, we proceed to consider the parties' arguments.

III.

DISCUSSION

Before this Court, the GAL and the DHHR filed a joint petition for appeal asserting the following three assignments of error: (1) the lower court erred in finding a lack of clear and convincing evidence of sexual abuse, (2) the circuit court erred in holding the legal maneuverings of the parties against the children and failing to rule in the best interests of the children,[16] and (3) the lower tribunal erred in dismissing the case against the mother

[16]Because of the manner in which we decide the first assignment of error, we (continued...)

because she failed to acknowledge that her boyfriend sexually abused her children and, therefore, failed to protect them. In response, April, the mother, argues that the rulings of the circuit court should be affirmed because there was no evidence that she abused or neglected her children or that she failed to protect them from abuse. She asserts that there was no evidence that her boyfriend sexually abused her children. Further, she argues that there was no evidence that she had knowledge of allegations of child abuse by her boyfriend or that she failed to protect her children as a result of having any such information.

Finding it dispositive of this case, we will first address the GAL and DHHR's argument that there existed clear and convincing evidence that the children were sexually abused. In that regard, W. Va. Code § 49-1-3(a) (2007) (Repl. Vol. 2009) defines an "[a]bused child" as a "child whose health or welfare is harmed or threatened by . . . [s]exual

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[16](...continued)
need not address this issue of the lower court's perception of the parties' legal maneuverings. However, we note our concern that the parties' behavior and the lower court's dislike for the same was elevated above a concern for the well-being of the children. *See* Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("[T]he primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children."). The circuit court found that the aunt "has been involved in five attempts to obtain custody of the children" and that "in this case the system was being used and manipulated and that needs to stop." While we agree that manipulation of the legal system is inefficient and improper, we also note that our independent review of the record, as well as the experts' opinions in this case, shows a family member who was sincerely and genuinely concerned about the well-being of these children and was clearly desperate to explore any avenue that may provide assistance to the children. As such, we decline to elevate any disdain for the procedural improprieties over our mandate to hold the welfare of the children as the polar star by which this Court will be guided.

abuse or sexual exploitation[.]" Pertinent to the facts of the present case, the term "sexual abuse" includes

> [a]ny conduct whereby a parent, guardian or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian or custodian, of the person making such display, or of the child, or for the purpose of affronting or alarming the child.

W. Va. Code § 49-1-3(l)(C). In examining the evidence in this case, we are mindful that "[t]he findings [of abuse or neglect, if applicable] must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof." W. Va. Code § 49-6-2(c) (2006) (Repl. Vol. 2009). We are guided by the proposition that

> "'W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." . . . . Syllabus Point 1, *In Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).' Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990)." Syllabus Point 1, *In re Beth*, 192 W. Va. 656, 453 S.E.2d 639 (1994).

Syl. pt. 3, in part, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995). While the statute requires the DHHR to prove the conditions existing at the time of the filing of the petition by clear and convincing proof, "[t]he statute, however, does not specify any particular manner or mode of testimony or evidence by which the [DHHR] is obligated to meet this burden." Syl. pt. 1, in part, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981).

In the present case, the circuit court stated as follows:

> This Court realizes its duty to protect the children, but parents also have rights and allegations of sexual abuse have serious and lifelong consequences to those who are so accused. However, the petitioners have the burden of proof by clear and convincing evidence that these children have been abused or neglected at the time the petition was filed and they have failed to meet that burden not only with respect to these allegations, but also all other allegations set forth in the Petition and Amended Petition including the allegations that the mother has a substance abuse problem or that Michael . . . or April . . . physically abused the children.

The DHHR submitted testimony from two mental health experts to support its claims of sexual abuse. The respondent mother and the mother's boyfriend presented no contrary expert evidence. Thus, to find that no clear and convincing evidence existed, the circuit court disregarded the testimony of two mental health experts, which was the only expert testimony in the case. In regard to the first expert, Margaret Tordella, the circuit court found that "Tordella's interviewing of the children violated standard protocol of evaluation of children suspected of sexual abuse in that she interviewed them together." Further, the lower court stated as follows:

> The Court finds that the interview techniques used by Tordella regarding the interviewing [of] the children together; the fact that on numerous occasions she got no information from the children; the fact that the children would want to mirror and do what the other was doing in the session; the lack and [sic] consistency in what the children told her in sixteen joint sessions; the fact that nothing was disclosed by Katelyn on the one occasion in which she was alone with her and that was the only occasion that her mother brought her to Tordella's office; and that Tordella was trying to do both an evaluation and therapy. Therefore, her opinion in this case as to whether or not these children were sexually abused is not worthy of any belief.

In reviewing the testimony of the second expert, Chanin Kennedy, the lower court found that "Kennedy expressed concern over Tordella's deviation from standard protocol in seeing the children together; in taking six months to do forensic interviews; and if Tordella was doing both evaluations and therapy, it was inappropriate. Kennedy did not get to see these children until after they were contaminated by Tordella." Thus, the circuit court disregarded the findings made by Ms. Kennedy as being tainted due to the previous inappropriate interview techniques employed by Ms. Tordella.

However, we determine this finding by the circuit court to be misguided. In examining the testimony adduced at the adjudicatory hearing, it is significant that the only expert testimony in this case was submitted by the DHHR. In her testimony, the following information was elicited from Ms. Tordella:

> Q. Okay. And did you meet with the children together or separately?
>
> A. I met with the children together. They would not separate. I found the children to be very shy and clingy to one another. They would not separate. They would, you know, at the very first -- well, this was the very first session because Janet had to be in the room for the other one to provide some of the information, and they would not separate. They would not even come down the hallway with me alone, so she had to walk down the hallway, and then made the excuse she needed to use the restroom so she could leave.
>
> . . . .

Q. -- is it fair to say that in all the sessions you saw the children together?

A. In most of all the sessions. Towards the end after Katie started in school and she was more willing to separate, I saw her, I think, twice without Joel.

. . . .

Q. Let me ask you, these children at the outset when you started seeing them were three and four years old?

A. Yes.

Q. Is their sexual knowledge appropriate for their age?

A. No, it's not.

. . . .

Q. Have they been consistent in the information that they have provided to you in your opinion?

A. Yes, they have. I mean they began telling me that -- telling me bits and pieces at the very beginning of, you know, when I first started seeing them and they've been consistent throughout --

Q. Okay.

A. -- telling me more.

. . . .

A. . . . I also attempted, too, to see the children separately. In the very beginning there was no way. I had tried to bring back, you know, had said, well, this will be Katie's turn, and then Joel will have a turn. They cried and carried on and would not agree to that. Now later on, I did see Katie twice alone. One time was because Joel was asleep and the other time was because Joel was uncooperative. But I think part of what had happened is

Katie had started going to school, and so she was more used to separating from Joel.

Q. Let me ask you, given the fact that the children saw you jointly, and that the children heard what each other was saying, do you believe that in anyway tainted the statements you were receiving from the children?

A. No, because there was collaboration from the children when they told me that. You know, one would make a statement and another one would add to it.

Q. Did they appear to be spontaneous statements or rehearsed?

A. They were spontaneous because at times they took me by surprise when they said them.

. . . .

Q. So would it be safe to say that you believe you would not have this little bit of disclosure had you tried to separate the siblings?

A. I don't believe they would've. I would've -- I think they would've seen me as one of the mean people and would not have talked to me.

Q. Do you believe the children were credible in what they reported?

A. I believe they were credible because they were consistent in reporting this. I mean there were gaps in my seeing them because of -- Friday was the best day to see the children because that was on a day that Katie was in school so things were calmer and stuff, and it was always later in the afternoon for convenience to the family. And there were times -- a number of times where I had to cancel because I got called out on a crisis. The children through the fall seemed to be -- have, you know, pink -- they had pinkeye, ear infections, colds, so they had been through a lot. There were a number of gaps yet they

would come back and be consistent in telling me what they --

Q. Based upon --

A. -- you know, the same information.

Q. -- your previous experience working with other children, you had testified earlier you do not believe the children were coached?

A. No. You know, the standard is that if the child is able to tell you three times then it's a believable statement. I asked them in different ways. We would, you know, there were times, you know, usually if a child is coached, the first thing they tell you when they walk in -- and especially children this young age, they would blurt everything out because they would remember. We would be in there playing. We would be in the room for a period of time having played and talked and done different things, and they would come out with this information. You know, and it appeared that it was information that they were remembering or responding to.

Further, on cross-examination, Ms. Tordella recognized that she violated the standard protocol in interview techniques, but explained that "my preference usually is to interview children alone. I could not get these children to separate."

Significantly, the second expert, Chanin Kennedy, directly addressed and rebutted the circuit court's concerns in her testimony. The relevant portions of her statements made during the adjudicatory hearing are as follows:

Q. Was it correct that these two children were very hard to separate?

A. They were hard to separate from each other and they were hard to separate from their maternal grandmother and aunt who brought them to the session. It's standard protocol to interview the children individually without other adults present. And just getting them to cooperate in general was very difficult. Getting them to sit at the chairs. Sit at the table. Be directed to activities we were working on. All of those things were very difficult.

. . . .

Q. But you interviewed them separately?

A. Correct.

. . . .

Q. Did you believe from your sessions with the children that they had been coached?

A. No. There was no evidence based on the information that's been provided to me that the children have been coached. Their statements are spontaneous. They've given information that have [sic] not -- have [sic] not been previously disclosed or known to their grandmother, to Janet, or to any other party, including Peggy Tordella.

Q. Now you're aware of the interviews with Peggy Tordella, correct?

A. Yes.

Q. Have you seen the reports from Peggy Tordella?

A. Yes.

Q. Obviously there's a concern that Ms. Tordella interviewed both children together?

A. Yes.

Q. Could that have changed -- tainted what the children disclosed to you?

A. It certainly complicates issues in the sense that the children were interviewed together. And one disclosure from one child could potentially contaminate the other child, and so it makes it more difficult to be able to say with any kind of certainty whether both children experienced this or one did and heard the other talking about it.

I think what has helped me have a better understanding of the children's perspective is that Katie made a disclosure to me that was not made to Peggy Tordella, to her grandmother, or to her aunt, and is information that a four-year old child could not just spontaneously make up. It would be information that would had -- had to have been observed and that's the shaking the penis to make milk come out statement.

Q. Okay. So she said he shook the penis to make the milk come out?

A. "His pee-pee squirts milk. He shaked it himself with his hands and milk squirted out."

Q. Okay. Did Joel make any independent disclosures that he had not made previously?

A. Joel's statements were more consistent with what he had talked about previously with Peggy, the milk squirting out. Although Peggy documents that that was a disclosure that Joel had made first to my recollection in her sessions and that Katie -- that Katie had touched Mike's pee-bug.

. . . .

Q. . . . do you believe that the children have inappropriate sexual knowledge?

A. Yes.

. . . .

Q. Do you believe, in looking at all the information that you have, that these children have been consistent?

A. With the core details, the children have been consistent regarding inappropriate sexual contact with their mother's boyfriend, Mike. I think due to a lot of barriers the children haven't been able to provide the level of peripheral, the details around the core details, that I would like to see. I think their age is a barrier. I think the fact that they had previously been evaluated is a barrier. I think these are kids that have a very unstructured kind of day with grandma and it's very difficult to get them used to a more structured forensic interview. I think those have all been barriers to gain additional information.

Q. Do you believe that there's consistency from their disclosures to Peggy Tordella up until the time of their disclosures to you?

A. Your question is are the details consistent between myself and Peggy?

Q. Yes.

A. Yes, they appear to be.

Q. Now given that Ms. Tordella interviewed the children together, do the disclosures made to Ms. Tordella lack credibility as far as you're concerned?

A. Not -- they don't lack credibility. They certainly make it more difficult to fully assess the children because the children were interviewed together, and as I've stated before, an interview in front of another child questions whether both children experienced this or just one.

It's my understanding that the children had given to their grandmother and to their aunt some spontaneous disclosures before they had ever met Peggy, suggesting

that both children had witnessed and or experienced some level of inappropriate sexual contact with Mike. Specifically that he -- Mike had told them to get naked with him. Joel had said that Katie had touched Mike's pee-pee. Katie had said that white milk had come out of Mike's pee-pee. And so these were statements that were made prior to contact with Peggy, and certainly consistent with information they gave me.

. . . .

Q. After conducting all of your interviews, were you able to come to any conclusions?

A. The children are exhibiting sexualized behaviors and knowledge that are not age and or developmentally appropriate. They're exhibiting emotional and behavioral characteristics that are often seen in sexually abused children. The children I have -- I believe are having difficulty articulating what they've observed, what they've -- what has happened to them because of their young age.

I think I have identified concerns regarding their mother's tendency not to respond to the allegations. When I spoke to April she had a plan to stay -- stay with Mike. She had -- she's pregnant with Mike's baby. She didn't have a plan to separate. I asked her if the court ordered her or required her to separate would she be able to do that? And she was really vague about how she would do that. Very inconsistent about whether she would really be willing to follow through with that.

The children, I think, are experiencing some adjustment related problems as far as poor boundaries with others, lacking trust of others, being withdrawn, some social skills deficits that I believe could be worked on. And so overall, that would be my diagnostic impressions.

Further, on cross-examination, Ms. Kennedy testified as follows:

Q. Given all of those criteria, and I think you said before there was eight total, all of those criteria, do you believe that the children's reporting is credible?

A. I've diagnosed them as sexually abused children and I think that they demonstrated a level of credibility given the barriers that we have, yes.

Thus, both experts squarely addressed and refuted the circuit court's basis for disregarding their opinions, that being the failure of the first expert to follow the standard protocol in interviewing these children. While we do not condone nor view lightly such a failure to follow the normal procedure, we recognize that this Court encountered a similar situation, involving the same mental health practitioner, in a previous case. In the case of *In re: Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002) (per curiam), this Court affirmed the lower court's termination of the father's parental rights. In that case, Ms. Tordella was involved in a sexual abuse case wherein her interview techniques with the child were called into question by a subsequent expert. However, in the *Tonjia M.* case, unlike the present case, the second expert could not confirm Ms. Tordella's opinion and, rather, found that she could neither confirm nor deny that sexual abuse had occurred. The lower court in *Tonjia M.* recessed the proceedings to have a third mental health expert, Chanin Kennedy, who happens to be the second expert in the case currently before this Court, perform an independent evaluation. Ms. Kennedy, in the *Tonjia M.* case, found that the child exhibited sexual behaviors inconsistent with other children in her age group. Based on this testimony, the lower court found that Tonjia M. was a victim of sexual abuse and terminated the parental

rights of her father. The termination was affirmed on appeal to this Court, based, in part, on the opinion of Ms. Tordella and the two other experts in the case. While recognizing the inadequacies in Ms. Tordella's interview tactics in this case, this Court, like the Court in *Tonjia M.*, will rely on her opinion due, in large part, to her full and adequate explanation as to her reasons for deviating from standard protocol. Further, the subsequent explanation by Ms. Kennedy, while recognizing the faults with Ms. Tordella's interview styles, fully explained the impact of Ms. Tordella's actions. Ms. Kennedy further elaborated on her ultimate opinion in the case, which was similar in all significant respects to Ms. Tordella's, despite any procedural failures by Ms. Tordella.

Therefore, we find it was clear error for the circuit court to disregard the only expert evidence in the case. Both experts addressed the deviation in the interview techniques employed by Ms. Tordella, and, while Ms. Kennedy did not agree with the methodology, both opined that it did not alter their final opinions in the matter. Not only did both experts agree that the interview techniques did not change the outcome in this case, but both experts also found that these children were credible reporters, were consistent with their disclosures over time, and did not raise any suspicions that they had been coached. Importantly, Ms. Kennedy, although not in agreement with Ms. Tordella's interview techniques, found that it did not taint her examination of the children. The testimony of two independent mental health professionals, who both reached the conclusion that the children were sexually abused

by the boyfriend engaging in self gratification, was clear and convincing evidence that abuse has occurred.

In making this determination, we recognize that both experts stated that the children reported that their mother was not present in the room when these instances took place. Acknowledging that the statute requires that "[t]he findings [of abuse or neglect, if applicable] must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof[,]" W. Va. Code § 49-6-2(c), the lower court found that "April . . . was not present when any of the alleged events happened in Mike's house in his living room." Further, the lower court found that

> [a]t the time of the filing of this petition, the children had not been in . . . Michael['s] . . . residence with their mother for the last six months and there is no indication that the mother, April . . . had sufficient information to know, or should have known, that these two children had any in [sic] appropriate sexual knowledge or were sexually abused by anyone.

Therefore, the lower court found, and April argues, that she could not have failed to protect her children because they were never in her care after she became aware of the sexual abuse allegations against her boyfriend. We find this argument to be without merit.

The present case has not developed to the point of necessitating a determination of the appropriateness of terminating the mother's parental rights; however, we find guidance from the applicable case law regarding a parent's nonparticipation in alleged abuse and the effect on termination of rights. This Court, in Syllabus point 5 of *West Virginia Department*

of Health and Human Resources ex rel. Wright v. Doris S., 197 W. Va. 489, 475 S.E.2d 865 (1996), stated as follows:

> "Termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W. Va. Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991).

Moreover, we have counseled that

> "[i]mplicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." Syllabus Point 1, *W. Va. Dept. of Health & Human Resources v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996).

Syl. pt. 2, *In re Harley C.*, 203 W. Va. 594, 509 S.E.2d 875 (1998). In the *Harley C.* case, this Court recognized that the applicable statute defining an abused child to include one whose parent "knowingly" allows another person to commit abuse does not require that a parent actually be present at the time the abuse occurs, but, rather, that the parent was presented with sufficient facts from which he or she could have and should have recognized that abuse has occurred.

While the facts as presented at the time of the filing of the petition are paramount, this Court has recognized that evidence of a parent's progress, or lack thereof, during the pre-adjudication improvement period in making a determination of whether the subject child is an abused and/or neglected child is a proper consideration when it relates back to conditions that existed at the time of the filing of the abuse and/or neglect petition, and that were alleged in such petition. *See generally State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1994). Significantly, termination of parental rights requires a specific and independent finding of fact or conclusion of law that the child was abused or that the child would be at risk of being abused if returned to that parent's custody. *See generally In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692.

In the present case, the mother was told by the aunt, the grandmother, and two mental health professionals of the children's disclosures of sexual abuse. While the timing of such disclosures to the mother is in question, Ms. Kennedy was quite clear in her testimony that April knew of the allegations, by her own admission, prior to the filing of the abuse and neglect petition.[17] Yet, April continued to live with the alleged perpetrator and believed him when he said he did not abuse the children. Her failure to acknowledge the facts, even when confronted by mental health experts and their opinions that the children had

[17]Ms. Kennedy's testimony was that April admitted that she knew about the disclosures of the children that her boyfriend had told the children to get naked with him. Further, April stated to Ms. Kennedy that she knew it was an ongoing concern of Charlotte and Janet's prior to the time of the filing of the abuse and neglect petition. Disclosures by the children regarding Michael playing on his "pee bug" and the squirting of "milk;" however, were not realized by April until the serving of the abuse and neglect petition.

been sexually abused, shows her inability to protect the children from such behavior. In fact, the mother fashioned stories to try to explain away the inappropriate sexual information known by her children, even to the extent of lying about whether her son possessed any cars the size of matchbox cars.[18] The interview by Chanin Kennedy showed April to be at high risk of returning to a relationship with Michael.[19] Even in the face of serious allegations by

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[18]The mother testified that her son did not own any cars of such size. However, her boyfriend's adult son, who also lived in the home, testified to the presence of cases of cars that are of the same size as Matchbox cars.

[19]During her testimony, Ms. Kennedy addressed the situation as follows:

> Q. Okay. Given the history of the children disclosing first to grandma, to the aunt, the process with Peggy Tordella, the process with you, do you have concerns in regards to April['s] . . . failing to protect these children?
>
> A. Yes.
>
> Q. Could you explain that?
>
> A. I think that -- and April and I discussed this directly. There's a lot of information to suggest these kids have been exposed to sexual behavior. They're reporting sexual contact with Mike, her boyfriend. I told her that there's never a case where someone can walk up to her and say 100 percent I know this happened. I witnessed it. It's there. But you have to weigh the risk to your children and listen to what your children are saying.
>
> The fact that she has not taken further steps to protect the kids, that she has

(continued...)

her children, which were supported by all of the experts in the case, April disregarded the possibility that the allegations were true and has failed to take any actions to extricate herself from a man who had abused her children. Significantly, she remains with this man, and they have a newborn child together.[20] Because April clearly knew of the sexual abuse allegations prior to the filing of the abuse and neglect petition and because she has failed to take any steps, even to the present, to absent herself from a man whom all experts agree committed acts of sexual abuse against her children, it was error for the circuit court to dismiss the petition against her.

IV.

CONCLUSION

For the foregoing reasons, the February 25, 2009, order by the Circuit Court of Harrison County is reversed to the extent that it failed to find clear and convincing evidence that sexual abuse of the minor children had occurred. Accordingly, this case is remanded to the circuit court for entry of an order adjudicating Katelyn and Joel as abused

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[19](...continued)

> become pregnant with this man during this process, has not separated from him despite the ongoing information provided to her about that, raises the level of risk that she won't be able to protect them in the future.

[20]We also recognize that, during oral arguments before this Court, the DHHR represented that it has continued to extend counseling services to the mother and to Katelyn and Joel, but that the mother has refused all offered services because she does not believe that any abuse has occurred.

children based upon the sexual abuse perpetrated upon them by the boyfriend, Michael, and based upon the failure of the mother, April, to acknowledge that such abuse had occurred and her failure to take any actions to protect the children. This case is remanded to the circuit court for further proceedings consistent with this opinion.[21]

The mandate of this Court shall issue contemporaneously herewith.

Reversed and Remanded.

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[21]Recognizing the amount of time between the lower court's order and the finalization of the appeal process before this Court, we remind the parties that the remand proceedings should be disposed of forthwith. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Further evidencing the priority placed on cases involving abused and neglected children, this Court has also stated that "matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. pt. 5, in part, *id.* Prompt resolution in such cases attempts to protect children from the turmoil associated with the lack of stability in their surroundings and in their caretakers. *See* Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians.").

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November 30, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
September 2006 Term

_____

No. 33005

_____

KATHERINE B. T.,
Petitioner Below, Appellant
v.
SALLY G. JACKSON, Judge of the Family Court of
Jefferson County, West Virginia; and
RICHARD B.,
Respondents Below, Appellees

_____

Appeal from the Circuit Court of Jefferson County
Hon. Thomas W. Steptoe, Jr., Judge
Case No. 05-C-108
AFFIRMED

_____

Submitted: October 4, 2006
Filed: November 30, 2006
Nancy A. Dalby, Esq. Robert D. Aitcheson, Esq.
Charles Town, West Virginia Charles Town, West Virginia
Attorney for Appellant Attorney for Appellee Richard
B.
JUSTICE STARCHER delivered the Opinion of the Court.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.
220 W. Va. 219, 640 S.E.2d 569
i
SYLLABUS BY THE COURT
1. “A writ of prohibition will not issue to prevent a simple abuse of
discretion by a trial court. It will only issue where the trial court has no jurisdiction or
having such jurisdiction exceeds its legitimate powers.” *W.Va. Code*, 53-1-1. Syllabus
Point
2 of *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).
2. “In determining whether to entertain and issue the writ of prohibition
for cases not involving an absence of jurisdiction but only where it is claimed that the
lower
tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether
the

party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

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3. "Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided." Syllabus Point 1 of *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989).

4. "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1 of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

5. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5 of *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

6. Under *W.Va. Code*, 48-27-305 (2002), a minor may file a petition for a domestic violence protective order.

iii

7. When a minor, without a next friend or guardian, files a petition for a protective order under *W.Va. Code*, 48-27-101, *et. seq*., the court in which the petition is filed shall immediately upon filing of the petition appoint a guardian *ad litem* for the minor.

8. When any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to *W.Va. Code*, 49-6A-2 (2006) and, if applicable, Rule 48 of the *Rules of Practice and Procedure for Family Court*.

[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the last names of the parties. *See In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

1

Starcher J.**:**

Appellant appeals from an order entered by the circuit court of Jefferson County denying her petition for a writ of prohibition. The appellant claims in her petition that a family court judge exceeded the jurisdiction of the family court by issuing a domestic violence protective order upon a petition filed by a minor. For the reasons set forth below, we affirm the dismissal of appellant's petition.

I.

Facts & Background

In the early morning hours of December 31, 2004, Richard B.[1] filed a domestic violence petition against his mother, Katherine B. T., in the magistrate court of Jefferson County, West Virginia. In the petition Richard B. claims that in the late hours of December 30, 2004, in Charles Town, West Virginia, "My mom provoked me and came after me and choked me. She also punched me in the face."

At the time of the filing of the petition Richard B. was a minor – fifteen years old. Also, at the time of the filing of the petition Richard B. was accompanied by his sister,

[2]

The magistrate made findings which included the following:

. . .

C. Petitioner has proven the allegations of domestic violence or abuse by clear and convincing evidence of immediate and present danger of abuse, and is entitled to mandatory relief as provided by W.Va. Code § 48-27-502.

D. (Initial if applicable) mpr That Petitioner has proven by clear and convincing evidence the need for the permissive relief granted in this ORDER as provided by W.Va. Code § 48-27-503.
The court makes the following findings of fact which support the conclusion stated in section C & D:
Petr's [Petitioner's] sworn statement; physical evidence of abuse [;] Statements & information from sister ie [sic]: history of violence between mother and children
. . .
PERMISSIVE RELIEF
. . .
12. mpr OTHER as allowed by W.Va. Code § 48-27-403: Petr [Petitioner] is going to stay w/ his sister, Jennifer M[.] (27 yr. Old) in Burnie, MD
. . .

[3]The record reflects that the following was sent by FAX to the Department of Health and Human Resources:
December 31, 2004
(continued...)
2
Jennifer M., a twenty-seven year old married woman who is the mother of two children. Jennifer M., however, was not named in the petition as next friend.
After reviewing the petition, the magistrate entered an emergency protective order and placed Richard B. in the custody of his sister, Jennifer M., who lived in nearby Maryland.[2] Subsequent to the hearing, the magistrate by telephone and by FAX reported the incident to the Department of Health and Human Resources ("the DHHR").[3]

[3](...continued)
Jefferson County DHHR Office
BY FAX: 267-0121
Attached for your information is a copy of a Domestic Violence Petition and Emergency Protective Order that was issued about 2:30 a m. today
I called the Hotline to report the incident. I spoke with Terry and told her I woul fax this paperwork to you Hope it helps.
Thank you.
[signature]
Mary Paul Rissler, Magistrate
Jefferson County
cc: Family Ct. Judge

[4]The order by its terms expired on July 10, 2005.

[5]Paragraph 5 of the order granting custody states:

(continued...)

3

On January 11, 2005, the family court of Jefferson County, West Virginia, conducted a final hearing on the petition. At the beginning of the hearing the court recognized the petitioner's sister, Jennifer M., as next friend and treated her as such by allowing her to remain in the hearing as a party while other witnesses were segregated. The minor petitioner was represented by counsel, Robert D. Aitcheson, and the respondent Katherine B. T. (petitioner on appeal) appeared *pro se*.

After hearing evidence from both the minor son and the respondent mother, the family court issued a 180-day protective order[4] and granted temporary custody to Richard B.'s sister, Jennifer M. The family court judge then, at the request of Jennifer M., granted permission to place Richard B. in the physical custody of Randall W., a family friend, who also was present and who testified at the hearing.[5] Randall W. is also a resident of Maryland.

[5](...continued)

PERMISSIVE RELIEF:

The following items initialed by the family law master [family court judge] are further **ORDERED:**

. . .

5. ✓ Temporary custody of (*list names of children, if any*) Richard [B.] is awarded to (*check one if granted*) G Petitioner G Respondent. his sister Jennifer [M.]. She may place him with Randall [W.], a family friend.

4

On January 13, 2005, the respondent mother appealed the order of the family court to the circuit court, claiming that false statements were made against her by her son and daughter. The circuit court conducted a hearing on the appeal on January 25, 2005, and reviewed the record of the family court. The circuit court affirmed the family court's protective order on January 25, 2005. The respondent mother, Katherine B. T., immediately filed a petition in the family court to modify the protective order. No specific relief was requested in the petition.

On February 3, 2005, the minor son, Richard B., by counsel filed a petition for contempt against his mother, Katherine B. T., alleging that his mother violated the protective order by making excessive phone calls to him. On February 8, 2005, the respondent mother, Katherine B. T., filed a second petition in the family court to modify the protective order, this

time seeking visitation with Richard B. On the same day, the family court considered the son's petition for contempt, and found the respondent mother, Katherine B. T., in contempt.

The family court also considered the mother's motion to modify the protective order, and
5
issued a modified protective order which permitted the petitioner, Richard B., to spend time with his mother, Katherine B. T., as "he [Richard B.] desires."

On March 9, 2005, the respondent mother, Katherine B. T., for the first time, appeared by counsel, by filing a motion in the family court to dismiss the original petition, or in the alternative, that the court enter an order placing the custody of Richard B. with an appropriate adult in West Virginia. On April 11, 2005, Richard B. filed a motion for drug testing of his mother, Katherine B. T. By order dated April 12, 2005, the family court denied the mother's motion to dismiss and the son's motion for drug testing.

On April 13, 2005, Katherine B. T., the respondent below and appellant in the instant case, filed a petition for a writ of prohibition in the circuit court against Sally G. Jackson, Judge of the Family Court, claiming, among other things, that the family court exceeded its legitimate powers by granting relief to the minor, Richard B., in the underlying case. The circuit court considered the petition for a writ of prohibition at a hearing on June 29, 2005, and entered an order denying the petition. It is from this order that the petitioner, Katherine B. T., appeals.

II.

Standard of Review

6
We first turn our attention to the standard of review to be applied in the instant case. We held in Syllabus point 2 of *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977) that:

> A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1.

Furthermore, we held in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) that:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1)

whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Finally, we held in Syllabus Point 1 of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) that:

[6]*See W.Va. Code*, 48-27-505(a) (2001) which limits protective orders to 180 days.

[7]

Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

We consider these principles applicable to the instant case.

III.

Discussion

We begin our discussion by noting that since the protective order in the underlying domestic violence case expired by its own terms and by operation of law[6] on July 10, 2005, it would appear that the instant case is moot. The petition for appeal was received by this Court on October 31, 2005, nearly three months after the expiration of the underlying domestic violence protective order issued by the family court.

Complicating our consideration of the instant case is the fact that in oral argument we learned that on July 7, 2005, three days before the expiration of the underlying domestic violence protective order, Richard B., by his next friend, Randall W., filed a new and separate petition in the family court of Jefferson County against the minor's mother, Katherine B. T., requesting that emergency and permanent custody be placed in Randall W.

We further learned that on July 8, 2005, the family court entered an order granting

[7]We take judicial notice of a July 8, 2005, order in Jefferson County Civil Action No. 05-D-210, in which custody of Richard B. was granted to Randall W. after the court

concluded that Randall W. was fit to have custody.
In the July 8, 2005, order the family court stated:
This Court has previously found that . . . C. Randall [W.] is fit to have custody of the child . . ..
[8]We take judicial notice of the June 13, 2006 hearing order in Jefferson County Civil Action No. 05-D-210 in which the agreement of the parties was memorialized. The order was entered on October 16, 2006. The following is a portion of the order:
1. Randall [W.] and Katherine [B.T.] shall have shared custody of Richard [B.], who shall live primarily with Randall [W.] in Hagerstown, Maryland.
2. Katherine [B. T]. shall have custodial time with the minor child for a minimum of three days per week or as she & child otherwise agree. Child is over 14 yrs & has the right to determine a custodial schedule.
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emergency temporary custody to Randall W. until further order of the court.[7] This order was in effect at the time of the oral argument in the instant case.
We have also learned since oral argument, and take judicial notice thereof, that a final hearing was conducted in the aforesaid pending custody case in the family court of Jefferson County on June 13, 2006. At the hearing the parties reported to the family court that the parties had reached an agreed settlement regarding the custody of Richard B. Additionally, we note that a guardian *ad litem* had been appointed for Richard B. in the custody case and that the guardian *ad litem* participated in the June 13 hearing.
The agreed settlement announced by the parties to the court at the June 13, 2006 custody hearing was reduced to writing and incorporated into a final order[8] which, in part, granted shared custody to Randall W. and Katherine B. T. The order also provides that
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Katherine B. T. shall have custodial time with Richard B. for a minimum of three days per week, or as she and the child otherwise agree. The order of the family court was entered on October 16, 2006, after the oral argument in the instant case.
The appellant encourages this Court to consider the issues in this case notwithstanding that the domestic violence order in issue has expired. Appellant cites to Syllabus Point 1 of *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989) for the proposition that this Court may consider issues that are technically moot.
Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will

determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

Syllabus Point 1 of *Israel*, *supra*.

In examining whether the instant case satisfies the three factors of *Israel*, *supra*, we first consider potential collateral consequences. If minor children were allowed to file domestic violence petitions without the necessity of doing so by a next friend or having a guardian *ad litem* appointed, it would be reasonable to expect to some children to use the domestic violence laws to escape legitimate parental supervision. We believe this potentiality alone satisfies the first prong of *Israel*, *supra*.

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Secondly, it is axiomatic that taking minor children from under parental supervision is a matter of sufficient public interest. We also believe that the public interest will be served by providing guidance regarding this matter to the public, the bar and the court system. The issue clearly involves a vital public function – serving the best interest of our minor children. The second prong of *Israel*, *supra*, is therefore satisfied.

Finally, because domestic violence protective orders are, by statute, limited in duration, it is likely that instances of similar circumstances as raised in this appeal have and will in the future escape appellate review "because of their fleeting and determinative nature." The third prong of *Israel*, *supra*, is also satisfied.

For the reasons stated above, and because it is foreseeable that minor children in the future may attempt to file domestic violence petitions, the questions raised in the instant appeal remain justiciable. *See White v. Linkinoggor*, 176 W.Va. 410, 412, 344 S.E.2d 633, 635 (1986).

The principle of mootness has proper application in this case because the underlying domestic violence protective order has expired and the custody issue raised has been resolved. We therefore find that the instant case is moot; however, we decline to dismiss the appeal.

A.

The appellant mother, Katherine B. T., challenges the fact that Richard B., a minor, filed a domestic violence petition on his own behalf and asserts that the family court

exceeded its legitimate authority by failing to dismiss the petition. We disagree.

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This issue involves, in part, a matter of statutory interpretation. We held in Syllabus Point 5 of *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959) that:

> When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

The appellant first cites to *W.Va. Code*, 48-27-305(2) (2001), which states:

> A petition for a protective order may be filed by:
> . . .
> (2) An adult family or household member for the protection of the victim or for any family or household member who is a minor child or physically or mentally incapacitated to the extent that he or she cannot file on his or her own behalf[.]

The appellant, however, fails to consider the first paragraph of *W.Va. Code*, 48-27-305(1) (2001), which states:

> A petition for a protective order may be filed by:
> (1) A *person* seeking relief under this article [W.Va. Code, 48-27-1 et seq.] for herself or himself.
> (Emphasis added.)

The appellant further fails to consider the express language of *W.Va. Code*, 48-27-304(b) (2001) which states:

> (b) No *person* shall be refused the right to file a petition under the provisions of this article. No *person* shall be denied relief under the provisions of this article if she or he presents facts sufficient under the provisions of this article for the relief sought.
> (Emphasis added.)

[9]*Black's Law Dictionary*, Eight Edition, West Publishing Co., 2004.

[10]*W.Va. Code*, 48-27-204 (2002) states:

> "Family or household members" means persons who: . . .
> (7) Have the following relationships to another person: . . .
> (H) Child or stepchild; . . ..

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In order to resolve the question of whether or not a minor may *file* a domestic violence petition, we need only determine whether or not the legislature intended to include minors as *persons* who may file a domestic violence petition and thus obtain relief under the statute.

A person is defined as a "human being."[9] *W.Va. Code*, 48-27-204 (2002), in defining the term "Family or household member" recognizes "child or stepchild" as a *person*.[10] Finally, we look to legislative findings and purposes in the enactment of the domestic violence statute. *W.Va. Code*, 48-27-101 (2001) states, in part, as follows:

§48-27-101. Findings and purposes.

(a) The Legislature of this state finds that:

(1) Every *person* has a right to be safe and secure in his or her home and family and to be free from domestic violence.

(2) Children are often physically assaulted or witness violence against one of their parents or other family or household members, violence which too often ultimately results in death. These children may suffer deep and lasting emotional harm from victimization and from exposure to domestic violence;

. . .

(Emphasis added.)

This section clearly expresses a legislative concern that children be protected from domestic violence and that they be treated as *persons* entitled to the protections of the

[11] *W.Va. Code*, 48-27-101(2001), states, in part, as follows:

§48-27-101. Findings and purposes.

(b) This article shall be liberally construed and applied to promote the following purposes:

(1) To assure victims of domestic violence the maximum protection from abuse that the law can provide; . . .

[12] *W.Va. Code*, 56-4-9 (1923) states:

Minors may sue by next friend or guardian; substitution of plaintiffs.

Any minor entitled to sue may do so by next friend or guardian.

(continued...)

domestic violence laws. We are persuaded that the language in this section is intended to include the protection of all victims of domestic violence, including minors.[11]

We believe that the clear and unambiguous intention of the legislature was to create a system for addressing domestic violence issues which would be open to all persons.

Because we find that the statute is clear and unambiguous and that the legislative intent is plain, our duty is simply to apply the statute.

We therefore hold that under *W.Va. Code*, 48-27-305 (2002), a minor may file a petition for a domestic violence protective order.

B.

Having answered the question as to whether or not a minor may file a domestic violence petition, we next turn to the procedure to be applied under these circumstances. The appellant cites to *W.Va. Code*, 56-4-9 (1923) which states that ". . . any

minor entitled to sue may do so by next friend or guardian."[12] The appellant also asserts the

[12](...continued)
When the action or suit is brought by his next friend, the court may, for good cause, substitute the guardian in lieu of the next friend, or any other person as the next friend.

[13]*W.Va. Code*, 50-5-3 (1978) states:

§50-5-3. Appointment of guardian ad litem.

No infant, incompetent person or incarcerated convict shall proceed or be proceeded against in a civil action in magistrate court unless the provisions of this section are complied with. Whenever an infant, incompetent person or incarcerated convict has a duly qualified representative, such as a guardian, curator, committee or other like fiduciary, such representative may sue or defend on behalf of the infant, incompetent person or convict. If a person under any disability does not have a duly qualified representative he may sue by his next friend. The magistrate shall appoint some suitable person who shall not be required to be an attorney-at-law as guardian ad litem for an infant, incompetent person or incarcerated convict not otherwise represented in an action.

14

application of *W.Va. Code*, 50-5-3 (1978) which requires that infants proceed or be proceeded against by a next friend or guardian in civil actions in magistrate court.[13] Finally, the appellant also cites Rule 17(c) of the *West Virginia Rules of Civil Procedure* as support for requiring a minor to proceed in a domestic violence case by a next friend or guardian. We believe a domestic violence proceeding under *W.Va. Code*, 48-27-101, *et. seq.*, is a remedial statute designed for the protection of the persons as defined in the statute and is to be liberally construed to accomplish its purposes. The Court has also adopted a comprehensive set of rules to govern the practice and procedure in civil domestic violence

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cases; however, the rules do not address whether or not a minor is required to proceed by next friend or guardian.

We agree with the appellant that both our statute and our rules provide that a minor must have either a next friend or guardian in order to prosecute or defend civil actions generally.

The record in the instant case reflects that the minor *was* accompanied by an

adult, namely his sister Jennifer M., at the time of the filing of the domestic violence petition
and at the final hearing on the petition. Also, the family court judge recognized the minor's
adult sister, Jennifer M., as his next friend at the final hearing and allowed her to remain in
the hearing as a party while other witnesses were segregated from the hearing. Jennifer M.
was, therefore, acting and recognized by the court as the *de facto* next friend of her minor brother Richard B.

Because our domestic violence rules do not speak specifically to domestic
violence petitions that may be initiated by minors, we believe it would be helpful to our courts and to litigants for this Court to adopt a procedure to be applied in such cases. We, therefore, hold that when a minor, without a next friend or guardian, files a petition for a protective order under *W.Va. Code*, 48-27-101, *et. seq*., the court in which the petition is filed
shall immediately upon filing of the petition appoint a guardian *ad litem* for the minor.

C.

Finally, we turn to the appellant's argument that the family court abused its
discretion when it did not report to the DHHR suspected abuse claimed by the appellant.

[14]This Court has adopted changes to Court rules effective April 3, 2006, regarding reporting of suspected abuse and neglect and accountability which, when followed, should
minimize the probability of any instances of abuse and neglect escaping prompt attention by
the Department of Health and Human Resources. *See* Rule 48 of the *Rules of Practice and*
Procedure for Family Court; Rule 3a. of the *Rules of Procedure For Child Abuse and Neglect Proceedings*; and Rule 16a of *Rules of Practice and Procedure for Domestic Violence Civil Proceedings*.

[15]Rule 48 of the *Rules of Practice and Procedure for Family Courts,* effective April
(continued...)

The appellant argues that this issue is governed by Rule 47(a) of the *Rules of Practice and Procedure for Family Courts*[14] which states:

> (a) *Reports by family court judges*. – If a family court judge has reasonable cause to suspect any minor child involved in family court proceedings has been abused or neglected, that family court judge shall immediately report to the state child protective services agency and the circuit court.

In the instant case the record reflects that the magistrate notified the Jefferson County Department of Health and Human Resources office by FAX of the domestic violence

petition and the emergency protective order when the order was issued. The record also reflects that the magistrate called the "hotline" and spoke to a DHHR worker to report the incident. From the record, it also appears that the FAX was sent to the family court judge. We believe that since the magistrate reported the matter to the DHHR and also notified the family court judge that the report was made, there was no necessity for the family
court judge to duplicate the report to the DHHR.

We do, however, believe that the better practice would be to follow the strict language of Rule 47 of the *Rules of Practice and Procedure for Family Court*[15] even if the

[15](...continued)
3, 2006.

petition and incident had been previously reported to the DHHR. This practice could help assure that no case "slips through the cracks."

We therefore hold that in any domestic violence case, when any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to *W.Va. Code*, 49-6A-2 (2006) and, if applicable, Rule 48 of the *Rules of*
Practice and Procedure for Family Court. When a petition for domestic violence is filed (typically magistrate court) and the judge or magistrate has reasonable cause to suspect that
a child is neglected or abused, it would also be the better practice for the court to require the
attendance of a representative of the DHHR at all proceedings.

IV.

Conclusion

In consideration of the foregoing, we affirm the circuit court's dismissal of the appellant's petition for a writ of prohibition and deny the requested relief. We further hold
that in any domestic violence case which is initiated by a minor, our courts shall be guided
by the holdings of this case.

Affirmed.

No. 33005 - Katherine B. T. v. Sally G. Jackson

FILED

December 4, 2006

Maynard, Justice, dissenting: **released at 10:00 a.m.**

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

This Court continues to decide cases that are devastating to West Virginia families. This is one such case. This decision is simply anti-family. Specifically, the majority has undermined the authority of every parent in West Virginia by permitting minor children to file domestic violence petitions on their own behalf.

Not only does this decision allow minors to file domestic violence petitions against their parents, it permits non-family members - actually strangers - to gain control and custody of children. Just look what happened here. The child who filed the domestic violence petition against his mother has ended up in the custody of an officious intermeddler with whom he has no family relationship. He is a man who lives in another state and who apparently entered this child's life around the time of his father's death and pursued a "mentor" relationship with him, whatever that is. Although the child's mother strongly felt that this relationship was inappropriate, her hands were tied as result of the protective order entered upon the filing of the domestic violence petition. Here is how outrageous this case is: while the protective order was in place, the mother was not permitted to have any contact with her own child or object to his placement with a single man living alone. In fact, when

she had her husband and family members try to contact this man to check on the welfare of her child, the court found her in contempt.

The record shows that the family court placed the child in this man's custody without conducting any independent inquiry into his fitness or ability to provide a suitable home for a teenage boy. Now, this man, whose motives I personally find to be suspect, has unsupervised custody of this child and has him off in another state. In light of the facts of this case alone, I am astounded and troubled by the majority's decision.

The West Virginia Legislature long ago recognized that abuse and neglect by custodial parents represents a serious danger to many children in West Virginia. In order to address this problem, the Legislature enacted a series of statutes designed to protect the interests of all parties involved yet ensure that children will be removed from the custody of abusive or neglectful parents. In particular, W.Va. Code § 49-6-1 (2005) provides that the West Virginia Department of Health and Human Resources may file a petition seeking custody of any child who is believed to be abused or neglected. Further, the law provides

that both the child and the parents will be provided with counsel and afforded an adequate opportunity to be heard. If there is a question regarding the fitness of any potential custodian, Child Protective Services can conduct a home study and provide the court with expert advice regarding the suitability of the proposed placement. Moreover, the important relationship between a child and his or her parents can be preserved whenever possible

through the use of improvement periods and supervised visitation. Of course, this process recognizes that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted).

The majority's decision in this case circumvents this entire body of law by allowing minors to remove themselves from the custody of their parents through a domestic violence petition. Essentially, the majority opinion allows a fourteen-year-old boy who becomes angry at his mother for not buying him a video game or a sixteen-year-old girl whose dad will not let her see her boyfriend to effectively have their parents' rights terminated by filing a domestic violence petition claiming that their parents are abusing them.

While I certainly believe that minors should be protected from abusive parents, I cannot agree to the wholesale rejection of the procedural framework enacted by the Legislature to address this very problem. The potential for misuse of W.Va. Code § 48-27-305 by rebellious teenagers is obvious. Because the majority's decision turns the parent-child relationship on its head and has the potential to destroy many West Virginia families, I respectfully dissent.

198 W. Va. 79, 479 S.E.2d 589

Supreme Court Of Appeals Of West Virginia

IN RE: KATIE S. AND DAVID S.,

No. 23584

Submitted: October 1, 1996
Filed: November 14, 1996

SYLLABUS BY THE COURT

1. When the Department of Health and Human Services finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code 49-6-1(a) (1992). Every effort should be made to comply with the notice requirements for both parents. To the extent that State ex rel. McCartney v. Nuzum, 161 W. Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, In Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

3. Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.

4. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the

abuse, have taken no action to identify the abuser." Syllabus Point 3, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

5. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 1, Interest of Darla B., 175 W Va.. 137, 331 S.E.2d 868 (1985)." Syllabus Point 1, In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993).

6. "Neither W.Va. Code § 49-6-2(b) nor W.Va. Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the twelve-month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the pre-dispositional section, W.Va. Code § 49-6-2(b)." Syllabus Point 2, In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993).

7. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, In re R.J.M., 164 W. Va.. 496, 266 S.E.2d 114 (1980). Syllabus point 4, In re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989)." Syllabus Point 1, In re Jeffery R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

8. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

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Petitioner Below, Appellee

Recht, J.: See footnote 1
Christina B., See footnote 2 the mother of Katie and David S., appeals the termination of her parental rights by order of the Circuit Court of Wood County. On appeal, Christina B. (the respondent) argues the following: (1) the evidence was insufficient to terminate her rights; (2) the circuit court erred in affording her only a seven-month improvement period rather than the ordered twelve-month improvement period; (3) the circuit court erred in opting for adoption of the children rather than long term foster care; and (4) the circuit court erred in failing to consider her disability. Based on our review of the record, we find no error in the circuit court's decision to terminate the respondent's parental rights. Although we affirm that portion of the circuit court's decision, we note that the circuit court failed to consider whether post-termination visitation between the respondent and her children is in the best interest of the children. We reverse the denial of visitation and remand for a hearing to determine whether such visitation is appropriate under In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

I.
FACTS AND BACKGROUND

On September 26, 1994, the Department of Health and Human Services (hereinafter the Department) filed a juvenile neglect and delinquency petition See footnote 3 against Christina B., alleging that she abused or neglected her children, Katie S., who was born on April 28, 1989 and was then five years old, and David S., who was born on May 29, 1993 and was then sixteen months old, within the meaning of W. Va. Code, 49-1-3 (1994).See footnote 4 The petition also sought to terminate the parental rights of the children's father, David S., whose address was listed as "unknown." The petition alleged the following:

(1) In August 1994, Katie S., left without supervision, was riding her bicycle in the middle of a street, and the child's location was unknown to her mother;
(2) On August 29, 1994, David S. was hanging out and could have fallen out of a second story window when he was left unsupervised by his mother. On that same day, David S. crawled onto the porch and almost fell off the porch;
(3) Between July 1994 and September 1994, David S. was crying and screaming when left unsupervised in his home while his mother remained in bed;
(4) In September 1994, Katie S. missed almost all of the first two weeks of school because of untreated head lice. Her mother failed and refused to treat the child for head lice, and finally, the school personnel had to cut Katie's hair;
(5) The respondent failed routinely to provide breathing treatments necessary to treat David S.'s asthmatic condition;
(6) Because the respondent failed or refused to provide adequate food, the neighbors frequently had to feed the children; and,
(7) In 1990 and 1991, Katie S. was frequently absent from home, and the respondent did not know where the child was.

At a hearing on October 5, 1994, the respondent, who was represented by counsel, told the circuit court that she did not contest the allegations in the petition. The circuit court, after finding Katie and David S. to be abused and neglected by the respondent, granted her an improvement period of twelve (12) months. Also attending the hearing was the children's father; however, even though the father had little contact with his children, he was not found to have abused or neglected his children. Although the order granted an improvement period "to the respondent-parents," rehabilitation efforts centered entirely on the mother, and the record does not show any further involvement by the father. At the final hearing, the father did not appear but his appointed counsel did. The circuit court found because of the father's abandonment, he was "not a proper party" and dismissed him.

On October 28, 1994, the Department prepared a family case plan outlining tasks for the respondent to complete during the improvement period to achieve the final goal of changing her behavior toward her children. During the first part of the improvement period, while the children remained outside the home, the respondent was to attend parenting classes, write reports, participate in counseling, read a parenting book, establish a residence and demonstrate an improvement in her parenting skills. During the first six months, the children visited with their mother in her home some several times with some overnight visits.

Although there is a dispute about the degree of successful completion of these activities by the respondent in the first six months of the improvement period, on June 8, 1995, Katie and David S. were returned to their mother's care. According to Christine Spiker, a licensed social worker with the Department's child protective services who worked with the respondent and her children, after the children were returned home, the Department began receiving numerous complaints alleging that the mother was neglecting the children. On June 15, 1995, Ms. Spiker visited the home, which she found to be "undescribably dirty, if extremely cluttered," and found the children to be disheveled, unkept and dirty. The kitchen which "appeared to have not been cleaned for several days" had a "pot on the stove that had mold growing on it." The pot was identified by the respondent as a "dinner that had been fixed the night after the children had been returned home, which would have been a week" earlier.

Ms. Spiker testified that she returned to the home at least six more times between June 15 and June 26, 1995. According to Ms. Spiker, she would find the respondent lying on the couch and the children complaining of hunger. Ms. Spiker said she had to coerce the respondent into fixing breakfast for her children. When questioned about feeding her children, the respondent answered that she "some times [sic]" fed the children. On June 26, 1995, Ms. Spiker removed the children from the home.

For the three weeks immediately after the removal of the children, the respondent did not request any visits with her children. Between June 26, 1995 and October 15, 1995, the respondent visited her children only four or five times, and during the month before the November 15, 1995 hearing, the respondent made no inquiry about her children. See footnote 5

The respondent maintains that she loves her children and does not want to have her parental rights terminated. Although the Department maintains that the respondent's efforts were not meaningful and ceased when the children were returned to the home, the respondent notes that she completed the tasks assigned during the first part of her improvement period and that the children were not malnourished. However, the respondent acknowledged that she did not feed her children regularly, but only "some times [sic]." Christopher Rutherford, a counselor who began working with the respondent on June 22, 1995 when the children were living with the respondent, thought that the drug treatment for her epilepsy could have made her appear listless. Mr. Rutherford, who had never visited the home or met the children, thought that the respondent, who had suffered abuse and neglect as a child, was making a sincere effort to get her children back. Mr. Rutherford thought that the respondent's counseling would take several months, but had not formulated an opinion on whether she had shown an improvement in her ability to be a responsible and successful parent during the

five months he worked with her.

At the conclusion of the hearing, counsel for the respondent requested she be allowed the remaining time of the twelve-month improvement period to show an improvement or "to find one of the grounds less than termination." Joseph P. Albright, Jr., Esq., guardian-ad-litem for the children, thought that there was no "harm in continuing the improvement period. . .[because] it is a short period of time."

The circuit court rejected any additional improvement period, finding that the respondent's improvement period continued after her children were removed so that the improvement period was a full year and that there was no evidence that the additional time would show any improvement. It is not disputed that except for the respondent's personal counseling with Mr. Rutherford and four or five visits with her children, between June 26, 1995 and November 15, 1995, the respondent made no effort to have her children returned to her.

Emphasizing the welfare of these very young children, the respondent's failure to show any improvement when her children were returned to the home and no showing of "a substantial likelihood of improvement or correction of the conditions within a short period," the circuit court ordered the termination of her parental rights. The circuit court also denied the respondent visitation with her children, but allowed the Department to grant visitation. The record does not indicate if any post-final order visitation has occurred.

This appeal followed, asserting several errors by the circuit court including insufficient evidence, failure to provide a full twelve-month improvement period, failure to consider long term foster care, and failure to consider the respondent's medical problems.

II.
DISCUSSION
A. *Termination*
1. Parental Rights of the Father

Before discussing the errors raised by the respondent concerning the termination of her parental rights, we note that no action was taken concerning the parental rights of the children's father, David S. Even though the evidence strongly suggests that the father abandoned his children and has no interest in their well-being, he was dismissed as "not a proper party." The Department's abuse and neglect petition named the father and stated that he "provides neither financial nor emotional support for Katie and David, does not provide them with supervision or for any of the physical or material needs, and has only occasional contact with them." The father was served by publication See footnote 6 and appeared at the

first hearing, where counsel was appointed to represent him. Although counsel for the father appeared at the final hearing, the father did not, and counsel for the father indicated that he had never talked to the father.

At the end of the hearing, even though the mother's parental rights were terminated, the status of the children was left dangling because of the father's dismissal. Apparently, the issue of the father's rights was left to be addressed in an adoption proceeding. See footnote 7

Recently, in In re Christina L., supra, we strongly indicated that a natural parent, who has abandoned the children, should be included in abuse and neglect petitions. We again emphasize that the practice of waiting until adoption proceedings to determine the status of such a parent's parental rights, leaves "the children in 'No Man's Land' with regard to any resolution in their lives," may discourage persons who want to adopt the children, and leaves "the validity of a future adoption subject to challenge" (when due process has not been afforded to a natural parent). In re Christina L., 194 W. Va. at 455-56, 460 S.E.2d at 701-2.

"Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period." Syl. pt. 2, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991); see also In re Christina L., 194 W. Va. at 455-56, 460 S.E.2d at 701-2.

When the Department has a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code 49-6-1(a) (1992). Every effort should be made to comply with the notice requirements for both parents. To the extent that State ex rel. McCartney v. Nuzum, 161 W. Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled. The circuit court should, as required by W. Va. Code 49-6-2(d) (1996), "to the extent practicable, . . . give. . . [abuse and neglect cases] priority over any other civil action before the court, except proceedings under article two-a [§ 48-2A-1 et seq.], chapter forty-eight of the code and actions in which trial is in progress" and consider timely the allegations of abuse or neglect and also the allegation of abandonment. See footnote 8 We emphasize delay in achieving a permanent home for children can be devastating. "Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, In Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). These concerns for a timely disposition of allegations of abandonment, promoted our holding in Syl. pt. 6 of Christina L., which states:

> When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W.Va. Code, 49-6-1 (1992).

See In the Matter of Brian D., 194 W. Va. 623, 637, 461 S.E.2d 129, 143 (1995).

In the case *sub judice*, the circuit court should have considered the allegation that the father had abandoned his children when the abuse and neglect petition was presented. Delaying a determination on the issue of the father's abandonment allows this matter to linger while Katie and David S. remain in foster care, a situation we found "ludicrous" in Christina L. 194 W. Va. at 456, 460 S.E.2d at 702. When the circuit court conducts a hearing on post-termination visitation (see infra section B), the issue of the father's parental rights should also be considered. Every effort should be made to comply with the notice requirements of W. Va. Code 49-6-1 (1992) and counsel should, if necessary, be appointed to represent the father. The status of these two young children needs to be resolved, without any unnecessary delay.

2. Parental Rights of the Mother

Recently, in Syl. pt. 1 of In Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), we stated our standard of review in an abuse and neglect case:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Based on this blend of deferential-plenary standards of review, we find that the circuit court was not clearly erroneous or wrong as a matter of law in terminating the parental rights of the respondent.

In her appeal, the respondent asserts that the evidence was insufficient to terminate her parental rights. Although the respondent, as a parent, has substantial rights which must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children. First, we note that the evidence of abuse and neglect must be clear and convincing. Syl. pt. 3 of In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993), states:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

In accord Syl. pt. 6, W.V. Dept. of Health and Human Resources ex rel. Wright v. Doris S., ___ W. Va. ___, 475 S.E.2d 865 (1996).

In this case, the respondent did not contest the allegations of abuse and neglect contained in the petition. See supra pp. 3-4, listing the petition's allegations. After the respondent had participated in various activities designed to assist in improving her parenting skills, her two young children were returned to her custody. However, the mother was still unable to care for the basic needs of these children including washing, supervising and feeding them regularly. The circuit court heard extensive testimony from Ms. Spiker, the Department's child protective service worker who visited the home more than six times after custody was returned to the mother. Ms. Spiker reported that the children were disheveled, unkept, and dirty, and that the children complained of hunger. The home was cluttered, dirty, and even had mold growing in a pot on the stove. Ms. Spiker said that she had to coerce the respondent into fixing breakfast for her children. The mother admitted that she "some times [sic]" fed her children but did not believe the children to be malnourished.

The respondent argues that there was insufficient "evidence of specific instances which demonstrate why . . . [her] parental rights should be terminated." However, the record shows: first, that the respondent did not contest the allegations of abuse and neglect in the petition which outlined several individual incidents; second, that the Department's social worker testified to the condition of the children and their home after they were returned to the mother; and finally, that the respondent presented no evidence that she had properly cared for the children when they were returned to her (she acknowledged that she did not feed the children regularly).

Based on the record, we find that the circuit court's finding of clear and convincing evidence of abuse and neglect was not clearly erroneous. Left to the mother's devices and child-rearing techniques, unencumbered by repeated inspections by the Department, the likelihood is very real that the health and welfare of both children was imperiled. Our primary goal in such matters must be the best interests of the child. We have reviewed the entire record and are not "left with the definite and firm conviction that a mistake has been committed." Syl. pt. 1, in part, In Interest of Tiffany Marie S., supra. We note that the circuit court heard the witnesses and, therefore, is better able than this Court to make credibility determinations. We find no merit in the respondent's claim of insufficient evidence of abuse and neglect.

The respondent alleges that although a twelve-month improvement period had been ordered, her improvement period effectively lasted only seven months. See footnote 9 The respondent maintains that after the Department removed her children on June 26, 1995, they stopped working with her, even though no official termination of the improvement period occurred. In essence, the respondent's improvement period argument is based on the assumption that with an additional four months, her parenting skills would improve. See footnote 10 W. Va. Code 49-6- 5(a)(6) (1996) provides that termination of parental rights is appropriate when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child. . . ." W. Va. Code 49-6- 5(b) (1996) defines "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that "based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help."

In this case, after the June 26, 1995 removal of the children, the respondent made very little effort to even see her children. Although able to continue with personal counseling, the respondent did not discuss the removal of her children with the counselor. Even though the counselor, Christopher Rutherford, testified that the mother was attending sessions and was making a sincere effort to get her children back, after over four months of counseling, he thought "it is too early to tell" if any progress had occurred. Neither had the counselor formed an opinion "as to whether or not she has shown an improvement in her ability to be a responsible and successful parent during the time" he worked with her. See footnote 11 The focus of the counselor's testimony was not on the respondent's relationship with her children, but on her own problems.

In Syl. pt. 2 of In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993), we discussed the length of an improvement period and when termination is appropriate by stating:

> Neither W.Va. Code Sec. 49-6-2(b) nor W.Va. Code Sec. 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the twelve-month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the pre-dispositional section, W.Va. Code Sec. 49-6-2(b).See footnote 12

The respondent's assertion that long term foster care is the best option for these young children is also without merit because the respondent failed to show that she would in the future be able to care for her children. Syl. pt. 1 of In re Jeffery R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993) states:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980).

Given the lack of any evidence showing a reasonable likelihood of improvement, we find no error in the circuit court's refusal to extend the respondent's improvement period or to order long term foster care. We have long held that mere speculation of parental improvement was insufficient where the children's welfare is seriously threatened. Syl. pt. 1 of In re Lacy P., 189 W. Va. 580, 433 S.E.2d 518 (1993) states:

> "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 1, Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985).

In this case, the respondent had an adequate period to demonstrate if, with reasonable help, she was capable of caring for her young children. The evidence of an amelioration of the conditions which lead to the abuse and neglect is too speculative given that the respondent was unable feed, supervise or wash her young children.

The respondent's argument concerning the stoppage of services by the Department after the children were removed, is based on the assumption that the Department, and not the mother, has the responsibility for initiating contact after the children were removed. Although the Department is required "to make reasonable efforts to reunify a family" (W. Va. Code 49-6-12(i) (1996), the parents or custodians have the responsibility "for the initiation and completion of all terms of the improvement period." W. Va. Code 49- 6-12(d) (1996).See footnote 13 In the four months between the removal of the children and the circuit court's final hearing, the respondent failed to do anything to pursue her improvement program; in fact, she only visited her children six times, even though she lived within a mile of where the visits occurred. See footnote 14 Given the evidence, we find that the circuit court did not abuse its discretion in refusing to extend the improvement period or to order long term foster case based upon the speculation of about a forthcoming resolution of the respondent's personal problems. See footnote 15

Finally, the respondent maintains that the circuit court erred in terminating her parental rights because she suffers from a disability. We note that the issue of the respondent's disability was not presented to the court below. We have long been reluctant to consider such matters. See Whitlow v. Bd. of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Shrewsbury v. Humphrey, 183 W. Va. 291, 395 S.E.2d 535 (1990); Cline v. Roark, 179 W. Va. 482, 370 S.E.2d 138 (1988).

In this case, the record fails to show a relationship between her medical condition, epilepsy treated by Depakote, and her behavior toward the children. The respondent did not testify about her medical condition or any effect caused by her medication. The record does include some speculation by Mr. Rutherford, the respondent's counselor, that her medication may make her listless because of general knowledge he gained from talking to some nurses and because the medication made a different client of his listless. Because of the lack of factual development below, we decline to address this disability issue, which was raised for the first time on appeal. See Whitlow v. Bd. of Educ. of Kanawha County, supra.

B. *Post-Termination Visitation*

After the circuit court determined that the respondent's parental rights should be terminated, counsel for the respondent requested visitation for the respondent

pending appeal. The request was denied without a hearing, and the idea of post-termination visitation was summarily dismissed with the comment, "Termination means termination." During oral argument before this Court, Mr. Albright, guardian ad litem for the children, said that although David S., who was only sixteen months when the abuse and neglect petition was filed, had no bond with his mother, Katie S. has emotional ties to her mother. See footnote 16 Mr. Albright said that Katie S. has "love and affection" for her mother and was unable to visit with her mother.

In Christina L., we noted that circuit court should be aware that post- termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents. Where no bond exists, the consideration of post-termination visitation is not required. Syl. pt. 5 of Christina L., states:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

See State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, ___, 470 S.E.2d 205, 214 (1996) (post-termination visitation should be allowed if it is in the children's best interest and "would not unreasonably interfere with their permanent placement").

Because it is argued that Katie S. has a bond with the respondent and continues to feel love and affection for her, the circuit court should conduct a hearing pursuant to In re Christina L., supra, to determine if continued visitation or other contact between the respondent and Katie S. would be detrimental to Katie S.'s well being and if the visitation would be in Katie S.'s best interest. On remand, the circuit court should take evidence and hear arguments from all sides on the post-termination visitation between Katie S. and the respondent.

For the above stated reasons, the decision of the Circuit Court of Wood County is affirmed, in part, reversed, in part, and remanded for proceedings consistent with this opinion.

Affirmed, in part, reversed, in part, and remanded.

Footnote: 1 The Honorable Arthur M. Recht resigned as Justice of the West Virginia Supreme Court of Appeals effective October 15, 1996. The Honorable Gaston Caperton, Governor of the State of West Virginia, appointed him Judge of the First Judicial Circuit on that same date. Pursuant to an administrative order entered by this Court on October 15, 1996, Judge Recht was assigned to sit as a member of the West Virginia Supreme Court of Appeals commencing October 15, 1996 and continuing until further order of this Court.

Footnote: 2 We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. See In re Jeffery R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

Footnote: 3 W. Va. Code 49-6-1(a) (1992) states, in pertinent part:

If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child.

Footnote: 4 W. Va. Code 49-1-3(a) (1994) provides the following definition of an "abused child:"

"Abused child" means a child whose health or welfare is harmed or threatened by:

(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or

(2) Sexual abuse or sexual exploitation; or

(3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen [§ 48-4-16], article four, chapter forty-eight of this code.

In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

W. Va. Code 49-1-3(g)(1994) provides the following definition of a "neglected child:"

(1) "Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

(2) "Neglected child" does not mean a child whose education is conducted within the provisions of section one [§ 18-8-1], article eight, chapter eighteen of this code.

Footnote: 5 The record indicates that between June 26, 1995 and November 15, 1995, Christina B. lived within a mile of where the parent/child visits occurred.

Footnote: 6 W. Va. Code 49-6-1(b) (1992) states:

The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice, and notice shall be given to the state department. In cases wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person. If said person signs the certificate, service shall be complete and said certificate shall be filed as proof of said service with the clerk of the circuit court. If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

Footnote: 7 The circuit court's order terminated the parental rights of the mother, who although unable to care for her children, loved them and wanted them, but left intact the parental rights of the father, who, according to the petition, provided nothing for the children and only had occasional contact with them.

Footnote: 8 Rule 8 of the Rules on Time Standards for Circuit Courts further instructs circuit courts expeditiously and timely to process and dispose of abuse and neglect proceedings.

Footnote: 9 In 1996, the Legislature amended W. Va. Code 49-6-5(c) to allow "parents or custodians an improvement period not to exceed six months." Previously W. Va. Code 49-6- 5(c) (1992) allowed a circuit court the option of ordering up to a twelve-month improvement period. See also W. Va. Code 49-6-2(b) (1996) allowing the court to "grant any respondent an improvement period in accord with the provisions of this article." Previously, W. Va. Code 49-6-2(b) (1992) "allowed an improvement period of three to twelve months. . . "

Footnote: 10 The respondent's third assignment of error is that the circuit court erred in not ordering long term foster care. This assignment is based on the assertion that the respondent would return to a normal functional level after a few months of treatment. Because this same assertion of a brief recovery period is also the base of her improvement period extension argument, we consider the two assignments together.

Footnote: 11 The respondent cited the following testimony as showing that the conditions of abuse and neglect would be corrected in "a few months:"

Q. (Judge Hill) Has she shown any improvement in her emotional problems; that is, have you noticed any progress in curing what you have diagnosed her problems are?

A. (Christopher Rutherford) I think it is too early to tell.

Q. Not yet, then?

A. Right.

Q. How long do you project that it would take to cure her emotional problems so that she is at least functionally normal?

A. It depends what theory or philosophy you go with.

Q. What do you mean?

A. Some people say eight sessions. Some people say one to four years. It just depends.

Q. Is it in the range of months rather than weeks?

A. I think it would be in the range of several months, yes.

Q. More than a year?

A. That I can't say.

Q. Well, you don't have any estimate, then, as to how many months?

A. I can't make an accurate one, no.

Q. Not even an educated estimate?

A. An educated guess, I would have to assume, that, probably, after several months of structured time with the client, intensive services, that she ought to be able to make her way.

Q. Some people say it might take four years?

A. Well, it depends. . . .
(Emphasis added.)

Footnote: 12 See supra note 9 for statutory changes.

Footnote: 13 In its entirely, W. Va. Code 49-6-12(d) (1996) provides:
When any improvement period is granted to a respondent pursuant to the provisions of this section, the respondent shall be responsible for the initiation and completion of all terms of the improvement period. The court may order the state department to pay expenses associated with the services provided during the improvement period when the respondent has demonstrated that he or she is unable to bear such expenses.

Footnote: 14 We have previously pointed out that the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child. See In Interest of Tiffany Marie S. 196 W. Va. at ___ and ___, 470 S.E.2d at 182 and 191; State ex rel. Amy M. v. Kaufman, 196 W. Va. at ___ and 470 S.E.2d at 213.

Footnote: 15 The respondent also argues that four months is a short time and therefore, it should be routinely granted. This "why not" argument for additional time in an abuse and neglect case fails to realize a child's need for permanency. See Syl. pt. 1, Carlita B., supra ("[u]njustified procedural delays wreak havoc on

a child's development, stability and security"); In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995); In Interest of Tiffany Marie S., supra.

Footnote: 16 We note with approval that the guardian ad litem for the children appeared before this Court for oral argument and was able to answer several questions concerning the interests of the children. The record indicates that the guardian ad litem has been diligent in protecting his clients' interests below. We continue to emphasize that guardians ad litem have a duty to represent fully represent the child's appellate rights, if an appeal is necessary.
In Matter of Scottie D., 185 W. Va. 191, 198, 406 S.E.2d 214, 221 (1991), we stated:

It is well established that "[a]fter judgment adverse to his ward, the guardian ad litem has the right to appeal and the duty to do so if it reasonably appears to be to the advantage of the minor[.]" Robinson v. Gatch, 85 Ohio App. 484, 487, 87 N.E.2d 904, 906 (1949). This is based upon the principle that a guardian ad litem has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian ad litem were in a normal lawyer-client relationship.

Part of the duty of appellate representation is the filing of appellate briefs, even when not invited to do so. In Christina L., 194 W. Va. at 700, n.7, 460 S.E.2d at 700 n.7, we emphasized the duty of guardians ad litem to appear before this Court for oral argument, stating: "We again admonish guardians ad litem that it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings." Part of this representation is to file an appellate brief to insure that their clients' interests are presented. The role of the guardian ad litem does not cease until permanent placement of the children occurs. Syl. pt. 5, James M. v. Maynard, supra.

178 W. Va. 10, 357 S.E.2d 43

Supreme Court of Appeals of West Virginia.

John KENNEDY

v.

Hon. John R. FRAZIER, Judge, etc.

No. 17501.

March 18, 1987.

Rehearing Denied June 3, 1987.

Syllabus by the Court

1. An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him.

2. Although a judge would be remiss to accept a guilty plea under circumstances where the weight of the evidence indicates a complete lack of guilt, a court should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster.

David C. Smith, Princeton, for appellant.

Charles G. Brown, Atty. Gen.,
David W. Johnson, Asst. Atty. Gen., Charleston, for appellees.

NEELY, Justice:

The petitioner, John Kennedy, was indicted on a two count indictment. Petitioner and the prosecuting attorney entered into a plea agreement under which petitioner would plead guilty to delivery of marijuana in return for dismissal of a second charge, delivery of oxycodone. In addition to dismissal of the second charge, the prosecution also agreed not to seek an enhanced sentence under *W.Va.Code,* 61-11-18 [1943], or *W.Va.Code,* 60A-4-408 [1971].

The petitioner and his counsel first presented the plea agreement to the respondent judge on 25 September 1986, but at that time the respondent remanded the petitioner to a mental health facility to determine whether respondent was under the influence of drugs. Petitioner presented the plea agreement to the respondent again on 10 October 1986. At the 10 October hearing petitioner indicated that he was guilty and his counsel represented to the court that there were no meritorious defenses. The judge found the guilty plea to be voluntarily and intelligently given, and referred the matter to the probation department for a pre-sentence investigation. During this hearing no mention was made of possible police misconduct.

The pre-sentence investigation was submitted to the court on 22 October 1986 and this report included statements by petitioner indicating that he had been entrapped, and that improper sexual advances had been made toward him by a police officer. Specifically, the pre-sentence report said:

I interviewed John Kennedy at the Mercer County Jail on October 17, 1986. He states that this was the 7th or 8th time that Detective Staton and Beverly Wallace had been to his house. He states that the first time they came he told them he did not sell drugs anymore. The 5th or 6th time they came, John states that he told Staton and Wallace he could take them to

Princeton and introduce them to a cocaine supplier. He says they were not interested.
John states that he no longer sold drugs and only had in his possession marijuana and Tylox for his personal usage. He states that Staton and Wallace pressured him so much to sell to them that he finally gave in and sold the marijuana and Tylox from his personal supply. John further stated that Beverly Wallace was making inappropriate sexual advances toward him in order to get him to sell the drugs. He states he was fearful of further incident at his home if he did not agree to make the transaction.

Based upon this report, a hearing was held on 24 October 1986, at which the respondent judge rejected the plea agreement and scheduled the matter for trial over petitioner's strenuous objection. During this hearing the court gave the following reasons for his decisions:
The last case I have on my calendar before we start the trial is State versus John Kennedy. Let the record show that Mr. Kennedy is here today with his attorney, Mr. David Smith. Mr. Knight represents the State.
Let me say, before we get into this at all, that I have received a copy of the presentence report, that under the defendant's version-Mr. Knight, I don't know if you've had a chance-Mr. Stevens, you might confer there with Mr. Knight on this matter-that under the defendant's version, pretty much, Mr. Kennedy is saying that he didn't want to make these sales, that he resisted continuously, that he was pressured significantly by the police to the-including the extent that the undercover agent made sexual offers to him to get him to sell these drugs.
And under those circumstances, it wouldn't appear proper-but I'll hear counsel on this before I make any final decision whether to accept the plea agreement or not. But under those circumstances, it certainly gives the Court considerable pause as to whether to accept the plea agreement or not.

The trial court also stated: Well, of course, you with your experience are familiar with the defense of entrapment. That sets a pretty good defense in his statement there. Of course, we're not-you know, I'm familiar with the Alfred (sic) decision but, of course, the test in West Virginia is the Myers vs. Losch and Frazier decision, whether in the public interest and the fair administration of justice the Court should accept this plea agreement.
The Court doesn't find the plea agreement-with his very strong, very adamant position that he was coerced into making these buys by extreme pressure by officers and the undercover agent-and under those circumstances, the Court doesn't feel that the public interest and the fair administration of justice would be served.
As you pointed out, in all likelihood he would receive some sort of sentence in this case. It's not my desire to send somebody to the penitentiary who is not guilty, who has been pressured, under the circumstances that he alleges in his statement there, by the police officers.

Under the facts of this case we find that the trial court abused his discretion when he rejected the plea agreement in order to vindicate the *defendant's* rights. The case of *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d

162 (1970) stands for the proposition that a guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant is not coerced within the meaning of the Fifth Amendment simply because it was entered into to avoid the possibility of a significantly higher penalty. The Supreme Court held that there is no bar to imposing a prison sentence upon an accused who is unwilling to admit guilt but who is willing to waive trial and accept the sentence. An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him.

In *Myers v. Frazier,* 173 W.Va. 658, 319 S.E.2d 782 (1984) we held in syllabus points 4, 5, and 6 as follows:

4. A court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.

5. As to what is meant by a plea bargain being in the public interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for his guilty plea. Rule 11(d) and (f). In addition to these factors, which inure to the defendant's benefit, we believe that consideration must be given not only to the general public's perception that crimes should be prosecuted but to the interests of the victim as well.

6. A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.

The law enunciated in *Myers v. Frazier, supra,* protects the interests of the public; plea agreements that are overly lenient in sentencing perpetrators of heinous crimes confound the public's expectation that crimes will be prosecuted and are not fair to the victims. In the case before us, however, the trial court did not reject the plea agreement because the probation report demonstrated lack of adequate contrition on petitioner's part and the plea agreement did not adequately protect the public. Had the judge assigned these reasons, his decision would have been within the permissible discretion allowed by Rule 11(e)(2), *West Virginia Rules of Criminal Procedure,* and our holding in *Myers, supra.*

In this case the court's reasons for rejecting the plea agreement were that the defendant *might,* indeed, prevail on the merits. The petitioner argues that although he *might* prevail on the merits, there is also a significant probability that he will be convicted of two felonies and suffer further sentence enhancement under *W.Va.Code,* 61-11-18 [1943] and 60A-4-408 [1971]. In such circumstances, it is for the defendant, after proper consultation with competent counsel, to determine whether to roll the dice and go to a jury. Although a judge

would be remiss to accept a guilty plea under circumstances where the weight of the evidence indicates a complete lack of guilt, a court "should not 'force any defense on a defendant in a criminal case,' particularly when advancement of the defense might 'end in disaster'...." *North Carolina v. Alford, supra,* quoting *Tremblay v. Overholser,* 199 F.Supp. 569, 570 (D.C.1961).

Experience teaches that the defense of entrapment is a slender reed on which to lean a defendant's defense. Entrapment so serious as to amount to a question of law, of course, would allow the judge alone to dismiss the case. But when a jury must pass on the entrapment issue, a defendant is well advised to make a conservative estimate of his chances of acquittal on that ground. The judge should not substitute his weighing of alternatives for the defendant's properly counseled weighing of the same alternatives.

In *Alford, supra,* the Supreme Court cited with approval numerous federal and state cases that generally stand for the proposition that reasons other than the fact that he is guilty may induce a defendant to plead, and he must be permitted to judge for himself in this respect. Because guilt, or the degree of guilt, is at times uncertain and elusive, an accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty.

Therefore, in light of the judge's stated reasons for rejecting petitioner's plea, we find that the petitioner has demonstrated grounds for issuance of a writ of prohibition under the criteria enunciated in *Hinkle v. Black,* 164 W.Va. 112, 262 S.E.2d 744 (1979). Accordingly the writ of prohibition for which petitioner prays is awarded and the case is remanded to the Circuit Court of Mercer County for further proceedings consistent with this opinion.

Writ awarded

Case remanded for further proceedings.

184 W. Va. 49, 399 S.E.2d 192

Supreme Court of Appeals of West Virginia

KENNETH B. and Phyllis B.

v.

ELMER JIMMY S.; Wilma Jean S.; George Ryan S.; and Glen R. Rutledge, Guardian Ad Litem for George Ryan S.

No. 19569

Nov. 13, 1990

SYLLABUS BY THE COURT

1. " 'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d [798] (1969). Syl. pt. 2, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975)." Syllabus Point 1, *Nancy Viola R. v. Randolph W.,* 177 W.Va. 710, 356 S.E.2d 464 (1987).

2. "A conviction of ... murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated." Syllabus Point 2, in part, *Nancy Viola R. v. Randolph W.,* 710 W.Va. 177, 356 S.E.2d 464 (1987).

3. "A cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to cooperate in reaching shared decisions in matters affecting the child's welfare." Syllabus Point 4, *Lowe v. Lowe,* 179 W.Va. 536, 370 S.E.2d 731 (1988).

4. "We do not authorize court-ordered joint custody over the objections of a primary caretaker parent although parents may agree to such an arrangement." Syllabus Point 8, *David M. v. Margaret M.,* 182 W.Va. 57, 385 S.E.2d 912 (1989).

Donald R. Jarrell, Wayne, for Kenneth and Phyllis B.

Larry E. Thompson, Williamson, for E.J. and W.J.

Robert H. Carlton, Williamson, for G.R.S.

PER CURIAM:

After George Ryan S. was convicted of the murder of his wife, a dispute concerning the custody of their child arose among the grandparents. See footnote 1 The Circuit Court of Mingo County terminated the parental rights of George Ryan S. and awarded joint custody of the child to the maternal and paternal grandparents. Kenneth and Phyllis B. (the mother's parents) appealed to this Court alleging that they never agreed to joint custody. George Ryan S. also appealed the termination of his parental rights alleging that he never abused or neglected his son. Although we agree that George Ryan S.'s parental rights were correctly terminated, we find that joint custody of the child should not have been awarded and, therefore, we remand this case for an expedited hearing to determine the custody of the child.

On March 16, 1988, George Ryan S. (the child's father) was convicted of murder, in the second degree, of Eskaleen Marie S., his wife and mother of his child. George Ryan S. was sentenced to not less than 5 or more than 18 years in the state penitentiary. After his conviction, George Ryan S. nominated his parents, Elmer and Wilma S., to be primary guardians for his and his dead wife's infant child. The child, George Ryan S. II, had been born on March 21, 1986. After the mother's murder, Wilma S. (the father's mother) was the primary caretaker of the child from February 1987 through October 1988; even though George Ryan S. lived with his parents prior to his incarceration and conviction.

Kenneth and Phyllis B. (the mother's parents) sought grandparent visitation with the child and after a hearing on January 8, 1988, a family law master awarded them visitation. However, no visitation occurred until Kenneth and Phyllis B. brought contempt proceedings. Wilma S. (the father's mother) testified that the child's allergies had prevented some visits and she refused to allow any visitation outside her house. Kenneth and Phyllis B. were reluctant to visit their grandchild in the house of Elmer and Wilma S. (the father's parents). However, Kenneth B. testified that visitation improved after the contempt proceedings.

On September 8, 1988, Kenneth and Phyllis B. petitioned the circuit court for custody of the child and for termination of the father's parental rights. At a hearing on October 17, 1988, the circuit court terminated the father's parental rights and awarded custody of the child to Kenneth and Phyllis B. with visitation rights to Elmer and Wilma S. See footnote 2 The order was entered November 3, 1988.

Thereafter the circuit court judge, *sua sponte,* instructed the parties to work out a joint custody arrangement. Although Kenneth and Phyllis B. objected and refused to work toward a joint custody arrangement, shortly thereafter, Elmer and Wilma S. petitioned for joint custody. At a hearing on March 20, 1989, joint custody was awarded with physical custody rotating between the maternal and paternal grandparents on a month-to-month basis and visitation with that month's non-resident grandparents on alternating weekends. The joint custody order was entered on June 16, 1989. [FN3] On appeal Kenneth and

Phyllis B. maintain that circuit court should not have awarded joint custody over their objection and that they should be awarded sole custody. Elmer and Wilma S. maintain that they, as primary caretakers of the child until October 1988, should be awarded custody or that joint custody, which they maintain has been working, should be continued. George Ryan S., the child's father, also appealed the termination of his parental rights.

I

In its decision to terminate George Ryan S.'s parental rights, the circuit court took judicial notice of his conviction for the murder, in the second degree, of his wife. The court noted that Eskaleen S. had also been the victim of repeated acts of violence and abuse by her husband. Kenneth B. testified that he had seen signs of this abuse on his daughter. In addition, the court noted that after George Ryan S. had killed his wife, he placed her body in his car's trunk and drove her body to a remote area where, until dissuaded by a friend, he planned to bury her in an unmarked grave. The record also indicates that after Eskaleen S.'s murder when George Ryan S. returned to live in his parents' house, Wilma S., his mother, assumed primary care of the child.

The standard for judging parental fitness was recently reiterated in Syllabus Point 1, *Nancy Viola R. v. Randolph W.,* 177 W.Va. 710, 356 S.E.2d 464 (1987), which stated:

> "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d [798] (1969). Syl. pt. 2, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975).

Syllabus Point 2, *Collins v. Collins,* 171 W.Va. 126, 297 S.E.2d 901 (1982); Syllabus Point 1, *Leach v. Bright,* 165 W.Va. 636, 270 S.E.2d 793 (1980); Syllabus, *Whiteman v. Robinson,* 145 W.Va. 685, 116 S.E.2d 691 (1960).

W.Va.Code, 49-6-5(b) [1988] expressly includes among the "conditions of neglect or abuse," which constitute ground for termination of parental rights, the following:

> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to

> mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child.

Recently we considered a similar case concerning the termination of a father's parental rights after the father's conviction for murder of the child's mother. In *Nancy Viola R., supra* 177 W.Va. at 714, 356 S.E.2d at 468, we noted that spousal abuse is a factor in determining parental fitness for child custody. *Collins, supra.* In this case as in *Nancy Viola R.,* "the most convincing evidence of the [father]'s unfitness is his conviction of the ... murder of his wife...." *Nancy Viola R. supra* 177 W.Va. at 714, 356 S.E.2d at 468. In Syllabus Point 2, *Nancy Viola R. supra,* we stated:

> A conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

George Ryan S. argues that *Nancy Viola R.* is not dispositive in his case because he was convicted of murder in the second degree, and not first degree, and the record contains no evidence of child abuse. In *Nancy Viola R. supra,* 177 W.Va. at 715, 356 S.E.2d at 469, we found the reasoning of *In re Abdullah,* 85 Ill.2d 300, 53 Ill.Dec. 246, 423 N.E.2d 915 (1981), a factually similar case, to be particularly relevant. In *Abdullah,* the Supreme Court of Illinois listed three factors that justified termination of the father's parental rights: (1) the father was convicted of murder; (2) the child's mother was the murder victim; and (3) "the murder was accompanied by exceptionally brutal and heinous behavior demonstrating wanton cruelty." *Id.* 85 Ill.2d at 307, 53 Ill.Dec. at 249, 423 N.E.2d at 918.

Parental rights may be terminated only upon clear and convincing evidence. *W.Va.Code,* 49-6-2(c) [1984]; *Nancy Viola R., supra* 177 W.Va. at 715, 356 S.E.2d at 469; *State ex rel. West Virginia Department of Human Services v. Cheryl M.,* 177 W.Va. 688, 356 S.E.2d 181 (1987). In the present case, there is clear and convincing evidence to terminate George Ryan S.'s parental rights. See footnote 4 George Ryan S. had a history of abusing his wife, which culminated in her murder. The murder of a child's mother is "the ultimate act of savagery to that child" because of the emotional and psychological scarring of the child. *Nancy Viola R., supra* 177 W.Va. at 716, 356 S.E.2d at 470. We find the minor factual differences between this case and *Nancy Viola R.* to be without merit and therefore, hold that the circuit court correctly terminated George Ryan S.'s parental rights.

II

Although the circuit court attempted to solve the custody dispute by making the maternal and paternal grandparents work together for the benefit of the child, the award of joint

custody to the maternal and paternal grandparents was clearly an error. In *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912, 927 (1989), we noted that "[j]oint custody works well when both parents live in the same neighborhood or at least in the same city, and so long as they can cooperate on child-rearing matters." Joint custody can work well when the parties have a cooperative spirit. Although a court can order joint custody, "it cannot order that the [grand]parents stop bickering, stop disparaging one another, or accommodate one another in child-care decisions." *Id.* In Syllabus Point 4, *Lowe v. Lowe*, 179 W.Va. 536, 370 S.E.2d 731 (1988), we held:

> A cardinal criterion for an award of jo int custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare.

Syllabus Point 9, *David M., supra.*

Because joint custody requires agreement and cooperation by the parties, in Syllabus Point 8, *David M., supra,* we stated:

> We do not authorize court-ordered jo int custody over the objections of a primary caretaker parent although parents m ay agree to such an arrangement.

In the present case, the circuit court clearly erred in ordering joint custody over the objections of the maternal grandparents. The relationship among the grandparents was so scarred by the tragedy that neither maternal nor paternal grandparents were able to visit with the child in the other grandparents' house.

The paramount and controlling factor in all custody matters is the child's welfare. *David M., supra* 182 W.Va. at 61, 385 S.E.2d at 916; *J.B. v. A.B.*, 161 W.Va. 332, 335-36, 242 S.E.2d 248, 251 (1978); *Funkhouser v. Funkhouser*, 158 W.Va. 964, 969, 216 S.E.2d 570, 573 (1975); *Boos v. Boos*, 93 W.Va. 727, 117 S.E. 616 (1923): *Dawson v. Dawson*, 57 W.Va. 520, 50 S.E. 613 (1905). We have long held that "all parental rights in child custody matters are subordinate to the interests of the innocent child." *David M., supra* 182 W.Va. at 61, 385 S.E.2d at 916. In determining the custody of the child, the circuit court should determine what would be in his best interest.

The record of the present case does not dictate a clear or easy solution to this custody dispute. No question of fitness to raise the child was raised by either set of grandparents. Although the paternal grandparents became the child's primary caretakers after George Ryan S.'s incarceration, there are factors that indicate they should be denied custody. The record indicates that the circuit court identified the following factors for his initial grant of custody to the maternal grandparents: (1) the child would be removed from "the

influence of an abusing, murdering parent," and (2) the paternal grandparents' "deliberate ..., wilful ... and active ..." interference with the maternal grandparents' visitation.

However given the passage of time and the joint custody arrangement, we are unable to determine from the record the placement that would best serve the interests of this very young child.

Therefore, we remand this case to ascertain proper custody considering the best interests of the child based on current considerations. On remand the circuit court shall appoint a guardian ad litem for the child and a hearing on the matter shall be held within sixty days. However, we would point out that if both sets of grandparents would prefer to avoid an all or nothing roll of the dice in the circuit court, it is still not too late to agree to some equitable and workable arrangement for joint custody. Indeed, joint custody is entirely acceptable whenever it is agreed to by the parties.

Accordingly, for the reasons set forth above, the judgment of the Circuit Court of Mingo County with respect to the termination of parental rights is affirmed, but with respect to the award of custody is reversed, and this case is remanded with directions to hold a hearing within sixty days to ascertain proper custody consistent with this opinion.

Affirmed in part; Reversed in part; and Remanded with directions.

Footnote: 1 We adhere to our past practice in styling domestic and juvenile cases that involve sensitive facts and do not utilize the last names of the parties. See David M. v. Margaret M., 182 W.Va. 57, 385 S.E.2d 912 (1989); Nancy Viola R. v. Randolph W., 177 W.Va. 57, 356 S.E.2d 464 (1987).

Footnote: 2 Because of a remark made by Wilma S., the circuit court originally restricted Elmer and Wilma S.'s visitation to the house of Kenneth and Phyllis B. However this restriction was modified because Wilma S., who had cared for the child for about one and one-half years, was reluctant to go to Kenneth and Phyllis B.'s house.

Footnote: 3 The circuit court hoped to encourage cooperation between the maternal and paternal grandparents with his modern day Solomon decision of figuratively dividing the child in half. (1 Kings 3:26)

Footnote: 4 George Ryan S. also argues that the proceeding terminating his parental rights was procedurally flawed because he was not physically present. We noted that although George Ryan S. was not present, his rights were protected at the hearing by a guardian ad litem. In addition, most of the evidence concerning George Ryan S.'s parental fitness came from his criminal conviction that was judicially noticed.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2011 Term

No. 11-0300

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: KRISTIN Y., ARTHER Y., SCHARLOTTE Y., AND WILLIAM Y.

Appeal from the Circuit Court of Harrison County
The Honorable James Matish, Judge
Civil Action Nos. 08-JA-21-3, 08-JA-22-3, 08-JA-23-3 and 08-JA-24-3

REVERSED AND REMANDED WITH INSTRUCTIONS

Submitted: May 25, 2011
Filed: June 14, 2011

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The opinion of the Court was delivered Per Curiam.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969).'

Syllabus. pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975).” Syllabus Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

3. “At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.” Syllabus point 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

4. “As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.” Syllabus point 1, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

5. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

6. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus point 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

Per Curiam:

This case is before this Court upon the West Virginia Department of Health and Human Resources's appeal of the November 16, 2010, order of the Circuit Court of Harrison County which terminated the custodial and visitation rights of Anna Y.[1] to her four children, but did not terminate her parental rights to said children.[2] As a result of this order, the children remain in the custody of the Department with no contact with their mother but are not available for permanent placement in an adoptive home. In this appeal the Department of Health and Human Resources (hereinafter referred to as "the Department"), joined by the children's guardian ad litem, assert that the circuit court erred when it failed to terminate all parental rights of Anna Y.

The Court has before it the petition for appeal, the designated record, the briefs of counsel and the arguments of counsel. For the reasons set forth below, we agree with the Department and the guardian ad litem's contention that the circuit court committed error when it failed to terminated Anna Y.'s parental rights. The circuit court's order is therefore

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[1]We follow our traditional practice in cases involving sensitive facts and use initials rather than surnames to identify the parties. See *In the Matter of Jonathan P.*, 182 W. Va. 302, 303 n. 1, 387.S.E.2d 537, 538 n. 1 (1989).

[2]All of the father's parental rights were terminated in the order that is the subject of this appeal. The father has not sought appellate review of this order and the appellant herein does not disagree with the lower court's findings and order of termination. Therefore, this appeal addresses only the parental rights of the mother.

reversed and this matter is remanded forthwith to the Circuit Court of Harrison County for proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Anna Y., (hereinafter referred to as "Appellee"), and Ricky Y., (hereinafter referred to as "Father"), are the parents of four children, to-wit: Kristin Y., born January 4, 1999, and age 11[3]; Arther Y., born March 18, 2000, and age 9; William Y. (known as "Eddy" throughout these proceedings), born May 31, 2002, and age 7; and Scharlotte Y., born May 31, 2002, and age 7.

On April 7, 2008, while the Appellee was hospitalized for what was alleged to be a suicidal[4] overdose of prescription medicine and the children were in the care of their father and his girlfriend, the West Virginia Department of Health and Human Resources (hereinafter referred to as "Appellant" or "Department") sought emergency custody pursuant to W. Va. Code §49-6-3(c) (2009) of the four children. The Department believed the children were in imminent danger of abuse and neglect because the children were currently

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[3]All ages given are correct for the time of the dispositional hearing on January 6, 2010.

[4]While appellee initially conceded that this was an attempt to kill herself, she later contended that she merely forget that she had taken her medication and repeated the dose.

in the care and custody of Ricky Y., who was prohibited by a 2007 domestic violence protection order from Jefferson County, Ohio, from having contact with the children.[5] Child protective service workers determined that Anna Y. had purported to effectuate a transfer of custody to Ricky Y. by a notarized statement that she was giving the children to their father. Included in that statement was a request to the Jefferson County, Ohio, court system to dismiss the domestic violence protective order. After finding that the children were in imminent danger if left in the care and custody of Ricky Y., the Magistrate Court of Harrison County immediately ratified the removal of the children from his home, and granted the Department temporary custody of the four children. The next day, on April 8, 2008, the Circuit Court of Harrison County entered an order containing findings that returning the children to the home of either parent would be contrary to their best interests because of the current threats of domestic violence, past sexual abuse and the mother's inability to protect the children because of her hospitalization. The circuit court continued the children's custody with the Department.

On April 9, 2008, the Department filed a petition in the Circuit Court of Harrison County alleging that the four children of Anna Y. and Ricky Y. were abused and

[5]The Appellee alleged in her petition seeking a protective order that "for the entire 10 years we have been married Ricky has choked, raped analy (sic), hit and threatend (sic) my life, most recently has threatened over the phone to blow my head off in front of our kids and told our kids he is going to slit my throat. Also (sic) oldest two kids say he penetrated them."

neglected children. The petition included a number of allegations of child abuse or neglect, including allegations of sexual abuse of Kristin Y. by her father and his girlfriend, maltreatment and sexual exploitation, as well as domestic violence between the mother and father. The Department referenced the domestic violence order of protection from Jefferson County, Ohio, that prohibited the father from having contact with the children. The petition also alleged that the children were witnesses to and subjected to their parents' drug abuse and that the father physically abused the children. The petition also included charges that the living conditions in the children's home were deplorable, unsafe and unfit. The Department alleged in its petition that services to assist the parents in remedying their unfit living conditions and other factors giving rise to potential abuse or neglect of the children were in place as early as October of 2007.[6] The Department alleged that when the children were taken into its custody pursuant to the earlier emergency ratification of custody, the children thanked the protective services workers for coming to get them.

The circuit court granted temporary custody of the children to the Department. In its order dated April 10, 2008, the circuit court also appointed counsel to the parties,

[6]The Department became involved with the Y. family after the Appellee obtained a domestic violence protective order in the State of Ohio. The Department opened a case for services for the family, which resulted in implementation of a safety plan in November of 2007, under which the Appellee agreed that she would not allow the father to have contact with the children. Some of the services provided prior to the filing of the petition included referrals for home-based services, low-cost housing, domestic violence counseling and housing at a domestic violence shelter.

appointed a guardian ad litem for the children and for the Appellee, Anna Y., and appointed a CASA.[7]

This petition was amended on April 18, 2008, to include educational neglect occasioned by the mother's failure to enroll the youngest children in school, as well as her failure to provide the children with adequate shelter. The amended petition further stated that the allegations of sexual abuse, maltreatment and emotional abuse had been substantiated against the father.

On May 8, 2008, the circuit court held a hearing on the allegations of abuse and neglect against the parents. Ricky Y. did not appear at the hearing. The circuit court continued the hearing until June 18, 2008, and ordered that the four children undergo a sexual abuse evaluation. Several weeks later, on May 22, 2008, a second amended petition was filed by the Department. This amended petition contained additional allegations of sexual abuse of the children, including the charge that the father engaged in sexual activity with the children, while the Appellee was present and aware of the father's actions. The

[7]As we explained in *In re: Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010) , CASA stands for Court Appointed Special Advocate. The role and duties of the CASA are defined in Rule 52 of the Rules of Procedure for Child Abuse and Neglect Proceedings. The CASA's primary role is "to further the best interests of the child until further order of the court or until permanent placement of the child is achieved."

amended petition also contained an accusation that the father had held a gun to the Appellee's head in the presence of the children.

On June 9, 2008, the CASA filed a report in which she noted that Kristin Renae Y., the oldest child, was hospitalized for threatening to harm herself. The report indicated that both Kristin Renae Y. and her brother Arther Eugene, were fearful of their father for beating them. The CASA reported that the twins, William and Scharlotte Y., were delayed in their education. The CASA noted in this report that the Appellee had difficulties in maintaining a parental role during visitations with the children. The CASA made specific recommendations at this time, including consistent therapy for the children and speech therapy for the twins.

On June 18, 2008, the circuit court resumed the adjudicatory hearing on the charges and allegations contained in the petitions. At this time the father and Appellee agreed that the children had been abused and/or neglected. The Appellee agreed and stipulated that she had exposed the children to sex and domestic violence, educational neglect and overall inadequate parenting. The circuit court accepted these stipulations and adjudicated the children abused and neglected. The parents separately moved for

improvement periods pursuant to W. Va. Code § 49-6-12(b) (2009)[8]

On July 9, 2008, the circuit court placed Anna Y. on a six-month post-

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[8]West Virginia Code §49-6-12(b) states:

> After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:
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> > (1) The respondent files a written motion requesting the improvement period;
> > (2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
> > (3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;
> > (4) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and
> > (5) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d of this chapter.

adjudicatory improvement period, under the terms and conditions enumerated in the family case plan.[9] The father was likewise placed on an improvement period. The children remained in the custody of the Department. The family case plan for the mother required her to address the following issues: general parenting deficiencies; exposure of the children to inappropriate sexual knowledge; domestic violence; inappropriate discipline; and unstable and inadequate housing. As part of this plan Anna Y. was to cooperate with the Department; keep all scheduled appointments with any program recommended by the Department; reschedule any missed appointments and inform the Department of these scheduling changes; comply with and expect unannounced home visits; sign releases for services and treatment; notify the Department within 24 hours of any address change; make weekly contact with the Department; submit to random blood and urine screenings for the presence of illegal or illicit drugs; fully participate in therapy designed to address the nelgect inflicted upon the children; and participate in family therapy if indicated. This family case plan was later amended to include addressing Anna Y.'s past physical abuse of the children.

[9]Family case plans are defined in W. Va. Code § 49-6D-3 (2009) and provide the framework for the goals of the improvement period. The statute requires that "[t]he family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems." The contents of the family case plan include a listing of the specific, measurable and realistic goals to be achieved; a listing of the problems to be addressed by each goal; a list of the services, including time-limited reunification services; time targets for achievement of goals or portions of goals and the assignment of tasks to the abusing or neglecting parent, caseworker and to other participants in the planning process, as well as other information.

The mother's compliance with the terms and conditions of her improvement period was initially acceptable. Her cooperation was such that in December of 2008, the Department agreed and recommended to extend Anna Y.'s improvement period for an additional three months by order entered January 7, 2009.

During the course of the mother's post-adjudicatory improvement period, more information concerning the abuse and neglect of the children became apparent. The children reported a host of abuses at the hands of their parents, including severe physical abuse, witnessing sexual acts between their parents and other paramours, sexual abuse by their father of other women and dreadful and deplorable living conditions. All of these factors contributed to negative developmental and emotional problems for the children. Kristin Y., the oldest child, was diagnosed with suffering from post-traumatic stress disorder and had to be separated from her siblings. At times, she was hospitalized for psychiatric treatment, and was later placed in a series of specialized institutional and foster care placements. At times following the adjudication of the children as abused and neglected, Arther Y. had to be placed in a group home separate from his younger siblings because of alleged sexual behavior toward his younger brother. Eddy Y. experienced such difficulties in controlling his anger and behaviors that he too had to be placed in specialized foster care placements. The educational needs of the children were also assessed. Eddy Y. and Scharlotte Y. were behind in school because their mother had not enrolled them at an appropriate age.

On April 9, 2009, the circuit court held a regular review hearing to assess the parents' progress in their improvement periods. By this time Anna Y.'s participation in the requirements of her improvement period had lessened. Both the Department and the CASA reported that the mother's home was filthy, unorganized, inadequately furnished and located far away from the school bus stop. The CASA believed that the mother was not compliant with her medication to treat her psychiatric condition because the blood tests administered showed no presences of her prescribed drugs. The Department advised the circuit court that Anna Y. was not regularly attending her therapy sessions and has not appeared for other scheduled appointments. Both the Department and the CASA also reported that visitation had gone well. However, at this time the Department believed that the mother was making some progress on her improvement period goals, but needed additional time to complete her services, and recommended a six-month dispositional improvement period. The CASA reluctantly agreed to the dispositional improvement period. On May 5, 2009, Anna Y. was placed on a six-month dispositional improvement period pursuant to W. Va. Code § 49-6-5(c)(2009).[10]

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[10]W. Va. Code § 49-6-5(c) states:

> The court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the

(continued...)

Anna Y.'s compliance with the requirements of the improvement period continued to wane. She refused to take drug screens and stopped attending her therapy sessions after making an allegation of wrongdoing against her counselor. She ceased cooperating with the Department and made allegations of unfair treatment. Anna Y. also began residing in the home of a convicted felon, against the recommendations of the caseworker.

The children continued to make disclosures to the Department and their therapists about their parents' behavior and treatment of them. Kristin Y. continued to disclose incidents of sexual abuse by her father. It was believed that Eddy Y. and Scharlotte Y. witnessed some of this sexual abuse, and that Eddy Y. himself was sexually abused. Scharlotte Y. likewise disclosed sexual abuse by her father. All the children disclosed witnessing sexual activity between their father and their mother. These allegations and more were the basis of another amended petition being filed on July 22, 2009.[11]

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[10](...continued)

> child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.

[11]It appears no significant action was taken by the court based upon this second petition, including setting the petition for adjudication on the merits, because it was filed so near to the filing of the motions to revoke the improvement period.

On July 23, 2009, the Department filed motions to terminate the improvement periods granted to Anna Y. and the father, based upon non-compliance with the terms and conditions of the improvement periods. Each motion detailed a host of failures on the part of Anna Y. and the father to comply with the Department's directives. Multiple hearings were held on the motions to terminate the improvement periods, beginning in July of 2009 and ending in October of 2009, when the improvement periods expired. Hence, the motions to terminate were rendered moot by the passage of time.

The CASA on October 1, 2009, prepared a written report recommending termination of the parental rights of Anna Y. and the father. In this report, the CASA provided a summary of the services provided to the family. She noted that Kristin Y. had been in eight different placements since the filing of the petition, including a 10-month stay at an inpatient psychiatric facility. Kristin Y. remained in need of specialized institutional care as opposed to a foster home. Arther Y. had been in four separate placements, including a residential group home, but was now in a suitable and appropriate foster care home where he was doing well. William Y. and Scharlotte Y. had been in three placements and were currently placed together and doing well in a foster home.

The CASA expressed concern that "it took 15 months for the respondents to become more serious about participating in services and it took a Motion to Revoke Hearing

to accomplish this level of effort." She also observed that neither parent took responsibility or explained how the children gained so much knowledge about sexual matters. They likewise did not accept responsibility for the children's host of behavioral issues. She also noted that the parents engaged in blaming one another for the extreme medical neglect[12] suffered by the children. She expressed her fear that without the parents' acknowledgment and acceptance of their roles in the current state of the children's lives, "I am concerned that the risk to the children remains."

In October, 2009, the disposition of this case commenced. On October 8, 2009, the Department filed its amended family case plan for the four children. The Department recommended termination of the father's and Anna Y.'s parental rights. In the case of Anna Y., the Department noted that she had received one six-month post-adjudicatory improvement, one three-month extension of that improvement period and an additional six-month post-adjudicatory improvement period. The case plan cited 10 reasons for its recommendation, including: the appellee's failure to carry out aspects of the family case plan; the failure to follow through with mental health treatment by missing a number of appointments; the failure to take required drug use screenings; the failure to cooperate and

[12]One of the children had to have a circumcision because of persistent infections and lesions. The same child was suffering from a dangerous untreated eye infection that the CASA reported could have resulted in his blindness. Another child had to have extensive dental extractions and restorative work because of the lack of dental care.

maintain regular contact with her caseworker; the failure to apprise the Department of her employment; a lack of motivation and desire to change her lifestyle in order to provide a safe and stable environment for the children and an inability to control her anger. The case plan also noted that the children had been in foster care for the last 15 of the most recent 22 months, and that pursuant to W. Va. Code § 49-6-5b (2009)[13], the Department was required to request termination or revise the case plan to show a compelling reason for not requesting termination.

Over another series of hearings, beginning in October of 2009, the court heard the testimony of some of the service providers for Anna Y. and the father. These hearings continued, with additional testimony from the children's therapists and service providers, as well as the Department's case worker. At the conclusion of the testimony in November 2009, the court instructed the parties to prepare and present proposed findings of fact and conclusions of law, and to submit arguments regarding a disposition pursuant to W. Va. Code § 49-6-5(a)(5) (2009).[14] Another hearing was scheduled for December 10, 2009.

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[13]Pursuant to W. Va. Code § 49-6-5b(a)(1), the Department is obligated to seek termination of parental rights when a child has been in foster care for 15 of the most recent 22 months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is 60 days after the child is removed from the home.

[14] W. Va. Code §49-6-5(a)(5) states, in pertinent part:

> Upon a finding that the abusing parent or battered parent or parents are

(continued...)

The parties timely submitted proposed findings of fact and conclusions of law. The Department and guardian ad litem jointly proposed in their submissions that the parental rights of Anna Y. and the father be terminated. Counsel for Anna Y. proposed an alternate disposition pursuant to W. Va. Code § 49-6-5(a)(5) that would have left the children in the custody of the Department, but retained residual parental rights in Anna Y. so that she may eventually return to seek restoration of her custodial rights.

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[14](...continued)
presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. The court order shall state: (A) That continuation in the home is contrary to the best interests of the child and why; (B) whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home; (C) what efforts were made or that the emergency situation made such efforts unreasonable or impossible; and (D) the specific circumstances of the situation which made such efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department shall continue. Considerations pertinent to the determination include whether the child should: (I) Be continued in foster care for a specified period; (ii) be considered for adoption; (iii) be considered for legal guardianship; (iv) be considered for permanent placement with a fit and willing relative; or (v) be placed in another planned permanent living arrangement, but only in cases where the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (I), (ii), (iii) or (iv) of this paragraph... .

On December 3, 2009, the CASA wrote a letter to the circuit court again expressing her recommendation that the parental rights of both parents be terminated. "After reviewing numerous reports, attending MDT's[15] and listening to three days of testimony at the Dispositional hearings, in my opinion neither parent has substantially corrected the circumstances that brought Kristen (sic), Arther, Scharlotte and Eddy to the Court's attention," she wrote. She stated that the children would need intensive therapy for a long period of time in an attempt to rehabilitate them from all of the physical and emotional abuse they suffered. She noted that Anna Y. was sporadic in her compliance with the case plan and showed no ability to care for herself despite nearly two years of parenting and individual therapy. She concluded that "these children need to be released from this pain and suffering and be allowed to heal and move on with their little lives."

On January 6, 2010, the circuit court issued[16] a 25-page order regarding the parental rights of both Anna Y. and the father. The father's parental rights were terminated. Anna Y.'s parental rights, however, were not terminated. The court found that termination of Anna Y.'s parental rights was not appropriate in this case "given the specific, tragic facts before the Court." The court concluded that Anna Y. and the children both suffered mental and physical abuse at the hands of Ricky Y., and that Anna Y. "has committed herself to a

[15]MDT is an abbreviation for Multi-Disciplinary Team.

[16]While the date recited in the body of the order was January 6, 2010, this order was not entered by the court until November 16, 2010.

course of treatment to remedy the conditions of abuse and neglect for which she is responsible."

The circuit court made certain findings summarizing the testimony rendered at the dispositional hearings. Chanin Kennedy, one of the treating psychologists for the children, testified that they possessed inappropriate knowledge of sex. She opined that Arther Y. was particularly traumatized by this information. The circuit court found that "he had a lot of inappropriate information without a lot of understanding." The circuit court found based upon Ms. Kennedy's testimony that the mother denied any involvement in how the children attained such knowledge of sexual matter and that she did attend one session with Ms. Kennedy in 2008, but missed two previously scheduled sessions.

The circuit court found, based upon the testimony of another treating psychologist of the children, Tammy Hamner, that the children would need family therapy prior to reunification with their parents. While the children needed this therapy, the circuit court found that the parents were not ready for reunification therapy as their own individual counseling had not progressed to that level. The circuit court also found that Anna Y. and the father continued to deny involvement in exposing the children to sexual knowledge. The circuit court also found that the children would continue to exhibit behavioral problems and would not be able to settle until they knew whether they would be returned to their parents.

The circuit court found based upon the testimony of Beth Albert, Kristin Y.'s counselor at a hospital placement, that the child was suffering from post-traumatic stress disorder, child abuse and neglect and physical and sexual abuse. She detailed at least one specific instance of sexual contact between Ricky Y. and Kristin Y., and numerous instances of physical abuse, including the father striking the child with his closed fist, a belt and a frying pan. Ms. Albert , and the circuit court found, that because of the abuse by her parents, Kristin's mental health was tenuous, despite being hospitalized for almost a year. Kristin expressed that she did not want to see her father, and wanted her mother to know how she felt about some of the things she believed her mother allowed to happen to her.

The circuit court found, based upon the testimony of Sharon McMillen, the psychologist who treated Arther Y., Eddy Y. and Scharlotte Y., that all three children suffer from post-traumatic stress disorder. The court found that Arther Y. was afraid of his father and had trust issues with his mother. He was fearful and anxious about his future. He had been thrown down the steps by his father. The court found that Arther Y. wanted to stay in his current placement and be adopted by his foster family. The court further found that Scharlotte Y. and Eddy Y. witnessed physical abuse between their parents. Ms. McMillen testified, and the court found, that it was not in the children's best interest to visit with their parents, as this contact was "re-traumatizing them each time they visited." She opined that

the children were stuck in the past, and unable to move forward. The court found that "a lack of contact would help the children settle into their placements better."

Testimony from Steve Richardson, who provided parenting and adult life skills training to Anna Y., as well as supervised visits between her and the children, led to the circuit court's finding that although she had received 16 months of parent education, she had yet to actually complete the program. Mr. Richardson also believed that she could not make any further progress in the parent education program. Mr. Richardson termed her demeanor up and down, and felt that her behavior during visits with her children was erratic. He opined, and the circuit court found, that Anna Y. was not ready for unsupervised visits with the children.

With respect to Anna Y.'s then-current mental status, the circuit court found, through the testimony of her counselor, Tom Hill, that she would need six months to address her own trauma and three to four months to address the parenting issues raised throughout these proceedings. The circuit court found that had Anna Y. not "taken a break from treatment" she would have potentially been at a point to begin family therapy at the end of her dispositional improvement period.

Based upon Anna Y.'s own testimony throughout these proceedings, the circuit court found that her excuses for not attending individual counseling were not acceptable, especially in light of her own psychological problems that caused her to be hospitalized.

The circuit court found that while Anna Y. had a deep affection for her children, "she clearly lacks the requisite judgment and mental stability to effectively protect the health, safety and welfare of her children, including addressing the children's significant mental health issues, at this time." The circuit court order concluded that all of the children in this case had suffered trauma because of the actions of Anna Y. and Ricky Y. Specifically, the court concluded:

> The children in this case have suffered severe trauma at the hands of the respondents. The testimony of the treating psychologists revealed that all of the children suffered from post traumatic stress disorder, that the eldest child has been institutionalized for a significant period fo time and continues to remain unstable, that the other children continue to suffer from behavioral issues and sexual acting out, and continue to experience periods of instability to the point that they cannot be reunified. Further, the problems experienced by the children are so significant that they to be separated into three different placements to protect them form acting out on each other, and have been in specialized foster care.

The father's parental rights were severed based upon the court's findings. In regard to Anna Y., however, the court order stated, *inter alia:*

> While the Petitioner sought straight termination of parental rights for both parents, the position of counsel for the children was that in a limited set of circumstances, post termination contact with only the respondent, Anna Y., may be appropriate for the children. Counsel for the children is of the opinion that post termination contact with Ms. Y. should occur if all of the following conditions are met:
>
> (a) the minor children request said contact;
> (b) the counselors and/or mental health professionals treating the children believe that the contact will not be detrimental to the child(ren);
> (c) that the contact be strictly supervised by an appropriate adult; and
> (d) if after contact the children deteriorate in any manner, as determined by their counselor and/or mental health provider, that the contact be terminated.

In terms of the progress of the improvement periods granted to the parents, the circuit court determined that "given the degree of the mental trauma suffered by the children, there is no question that after fifteen (15) months nothing more can be done to mitigate, or resolve, the family problems that exist in this case." The court further found that the respondents failed to fully avail themselves of all of the resources offered to them to correct the problems and deficiencies that led to the filing of this matter.

Finally, with respect to Anna Y.'s parental rights, the circuit court concluded as follows:

> This Court concludes that termination of the parental rights of Anna Y. is not warranted given the specific, tragic facts before the Court. It has been proved throughout this matter that both Anna Y. and the children suffered mental and physical abuse at the hands of Ricky J. Y., II. Anna Y. has committed herself to

a course of treatment to remedy the conditions of abuse and neglect for which she is responsible.

The Court further finds that the disposition available to it pursuant to West Virginia Code § 49-6-5(a)(5) is most appropriate for Anna Y., wherein the Court specifically finds that Anna Y. is presently unable to provide for the children's needs, and the children shall therefore be committed to the temporary legal and physical custody of the West Virginia Department of Health and Human Resources for continued placement in their respective foster homes until such time as reunification is accomplished.

The Court further believes that a disposition pursuant to West Virginia Code § 49-6-5(a)(5) is appropriate because it allows for a gradual transition period, allowing time for the children to emotionally adjust to all the changes while maintaining as much stability as possible.

In making this finding, the Court is mindful that it is not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened...." as stated in Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980), nor does the Court believe it is doing so. Rather, the Court concludes that Anna Y. has already demonstrated improvement. Ms. Y has made marked improvements in her life which will benefit the children and address the issues that were of concern to the Court.

With the foregoing findings of fact and legal conclusions, it is in the best interest of the children that the disposition of the Respondent mother, Anna Y., be pursuant to West Virginia Code § 49-6-5(a)(5).

The Department appealed the November 16, 2010, order.

II.

STANDARD OF REVIEW

As set forth above, the Department appeals the ruling of the circuit court that allowed Anna Y. to retain her parental rights on two grounds; first that the circuit court erred by not terminating the parental rights of Anna Y. because there was not a reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future; and second, that it was in the children's best interest to have the parental rights of their mother terminated. Thus, this appeal is based both on the findings of fact of the circuit court, as well as the circuit court's conclusions of law based upon those facts.

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account

of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

With these standards in mind, we now consider the arguments of the parties.

III.

DISCUSSION

We begin our analysis with the understanding that our law favors the rights of a parent to raise his or her children.

> " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts."

Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969)' ' Syl. pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)." Syl. Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

The substantial rights of the parents, however, are not the sole focus of courts in deciding how to dispose of an abuse and neglect case. We have held that these decisions must always be in furtherance of the children's best interests. In all cases involving the

disposition of an abuse and neglect case, we have repeatedly stated that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 192 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). Further, as we held in Syllabus Point 3 of *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996), "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children. Thus, in furtherance of the goals of balancing the substantial parental rights and notice of the children's best interests, the least restrictive alternative is employed.

The statutory plan for determining whether parental rights should be terminated is set forth in W. Va. Code §49-6-5(a). When it is determined that the conditions that gave rise to the removal of the child from the home cannot be remedied, W. Va. Code §49-6-5(a)(6) (2009) states that termination of the parental, custodial and guardianship rights of the abusing parent is the remedy.[17] Further, W. Va. Code §49-6-5(b) provides a

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[17]W. Va. Code § 49-6-5(a) states, in pertinent part:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed

(continued...)

definition for the phrase "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected." The provisions of this section that are pertinent to the case at bar state:

> (b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> . . .
>
> (2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;
>
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;
>
> . . .

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[17](...continued)
child welfare agency...

> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve the family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or
>
> (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills
>
> . . .

However, courts do not have to engage in speculation or guesswork as to when to terminate parental rights. We have previously held:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

Syl. pt. 1, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Thus, in some instances, the only remedy is termination of parental rights

when there is no reasonable likelihood that the parenting deficiencies or abuse cannot be substantially corrected. We have held:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected.

Syl. pt. 2, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Our review of the case at bar focuses on whether the circuit court's conclusion of law allowing Anna Y. to retain residual parental rights is supported by the circuit court's own findings of fact. After applying the applicable statutory language to the facts found by the circuit court, we find, utilizing the circuit court's own findings of fact, that the clear and convincing evidence presented by the Department showed "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" on the part of Anna Y. Despite having received 16 months of parenting and life skills training at the time of her dispositional hearing, she had yet to complete the program and was actually unable to complete the program. Hours of therapy and missed opportunities for counseling still rendered Anna Y. unable and unequipped to properly parent the children. The court found that there was "no question that after fifteen (15) months nothing more can be done to

mitigate, or resolve, the family problems that exist in this case." Furthermore, the court found that "the respondents failed to fully avail themselves of all of the resources offered to them in order to correct the problems and deficiencies that led to the filing of this matter." While arguably Anna Y. had made some improvement, it is clear that after reviewing the record Anna Y. was not able to remedy the facts and circumstances that gave rise to these proceedings.

Despite these findings, the circuit court did not fully terminate Anna Y.'s parental rights. Left intact was the chance for future contact with the children. This contact was, of course, conditioned on a series of events, including the child or children's wishes to see their mother, the consent of the treating psychologists, strict supervision and a chance to terminate the contact if the children's condition deteriorated. These residual rights, however remote and unlikely to be exercised, act to prohibit the children's adoption and permanent placement, which is contrary to this Court's precedent stating that children are entitled to permanency to the greatest degree possible. *See In re: Isaiah A.*, ___ W. Va. ___, 2010 WL 1488012 (W. Va.), *citing In re: Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); *State ex rel Amy M. v. Kaufman*, 196 W. Va. 241, 470 S.E.2d 205 (1996); *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); *in re Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995) (Workman, J., dissenting).

We find no real error in the lower court's factual findings and find them supported by the clear and convincing evidence in the record. However, the lower court's application of our law to these facts is erroneous. Its failure to terminate Anna Y.'s parental rights and its ultimate conclusion to allow the potential for Anna Y. to have future contact with the four children is an abuse of discretion. The standard applicable herein is whether there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W.Va.Code § 49-6-5(a)(6). Applying the facts to the statutory definition of when parental rights should be terminated, we find that the lower court's facts amply support the termination of Anna Y.'s parental rights.

We conclude that the facts as developed demonstrate no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future. Hours of therapy, parent education, life skills training and other supportive service, provided through the post-adjudicatory and dispositional improvement periods, have not substantially altered, ameliorated, remitted or modified Anna Y.'s parenting deficiencies. A parent's participation in an improvement period is a clear indicator of the parent's future potential for success and willingness to make the necessary changes to become a fit and suitable parent. Anna Y.'s sporadic cooperation with service providers, her inability to complete a course of parent education over a 15-month period and her failure to fully cooperate with

the Department, provide sufficient grounds for the finding that the conditions of neglect or abuse cannot substantially be corrected.

These children are entitled to, and deserve, permanent placements and the opportunity to grow up in loving homes, free from the abuses heaped upon them during their short lives. The circuit court's order deprives the children of the permanency they need, want, deserve and are entitled to have. Based upon the factual record as developed below, in light of the best interests of the children, and the children's rights to permanent placements, this Court reverses the lower court's conclusion that the mother's parental rights should not be terminated.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the dispositional order of the Circuit Court of Harrison County entered November 16, 2010, is reversed and this matter is remanded with directions for the entry of an order permanently terminating the parental rights of Anna Y. and for such other proceedings as necessary to permanently place the children in appropriate placements. The mandate of this Court shall issue immediately.

Reversed and remanded with directions.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

FILED
November 4, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30444

RELEASED
November 4, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: KRISTOPHER E. AND KENNETH C. E.

Appeal from the Circuit Court of Preston County
Honorable Lawrence S. Miller, Jr., Judge
Civil Action Nos. 01-JA-5 and 01-JA-6

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 17, 2002
Filed: November 4, 2002

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

Per Curiam:

This is an appeal by Kenneth E., the natural father of two minors, Kristopher E. and Kenneth C. E., from an order of the Circuit Court of Preston County adjudicating him an abusive and neglectful parent. On appeal, Kenneth E. claims that the evidence fails to show that he has been abusive and neglectful and that, consequently, the decision of the circuit court is erroneous.

I.
FACTS

The appellant in this proceeding, Kenneth E., is the natural father of Kristopher E., who was born on January 1, 1987, and Kenneth C. E., who was born on March 8, 1988. The appellant and the children's mother were divorced shortly after the birth of Kenneth C. E., in the course of the divorce, their mother voluntarily surrendered custody of the children to the appellant.

In the years following the divorce, the two children demonstrated severe behavioral problems. For instance, when they were eight and nine years old, they burglarized a house in Maryland. They were also involved in a number of incidents of destroying property and of terrorizing animals. On one occasion, they stoned a cow until it was unconscious. They also had numerous behavioral problems at school.

The appellant made concerted efforts to deal with the children's problems. For instance, in 1992, the appellant consulted the Krieger Institute, an institution dealing with child behavioral problems, about the problems. He arranged counseling for the children at the Institute, and he himself took a parenting class. He later took and completed STEP parenting courses, and attended additional parenting classes provided by an agency in Maryland.

In 1996, the appellant married for a second time and moved to West Virginia. Following the marriage, Kenneth C. E. engaged in attention-seeking behavior. Among other things, he urinated on bathroom walls; he shoved pencils down a dryer; and he destroyed furniture with an ice pick and cut his clothes with scissors.

In 1998, the appellant became concerned over Kenneth C. E. after he began starting fires in the home and in the woods. He consequently had Kenneth C. E. admitted to Chestnut Ridge Hospital for a 30-day psychiatric examination. The examination resulted in the conclusion that Kenneth C. E. was immature and would outgrow certain of his problems.

Problems continued at home and Kristopher E. began pushing his stepmother around and bruising her. The situation reached the point where the appellant and his wife slept in a locked, downstairs bedroom at night to protect themselves from the children. They also locked their bedroom door during the day to prevent destruction of their property.

In May 2001, the appellant, who was in the National Guard, traveled to California for training. In his absence, the children continued to act up, and on May 23, 2001, their stepmother requested that the Prosecuting Attorney institute juvenile proceedings against them. The Prosecuting Attorney refused to do so. Subsequently, on May 24, 2001, the children's stepmother called the hotline at the Department of Health and Human Resources and suggested that she was going to beat or switch Kristopher E. if he remained in the home. The appellant was contacted in California and asked why the children should not be removed from the home, and he said that he could not answer that question and that, perhaps, the children should be removed. As a consequence, both children were removed from the home on May 24, 2001, and the abuse and neglect petition instituting the present proceeding was filed on the same day.

A preliminary hearing was held in the matter on May 31, 2001, and at that hearing the court found that there was probable cause for the emergency removal of the children. At a subsequent hearing, the appellant, who had been charged with calling the children abusive names ("tub of lard," etc.), admitted that he had used the names on several occasions and that he had sent the children to bed without dinner on four occasions. The events justifying their being sent to bed without dinner were two food fights at the table, a school incident involving a female classmate, and Kristopher E. lying about a note from school.

As the proceeding developed, the appellant executed an agreement with the Department of Health and Human Resources in which he agreed voluntarily to surrender custody of the children to the Department.

The court found the voluntary surrender agreement appropriate, but apparently concluded that it could not properly make the disposition without adjudicating the appellant an abusive and neglectful parent. The court, therefore, proceeded to rule that the evidence adduced showed that the appellant was an abusive and neglectful parent.

It is from the court's ruling that the appellant now appeals. In appealing, he does not object to the children being removed from his custody, but he believes that the removal should occur pursuant to his agreement with the Department of Health and Human Resources. He claims that the evidence fails to prove that he was an abusive and neglectful parent, and he claims that the circuit court erred in holding that he was.

II.
STANDARD OF REVIEW

In Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996), this Court stated:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and

> shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

III.
DISCUSSION

In reaching the conclusion that the appellant had abused and neglected Kristopher E. and Kenneth C. E., it appears that the trial court in the present case relied principally upon evidence that on May 24, 2001, the children's stepmother had told a Child Protective Services worker that she was going to beat or switch Kristopher E. unless he was removed from the home. The court found that when the appellant, who was then in California, was advised of the situation, he did not disagree with the threats made by his wife, but told the social worker handling the case to remove the children from the home. The court noted that the appellant further refused to accept services designed to prevent the removal. The court found:

> The father and stepmother have occasionally used the withholding of meals as punishment for the children, for such offenses as failure to complete chores, to the extent that the children felt that they had to earn their food. While such practice by no means rose to the level of nutritional deprivation, when coupled with other improper disciplinary approaches, it contributed to emotional abuse of the children.

Finally, the court noted that there was testimony by the children suggesting that they had occasionally been physically corrected. The court concluded:

> The evidence shows that for many years, [the appellant] . . . . attempted to provide all of the necessities of life to both children, including seeking out mental health services for them; . . . [t]he evidence shows that, in many ways, [the appellant] . . . tried to properly parent the Infant Children; . . . [r]egardless of the number of [the appellant's] . . . previous efforts to properly parent the children, his refusal to intervene on their behalf on May 24, 2001 constitutes neglect of the Infant Children. . . .

After reviewing the circuit court's decision, this Court cannot find that the court's factual findings were clearly erroneous. There was evidence that the children's stepmother had threatened to beat or switch Kristopher E. on May 24, 2001, and there was also evidence that the appellant had indicated to the Child Protective Service worker handling the case that he did not disagree with his wife's threats and that he refused to accept services designed to prevent removal.

As has previously been stated, the circuit court apparently based its ultimate decision to terminate custody on the conclusion that the children faced a threat at home, rather than on actual physical abuse or neglect which had occurred prior to the filing of the petition.

The circuit court rendered its decision in the case on November 1, 2001. At the time, there was some question in the law as to whether a trial court had authority in an abuse

and neglect proceeding to accept a voluntary relinquishment of parental rights in an abuse and neglect proceeding and to terminate parental rights without ruling on the final question of abuse and neglect.

Subsequent to the circuit court's entering its final order, this Court, in the case of *In re: James G. and Emmett M. L., III*, ___ W. Va. ___, ___ S.E.2d ___ (No. 30039, June 13, 2002), recognized that a court could accept a parent's voluntary relinquishment of parental rights and dispose of an abuse and neglect proceeding without adjudicating the abuse and neglect question.

In reviewing the facts of the present case, the Court believes that it is a very close question as to whether the circuit court's decision was clearly erroneous. As indicated in *In the Interest of: Tiffany Marie S., id.*, a finding should be deemed clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. In the present case, the facts show that the appellant and his wife, although plainly disappointed and profoundly upset by the children's long misbehavior, had gone to extraordinary means to cope with the misbehavior in a socially accepted manner. Although they had selectively withheld meals from the children, there was no evidence that they had actually physically harmed the children in the past. The fact that the appellant's wife sought governmental intervention rather than actually beating the children militates against the conviction that she would have carried out her threats. By the time the appellant himself was

contacted, the State had already intervened, suggesting that the children were, in fact, protected from his wife's threats.

Although dealing with a very close case, this Court, after reviewing the evidence, comes away with the firm conviction that the trial court's conclusion is erroneous. The Court also senses that the trial court might have ruled otherwise if it had been plain that it could have accepted the voluntary relinquishment without reaching the ultimate abuse/neglect question.

In light of the foregoing, the Court believes that the judgment of the circuit court adjudicating the appellant an abusive and neglectful parent should be reversed. The Court, however, also believes that, given the overall facts of the case, the appellant's parental rights have been relinquished in accord with the agreement into which the appellant voluntarily entered, and that the trial court should so adjudicate.

IV.
CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Preston County is reversed, and this case is remanded to the circuit court with directions that the circuit court dispose of the case consistent with this opinion.

Reversed and remanded
with directions.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2011 Term

FILED
February 11, 2011
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35713

KRISTOPHER O. AND CHRISTINA O.,
Petitioners

v.

THE HONORABLE JAMES P. MAZZONE, JUDGE OF THE FIRST JUDICIAL CIRCUIT, AND WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondents

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED AS MOULDED

Submitted: January 12, 2011
Filed: February 11, 2011

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

This case is before this Court upon a petition for a writ of prohibition filed by the petitioners, Kristopher and Christina O.,[1] against the respondents, the Honorable James P. Mazzone, Judge of the First Judicial Circuit, and the West Virginia Department of Health and Human Resources (hereinafter, the "DHHR"). The petitioners, who were foster parents to D.D. for nearly twenty-two months, seek to prohibit the circuit court from enforcing its March 29, 2010, order granting legal and physical custody of D.D. to a paternal aunt as well as its May 18, 2010, order denying their motion to intervene. Based upon the parties' briefs and arguments in this proceeding as well as the pertinent legal authorities, the writ is hereby granted as moulded.

I.

FACTUAL AND PROCEDURAL HISTORY

On April 21, 2008, D.D. was born five weeks premature to J.D., her biological mother, who admitted that she used crack cocaine during her pregnancy. D.D. tested positive for cocaine at birth. On April 28, 2008, as a result of the mother's admission of drug use, the

[1]Our customary practice in cases involving minors is to refer to the parties by their initials rather than by their full names. *See, e.g., In re Cesar L.*, 221 W.Va. 249, 252 n. 1, 654 S.E.2d 373, 376 n. 1 (2007).

DHHR filed a petition for relief from parental abuse and neglect with the Circuit Court of Ohio County. Upon being provided legal custody of D.D. by the circuit court, the DHHR placed the infant in the foster care of the petitioners on May 6, 2008. D.D. remained in the continuous foster care of the petitioners at all times prior to the circuit court's March 29, 2010, order, as discussed below.

While D.D. was in the foster care of the petitioners, the DHHR pursued the termination of the parental rights of her biological mother, J.D., and father, L.W.[2] On November 24, 2008, J.D.'s parental rights to D.D. were involuntarily terminated. The order reflecting the termination of J.D.'s rights was entered by the circuit court on November 5, 2009. Thereafter, during a hearing held on December 29, 2009, L.W.'s parental rights to D.D. were also involuntarily terminated. The order reflecting the termination of his parental rights was entered by the circuit court on March 24, 2010.

Beginning in April 2009, when D.D. was one year old, the DHHR arranged for L.W., as well as D.D.'s paternal aunt, K.M., to have weekly ninety-minute supervised visits with the child. Prior to that time, K.M. had not had any contact with D.D. L.W.'s visits stopped upon the termination of his parental rights on December 29, 2009; however, the

[2]Although L.W. is not named on D.D.'s birth certificate as being D.D.'s biological father, subsequent DNA tests confirmed that he is her biological father.

DHHR arranged for K.M. to continue supervised visits with D.D. for two hours per week. The DHHR then determined that the best permanent placement for D.D. would be with K.M. Pursuant to this determination, the petitioners were advised on March 25, 2010, that D.D. would be removed from their home on March 29, 2010, and placed with K.M. Following a March 29, 2010, hearing in the circuit court, D.D. was placed with K.M.[3]

According to the petitioners, they verbally advised DHHR officials and the guardian ad litem[4] on numerous occasions prior to March 29, 2010, that they wished to adopt

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[3]It is troubling that the DHHR was so certain of the outcome of a court hearing that had not yet been held and it suggests that the DHHR anticipated the circuit court would rubber-stamp its recommendation.

[4]This Court is troubled by the guardian ad litem's limited participation in this appeal. The guardian ad litem filed a bare-bones brief with this Court and then failed to appear for oral arguments to represent the child. A guardian ad litem has a duty to advocate for the child at every level. "We again admonish guardians ad litem that it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings. This duty includes appearing before this Court to represent the child during oral arguments. In fact, the guardian ad litem's role to represent the child does not cease until permanent placement of the child is achieved. Syl. pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991)." *Christina L.*, 194 W.Va. 446, 454 n. 7, 460 S.E.2d 692, 700 n. 7 (1995). Moreover, this Court emphasized the need for guardians ad litem to conduct a "full and independent investigation" in Syllabus Point 5 of *In Re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), explaining as follows:

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W.Va.Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts

D.D. In fact, the petitioners assert that just prior to the termination of J.D.'s parental rights, Jason Prettyman, a social services supervisor for DHHR and coordinator for the multi-disciplinary treatment team (hereinafter, "MTD") assigned to the case of D.D., asked the petitioners if they would be interested in adopting D.D. if parental termination was achieved. The petitioners contend that they responded, "Absolutely."

In addition to expressing their desire to adopt D.D. to DHHR officials many times, the petitioners state they requested that the DHHR conduct a bonding assessment to establish the bond D.D. had formed with them. The petitioners contend that while D.D. was in their custody, they were never advised by the DHHR that they were required to submit a

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> involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians Ad Litem in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the West Virginia Code, the West Virginia Rules for Trial Courts of Record, and the West Virginia Rules of Professional Conduct, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed.

Given the fact that the petitioners in the case at hand cared for this child for twenty-two months, coupled by the circuit court's failure to provide them notice of and the opportunity to participate in the permanency hearing, the duties of the guardian ad litem were especially critical to a proper determination of the best interests of this child.

written application to convey their intent to adopt D.D. upon the termination of parental rights. As such, the petitioners maintain they believed in good faith that they had made their intention to adopt D.D. known to the DHHR.

As previously noted, the petitioners state that they were first advised by the DHHR that on March 25, 2010, D.D. would be taken out of their custody on March 29, 2010, and that she would be permanently placed into the custody of K.M. At that point, they sought legal counsel who filed a petition to intervene on their behalf. The petitioners contend they were not notified by the DHHR that a permanency hearing for D.D. would be held in the circuit court on March 29, 2010. Instead, the petitioners' counsel maintains that she learned of the permanency hearing on March 26, 2010, but only after contacting the circuit judge's secretary to request a hearing regarding the motion to intervene in the ongoing proceedings.[5]

On March 29, 2010, the circuit court held a permanency hearing in the matter of D.D., but the petitioners were not provided an opportunity to be heard at that hearing, nor was their motion to intervene considered at that time. According to the petitioners' counsel, upon entering the courtroom during the March 29, 2010, permanency hearing, the petitioners

[5]According to the petitioners' counsel, she believed that a motion to intervene in the proceedings was the only option since foster parents are not parties in abuse and neglect cases.

were asked to leave as they were advised by the circuit court that the hearing was closed. The record reflects that at that hearing, the circuit court ordered that D.D. be immediately placed in the physical and legal custody of K.M.

On April 27, 2010, almost a month after the permanency hearing, the circuit court held a hearing to consider the petitioners' motion to intervene, and on May 18, 2010, it entered an order denying that motion. Within its May 18, 2010, order, the circuit court found that: the petitioners, as former foster parents, lacked standing to intervene in the matter; that intervention by the petitioners would be contrary to the best interests of D.D.; that the petitioners had failed to submit a written application for adoption of the child to the DHHR within thirty days following the termination of the father's parental rights; and that the DHHR is required to pursue, and West Virginia law favors, placement with blood relatives for abused and neglected children. The petitioners did not appeal the circuit court's May 18, 2010, order. Instead, the petitioners filed a September 20, 2010, petition for a writ of prohibition with this Court.

II.

STANDARD FOR ISSUING A WRIT

A writ of "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In order to determine whether the writ of prohibition should be granted, we apply the following standard of review:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

III.

DISCUSSION

A. Writ of Prohibition

The petitioners have filed this petition for a writ of prohibition seeking to void the March 29, 2010, order of the circuit court granting legal and physical custody of D.D. to her paternal aunt, K.M., as well as seeking to void the May 18, 2010, order denying their motion to intervene. The petitioners further request that D.D. be returned to their custody pending future proceedings.[6]

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[6]The DHHR maintains that the petitioners request for relief is untimely and should not be considered by this Court. In that regard, the DHHR states that while the petitioners style their request for relief with this Court as a petition for a writ of prohibition, they are simply attempting to file a direct appeal of the circuit court's May 18, 2010, order denying them the right to intervene in a child abuse and neglect case. As such, the DHHR believes the petitioners' challenge to the May 18, 2010, order is untimely. Having reviewed the entire matter, we believe that the petitioners' request for a writ of prohibition is appropriate and that the DHHR's argument is without merit. As this Court held in Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979):

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

The petitioners argue that at the time D.D. was removed, they had developed strong emotional bonds with her due to caring for her for twenty-two consecutive months. They further contend that they were D.D.'s psychological parents as they were the only family she had ever known.[7] Nonetheless, the petitioners state that they were not given an opportunity to participate in the hearing to determine D.D.'s best interests. Consequently, the petitioners contend that D.D.'s placement with a relative with whom she had minimal contact was not in her best interests. As such, the petitioners maintain that in denying them an opportunity to be heard at the permanency hearing for D.D., the circuit court exceeded its legitimate bounds of authority, and that their writ of prohibition should be granted.[8]

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[7]"A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syllabus Point 3, *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

[8]The DHHR maintains that the petitioners argument that they were not given notice and the opportunity to be heard during the permanency hearing is without merit due to the petitioners' failure to submit a written application of their intent to adopt the child. The DHHR asserts that while the petitioners may have made verbal statements that they were interested in adopting D.D., that such verbal statements do not satisfy the requirement that foster parents make an application to the DHHR establishing their intent to adopt a child. W.Va. Code § 49-2-14(c) states:

> When a child has been residing in a foster home for a period in excess of six consecutive months in total and for a period in excess of thirty days after the parental rights of the child's biological parents have been terminated and the foster

Upon review of the relevant statutory law, in particular, W.Va. Code § 49-6-5a(c), this Court finds that the circuit court exceeded its legitimate powers when it refused to allow the petitioners to participate in the permanency hearing on March 29, 2010. W.Va. Code § 49-6-5a(c) provides, that "[a]ny foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the opportunity to be heard at the permanency hearing provided in this section." W.Va. Code § 49-6-5a(c) is a plainly worded statute that clearly evidences the Legislature's intention and must be accorded its plain meaning. Thus, the statute may not be interpreted by this Court. "'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.'" *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 729, 679 S.E.2d 323, 328 (2009) (*quoting* Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108

> parents have not made an application to the department to establish an intent to adopt the child within thirty days of parental rights being terminated, the state department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed: Provided, That if the child is twelve years of age or older, the child shall be provided the option of remaining in the existing foster care arrangement if the child so desires and if continuation of the existing arrangement is in the best interest of the child.

We find no merit to this argument for two reasons. First, W.Va. Code § 49-6-5a(c) does not require foster parents to file an application to adopt the child in order to participate in the permanency hearing. Second, the parental rights of the biological father were terminated by order entered on March 24, 2010. As such, the thirty day time limit for filing an application to adopt had not expired at the date of the permanency hearing.

(1968)). *See also* Syllabus Point 1, *Ohio County Comm'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent."). Consequently, the circuit court should have allowed the petitioners to participate in the permanency hearing.

Having found that the petitioners should have been permitted to participate in the permanency hearing, this Court finds it necessary to grant the writ and return this case to the circuit court for another permanency hearing to allow the petitioners the opportunity to be heard. Nonetheless, in order to avoid any unnecessary disruption, until it is determined what custodial arrangement is in the best interests of D.D., legal and physical custody of D.D. should remain with K.M. Should the circuit court determine that any further change of physical and legal custody is required, it must be accomplished via a gradual transition. As discussed more fully below, changes of custody can be traumatic for children if not done in a gradual manner.

B. Concurrent Planning for Permanency

In reviewing this matter, the DHHR's handling of this case from the beginning to the present day is troubling. Based upon the record below, it is apparent that little, if any

concurrent planning[9] occurred during the first two years of D.D.'s life. As previously discussed, D.D. was born addicted to crack cocaine. Therefore, shortly after her birth, the DHHR began proceedings to terminate parental rights. It does not appear, however, that the DHHR sought placement with anyone other than the foster parents at that time. While foster care may have indeed been the only option immediately available, K.M. was not contacted by the DHHR until D.D. was one year old.[10] The significant lapse in time by the DHHR is curious due to the fact that it has consistently maintained that it believes that permanent placement with a blood relative is required pursuant to its internal policies.

If the DHHR's policy is to seek permanent placement with a relative, then it should have been seeking a relative placement with the potential for permanency at the outset. It is well-established that every child is entitled to permanency to the greatest extent the legal system can ensure it. *See State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996); *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995); *In re Lindsey C.*, 196 W.Va. 395, 473 S.E.2d 110 (1995) (Workman, J., dissenting); *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

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[9]This Court has explained that: "Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings." Syllabus Point 5, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999).

[10]The record does not reflect when L.W. or K.M. learned that D.D. was born.

The DHHR should have acted very early to begin concurrent planning and permanency in D.D.'s life in "the level of custody, care, commitment, nurturing and discipline that is consistent with ... [a] child's best interests." *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185 (1998). This Court observed in *Amy M.*, *supra*, that a child deserves "resolution and permanency" in his or her life and deserves the right to rely on his or her caretakers "to be there to provide the basic nurturance of life." 196 W.Va. at 260, 470 S.E.2d at 214. Moreover, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). *See In re Micah Alyn R.*, 202 W.Va. 400, 409, 504 S.E.2d 635, 644 (1998) (Workman, J., concurring) ("concurrent planning for permanency should occur even where parental rights are not terminated. This should be the practice in all abuse and neglect cases, so that there is a permanency plan for children where family reconciliation efforts are not successful for whatever reason."). In this case, more concurrent planning should have occurred to give D.D. resolution and permanency in her life in a manner that thoroughly considered her best interests.

C. Relative Placement

With regard to placement with a blood relative, this Court is concerned by the DHHR's contention that it is required to place a child with virtually any relative instead of with a foster parent regardless of the emotional bond formed with the foster parents, the

length of stay in their home, or the many additional factors important for consideration of a child's best interests. It appears that the DHHR may be conducting its adoption policy in a manner that is inconsistent with West Virginia law. The DHHR explains that in the May 18, 2010, order, the circuit court determined that the DHHR correctly chose to move D.D. to her paternal aunt's house on March 29, 2010, based on the DHHR's internal regulations which provide for a preference for placement with a relative. The DHHR's Adoption Policy § 7.3 states, in part,

> A Grandparent or an adult relative with a positive home study certifying the home for adoption **must be given preference** over the non-relative home even if the non-relative home has the appearance of a better placement choice.

(Emphasis added). The DHHR states that its internal policy is based on federal law in that the Social Security Act governing the requirements for the award of federal funds to state child welfare programs provides:

> [T]he State shall **consider** giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.

42 U.S.C.A. 671(a)(19). (Emphasis added). Given the language in the applicable federal law and in the Department's policy, the DHHR maintains that it correctly determined that D.D.'s paternal aunt, as a relative, must be given preference over the petitioners, who were non-

relatives. Accordingly, the DHHR contends that the circuit court's determination that a relative must be given preference was in accordance with state and federal law.[11]

It is clear from our jurisprudence that the only statutory preference within our laws regarding the adoption of a child involves grandparents and reunification of siblings. For example, this Court has explained that:

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[11]The record before this Court indicates that the DHHR made its decisions regarding the placement of D.D. based primarily upon its internal preference to place a child with a relative. For example, during the September 10, 2009, multi-disciplinary treatment team meeting, which was attended by one of the petitioners, D.D.'s possible relatives for placement were discussed in the event that the biological father's rights were terminated. It was further determined that D.D.'s paternal aunt, K.M., would be contacted to determine if she would even like to be considered for permanent placement. Conversely, however, the MDT notes of that meeting indicate that the petitioner stated that she was interested in adopting D.D.

Likewise, during the November 2, 2009, MDT meeting, of which both petitioners were present, placement of D.D. with K.M. was discussed extensively. The petitioners requested that a "bonding evaluation" be completed on the child because they stated they were very bonded to the child and that the child referred to them as "mother" and "father" and that the MDT should do what was in the best interest of the child and not the family. The DHHR stated that the case was not at that point as the blood relatives of the child must be considered for potential placement of the child. The notes from that meeting further state:

> Jason Prettyman, discussed at the MDT meeting that he had previously spoken with the foster parents about the issues of placement preference in this case to the foster parents. It was previously explained that the DHHR must considered [sic] relatives of the child and must consider the adoptive parents of the siblings of the child as well. Christina recalled this conversation that she had with Jason Prettyman about placement preference.

> West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

Syllabus Point 4, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005). It does not appear, however, that a preference is granted to blood relatives generally. Nevertheless, it seems that the DHHR interprets "shall consider giving preference to an adult relative over a non-relative caregiver" as meaning that it must place a child with any available relative regardless of whether the best interests of the child are served by non-relative placement. Such an interpretation far exceeds any West Virginia statutory requirements and is inconsistent with a federal requirement that the family preference be "considered." *See* 42 U.S.C.A. 671(a)(19). Compliance with federal policy is certainly important as such compliance is often tied directly to federal funding that is so critical to the implementation and administration of many worthwhile programs. Simply stated, compliance with federal law does not require that a child be placed with a blood relative, it only requires that such placement be considered.

Moreover, even with regard to this State's statutory preference for considering grandparents for adoption of a child in situations wherein the parental rights have been terminated, this Court has clarified that such a preference is not an absolute directive to place children with their grandparents in all circumstances. *In re Elizabeth F.*, 225 W.Va. 780, 786-787, 696 S.E.2d 296, 302-303 (2010). In *In re Elizabeth F.*, this Court explained that "an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interests of the child." 225 W.Va. at 787, 696 S.E.2d at 303. Moreover,

> [o]nce a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.

Syllabus Point 8, in part, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). *Accord* Syllabus Point 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("[T]he primary goal in cases involving abuse and neglect ... must be the health and welfare of the children."); Syllabus Point 5, in part, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In ... custody matters, we have traditionally held paramount the best interests of the child."). This Court further explained *In re Elizabeth F.* that:

> Thus, adoption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child's best interests, it is not obligated to prefer the

> grandparents over another, alternative placement that does serve the child's best interests. *See* Syl. pts. 4 & 5, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801. Because the circuit court accorded the grandparents an absolute preference in this case despite its expressed concerns about the propriety of such a placement, we reverse the circuit court's decision.

225 W.Va. at 787, 696 S.E.2d at 303. In consideration of all of the above, it is clear that the petitioners in this case received little to no actual consideration for permanency in spite of the fact that they cared for this child for twenty-two consecutive months. More importantly, the failure to consider the petitioners for permanency also resulted in their inability to present evidence to the circuit court regarding the child's best interests based upon their continuous and long-term care for that child.

D. Gradual Transition

Finally, the manner in which D.D. was removed from the custody of the petitioners and placed with K.M. is concerning. D.D. was removed from the petitioners' home after twenty-two months of continuous care by the petitioners. This seems to have been done in a manner vastly inconsistent with our case law. For instance, it has been long understood that the law governing child custody directs that a child's best interests are best served by a gradual transition to a new home. In that regard, Syllabus Point 3 in *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991) provides,

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever

> possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

This concept has been reiterated on several other occasions. *Accord In re Maranda T.*, 223 W.Va. 512, 678 S.E.2d 18 (2009); *Napoleon S. v. Walker*, 217 W.Va. 512, 617 S.E.2d 801 (2005); *In re Desarae M.*, 214 W.Va. 657, 591 S.E.2d 215 (2003); *In re Jade E.G.*, 212 W.Va. 715, 575 S.E.2d 325 (2002); *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001); *In re Brian James D.*, 209 W.Va. 537, 550 S.E.2d 73 (2001); *In re Zachary William R.*, 203 W.Va. 616, 509 S.E.2d 897 (1998); *Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997); *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *State ex rel. Virginia M. v. Eugene S.*, 197 W.Va. 456, 475 S.E.2d 548 (1996); *Weber v. Weber*, 193 W.Va. 551, 457 S.E.2d 488 (1995); *Michael Scott M. v. Victoria L.M.*, 192 W.Va. 678, 453 S.E.2d 661 (1994); *Feaster v. Feaster*, 192 W.Va. 337, 452 S.E.2d 428 (1994); *Robert Darrell O. v. Theresa Ann O.*, 192 W.Va. 461, 452 S.E.2d 919 (1994); *Alonzo v. Jacqueline F.*, 191 W.Va. 248, 445 S.E.2d 189 (1994); *Snyder v. Scheerer*, 190 W.Va. 64, 436 S.E.2d 299 (1993).

The record shows that a gradual transition did not occur in transferring the child to K.M.'s home. The child was taken from the petitioners' home and all contact with her ceased at that time. The DHHR argues in its brief to this Court that "[b]y their own admission the [petitioners] have not had any visitation with [D.D.] since she was removed

from their care." While that is true, it certainly was not the petitioners' choice for that to have occurred. In fact, it highlights the very problem with the circuit court's failure to provide for an appropriate transition of this child to a new home. The petitioners consistently informed the DHHR that they wished to adopt this child. Nonetheless, the DHHR removed the child from their home with virtually no notice and then abruptly ended all contact with the child for whom they had consistently provided care and nurturance for twenty-two months.

In *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989), in recognizing that a gradual six-month transition of custody from the stepfather to the biological father was warranted, this Court observed with respect to the child's longtime residence with her stepfather and half-brother that "[t]hese familial surroundings are the only ones she has ever known, and it is undisputed that she has developed a close and loving relationship with her stepfather." 182 W.Va. at 450, 388 S.E.2d at 323. Thus, by recognizing the significant role her stepfather had played in the child's life as her psychological parent, this Court accorded visitation privileges to him, as well as to the child's half-brother, despite the ultimate award of the child's custody to her biological father. Similarly, in *Maynard, supra,* this Court required the circuit court to establish a plan for a gradual shift of custody.

As this Court stated in *In re George Glen B., Jr.*, 207 W.Va. 346, 355, 532 S.E.2d 64, 73 (2000), "[e]xplicit in both *Honaker v. Burnside* and *James M. v. Maynard* is the principle that the circuit court, and not the Department or a private agency, bears the burden of crafting a plan for the gradual transition of custody." Moreover, "[w]hen a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren)." Syllabus Point 7, *In re George Glen B., Jr.* Upon reviewing the transcript of the March 29, 2010, permanency hearing, it is clear that the circuit court did not develop or consider any plan for a gradual transition of D.D. to K.M. Said another way, the record is devoid of any discussion by the circuit court with the petitioners (because the petitioners were not permitted to participate in the hearing), the DHHR, or the guardian ad litem regarding any reasonable concerns that would arise from an abrupt change of custody. There was no discussion concerning a sufficient adjustment period nor was there a discussion about whether or not the petitioners should be allowed continued visitation with this child who referred to them as mother and father. A child should not be treated like a sack full of potatoes picked up from a local grocery store. The law requires that there must be a gradual transition in cases such as the one before us.

Clearly "[t]he best interests of a child are served by preserving important relationships in that child's life." Syllabus Point 2, *State ex rel. Treadway v. McCoy*, 189

W.Va. 210, 429 S.E.2d 492 (1993). As stated, the petitioners were the foster parents of D.D. for nearly two years and had formed a significant relationship with the child. Nonetheless, it appears that she was removed from the one stable home she had known, and was placed elsewhere, without any type of gradual transition and without affording her foster parents any visitation. Pending further resolution of these issues, it is difficult to see how the circuit court could direct the removal of this child from the petitioners' home without taking into consideration anything regarding the first two years of the child's life. Nor did the court even consider the child's right to continued relationship with those to whom she had bonded. *See* Syllabus Point 11, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996) ("A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child.").

It seems that the circuit court did not have a sufficient record to support its determination to remove the child while not even considering visitation by the petitioners.[12]

[12]The petitioners also contend that the circuit court's May 18, 2010, order denying their motion to intervene was clearly erroneous as a matter of law. It is unnecessary to address this issue in light of our holding that the circuit court shall hold a hearing to allow the petitioners to be heard with regard to permanency of the child. This Court does, however, wish to point out that the circuit court erroneously determined in its May 18, 2010, order that the petitioners lacked standing to intervene due to the fact that they were "former" foster parents on the date that the motion to intervene was actually considered by the circuit court. As discussed, the petitioners filed a motion to intervene on March 26, 2010, in the permanency proceedings on March 29, 2010. They were the physical custodians of D.D.

Unfortunately, in denying the petitioners the opportunity to participate in the permanency hearing, the circuit court has created a quandary—a child who knew and bonded with one family for nearly two years and who now has likely bonded with another parent for approximately ten months. The task now before the circuit court is made more difficult by this conundrum as the question of the child's best interests is now even more complicated. Therefore, the circuit court should act immediately to hold further hearings with full participation by all parties on the best interests of this child and her proper permanent placement. Because this Court has said that children have a right to continued association with those to whom they have formed close emotional relationships, the circuit court should also consider whether the current circumstances justify continued association/visitation by the child with whichever family ultimately is not chosen as her permanent custodian. *See* Syllabus Point 11, *In re Jonathan G.*, *supra*. To facilitate the commencement and conclusion of the remand proceedings, we issue the mandate of the Court contemporaneously with the issuance of this opinion.

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until she was removed from their foster care pursuant to the permanency proceedings on March 29, 2010. The petitioners did have standing to file the motion.

IV.

CONCLUSION

The petitioners were not given notice of and the opportunity to be heard at the permanency hearing as provided by W.Va. § 49-6-5a(c). Based upon the foregoing, this Court grants the writ of prohibition as moulded, and remands this matter to the circuit court for further proceedings consistent with this opinion. The mandate of this Court shall issue contemporaneously herewith.

Writ Granted as Moulded.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34618

STATE OF WEST VIRGINIA EX REL.
KATHRYN KUTIL AND CHERYL HESS,
Petitioners

v.

HONORABLE PAUL M. BLAKE, JR.,
JUDGE OF THE CIRCUIT COURT OF FAYETTE COUNTY, AND THE
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Respondents

Petition for a Writ of Prohibition

WRIT GRANTED

Submitted: March 11, 2009
Filed: June 5, 2009

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syllabus, *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

3. "'Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.' *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)." Syl. Pt. 2, in part, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991).

4. "The best interests of a child are served by preserving important relationships in that child's life." Syl. pt. 2, *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993).

5. "A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." Syl. Pt. 11, *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996).

6. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).

Per Curiam:

By means of this original jurisdiction action, Kathryn Kutil and Cheryl Hess (hereinafter collectively referred to as "Petitioners") seek a writ of prohibition to bar enforcement of the November 21, 2008, order [1] of the Circuit Court of Fayette County. Petitioners specifically are seeking to prevent the female infant, Baby Girl C. (hereinafter "B.G.C."),[2] from being removed from their foster home. B.G.C. was placed in Petitioners' home as a foster child by the West Virginia Department of Health and Human Resources (hereinafter "DHHR")[3] shortly after the child's birth. Petitioners are a same sex couple whose home had been approved by DHHR for both foster care and adoption. The removal of the infant was ordered at the conclusion of an abuse and neglect permanency hearing at which the lower court accepted the recommendation that B.G.C.'s case be transferred to the adoption unit of DHHR. In its removal order, the lower court directed that B.G.C. be moved

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[1]As related later in this opinion, the order was orally made at the conclusion of an evidentiary hearing held on November 21, 2008, and thereafter incorporated in a written order dated December 2, 2008.

[2]Following our traditional practice in child abuse and neglect matters and other cases involving sensitive facts, we will not reveal the child's last name. *See, e.g., In Interest of Tiffany Marie S.*, 196 W.Va. 223, 226 n. 1, 470 S.E.2d 177, 180 n. 1 (1996).

[3]Both Judge Paul M. Blake (hereinafter "Respondent") and DHHR are named as respondents in the petition before us; however, prohibition does not lie against DHHR under the facts of this case because the agency was not acting in a judicial capacity. *See* W.Va. Code § 53-1-1 (1923) (Repl. Vol. 2008); *State ex rel. Miller v. Smith*, 168 W.Va. 745, 756, 285 S.E.2d 500, 506 (1981) (performance of executive duties is not subject to a writ of prohibition).

from her temporary foster home and placed in a household interested in adoption that is a "traditional family" having a mother and a father rather than a household headed by a same sex couple or single person. In consideration of the arguments of the parties,[4] copies of court documents supplied with the briefs as exhibits and applicable legal authorities, we grant the relief requested.

I. Factual and Procedural Background[5]

When B.G.C. was born on December 8, 2007, she tested positive for the presence of cocaine and oxycodone in her bloodstream. On this basis, while B.G.C. was still in the hospital DHHR instituted abuse and neglect proceedings against the biological

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[4]We hereby acknowledge the contribution of the various amici curiae who filed briefs in this case. We have received three amicus briefs supporting Petitioners' position: one jointly authored by the American Civil Liberties Union, American Civil Liberties Union of West Virginia and People for the American Way Foundation; a second representing the collaborative efforts of Foster Care Alumni of America, COLAGE, CASA (Court Appointed Special Advocates) of the Eastern Panhandle, Inc. and Fairness West Virginia; and the third presented by the National Association of Social Workers, National Association of Social Workers – West Virginia Chapter, Evan B. Donaldson Adoption Institute, North American Council on Adoptable Children, and West Virginia Coalition Against Domestic Violence. Two amicus briefs were filed in support of Respondents' position: one by The American College of Pediatricians and the other by The Family Policy Council of West Virginia. We value the participation of these groups and the insights their briefs lend to the parties' arguments.

[5]To aid the reader in understanding the numerous facts of this case, a timeline of significant occurrences is supplied as an appendix to this opinion.

mother,[6] and was granted custody of B.G.C. on December 13, 2007. At the same time, the court appointed a guardian ad litem (hereinafter "GAL") for B.G.C. Upon discharge of the infant from the hospital on December 24, 2007, DHHR placed B.G.C. directly into Petitioners' home, which had been approved previously by DHHR for both foster parenting and adoption and was then serving as a foster home for several other children.[7]

A motion to remove B.G.C. from the foster home was filed by the infant's GAL on January 24, 2008.[8] In support of his motion, the GAL maintained that removal was necessary even though the home appears "to be comfortable and physically safe for the infant respondent . . . [he nonetheless believed] that the best interest of the child is not to be raised, short term or long term, in a homosexual environment and that the same is detrimental to the child's overall welfare and well-being." DHHR and the foster parents filed responses objecting to the motion. The motion was entertained at a January 31, 2008, hearing at which the lower court granted intervenor status to Petitioners. The February 25, 2008, order issued as a result of this hearing reflects that the court determined "not [to]

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[6]The identity of the biological father is unknown.

[7]Ms. Kutil's adopted daughter, who had initially been placed by DHHR in the home as a foster child, was among the children present when B.G.C. was placed in the foster home. It is noteworthy that the adoption, which also occurred in Fayette County, was approved by the other judge in the circuit.

[8]The motion also asked the court to enter a statewide injunction against DHHR to prohibit the agency "from placing foster children in homosexual homes," for which the lower court ultimately determined it lacked jurisdiction.

interfere with the current foster care placement at this time" and reserved ruling on the removal motion as well as the GAL's request for full hearing on the motion.

The child's biological mother was granted two improvement periods, however, she failed in her efforts to become a fit parent. The biological mother's parental rights were terminated at a dispositional hearing held on October 8, 2008, which termination is memorialized in a November 5, 2008, order. Shortly following the termination, a multidisciplinary treatment team (hereinafter "MDT") met to discuss B.G.C.'s future. A "MDT/Status Report" dated October 28, 2008, containing the results of this meeting was submitted to the court. The report reflected that the MDT endorsed the transfer of B.G.C.'s case to DHHR's regional adoption unit and recommended that B.G.C. remain in Petitioners' home during the adoption process. The MDT report also related that the team had been informed by the adoption unit supervisor that "there would be no reason for the Adoption Unit to move . . . [B.G.C.] due to family members and siblings being previously ruled out[9] . . . . [and that] the Adoption Unit would be reluctant to 'uproot' a child from the only home she knows." The only member of the MDT who objected to the recommendation was the GAL. Following the release of the MDT report, DHHR issued a permanency plan on

[9]In response to an order of the lower court, DHHR had conducted home studies to determine if a custodial arrangement with a family member or sibling was feasible. These efforts resulted in finding that no such acceptable placement existed for B.G.C.

October 31, 2008, indicating the department's position that adoption was in the best interest of B.G.C.

The permanency plan also noted that Petitioners had expressed the desire to adopt B.G.C. followed by a list of reasons why the home would be appropriate for adoption.

A permanency hearing in the abuse and neglect case was held on November 6, 2008, at which the GAL renewed his motion for removal of B.G.C. from a "homosexual home." The lower court set forth its findings from the initial permanency hearing in a November 12, 2008 order. The order begins with a summary of the positions of the parties and then states the observations and findings of the lower court, including the following:

> 29. It also appears to the Court that the fairness showed by the Court by allowing the child to remain with the foster parents pending resolution of the case is now being used to support the argument that, since the child is developing bonds with the intervenors, the child should not be removed from the intervenors' care, and that adoption by the intervenors should be recommended without pursuing adoptive parents which could provide a more traditional home setting.
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> * * * * *
>
> 31. The Court **FINDS** that children need both mother and father and that avenues to such a result should at the least be explored by the DHHR. The Court **FINDS** that untraditional family settings should not be the first and only route taken by the DHHR when searching for a permanent/adoptive placement for a child.

The November 12 order also includes the following conclusions of law:

> 4. The Court **CONCLUDES** that Circuit Courts are not required to accept the *Permanency Plan* of the DHHR and may either accept, reject or modify said recommendation depending on whether or not the Court finds it to be in the best interests of the child at issue.
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> 5. The Court **CONCLUDES** that the polar star in all matters involving children is what is in the best interest of the child.
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> * * * * *
>
> 7. The Court **CONCLUDES** that the standards and guidelines in the Rules applicable for permanency placement review hearings are also applicable and should be considered during the initial permanency plan hearings. Pursuant to these standards and guidelines imposed upon the Courts, the Court must consider, among other things, the appropriateness of the current placement of the child and whether it is the most family-like setting. *See Rule 41(a)(6).*[10]

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[10]Although not squarely before us, an argument raised in the amicus brief jointly submitted by the American Civil Liberties Union, the American Civil Liberties Union of West Virginia and the People for the American Way Foundation maintains that the lower court incorrectly relied upon the parenthetical reference to "most family-like" placement in Rule 41(a)(6) to arrive at the conclusion that a traditional home consisting of a mother and father is a preferred foster placement or adoptive home in this state. The first point argued in the brief is that the Abuse and Neglect Rules do not govern adoption proceedings and cannot be used to support the concept that the law favors adoption by married couples. It is then proposed that the provision in Rule 41(a)(6) of the Rules of Procedure for Abuse and Neglect Proceedings (hereinafter "Abuse and Neglect Rules") requiring consideration of whether a foster home placement of an abused and neglected child is "the least restrictive one (most family-like one) available," simply indicates a preference for a foster home over a group home or institutional setting. As further support for this position, reference is made to the following related Abuse and Neglect Rule provisions: Rule 41(a)(10)(E) ("If placement in a group home or institution is recommended [matters for discussion at a permanent placement review conference should include]: (i) An explanation of why

(continued...)

8. The Court **CONCLUDES** that, if at all possible, it is in the best interest of children to be raised by a traditionally defined family, that is, a family consisting of both a mother and a father. The Court **CONCLUDES** that non-traditional families, such as the intervenors, should only be considered as appropriate permanent/adoptive placements if the DHHR first makes a sufficient effort to place the child in a traditional home and those efforts fail. In other words, if the DHHR has attempted in good faith to secure a traditional family to adopt the child and the DHHR's attempts fail, then a non-traditional family may be considered as an adoptive placement. This did not occur in the present case.

9. For the above stated reasons, the Court **CONCLUDES** that it can only tentatively approve the *Permanency Plan* pending argument/hearing to address the issues raised in this hearing regarding the *Permanency Plan*, including the extent of the Court's authority over the execution of the *Permanency Plan* . . . and argument/evidence in support of and in opposition to the guardian ad litem's pending motions.

10. The Court **CONCLUDES** it is necessary and in the best interest of the child to **ORDER** that the DHHR place the child in a traditional home setting with a mother and a father. The Court deems such action necessary to materially promote the best interests of the child. In recognition of the bonds that may have formed between the child and the intervenors, and to lessen any stress on the child, the Court **CONCLUDES** that it is in the best interests of the infant child that the removal from the intervenors' home and placement in a traditional home

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[10](...continued)
treatment outside a family environment is necessary, including a brief summary of supporting expert diagnoses and recommendations; and (ii) A discussion of why a less restrictive, more family-like setting is not practical, including placement with specially trained foster parents[.]"); and Rule 28(c)(3) (The contents of a child's case plan when DHHR's recommendation is temporary or permanent placement outside of the child's home must include "[a] description of the recommended placement or type of home or institutional placement in which the child is to be placed . . . and whether or not it is the least restrictive (most family-like) one available."

> should be completed over a two week transitional period. **The purpose of the removal and transfer to a traditional home is to materially promote the best interests of the child by encouraging and facilitating adoptive placement of the child with a traditionally defined family and to ease the child's transition when and if such adoptive placement occurs.**

(Emphasis in original.) The order also set November 21, 2008, as the date on which the evidentiary hearing regarding the permanency plan would be held.

On November 17, 2008, Petitioners petitioned this Court for a writ of prohibition accompanied by a motion for an emergency stay of the lower court's order of removal. The lower court rendered both matters moot by entering an order on November 18, 2008, staying its removal order.

DHHR had objected to the removal of B.G.C. from Petitioner's home until the day of the November 21, 2008, evidentiary hearing. Prior to the hearing convening that day, DHHR informed the lower court by fax that B.G.C. needed to be moved to another foster care home because Petitioners' home was over the capacity limit set for foster homes.[11] At the hearing it was made known that the last foster placement by DHHR in

[11]There were a total of seven children in Petitioners' home on the day of the November 21 hearing, six foster children and Ms. Kutil's adopted daughter. The maximum number of children a foster home may house at one time is not entirely clear. West Virginia Code § 49-2B-2 (p) (2006) (Supp 2008) sets the capacity at "no more than five children who are unrelated by blood, marriage or adoption to any adult member of the household." However, there are inconsistencies in the state regulations regarding occupancy limits of (continued...)

Petitioners' home had occurred on October 31, 2008, shortly before either of the permanency plan hearings.

The evidence presented at the November 21, 2008, hearing included the testimony of DHHR adoption and child protective service workers, both Petitioners and two expert witnesses – a clinical psychologist called by the GAL, and a clinical/forensic psychiatrist called by Petitioners.[12] At the conclusion of the hearing, the lower court renewed its previous finding that adoption was the proper permanency plan for B.G.C. and ordered from the bench that B.G.C. be removed from Petitioners' home by noon the following day for placement in the home of a married couple DHHR had identified as a potential adoptive home. The lower court later summarized the basis for its action in a December 2, 2008, order. This order included the following relevant findings of fact and conclusions of law:

> 13. The Court FINDS that the Kutil-Hess household may be the most appropriate adoptive placement home for the child, but it is unfair not to allow the child the option to be adopted by a traditional family. The child should be given the opportunity to be adopted by mother-father adoption and not be locked into a single parent adoption.

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[11](...continued)
foster care homes. *See* 78 C.S.R. 2-3.18 (providing that a foster family home may care for five or less children), *contra* 78 W.Va. C.S.R. § 2-13.3.a. (providing that the number of children who may reside in a foster home "may not exceed six (6).").

[12]According to their testimony, neither of the experts actually assessed B.G.C.'s foster home relationships or environment.

* * * * *

15. The Court FINDS that the *Permanency Plan* of transition to the DHHR Adoption Unit is appropriate and should be accepted by this Court.

16. The Court FINDS that [B.G.C.] is presently in the intervenors' home, however, the DHHR has found the intervenors' home is over capacity and has asked the Court to remove the child with a transitional period, based upon that reason. Thus, the Court FINDS that [B.G.C.] should be moved immediately. The Court FINDS that placement of [B.G.C.] in a home with a married mother and father pending such adoption process is most appropriate for the child's well being.

CONCLUSIONS OF LAW

1. The Court CONCLUDES that the intervenors cannot adopt this child as a couple because of statute. The intervenors argue that ***they*** are the only proper parties to be considered for the adoption of [B.G.C.]; however, under West Virginia law §48-22-201, only married couples, married persons with consent of their spouse, or single persons may petition to adopt a child. For this reason, the Court CONCLUDES that the intervenors cannot lawfully petition ***together*** to adopt B.G.C., ***only one*** of the two intervenors may petition for adoption.

2. The Court CONCLUDES that the DHHR's request for removal based upon the fact that the intervenors' home is overcapacity should be GRANTED as it is in the child's best interest. Further considering the well-being of the child, the Court CONCLUDES and ORDERS that the child be removed from the intervenors' home by 12:00 noon November 22, 2008.

(Emphasis in original).

Before the written order was issued, Petitioners acted on the pronouncement of the lower court at the November 21 hearing by again seeking an emergency stay by this

Court of the removal order. We granted the stay requested on November 26, 2008.[13] Thereafter, on December 9, 2008, this Court granted Petitioners leave to amend their previously filed petition for a writ of prohibition which is now under consideration.

II. Standard of Review

The original jurisdiction authority of this Court to consider matters of prohibition stems from Article VIII, § 3 of the West Virginia Constitution. That authority is further recognized and defined by statute and rule. *See* W.Va. Code §§ 51-1-3 (1923); 53-1-2 (1933); W.Va. R. App. P. 14. Historically, we have been guarded about granting relief in prohibition, reserving its use for extraordinary situations. As we stated in the syllabus of *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925), "[t]he writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction."

Petitioners do not allege that the lower court acted without jurisdiction of the subject matter and parties in the abuse and neglect action, but instead maintain that the lower

[13] Although Petitioners took steps to stop the enforcement of the removal order, it is undisputed that Petitioners complied with the terms of the order and delivered B.G.C. with her belongings to her new foster home on November 22. As related to this Court, on or about November 26, 2008, the prospective adoptive parents named in the removal order informed DHHR that conditions had changed and they were no longer in a position to adopt B.G.C.. The child was returned to Petitioners' home later this same day after this Court granted Petitioners' motion for the emergency stay of the removal order.

court went beyond the bounds of its authority in ordering removal in this case. In such circumstances, we consider those measures outlined in syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), which reads as follows:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With this standard in mind, we proceed to consider whether it was proper for the lower court to order removal of the infant from Petitioners' home.

III. Discussion

Petitioners assert that the lower court was exceeding its legitimate authority by ordering the removal of B.G.C. from their home for placement in a traditional home which the court defined as headed by a mother and a father. Respondent asserts that removal was legally required under the circumstances before it because: (1) Petitioners as a couple

are not permitted to adopt a child under the provisions of the adoption statute, and (2) the number of children residing in Petitioners' foster home exceeded the statutory limit. It is upon these legal foundations that Respondent maintains that it was necessary to order removal of the child from the home. Respondent further contends it also was appropriate to order placement of B.G.C. with a suitable married couple interested in adoption given the legislative preference expressed in the adoption statutes for adoption by married couples.

A. Removal

As to Respondent's first ground for removal, it is not at all clear that the issue of joint adoption by unmarried parties was before the court. It is important to keep in mind that the purpose of the permanency hearing in an abuse and neglect case is to determine what type of permanent placement would provide "the level of custody, care, commitment, nurturing and discipline that is consistent with . . . [a] child's best interests." *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185 (1998). And although adoption is the preferred permanent placement for a child when parental rights are terminated,[14] it is but one permanent placement option which DHHR may recommend in its permanency plan.[15]

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[14]Syl. Pt. 2, *State v. Michael M.*, *supra*.

[15]*See* W.Va. Code § 49-6-5a (2007) (Supp. 2008); R. 41, W. Va. Rules of Procedure for Child Abuse and Neglect (identifying possible permanent living arrangements which may be recommended in abuse and neglect cases as returning a child to parent(s), adoption, placement of a child with fit and a willing relative, a legal guardian or in another planned permanent arrangement, including institutional settings).

It was made abundantly clear during the course of the hearings in the present case that the permanency plan is designed to recommend a general course of action regarding future placement of a child after parental rights have been terminated, and that it would be premature for DHHR to recommend a particular adoptive home at the permanency hearing. Certainly, DHHR has the responsibility to develop a permanent placement plan for a child contemporaneously with reunification efforts,[16] but the details of the plan necessarily depend on the course of action the court determines to be most suitable under the circumstances. According to the testimony of DHHR workers, a particularized plan for a child whose recommended permanent placement is an adoptive home would not be completed until after the child's case is transferred to DHHR's adoption unit because the agency's operations involving adoptive home selection are run separately from DHHR's operations involving services for abuse and neglect victims. We further note that although Petitioners may have indicated the desire to make B.G.C. a permanent part of their household, there was no formal joint or individual request for adoption pending before the court at the permanency hearings.

This Court has clearly and consistently maintained that "'[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes.' *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943)." Syl. Pt. 2, in part, *Harshbarger*

[16]Syl. Pt. 5, *In re Billy Joe M.*, 206 W.Va. 1, 521 S.E.2d 173 (1999).

v. Gainer, 184 W.Va. 656, 403 S.E.2d 399 (1991). It was thus inappropriate for the lower court to rule as a matter of law on the subject of the propriety of joint adoption of a child by a same sex couple because it was not a matter pending before the court. Moreover, Petitioners have represented to this Court that joint adoption is not being sought, and Ms. Kutil has informed DHHR of her interest in adopting B.G.C. as a single person.

We next consider whether overcapacity suffices as a ground for removal of B.G.C. from her home. As was noted earlier, there were seven children residing in Petitioners' foster home during the time period when both permanency hearings occurred. Whether the upper limit for the number of children who may reside in a foster home is five or six,[17] Petitioners' foster home was overcapacity and the situation needed to be corrected.[18] Our concern lies with the manner in which the problem was rectified.

In its response to the pending writ of prohibition, DHHR stated that the change in the agency's position regarding removal of B.G.C. only occurred because of "overcrowding at Petitioners' home and the ready availability of a foster home that was

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[17]*See supra* n. 7.

[18]We find it disconcerting that DHHR just "discovered" the overcapacity issue on the date of the hearing when the agency had created the situation by placing what appears to have been more than one child in the home a month earlier. Even accepting DHHR's representation that the worker who handled the last placement in the home misunderstood relevant procedures, it is certainly not clear why it took a month for the agency to uncover this problem.

willing and capable at the time to accept the infant, ... [and the agency] did not at that time have a placement available for the children who were most recently placed in the Petitioners' home." DHHR then added, "Nowhere has WVDHHR indicated that the home provided by Petitioners was anything other than loving and nurturing." Despite the number of times that this Court has stated the best interest of the child is the polar star upon which decisions involving children are to be based,[19] DHHR did not even consider whether the individual needs of B.G.C. would be best served by removing her from Petitioners' care, but instead opted for a swift and ready solution to the problem the agency created. The agency simply turned a blind eye to the fact that B.G.C. had been placed in the foster home a number of months before some of the other children then in the home, and ignored any consideration of the impact relocation would have on B.G.C.'s emotional, physical and mental development. By following the lead of DHHR, the lower court erred in not closely examining the individual needs of B.G.C. as well as of the other children placed in Petitioners' home to determine how the best interests of all the children would be served while remedying the overcapacity problem of the foster home.

No evidence was produced at the hearings as to Petitioners providing anything but quality care in their foster home, or of any particular problems B.G.C. was experiencing in her foster home environment. Consequently, the main concern in solving the

[19]*See In re Erica C.*, 214 W.Va. 375, 380, 589 S.E.2d 517, 522 (2003) (numerous cases listed).

overcrowding problem should have been what affect the disruption of relocation would have on the emotional and physical well-being of the individual children in the home. The length of time each of the foster children was in the home no doubt would affect the strength of the emotional bond that had developed between each child and Petitioners as well as their sense of comfort and security with their home environment. The only home B.G.C. had ever known in the eleven months of her life had been Petitioners' foster home. Surely bonding had occurred between the infant and Petitioners to a much larger extent than with children who had lived in the household for a much shorter period of time. We have been clear in pointing out that "[t]he best interests of a child are served by preserving important relationships in that child's life." Syl. pt. 2, *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993). This concern extends to the relationship a child in foster care has with foster parents. As we held in syllabus point eleven of *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996), "[a] child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." *Cf. In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005) (recognizing that a foster parent may attain the status of psychological parent when the relationship is not temporary in duration and exists with the consent and encouragement of a child's legal parent or guardian). The GAL contends that because B.G.C. is a child under the age of two she is less apt to have bonded with her foster parents. He relies on language we quoted from a

Pennsylvania Superior Court in our decision in *West Virginia Department of Human Services v. La Rea Ann C.L.*, 175 W.Va. 330, 332 S.E.2d 632 (1985) to support this proposition. This reliance is misplaced. The fundamental issue decided in *La Rea Ann C.L.* is that a minor parent's right to revoke the relinquishment of child custody ceases to be absolute when an unreasonable period of time has passed. *Id.* at Syl. Pt. 2. We further determined that in such circumstances "the best interests of the child not only be considered but be given primary importance." *Id.* The case was then remanded with instruction to the trial court "to receive evidence to make a finding of fact on the child's best interests presently." *Id.* at 337, 332 S.E.2d at 638. Thus, whether a given child has bonded with a parental figure is a question of fact.

The situation before us involves a removal decision where the foster home environment or care provided in a foster home is not in question, and removal of a child is necessary to correct problems created by bureaucratic error. When presented with such situations, courts need to safeguard the best interests of the children by examining evidence of the emotional, physical and mental needs of the individual children under the particular circumstances of a case, and then balancing the relative interests of the children in order to decide which child or children would be less traumatized or detrimentally affected by being removed from the home. No such examination or balancing occurred in the present case. However, even though the relevant analysis regarding the best interests of the children

placed in Petitioners' home is a significant oversight, it is unnecessary for the lower court to further address that issue as we have been informed that the overcrowding problem has been resolved. During oral argument in this case, the Court was told that the foster home is no longer overcapacity, with only five children, including B.G.C., presently residing in Petitioners' home. Consequently, removal of B.G.C. to resolve an overcrowding problem is moot.

In consideration of the foregoing discussion of the grounds upon which Respondent ordered removal of B.G.C., such action constituted clear error and the writ of prohibition is granted on the removal issue.

B. Adoption

Finding no merit in the grounds for removal asserted by Respondent, we must also consider Respondent's contention that removal of B.G.C. to a foster home representing a more traditional family unit consisting of a married mother and father who are interested in adoption furthers a legislative preference expressed in the adoption statutes.

West Virginia Code § 48-22-201 (2001) (Repl. Vol. 2004) provides that

> [a]ny person not married or any person, with his or spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons

> reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners.

The statute thus sets forth three classifications of persons who may adopt: (1) an unmarried person; (2) a married couple jointly, and (3) an individual in a marriage whose spouse consents. Although Respondent recognized that each Petitioner may individually petition to adopt under the statute, he asserts in his brief that the "statutes indicate a preference for adoption by married couples." No statutory citation was supplied to support this position and our research reveals no such stated preference. Nor were we able to locate any legislatively assigned preference for adoption into a traditional home or any statutory definition of a traditional home for adoption purposes. As is evident from the clear language of West Virginia Code § 48-22-201, there is no prioritization among the three classifications of those eligible to adopt a child in this state. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).[20]

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[20]The only express legislative preferences we have found with particular regard to adoption of children in the legal custody of the State involve grandparents and reunification of siblings. Specifically, West Virginia Code § 49-3-1 (a)(3) establishes that a grandparent or grandparents found to be both suitable and willing to adopt a child in DHHR's custody be given priority over other prospective adoptive parents, and West Virginia Code § 49-2-14 (e) & (f) expresses the preference that DHHR reunite siblings for either foster care or adoption purposes if such arrangement is available and is determined to be in the best interests of the children. Neither of these preferences are automatic, however, as they turn on the best interests of the child who is the candidate for adoption.

Notwithstanding Respondent's and GAL's suggestions to the contrary, there simply is no legislative differentiation between categories of eligible candidates for adoption under the terms of West Virginia Code § 48-22-201. Such policy determination is clearly a legislative prerogative, outside of the purview of the courts. The primary concern of courts in adoption cases is whether there is evidence that the recommended adoptive home possesses the necessary attributes to meet the individual and specific needs of the child both at present and in the future.[21]

C. Summary

Central to our deliberation in this case is the reason or motivation underlying Respondent's decision to remove a child from her foster care home. The motion to remove the child was not supported by any allegation that B.G.C. was receiving improper or unwise care and management in her foster home, or that she was being subjected to any other legally recognized undesirable condition or influence. W.Va. Code § 49-2-12 (1970) (Repl. Vol. 2004); *see also* W.Va. Code § 49-2-14 (2002) (Repl. Vol. 2004) (criteria and procedure for removal of child from foster home). Likewise, no evidence supporting a legal reason for removing the child was presented at the hearings. As a matter of fact, the court was never presented with any actual evaluation of the home or evidence of the quality of the

[21]Our discussion in this case does not extend to equal protection considerations because Petitioners did not raise that argument during the course of the proceedings below nor did they pursue it once raised in this prohibition proceeding.

relationship B.G.C. had with Petitioners.Moreover, Respondent deferred hearing testimony from Petitioners' witnesses regarding their parenting abilities. Nevertheless, there also was no indication that Petitioners provided B.G.C. with anything other than a loving and nurturing home. As Respondent observed from the bench at the November 21 hearing, "there has been absolutely no allegation that these women have not cared for [B.G.C.] or the other kids and, in fact, all of the evidence indicates that they have done very well and have provided very well for the children."Without any information that thefoster care placement with Petitioners was not proceeding well, there was no legal reason for the court to remove B.G.C. from the only home she has known.

It is more than apparent that the only reason why Petitioners were being replaced as foster care providers was to promote the adoption of B.G.C. by what Respondent called in his November 12, 2008, order a "traditionally defined family, that is, a family consisting of both a mother and a father." It was only by addressing issues he anticipated would develop and believed would be problems at a later point in this case that Respondent was even able to reach the subject of this conclusion. The conclusion itself thus represents a blurring of legal principlesapplicable to abuse and neglect and adoption. Moreover, even if our current statutes, rules and regulationscould somehow be read to support the adoption preference proposed by Respondent, such a newfound principle would need to be harmonized with established law. Under our current law which encourages adoption by

qualified foster parents, one of the Petitioners seeking to adopt B.G.C. individually would at the very least need to be considered if not favored in the selection of the prospective adoptive home.[22]

In the present case, all indications thus far are that B.G.C. has formed a close emotional bond and nurturing relationship with her foster parents, which can not be trivialized or ignored. *State ex rel. Treadway v. McCoy; In re Jonathan G.* As such, it serves as a classic example of a case in which the permanency plan for adoption should move quickly to the desired result of a permanent home for B.G.C. One of the Petitioners who has already adopted a child[23] and appreciates the tremendous responsibility adoption entails, has recently expressed the desire to adopt B.G.C. Clearly, that Petitioner should not be excluded from consideration for the reason stated by Respondent. These factors all should serve to facilitate the selection process, which needs to be completed as expeditiously as possible in order to further the best interests of B.G.C. and in recognition and support of the parenting investment which has been made.

IV. Conclusion

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[22]*See State ex rel. Treadway v. McCoy*, 189 W.Va. at 213, 429 S.E.2d at 495; *cf. In re Jonathan G.*, 198 W.Va. at 735, 482 S.E.2d at 913.

[23]*See supra* n. 6.

For the reasons stated in this opi nion, the writ of prohibition sought by Petitioners is granted.

Writ of prohibition granted.

APPENDIX

TIMELINE OF SIGNIFICANT OCCURRENCES

12-8-07	B.G.C. born testing positive for cocaine & oxycodone.
12-11-07	Abuse & neglect [A&N] petition filed.
12-13-07	DHHR granted legal custody of B.G.C.; GAL appointed for B.G.C.
12-24-07	B.G.C. placed in foster home of Petitioners after discharge from hospital.
1-24-08	GAL filed a "Motion to Order DHHR to Remove Child from Physical Placement in Homosexual Home & Other Injunctive Relief."
10-28-08	MDT meeting held and report issued finding adoption of the child as the acceptable disposition; report reflects DHHR Adoption Supervisor "informed MDT members that, although she must 'ensure that [B.G.C.] is doing well in her present placement", there would be no reason for the Adoption Unit to move her due to family members and siblings being previously ruled out." The report goes on to say that the supervisor "further stated that the Adoption Unit would be reluctant to 'uproot' a child from the only home she knows."
10-31-08	Date on which DHHR placed seventh child in Petitioner's home [a foster home's maximum capacity is set at 5 or 6 foster children].
11-5-08	Order terminating parental rights of B.G.C.'s mother; the parental rights of both the mother and unknown father were terminated at a dispositional hearing held on October 8, 2008.
11-6-08	Permanency hearing in A&N case [DHHR recommends adoption].
11-12-08	First order of removal entered [directing that child be transitioned to a "traditional home" within two weeks].
11-17-08	Foster parents (Petitioners) file petition for writ of prohibition in Supreme Court.
11-18-08	Circuit court order staying the November 12, 2008, order of removal.
11-21-08	Resumption of permanency hearing, including consideration of GAL motion to remove the child from the "homosexual home." At the conclusion of the

hearing the lower court ordered DHHR to remove B.G.C. from Petitioners' home by noon the following day (November 22, 2008), and continue foster care placement of the child in the home of a prospective adoptive married couple identified during the hearing. [Petitioners complied with the order and B.G.C. was delivered with her belongings to the prospective adoptive home on November 22.]

11-24-08 Motion to Supreme Court for emergency stay.

11-26-08 Prospective adoptive married couple informed DHHR they would not adopt B.G.C. The child was returned to Petitioners' home later in the day after the motion for the emergency stay was granted by this Court.

12-2-08 Second order of removal memorializing hearing of November 21, 2008, entered. The order directed DHHR to move the child from Petitioners' home because Petitioners were not eligible to adopt the child together under the adoption statute and the number of foster children in Petitioners' home was over the capacity limit. Lower court iterated in this order that it was most appropriate to B.G.C.'s best interests to be placed in a traditional home with a married mother and father pending the adoption process.

12-9-08 Supreme Court Order granting petition.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED
May 21, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30971

IN RE: KYIAH P. AND JOSEPH P.

Appeal from the Circuit Court of Raleigh County
Honorable John A. Hutchison, Judge
Civil Action Nos. 02-JA-36-H & 02-JA-37-H

REVERSED AND REMANDED

Submitted: April 9, 2003
Filed: May 21, 2003

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Raleigh County entered on August 29, 2002. Pursuant to that order, the abuse and neglect petition brought against the appellees, Alvin and Stacy P.,[1] concerning their two children, Kyiah and Joseph P., was dismissed.[2] In this appeal, the appellants, the guardian ad litem on behalf of the children and the Department of Health and Human Resources ("DHHR"), contend that the circuit court erred by dismissing the petition.

This Court has before it the petition for appeal, the entire record, and briefs and argument of counsel. For the reasons set forth below, the final order is reversed, and this case is remanded for further proceedings consistent with this opinion.

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2]The circuit court stayed dismissal of the case for sixty days. By order dated October 28, 2002, this Court continued the stay of the dismissal of the case pending the resolution of this appeal.

I.

FACTS

On April 15, 2002, Alvin P. contacted the DHHR and requested diapers for his son, Joseph. According to the DHHR, it was evident from the phone call that there was stress in the home and, thus, a referral for services was made. On April 25, 2002, a DHHR social worker met with the family which included Alvin P., his wife, Stacy P., and their two children, Kyiah P., who was born on December 24, 2000, and Joseph P., who was born on December 24, 2001. During the meeting, Stacy P. told the social worker that she had four other children removed from her custody by child protective services in Virginia.

Thereafter, the DHHR contacted Amy Whitt of child protective services in Campbell County, Virginia. The DHHR was advised by Ms. Whitt that eight children had been removed from Stacy P. and her parental rights to those children terminated. Ms. Whitt also said that Alvin P. had sexually abused his four-year-old daughter, Samantha P.[3] Ms. Whitt indicated that any children in the custody of Alvin and Stacy P. would be in imminent danger.

[3]Stacy P. is not the biological mother of Samantha P.

Based on this information, the DHHR filed an application for emergency custody of Kyiah and Joseph P. on April 26, 2002. Consequently, the children were immediately removed from their parents' custody. A formal abuse and neglect petition filed by the DHHR on May 1, 2002, asserted that Kyiah and Joseph P. were at risk for abuse and neglect because of the involuntary termination of Stacy and Alvin P.'s parental rights to their other children in Virginia.

A preliminary hearing was held on May 15, 2002. Apparently, child protective service workers from Virginia testified that the parental rights of Alvin and Stacy P. to their other children were not involuntarily terminated.[4] However, they did state that Stacy P. voluntarily terminated her parental rights to two of her other children. Also, they indicated that Alvin P. had sexually abused his daughter, Samantha P. Thereafter, the court ordered that legal custody of the children remain with the DHHR, but afforded the DHHR discretion with regard to the physical custody of the children.

Subsequently, the DHHR returned the children to the home of Stacy P. However, Alvin P. was permanently restrained and enjoined from having contact with the

[4]Transcripts of the hearings held in this case were not included in the record presented to this Court in connection with this appeal. As a result, we are unable to ascertain the exact content of the testimony presented during the preliminary hearing.

children except for supervised visitation.[5] An adjudicatory hearing was scheduled for August 6, 2002. At that hearing, the DHHR sought and received a continuance in order to travel to Virginia to investigate the allegations of sexual abuse against Alvin P.

The adjudicatory hearing was rescheduled for August 28, 2002. Although the DHHR had subpoenaed case workers from Virginia to testify, they refused to appear contending that they did not have sufficient notice. The DHHR sought another continuance, but the circuit court denied the motion. The court then dismissed the abuse and neglect petition by order entered on August 29, 2002. This appeal followed.

II.

STANDARD OF REVIEW

We begin our analysis of this case by setting forth our standard of review. We recently stated that, "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). This Court has also held that:

> Although conclusions of law reached by a circuit court

[5]It appears that Alvin P. agreed to move out of the home so the children could be returned to Staci P.

> are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

With these standards in mind, we proceed to determine whether the circuit court erred in this case.

III.

DISCUSSION

The sole issue in this case is whether the circuit court erred by dismissing the abuse and neglect petition filed against Alvin and Stacy P. The appellants argue that the dismissal was improper absent a full evidentiary hearing. In support of their argument, the appellants rely upon this Court's holdings in *In the Matter of George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999) ("*George I*"). In Syllabus Point 2 of *George I*, this Court held

that:

> Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present.

Also, in Syllabus Point 4 of *George I*, this Court stated that:

> When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s).

The appellants acknowledge that through further investigation, they learned that the appellees' parental rights to their other children were never involuntarily terminated. However, they contend that the holdings of *George I* should nevertheless be applied in this case because child protective services in Virginia had sufficient evidence to terminate the appellees' parental rights to their other children. Stacy P.'s parental rights were not terminated only because she agreed to voluntarily relinquish her rights. Similarly, Alvin P.'s

parental rights to Samantha P. were not terminated, but he was denied visitation with her after Virginia child protective services determined that he sexually abused her. Based on these facts, the appellants argue that the circuit court should have held an adjudicatory hearing and allowed them to present evidence concerning the abuse and neglect proceedings that were conducted in Virginia. The appellants maintain that there was good cause for a continuance of the adjudicatory hearing based on the failure of the Virginia social workers to appear to testify.

In response, the appellees argue that the abuse and neglect petition was properly dismissed because the appellants were unable to produce any evidence of a prior involuntary termination of their parental rights. The appellees contend that W.Va. Code § 49-6-5b (1998) only applies where a parent's parental rights have been involuntarily terminated. They further assert that the appellants did not have good cause for a continuance of the adjudicatory hearing. In that regard, the appellees note that the circuit court granted one continuance before dismissing the petition. The appellees say that even with an additional three weeks to secure their witnesses, the appellants were not able to do so. Thus, the appellees conclude that the circuit court's dismissal of the petition should be affirmed.

It is well established that W.Va. Code § 49-6-5b requires the DHHR to join efforts to terminate parental rights where "the parental rights of the parent to a sibling have

been terminated involuntarily." In *George I,* we explained that,

> Quite clearly, the statute contemplates that a prior termination of parental rights to a sibling is, at least, some evidence of a child being threatened with abuse and neglect. The legislature has clearly determined that where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998).

205 W.Va. at 442, 518 S.E.2d at 870. In addition, in Syllabus Point 1 of *In re George Glen B., Jr.*, 207 W.Va. 346, 532 S.E.2d 64 (2000) ("*George II")*, this Court held that:

> When the parental rights of a parent to a child have been involuntarily terminated, *W.Va.Code*, 49-6-5b(a)(3) [1998] requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

It is clear from the record that the DHHR filed the abuse and neglect petition in this case based upon the belief that the appellees had their parental rights to as many as eight other children terminated. However, upon further investigation, the DHHR learned that the appellees' parental rights to their other children were never involuntarily terminated. Yet, the DHHR did confirm that abuse and neglect proceedings had been instituted by child protective services in Virginia against the appellees. Furthermore, the DHHR discovered that Stacy P. agreed to voluntary relinquish her parental rights to two of her other children once

she learned that child protective services had instituted termination proceedings. Also, the DHHR discovered that child protective services in Virginia had determined that Alvin P. sexually abused his daughter, Samantha P. Instead of contesting that finding, Alvin P. agreed to no longer visit Samantha P.[6]

Based on these facts, the DHHR sought a continuance of the adjudicatory hearing to gather more evidence including the testimony of the Virginia child protective service workers. The circuit court granted the DHHR's motion, but when a second continuance was requested, the motion was denied. Thereafter, the circuit court dismissed the petition because the DHHR was unable to produce any additional evidence of abuse and neglect of the children. Having reviewed the entire record, we agree with the appellants that the circuit court abused its discretion by dismissing the abuse and neglect petition at this juncture.

While the appellees' parental rights to their other children have not been involuntarily terminated, it is clear from the record that substantial allegations of abuse of neglect by these parents were made in the state of Virginia with respect to their other

[6]The DHHR was also advised that at some point during the proceedings involving Samantha P. in Virginia, Stacy P. told child protective services that Alvin P. did sexually abuse Samantha P.

children.[7] As we stated previously, these allegations resulted in the voluntary termination of Stacy P.'s parental rights to two of her other children. Also, Alvin P. was denied further visitation with his daughter, Samantha P. because he sexually abused her.

The appellees maintain that the abuse and neglect petition should have been dismissed once it was established that their parental rights to their other children were never involuntarily terminated. We disagree. Recently, in *In re James G.*, 211 W.Va. 339, 566 S.E.2d 226 (2002), we considered the effect of a voluntary versus involuntary termination of parental rights on later-born children. In that case, the appellant mother argued that the circuit court had erred by refusing to accept her voluntarily relinquishment of parental rights. The DHHR would not agree to the voluntary termination suggesting that the mother only offered to relinquish her parental rights because she knew they were going to be terminated, and she wanted to limit the DHHR's ability to take action against her should she later have another child. Ultimately, this Court determined that "[a] circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination." Syllabus Point 4, in part, *id.* However,

> [w]e note[d] that while W.Va.Code § 49-6-5b (1998) does not include the voluntary termination of parental rights as one of the factors triggering a new petition against a parent with additional

[7]The record suggests that the proceedings in Virginia were never completed because the appellees moved to West Virginia.

> children, the *absence* of one of these factors does not in any way prevent the Department from filing such a petition should conditions warrant. Nothing prevents the Department from conducting an investigation if it believes that a parent who has voluntarily terminated parental rights with respect to one child might be mistreating another child, or from providing such a parent with assistance or counseling where available.

Id., 211 W.Va. at 346, 566 S.E.2d at 233.

In the case *sub judice*, we find that the conditions warranted the filing of the abuse and neglect petition. Furthermore, based upon the preliminary hearing testimony, there was probable cause for the emergency removal of the children from their home. While the appellees' parental rights to their other children were never involuntarily terminated, there was reason to believe that the appellees might be mistreating Kyiah and Joseph P. Given that possibility, an adjudicatory hearing was required. As this Court has stated on many occasions,

> The guiding principle in any child abuse or neglect proceeding is to do what is best for the child: "First and foremost in a contest involving the custody of a child is the consideration of that child's welfare. It has been held repeatedly by this Court that the welfare of the child is the polar star by which the discretion of the court will be guided." *State ex rel. Cash v. Lively*, 155 W.Va. 801, 804, 187 S.E.2d 601, 604 (1972); *accord, Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989); *State ex rel. Rose L. v. Pancake*, 209 W.Va. 188, 192, 544 S.E.2d 403, 407 (2001) (Davis, J. concurring).

Id., 211 W.Va. at 345, 566 S.E.2d at 232.

Consequently, we find that the circuit court erred when it dismissed the abuse and neglect petition without conducting the adjudicatory hearing. While we recognize that the DHHR had a significant amount of time during which to secure its witnesses for the adjudicatory hearing, we, nonetheless, believe it established good cause for a second continuance. In summary, based on all of the above, especially the need to protect the welfare of these children, the circuit court should have rescheduled the adjudicatory hearing and allowed the DHHR and guardian ad litem to present the testimony of the child protective service workers from Virginia.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Raleigh County entered on August 29, 2002, is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

No. 30971 *In Re: Kyiah P. and Joseph P.*

FILED
July 9, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C. J., concurring:

I concur in the Court's opinion. I write separately to comment on the circuit judge's decision not to grant the DHHR a second continuance.

Courts are busy forums, in which litigants who fail to bring evidence forward in a timely fashion risk having their cases dismissed. If there is no risk of sanctions for delay, there is a correlative tendency for no one to take deadlines seriously. And especially in priority child abuse cases, the court is on a strict timetable.

In the instant case, the DHHR should have known what the Virginia authorities' position was well before the August 28 hearing, and should have asked for second continuance. Just "showing up" and saying "Sorry, Judge, we're not ready" is not acceptable. For this reason, the circuit court's action was, it appears, entirely understandable.

235 W. Va. 436, 774 S.E.2d 517

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-0050

IN RE: L.M. AND L.S.

Appeal from the Circuit Court of Calhoun County
Honorable Thomas C. Evans, III, Judge
Civil Action Nos. 13-JA-2E and 13-JA-3E

AFFIRMED

Submitted: February 25, 2015
Filed: May 13, 2015

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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo.*' Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syllabus point 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

2. "In . . . custody matters, we have traditionally held paramount the best interests of the child." Syllabus point 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

3. "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." Syllabus point 3, *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W. Va. 83, 543 S.E.2d 364 (2001).

4. "Although conclusions of law reached by a circuit court are subject to a *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts

without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

5. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

6. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

7. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the

duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syllabus point 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).

8. "'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982)." Syllabus point 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997).

9. The mandatory language of W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014) requires that a home study evaluation be conducted by the West Virginia Department of Health and Human Resources to determine if any interested grandparent would be a suitable adoptive parent.

10. While the grandparent preference statute, at W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014), places a mandatory duty on the West Virginia Department of Health and Human Resources to complete a home study before a child may be placed for adoption with an interested grandparent, "the department shall first consider the [grandparent's] suitability and willingness . . . to adopt the child." There is no statutory

requirement that a home study be completed in the event that the interested grandparent is found to be an unsuitable adoptive placement and that placement with such grandparent is not in the best interests of the child.

Davis, Justice:

In this case, the Court must determine whether grandparent placement is appropriate for two minor children: L.M.[1] and L.S. The maternal grandparents, B.S. and D.S., the petitioners herein and intervenors below (hereinafter "grandparents"), appeal the circuit court's December 19, 2013, order. By that order, the lower court denied the grandparents' request to intervene and their motion for placement of the minor children in their home. Both the respondent, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), as well as the Guardian *ad litem* (hereinafter "Guardian") for the minor children, assert that the grandparents' home is not a proper placement for the children. Based on the parties' briefs, the appendix record designated for our consideration, and the pertinent authorities, we find that the circuit court's ruling was proper; thus, it is affirmed.

I.

FACTUAL AND PROCEDURAL HISTORY

This case involves the proper placement for two children: L.M., a three-year-old boy, and his younger sister, L.S., who is two. The DHHR filed an abuse and neglect petition on January 11, 2013, prior to L.S.'s birth, alleging that L.M. was neglected by his

[1]"We follow our past practice in . . . cases which involve sensitive facts and do not utilize the . . . names of the parties." *State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

parents as a result of chronic substance abuse. The petition maintained that L.M. had been exposed to drug paraphernalia and that police had seized a clandestine methamphetamine (hereinafter "meth") lab from the mother's home, a trailer that had been purchased for her by her parents, the grandparents herein. The DHHR sought and received custody of L.M., and placed him in foster care. Thereafter, on January 17, 2013, the grandparents filed a motion to intervene and, further, moved for placement of L.M. in their home. The DHHR opposed this motion; however, the circuit court granted physical custody of L.M. to the grandparents.

L.M.'s younger sister, L.S., was born soon thereafter in March 2013. At birth, L.S. tested positive for substantial amounts of alcohol and trace amounts of controlled substances, cotinine and hydrocodone, in her bloodstream. The DHHR amended its petition to include L.S., and was granted custody of L.S. When L.S. was released from the hospital, she also was placed in her grandparents' care. The following day, the DHHR's child protective service (hereinafter "CPS") worker conducted an unannounced home visit to the grandparents' home. While there, the CPS worker took photographs of the children's living environment.

Subsequent to the home inspection, the CPS worker was examining pictures taken of the grandparents' home and compared them with photographs that had been taken

of the mother's home on the day the meth lab had been discovered. CPS determined that several baby items in the grandparents' home were the same items that had been in the mother's meth-contaminated home. Specifically, CPS identified a bassinet and a baby swing.

Based upon its concern that the children currently were exposed to items in the grandparents' home that had been contaminated in an unremediated meth environment, the DHHR filed a motion for emergency custody and for the children to be removed from the grandparents' home. The circuit court granted the DHHR's motion to change placement, and the matter was set for a full hearing.

The hearing on the emergency motion for change of placement occurred on April 15, 2013. The DHHR presented evidence that a baby bassinet and indoor baby swing were found in the grandparents' home where the children were placed. It was asserted by the DHHR, through its witnesses' testimony, that these items were the same items that had been contaminated in the mother's trailer where she was managing a clandestine meth lab while L.M. was in the home. The testimony presented by the DHHR focused on a comparison of the colors of the items in question, the ribbons attached thereto, the accessory bag on the side, the bars on the base, and the product warning labels. Further, the DHHR presented testimony that the contamination of the mother's trailer caused by the meth lab resulted in the property being closed, with entry on the premises precluded and removal of items disallowed. It was

stated, through a witness at the hearing, that exposure to the trailer or any items that had been inside of the trailer, such as the baby bassinet and swing, created a risk to the public health and safety. It was explained to the circuit court that meth residue on household items can cause adverse health effects, including respiratory issues.

Both grandparents also testified at the hearing on the emergency motion for removal of the children. They testified that they had purchased the trailer for their daughter, the children's mother, and that the trailer was located on the grandparents' property. Further, the trial statements from the grandparents indicated that the baby equipment in their home was not the same as had been in the mother's home but, rather, had been received from friends or elsewhere.

The circuit court, based on the evidence submitted at the emergency hearing regarding placement of the children, found that certain items in the photographs taken at the contaminated trailer were the same currently being used by the grandparents in their home. The lower court found that "it appears the items have been transferred from the unremediated trailer which once contained a methamphetamine lab, to the grandparent's [sic] home for use by them with the infant child." The motion for an emergency change of placement for the children was granted, and the children were removed from the grandparents' care.

Subsequent thereto, the rights of the biological parents were terminated by the circuit court.[2]

On December 2, 2013, the circuit court held a hearing on the grandparents' previously-filed motion to intervene and for placement of the children in their home. The circuit court took judicial notice of the evidence from the April 15, 2013, emergency hearing. CPS testified that placement of the children with the grandparents was concerning based on the fact that the grandparents' own children had trouble in school, and three of them became involved in drugs. Despite the drug issues, the grandparents continued to support and engage with their adult children, including posting bond for the adult children's drug charges. Therefore, CPS voiced concerns that the grandparents would not prevent interaction between the children and the mother, or preclude exposure to others with criminal proclivities, including illicit drug use.

At the hearing, the grandmother testified, reiterating her previous statements that the bassinet and the swing in her home were not from her daughter's trailer. Additionally, the grandparents' counsel proffered to the circuit court that the grandfather's

[2]The children's biological parents' rights were terminated July 8, 2013. The mother appealed the termination of her rights to this Court, and such termination was affirmed November 26, 2013. L.M.'s and L.S.'s fathers' rights also were terminated July 8, 2013. Neither father appealed. No parental rights are at issue in the instant case.

testimony would be the same as he previously had testified. Further, counsel for the grandparents also submitted that another witness had observed the bassinet and swing through the trailer's window on the same day that he had observed similar items in the grandparents' home.

The resultant court order, entered December 19, 2013, denied the grandparents' motion to intervene and motion for placement of the children in their home. The circuit court found that, while the grandparents proffered testimony concerning the bassinet and swing, they "did not proffer any new evidence, such as dated photographs to corroborate the proffered testimony, or the testimony of the person from whom the grandparents claimed they obtained the baby bassinet[.]" The circuit court found that there was no new evidence upon which to reconsider its previous finding that the grandparents had knowingly exposed the children to meth-contaminated baby equipment. It also found that, in the past, the grandparents had supported their adult children, who have had issues with drugs and crime, and had failed to protect their grandchildren. The circuit court found that "[t]he presumption in favor of placement with the grandparents has been rebutted in this case, based on clear and convincing evidence that the grandparents have exposed the children to the risk of imminent harm and lack sufficient judgment to ensure the children's safety." The circuit court expressed that it "considered the best interests of the children, including their need for continuity of care and caretakers, and their opportunity for adoption in a stable home

environment." Thus, the circuit court denied the grandparents' motion to intervene and for placement of the minor children. The grandparents appealed to this Court.

Currently, both siblings are placed together with a foster family who wants to adopt them. They have lived with this family for over twenty months and, by all accounts, are doing well and are very bonded with the foster parents. The children have not had any contact with the grandparents for over a year and a half. The foster parents have commenced adoption proceedings; however, the underlying judge is awaiting the results of this appeal before proceeding with the adoptions.

II.

STANDARD OF REVIEW

This case originated as an abuse and neglect case filed by the DHHR against the biological parents of the children. However, the lower court's findings that the children were abused and neglected children by their parents is no longer a reviewable issue and is not addressed in this appeal. Rather, the matter before this Court involves the proper placement of the minor children. Generally,

> "[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

Syl. pt. 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). Specifically, we are mindful that "[q]uestions relating to . . . custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syl., in part, *Nichols v. Nichols*, 160 W. Va. 514, 236 S.E.2d 36 (1977). Further, "[i]n . . . custody matters, we have traditionally held paramount the best interests of the child." Syl. pt. 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

To completely resolve the issues before us, we must consider the relevant statute. In this regard, we have held that "'[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." Syl. pt. 3, *Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 209 W. Va. 83, 543 S.E.2d 364 (2001). Mindful of these applicable standards, we now consider the substantive issues herein raised.

III.

DISCUSSION

On appeal to this Court, the grandparents assert numerous and overlapping assignments of error. All of the appeal issues, however, can be placed into two broad

categories: (1) the sufficiency of the evidence, including evidentiary determinations by the circuit court; and (2) the application and mandate of W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014).[3] We will discuss each of the general categories individually.

A. Evidentiary Issues

First, we will address the evidentiary issues raised by the grandparents. The grandparents' protestations center around the baby swing and baby bassinet and the circuit court's finding that the same items from the meth-contaminated home were being used by the grandparents, as well as the grandparents' allegation that they were not allowed to introduce evidence at the hearing. Conversely, both the DHHR and the Guardian agree with the circuit court's determinations.

Many of the grandparents' arguments can be reduced to the contention that the circuit court's findings were not supported by adequate evidence. Our guiding standard is well-settled:

> Although conclusions of law reached by a circuit court are subject to a *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the

[3]We note that W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014) was repealed and recodified during the 2015 Regular Session of the West Virginia Legislature. The new enactment, W. Va. Code § 49-4-114, has minor stylistic changes and will be effective ninety days after the February 19, 2015, approval date. See W. Va. Code § 49-1-103.

> circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

As previously explained, the CPS worker was comparing photographs taken of baby items at the mother's meth-contaminated trailer with pictures of baby equipment taken at the grandparents' home. Based on the concern that the children were being exposed to items that had been tainted with meth, the DHHR filed its emergency motion to move the children's placement. The motion was granted, and a full hearing was held on April 15, 2013. At the hearing, the circuit court heard conflicting testimony from the DHHR and the grandparents regarding the baby equipment. After hearing the testimony, the circuit court stated that

> I think it is the same bassinet. They both have a blue ribbon, in the upper picture . . . there are items laying over the ridge of the bassinet which cover up portions of the - - what would appear to be the blue ribbon. If you look clear to the extreme right, you see the blue ribbon going around the corner. I think it is the same one. I think it came out of that trailer. That is my finding.

Subsequent thereto, at the hearing on the grandparents' motion to intervene, the circuit court took judicial notice of the evidence from the April 15, 2013, emergency hearing. No parties objected to the circuit court's judicial notice of the evidence from the prior hearing.[4]

---

[4]Significantly, the grandparents assert that they were precluded from presenting relevant evidence on the matter of the baby equipment during the hearing on their motion to intervene. Our review of the hearing transcript, however, leads to the conclusion that such a complaint is disingenuous. Early in the hearing, the Guardian moved the circuit court to take judicial notice of the prior evidence on the issue of the baby items. The following exchange occurred between counsel for the grandparents and the circuit court judge:

> [GRANDPARENTS' COUNSEL]: . . . . So just so that I'm clear in my mind, Judge, I'm not allowed to inquire any further into any facts related to that?
>
> THE COURT: I'm not going to retry that issue, if that is what you mean.
>
> [GRANDPARENTS' COUNSEL]: Yes.
>
> THE COURT: Do you have additional evidence you want put in the record?
>
> [GRANDPARENTS' COUNSEL]: Yes.
>
> THE COURT: I will allow you to do that.
>
> [GRANDPARENTS' COUNSEL]: Okay.
>
> THE COURT: Is this your witness to do that [referring to the CPS worker who was on the stand]?
>
> [GRANDPARENTS' COUNSEL]: No, no.

After the witnesses testified, counsel for the grandparents, by way of proffer, argued to the circuit court:

(continued...)

Evidence was heard at two evidentiary hearings, wherein the grandparents could have introduced evidence to refute the photographic evidence submitted by the DHHR. The grandparents chose to rely on their own testimony and the proffered testimony of another individual. In situations concerning the credibility of witnesses, a circuit court's findings are

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[4](...continued)
[GRANDPARENTS' COUNSEL]: Both [grandparents] would testify that - - as they have in the past - - that the furniture, the baby furniture the bassinet and the swing - - did not - - that was found, that was in their home, despite similarities in appearance, that these were not items that came from [the mother's] trailer.

[The grandfather] would testify further that he has been to [the mother's] trailer, and the bassinet and the swing that are . . . pictured as having come from [the mother's] trailer and being in the [grandparents'] home, that those items are still in the trailer. And that he has gone from [the mother's] old trailer, has seen those items in the trailer looking through the window, and returned to his home and the items are still in his home. Clearly, not the same items.

THE COURT: He already testified to that, didn't he.

[GRANDPARENTS' COUNSEL]: Well, they did originally, yes. . . . But, in addition, I have a witness . . . who accompanied [the grandfather] to the . . . trailer, and also looked through the window and saw the bassinet and swing there, and then from there immediately went to the [grandparents'] home and saw the similar items in the home.

And one additional witness . . . who is [the grandmother's] mother. She would testify that the high chair that was also in one of the photographs submitted by the Department was given to [the grandmother] by her[.] . . . That is the extent of the proffer, Judge.

afforded deference "because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties." *In Interest of Tiffany Marie S.*, 196 W. Va. at 237, n.26, 470 S.E.2d at 191, n.26. *See also In re Elizabeth Jo "Beth" H.*, 192 W. Va. 656, 659, 453 S.E.2d 639, 642 (1994) ("Consistent with our cases in other areas, we give appropriate deference to findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law."). The circuit court heard and considered all of the evidence and, as the finder of fact, determined that, although the grandparents proffered testimony concerning the bassinet and swing, there was no new evidence on which to reconsider its previous finding that the grandparents had knowingly exposed the children to meth-contaminated baby equipment. By using the tainted equipment, the circuit court found that the grandparents had exposed the children to the risk of imminent harm and that they lacked sufficient judgment to ensure the children's safety. The circuit court's factual rulings will not be disturbed by this Court.

B. W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014)

Having ascertained that the evidence was properly considered by the circuit court, we now turn our focus to the application of the grandparent preference statute. In this case, we are called upon to determine whether W. Va. Code § 49-3-1(a)(3) is mandatory, and, if so, whether the circuit court failed to follow the requirements set forth within the statute. The grandparents contend that the circuit court did not apply the statutory presumption in favor of grandparent placement and, further, failed to consider the results of a home study prior to making a placement determination. Conversely, the DHHR responds that the grandparents did not provide an approved home study, and, more importantly, because the circuit court found that the children were in imminent danger, it was not required to wait for a home study before removing the children from the grandparents' home.

W. Va. Code § 49-3-1(a)(3) provides, in pertinent part:

> For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

The first step in statutory construction is to identify the intent expressed by the Legislature in promulgating the provision at issue. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Next, we look to the particular language used by the Legislature. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). Finally,

> [i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Syl. pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925). Appropriate for the present case, "[t]he law does not require a suitor to do a futile thing." Syl. pt. 2, *Brawley v. County Court of Kanawha Cnty.*, 117 W. Va. 697, 188 S.E. 139 (1936).

In examining this portion of the governing statutory law, this Court has recognized that, to effectuate the legislative intent, a circuit court "must endeavor to secure

for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment, nurturing and discipline that is consistent with the child's best interests." *See State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 177, 185 (1998) (discussing legislative intent as stated in W. Va. Code § 49-1-1 (1999) (Repl. Vol. 2014)). The specific portion of the statute states: "[o]nce any such grandparents who are interested in adopting the child have been identified, the department *shall* conduct a home study evaluation[.]" W. Va. Code § 49-3-1(a)(3) (emphasis added). "'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982)." Syl. pt. 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997). Having determined the legislative intent of the statute and found that the wording is clear and unambiguous, we now specifically hold that the mandatory language of W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014) requires that a home study evaluation be conducted by the West Virginia Department of Health and Human Resources to determine if any interested grandparent would be a suitable adoptive parent.

However, resolution of this case does not come simply by interpreting the statute. Rather, this statute must be applied to the peculiar facts of the present case. We have determined that a home study is a required mandate when a grandparent expresses interest

in adopting a child. However, the home study obligation also must comport with the ultimate determination of child placement premised upon the best interests of the child. *See* Syl. pt. 4, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005) ("West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child."); Syl. pt. 5, *Napolean*, *id.* ("By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents 'would be suitable adoptive parents,' the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case.").

As this Court consistently has reiterated, in all cases involving children, the polar star is the best interests of the child. "[A] crucial component of the grandparent preference is that the adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's

grandparents is not proper." *In re Elizabeth F.*, 225 W. Va. 780, 786, 696 S.E.2d 296, 302 (2010). A determination of the child's best interests must be based on all of the circumstances of the case. *See generally In re Hunter H.*, 231 W. Va. 118, 744 S.E.2d 228 (2011). Adoption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests based upon a thorough review of the entire record. *See In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012); *see also In re N.P.*, No. 11-0324, 2011 WL 8199162 (W. Va. Oct. 25, 2011) (unpublished mem. dec.).

Significantly, the lower court in this case found that the children were in danger of imminent harm. Protection of children is one of the most defended principles by this Court. *See* W. Va. Code § 49-4-105 (allowing removal of child from home and foregoing requirement for hearing on reasonable efforts to maintain the family when child appears in imminent danger of serious bodily or emotional injury or death in any home). *See also* W. Va. R.P. for Child Abuse and Neglect Procs. 16 (authorizing circuit court to place custody of a child with the DHHR at any time when the child is thought to be in imminent danger). "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. pt. 7, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). By way of example, this Court recently found that the circuit court in an abuse and

neglect proceeding did not abuse its discretion in not requiring completion of a home study of a mother's adult daughter for the children's placement when it was clear that the adult daughter was not a suitable placement. *In the Interest of J.M.*, No. 11-1165, 2012 WL 2988787 (W. Va. Mar. 12, 2012) (unpublished mem. dec.). Moreover, this Court has affirmed a lower court's denial of grandparent placement, in the absence of a home study, because the circuit court's decision was not based solely on the lack of a completed home study but also, on other factors, including the length and quality of time the child had lived in the home of the foster parents. *In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012). Additionally, this Court again affirmed a circuit court's finding that occurred in spite of a lack of a home study in the case *In re S.S.*, No. 14-1039, 2015 WL 1332668 (W. Va. Mar. 16, 2015) (unpublished mem. dec.), based upon the court's finding that a home study was unnecessary given that evidence regarding the grandmother's substance abuse enabled the circuit court to determine her suitability as a potential adoptive parent. Notwithstanding this Court's concern over the lack of a home study, especially given the mandatory language of the statute, we recognize that the safety of children is of utmost importance, taking into account the totality of the circumstances and the best interests of the children. In circumstances where it is apparent that an interested grandparent would fail to be found as a suitable placement for a minor child, the charade of continuing a home study is not necessary, and, in fact, could be harmful. *See* Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938) ("Where a particular construction of a statute would result

in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."). Accordingly, we now expressly hold that while the grandparent preference statute, at W. Va. Code § 49-3-1(a)(3) (2001) (Repl. Vol. 2014), places a mandatory duty on the West Virginia Department of Health and Human Resources to complete a home study before a child may be placed for adoption with an interested grandparent, "the department shall first consider the [grandparent's] suitability and willingness . . . to adopt the child." There is no statutory requirement that a home study be completed in the event that the interested grandparent is found to be an unsuitable adoptive placement and that placement with such grandparent is not in the best interests of the child.

In the instant case, the minor children were placed with the interested grandparents before a home study had been completed. During the pendency of the home study evaluation process,[5] the DHHR filed an emergency motion based upon its concern with

[5]It is noted that a previous home study had been completed on the grandparents' home. In 2010, during a prior abuse and neglect case, the DHHR submitted a completed home study evaluation, which approved placement of petitioners' grandchild, H.T., in their home. The placement is "approved with concerns" due to prior CPS issues in the home. Because of the age of the 2010 home study, a new home study was undertaken. The new home study had not been completed at the time of the circuit court's denial of the grandparents' placement request in the present case. This Court was informed of the study's findings through a supplemental appendix. The supplement included a letter dated and signed by Lori Hesson of KVC Behavioral Healthcare. The letter stated that the grandparents previously worked with KVC in efforts to obtain custody of L.M. and L.S. The letter stated that the grandparents attended all required trainings, background checks, and home visits. The letter further explained that KVC had been prepared to approve petitioners' home as an (continued...)

the health and safety of the children. After hearing evidence at both the emergency hearing and at the hearing on the grandparents' motion to intervene and for placement of the minor children, the circuit court found that "[t]he presumption in favor of placement with the grandparents has been rebutted in this case, based on clear and convincing evidence that the grandparents have exposed the children to the risk of imminent harm and lack sufficient judgment to ensure the children's safety." The circuit court expressed that it "considered the best interests of the children, including their need for continuity of care and caretakers, and their opportunity for adoption in a stable home environment." This Court affirms the circuit court's determination that the grandparents were not an appropriate adoptive placement for the minor children.

IV.

CONCLUSION

For the foregoing reasons, we affirm the December 19, 2013, order of the Circuit Court of Calhoun County.

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[5](...continued)
approved placement; however, KVC then received information regarding the "extensive criminal and CPS history of their children and the current concerns with their grandchildren with whom they have legal guardianship." KVC, accordingly, expressed that the grandparents' home is denied as a proper placement for the children at issue herein.

Affirmed.

175 W. Va. 330, 332 S.E.2d 632

Supreme Court of Appeals of West Virginia

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

v.

LA REA ANN C.L.

No. 16645

July 10, 1985

SYLLABUS BY THE COURT

1. The effect of *W.Va.Code,* 49-3-1(a) [1977, 1984] and of the proviso to *W.Va.Code,* 48-4-la [1965] (now *W.Va.Code,* 48-4-5(a) [1984]) is, ordinarily, to make revocable any relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the West Virginia Department of Human Services which has not yet been approved by a court of competent jurisdiction.

2. Where the child has spent a substantial period of time in the home of foster parents, pending a ruling by the trial court on whether to approve a minor parent's relinquishment of child custody to a licensed private child welfare agency or to the West Virginia Department of Human Services, extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance. In such a case the minor parent's right to revoke his or her relinquishment ceases to be absolute, due to the passage of the unreasonable period of time.

Mary Beth Kershner, Asst. Atty. Gen., Charleston, for appellant.

Cooper & Martin, George M. Cooper, Sutton, for appellee.

Benjamin Snyder, Clendenin, for intervenors.

McHUGH, Justice:

The appellant, the West Virginia Department of Human Services, appeals from the final order of the trial court, which denied the appellant's petition to approve the appellee's relinquishment of parental rights. The trial court held that, although the minor parent had not been coerced by anyone into signing the relinquishment, she had been "under considerable pressure as a result of the circumstances in which she then found herself," at the time of execution of the relinquishment, and that the appellant had violated its own regulations by not informing her of her right to an attorney before deciding to terminate her parental rights by signing a consent to adopt form. This Court has before it the petition for appeal, all matters of record and the briefs filed by the parties, including the intervenors, who are the child's foster parents in this case.

In the year 1980, the appellee, then a pregnant, unmarried 16-year-old, voluntarily placed herself in the temporary custody of the West Virginia Department of Human Services in order to receive the proper care that her parents, both of whom had been declared unfit parents by reason of alcoholism, would not be able to provide her. See footnote 1 After the baby was born, the appellee placed her child under foster care also, so they could be placed in the same foster home, without accepting financial responsibility for the child. See footnote 2

Throughout the pregnancy and thereafter, the appellee debated placing her child up for adoption, and eventually decided to do so, with the explanation that she wanted to live the life of a normal 16-year-old. See footnote 3 Once informed of the ramifications of her actions, although not informed of her right to consult with an attorney before relinquishment, the appellee signed a consent to adopt form. See footnote 4 Thereafter, the infant was transferred to the home of the intervenors, the child's foster parents, where the child resided for about four years pending the trial court's decision on whether to approve the relinquishment.

Several days after the appellee executed the consent to adopt form, the appellee's mother contacted the West Virginia Department of Human Services in efforts to revoke the relinquishment. Thereafter, the Department of Human Services petitioned the trial court to approve the relinquishment. Although an evidentiary hearing was held on the relinquishment and the matter was ripe for a decision, the trial court did not rule until after the appellee herein filed a habeas corpus petition nearly four years later. Arguments on the matter were again heard, and the trial court refused to approve the relinquishment.

The Department of Human Services filed a motion for a new trial and the intervenors filed a motion to reconsider, both of which were denied. The instant case is a consolidation of the matter involving the original petition to approve relinquishment and the habeas corpus proceeding which resulted in a decision by the trial court.

At this point we note the unusual posture in which this case reaches us. The Department of Human Services failed to seek a timely ruling on its petition for approval of the relinquishment. Moreover, the problems could have been avoided by the Department by promptly seeking the approval of the relinquishment by the trial judge in accordance with *Code,* 49-3-1(a). Turning to the appellee, this Court is surprised that she, through counsel, did not at a much earlier date seek a ruling so as to recover possession of her child. Finally, the trial court obviously should have ruled much sooner than it did.

II

The issue before this Court is whether the trial court correctly refused to approve the relinquishment by the appellee.

The appellant asserts several errors in the trial court's decision. First, it asserts that the trial court erred in concluding that the appellee had the right to revoke her relinquishment as a result of personal misgivings at the time of the hearing on the petition to approve the relinquishment.

The appellant also asserts that the trial court erred by not concluding that the best interests of the child require that the child be left in the care of the intervenors, her foster parents, with whom the infant has been living for almost all of her life. The appellant argues that moving the child to the home of the appellee, her natural mother, with whom she has not lived since she was two-months old, would interfere with the child's emotional well-being and development. See footnote 5 For the reasons stated below, we hold that the ruling of the trial court was not proper and remand this matter for further consideration.

III

The statutes of this State and the opinions of this Court have traditionally protected the parent-child relationship. For example, this Court, in *In Re Willis,* 157 W.Va. 225, 237, 207 S.E.2d 129, 136 (1973), stated that "no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person." Generally, in the absence of neglect or abuse, parents will retain custody and control over their children.

However, in the event that parents no longer wish to retain custody over their children, statutory law allows for a permanent relinquishment of parental rights. This relinquishment of child custody by adult parents and by minor parents to an individual or individuals is generally not revocable. *W.Va.Code,* 48-4-la [1965], effective at all relevant times herein (now see *W.Va.Code,* 48-4-3 to -5 [1984]), states, in pertinent part: "[E]xcept where a court of competent jurisdiction finds that such consent or relinquishment of legal custody for adoption was obtained by fraud or duress, no consent or relinquishment of legal custody for adoption of a child, whether given by an adult or a minor, shall be revocable[.]" Read alone, this language would indicate that the appellee, the natural mother, would have no right to revoke relinquishment of parental rights in the absence of fraud or duress. As indicated above, this is precisely the argument asserted by the appellant in this case.

The appellant directs our attention to this Court's opinion in *Lane v. Pippin,* 110 W.Va. 357, 158 S.E. 673 (1931), the syllabus of which is quoted in syl. pt. 1, *In re Adoption of Truslow,* 696 167 W.Va. 696, 280 S.E.2d 312 (1981), as follows:

> "An adoption of a child should not be revoked merely because the natural parent or parents, who formally consented to the adoption, subsequently experience a change of mind on the subject. In the absence of fraud in the adoption proceedings or a showing that the best interests of the child would be served by annulling the adoption, the court should refuse to disturb the same."

Lane v. Pippin and *Truslow* are not controlling in this case. In the instant case, the natural mother is a minor parent, unlike the parents in *Lane v. Pippin* and *Truslow,* and the relinquishment here was to the Department of Human Services, not to an individual or individuals. *W.Va.Code,* 48-4-la [1965] imposes an additional requirement before a relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the Department of Human Services will become final. This section contains this proviso: "[A] relinquishment of legal custody for adoption of a child given by a minor parent or parents to a licensed private child welfare agency or to the state department of welfare [now Department of Human Services] shall be revocable unless the relinquishment was given in compliance with [*W.Va.Code,* 49-3-1.]" Significantly, *W.Va.Code,* 49-3- 1(a) [1977, 1984], provides, in pertinent part:

> [I]f either of the parents of such child is under eighteen years of age, such relinquishment shall not be valid unless and until the same shall have been approved in writing by a judge of a court having jurisdiction of adoption proceedings in the county in which such parent may reside or in which such relinquishment is made.

We believe the effect of this provision and of the proviso to *W.Va.Code,* 48-4-la [1965] (now *W.Va.Code,* 48-4-5(a) [1984]) is, ordinarily, to make revocable any relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the West Virginia Department of Human Services which has not yet been approved by a court of competent jurisdiction. Therefore, the trial court was correct in concluding that a minor parent normally has the unfettered rights to revoke his or her relinquishment to such agencies before it is approved by a circuit court. Normally, it is only after a relinquishment of child custody by a minor parent to such agencies is approved by a circuit court that *W.Va.Code,* 48-4-la [1965] (now *Code,* 48- 4-5(a) [1984]) will ordinarily bar revocation of the relinquishment.

The appellant also maintains, however, that the trial court erred in not granting custody to the intervening foster parents because removing the child from their home was against the child's best interests.

The best interest standard is a widely accepted method of determining custody in this country. In *In re Baby Boy Reyna,* 55 Cal.App.3d 288, 126 Cal.Rptr. 138 (1976), a California court refused to return an illegitimate infant to its natural father, when to do so would remove him from his "preadoptive" home, where the child lived for five years. Although acknowledging a strong preference for a parent over a nonparent, the court stated, in part, that, "if the award of custody to a parent as against the claim of a nonparent would be harmful to the child, custody must be awarded to the nonparent." 55 Cal.App.3d at 301, 126 Cal.Rptr. at 147.

"Harm" was described in *Reyna* to include, "uproot[ing] the child from the care and love of the nonparents with whom it has been living for a substantial period of time and plac[ing] it with the father with whom it has never had contact." 55 Cal.App.3d at 302, 126 Cal.Rptr. at 147.

Massachusetts courts have also adopted the best interest approach in child relinquishment cases. In *Revocation of Appointment of a Guardian,* 360 Mass. 81, 271 N.E.2d 621 (1971), the court did not permit the return of an infant to his natural mother where the mother had not read the relinquishment form which she signed after it had been explained to her. The court expressed an interest in protecting the state adoption system and stated that the "system obviously could be greatly injured if prospective adoptive parents could not rely on the availability of children placed in their custody[.]" 360 Mass. at 85, 271 N.E.2d at 624.

Further, the Massachusetts court held that the predominant consideration in such cases was always the welfare of the child, and that where an infant had been in the home of prospective adoptive parents for a substantial period of time, in that case a year and a half, that "[h]is environment and sense of security should not be disturbed without a clear showing of significant benefit to him." 360 Mass. at 89, 271 N.E.2d at 625.

This Court has not been confronted previously with a case involving relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the West Virginia Department of Human Services which had not been ruled upon by the trial court within a reasonable time and, thus, we have never been presented with the question of whether the best interest standard should be applied to these circumstances. We believe, under the circumstances of this case, where the child has spent a substantial period of time in the home of foster parents, pending a ruling by the trial court on whether to approve a minor parent's relinquishment of child custody, extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance. In such a case the minor parent's right to revoke his or her relinquishment ceases to be absolute, due to the passage of the unreasonable period of time.

In *Commonwealth ex rel. Martino v. Blough,* 201 Pa.Super. 346, 191 A.2d 918 (1963), the court in a child custody case considered the "tragic effect that judicial delay has had on this case." 201 Pa.Super. at 351, 191 A.2d at 920. A delay of about two years in *Martino* was attributable to several persons, namely, the trial court reporter, trial counsel, and the trial court. The appellate court in *Martino* refused "to go outside of the record" (201 Pa.Super. at 352, 191 A.2d at 920) to examine the current status of the relationships between the then four-year-old child and her natural father and between the child and her foster parents (the natural mother had died when the child was about 14-months old). The court felt "compelled to decide this case on the basis of a status which no longer exists" (*id.*) due to the two-year judicial delay. We, on the other hand, believe that the appropriate procedure is to remand for development of a record on the existing state of facts, rather than making a decision on a "stale" record.

Martino also discusses the best interest of the child in the context of a changed environment:

> If this child had spent a num ber of years with the [foster parents] when the father sought custody, the probabilities are that it would not have been advisable to subject her to a change d environment and to rem ove her from the home to which she had becom e accustomed. But [the child] was only 19 months old when her fa ther sought custody of her. ... "A child of two years of age or under will form new a ttachments quickly if treated kindly by those into whose care it is given. In that respect it resem bles a young tree whose roots have not yet taken deep hold in th e nourishing earth, but when a child is m uch beyond the age of two years, it becom es strongly attached to those who stand in pare ntal relationship to it and who have tenderly cared for it. Its bonds of affe ction have becom e so strong that to surrender them suddenly may result not only in the child's unhappiness, but also in its physical injury."

201 Pa.Super. at 351, 191 A.2d at 920.

Similarly, in this case, by the time the trial court was ruling on the appellee's relinquishment, the child "had spent a number of years" with the foster parents/intervenors, and was over four years of age. Consequently, her "bonds of affection [for her foster parents may] have become so strong that to surrender them suddenly may result not only in the child's unhappiness, but also in [her] physical injury." *Id.* The trial court did not, however, consider this extremely important factor. It should do so on remand.

Further, we emphasize that *W.Va.Code,* 49-3-1(a) [1977, 1984] requires relinquishments by minor parents to a licensed private child welfare agency or to the Department of

Human Services to be approved by a judge of competent jurisdiction before the action becomes valid and final. The statute we believe entrusts to the court, as a very important factor in determining whether to approve the relinquishment, the determination of the best interests of the child involved. This is especially important when there is a substantial delay in the trial court's ruling on the relinquishment. See footnote 6

While this Court heretofore has not specifically applied the best interest standard to relinquishment approval cases, a very close analogy may be drawn from this Court's treatment of child custody situations. We have repeatedly held that in contests involving the custody of infants the welfare of the child is of paramount and controlling importance and is the "polar star" by which the discretion of the court will be guided. Specifically, we stated in syl. pt. 4 of *State ex rel. Harmon v. Utterback,* 144 W.Va. 419, 108 S.E.2d 521 (1959):

> When a parent, by agreem ent or otherwis e, has transferred, relinquished or surrendered the custody of his or her child to a third person and subsequently dem ands the return of the child, the action of the court in determining whether the custody of the child shall rem ain in such third person or whether the child shall be returned to its parent depends upon which course will promote the welfare a nd best interests of the child; and the parent will not be permitted to re claim the custody of the child unless the parent shows that such change of custody will materially promote the moral and physical welfare of the child.

However, this Court placed a limitation on this ruling in later cases. In *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975), we acknowledged our adherence to the "polar star" concept, but stated that the concept will not be invoked to deprive an "unoffending parent" of his or her natural right to the custody of a child. We applied the standard of the "unoffending parent" in *Ford v. Ford,* 175 W.Va. 25, 303 S.E.2d 253 (1983), and held that a natural mother who left her child in the care of its grandparents under an apparent agreement that the arrangement would be temporary was an "unoffending parent," not having led the caretakers to believe that they might have permanent custody of the infant. Therefore, this Court affirmed the trial court's ruling to return the infant to the natural mother, even in the absence of evidence that to do so would be in the best interests of the child. Specifically, this Court stated:

> Our decision is based on this well-esta blished principle of law [that the natural parent's right to custody of his or her child is param ount to that of any third party] . In th is case the record cont ains no evidence that the appellee intended perm anently to ab andon or relinquish her rights to Michelle when she left the appella nts' home.... There was no agreement

> between the parties, either oral or written, that Michelle would be remaining with her grandparents permanently.

172 W.Va. at 27, 303 S.E.2d at 255. On the basis of this finding, coupled with the fact that there was no evidence that the natural mother was an unfit parent, this Court held that the mother was an "unoffending parent" entitled to custody of her child, regardless of whether the child's best interests would be better promoted by continuing to live with her grandparents.

In the case before us, while counsel for the appellant Department of Human Services suggested that the "meaningful relationship" existing between the child and the intervening foster parents should be taken into consideration, the trial court made no finding on the best interests of the child. In *In Re DiMatteo,* 62 N.C.App. 571, 303 S.E.2d 84 (1983), the Court of Appeals of North Carolina refused to uphold the trial court's decision to return a child to the home of his father without making a finding on the best interests of the child. Instead, the court remanded the case to the trial court with instructions to make a finding on the best interests of the child. We agree with that court's holding that no determination of the child's custody should be made without first giving primary consideration to the child's best interests, with some consideration also given to the interests and the fitness of the natural and foster parents. See footnote 7

Therefore, we remand this case to the trial court with instructions to receive evidence and to make a finding of fact on the child's best interests presently. We emphasize that the appellee clearly did not intend to leave the child with the Department of Human Services for a temporary time, but, rather, executed a permanent relinquishment form. Although she protested the termination of her parental rights at the subsequent relinquishment hearing, it may be relevant that the appellee waited about three years to file a habeas corpus petition to obtain a decision on the issue of the infant's custody and, thus, permitted the arrangement with the foster parents to continue for several years. However, we make no decision at this time on that issue, instead leaving it also to the trial court.

Upon all of the above, the final order of the trial court is reversed, and this matter is remanded for further proceedings consistent herewith, including an order by the trial court ruling on the relinquishment within 60 days after its receipt of this opinion. See footnote 8

Reversed and remanded with directions.

Footnote: 1 The appellee was in the legal custody of the Commonwealth of Virginia while living with her mother and stepfather, in 1980. On July 25, 1980, the appellee was placed in a foster home. Being approximately seven months pregnant, the appellee

moved into a "temporary" foster home for a period of 12 days. Thereafter, she moved into her "permanent" foster home. The appellee remained there until about three weeks after the baby was born.

Footnote: 2 The appellee was also able to return to school, while her "permanent" foster parent cared for her newborn daughter. However, there was testimony that conflict arose between her "permanent" foster parent and the appellee when the appellee was not willing to care for the child while not attending school. In October, 1980, the appellee returned to the home of her "temporary" foster parents at her request.

Footnote: 3 There was testimony that the appellee did not care to take the baby out in public because she felt that her motherhood was a poor reflection on herself. Further, the appellee told the trial court that her boyfriend at that time did not want her to retain parental rights to the infant.

Footnote: 4 In October, 1980, the appellee failed to return to her foster home and instead spent the night at her boyfriend's trailer. One of her foster parents and a social worker with the Department of Human Services went to the trailer and took her from there to the office of the Department of Human Services. That day she signed the consent to adopt form.
We note that the putative father of the child was duly notified of the relinquishment hearing. See W.Va.Code, 49-3-1(b) [1977, 1984]; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

Footnote: 5 The appellant also claims the trial court erred by concluding that the appellee's relinquishment should not be approved because the appellee was not informed of her right to counsel before deciding to relinquish her child. Section 15210(C) of the Social Services Manual utilized by the West Virginia Department of Human Services states the following: When the worker feels that a termination of parental rights is in the child's best interests, but the parent cannot reach a decision to relinquish voluntarily, the worker should discuss with the parents his plan to approach the court to seek guardianship and his reasons for taking this step. The parent should understand his legal rights and should be encouraged to seek legal counsel to represent him.
Instead of focusing on the earlier apparent noncompliance with this regulation, the trial court should have inquired into the factors, such as the best interests of the child, which would have informed the trial court of the material facts existing at the time of its decision nearly four years later.

Footnote: 6 For example, while Ohio Rev.Code Ann. § 5103.16 (Page 1979) and Va.Code § 63.1-204 (1985) do not require court approval of a minor parent's relinquishment of parental rights to an agency, W.Va.Code, 49- 3-1(a) has done so since

1945, thus enabling a judge to consider not only the natural parents' interests but the best interests of the child before approving the relinquishment.

Footnote: 7 In this regard, we note that the record before this Court indicates that the appellee is now married, has another child and is apparently much more mature than she was at the time she executed the relinquishment form.

Footnote: 8 The trial court's delay in ruling in this case was longer than the period of 33 months in State ex rel. Patterson v. Aldredge, 173 W.Va. 446, 317 S.E.2d 805 (1984). In syl. pt. 1 of that case we held:
Under article III, § 17 of the West Virginia Constitution, which provides that "justice shall be administered without sale, denial or delay," and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), which provides that "A judge should dispose promptly of the business of the court," judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission. See also State ex rel. Taylor v. MacQueen, 77 W.Va. 174, 322 S.E.2d 709 (1984) (two-year judicial delay). Child custody cases certainly should be decided promptly. Regardless of who is responsible for the delay in this case, the child is the unfortunate victim.

189 W. Va. 580, 433 S.E.2d 518

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1993 Term

No. 21528

IN RE: LACEY, SHANNA AND NICHOLAS P. AND MICHELLE S.

Appeal from the Circuit Court of Wood County
Honorable George W. Hill, Judge
Civil Action No. 91-J-127
AFFIRMED

Submitted: May 4, 1993
Filed: June 24, 1993

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JUSTICE BROTHERTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' In Re R.J.M., ___ W.Va. ___, 266 S.E.2d 114 (1980)." Syllabus point 1, Interest of Darla B., 175 W.Va. 137, 331 S.E.2d 868 (1985).

2. Neither W.Va. Code § 49-6-2(b) nor W.Va. Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also

within the court's discretion to terminate the improvement period before the twelve-month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the pre-dispositional section, W.Va. Code § 49-6-2(b).

Brotherton, Justice:

This case involves the appeal of Tauna P., the mother of the above captioned children, from the June 12, 1992, order of the Circuit Court of Wood County which terminated her parental rights, placed the children into protective custody, including her unborn child, and ordered that the Department of Health and Human Services assist the appellant in being surgically sterilized.

The appellant/mother is approximately twenty-three years old. She has five children and has never been married. The children's ages range from approximately six years to one year. On October 4, 1991, the West Virginia Department of Health and Human Services (HHS) filed a petition in the Circuit Court of Wood County, pursuant to W.Va. Code § 49-6-3 (1990), seeking temporary custody of Lacey, Shanna, Nicholas, and Michelle. Shortly thereafter, the appellant became pregnant with her fifth child. A preliminary hearing was held on October 15, 1991, at which time the court heard evidence. A review of the transcript reveals that since 1989, the appellant has been investigated on numerous occasions by various social service agencies in Ohio and West Virginia for allegations of abuse and neglect of her children. The HHS contends that the appellant also has a history of moving from county to county, which coincided with the social services agencies' investigations of charges of abuse and neglect.

In early 1991, the appellant was living in Washington County, Ohio, when she was charged with neglecting her children. In April, 1991, the appellant agreed to a protection plan in order to prevent the removal of the children. Services were set up for budgeting, parenting skills, housekeeping skills, and nutritional education. The appellant never attended any of the appointments or classes. In May, 1991, the Ohio Department of Human Services planned to take the children from the home because of allegations of drug use and child abandonment, but the appellant moved to Wood County, West Virginia, before they could be removed. Those allegations were not substantiated. On May 31, 1991, the West Virginia Department of Health and Human Services received a referral from the Washington County, Ohio, Human Services Department regarding the appellant's neglect charges. Child Protective Services Worker Tracy Morris was assigned to the case.

On August 8, 1991, Morris met with the appellant and discussed enrolling the children in pre-school, infant stimulation classes, and daycare. The appellant failed to keep three appointments to enroll her oldest child, Lacey, in the Headstart Program. By the time Lacey was enrolled, the program was already full for the year. The appellant then enrolled Lacey and Shanna in pre-school, but their attendance was sporadic.

On August 26, 1991, the appellant informed the HHS that her electricity was going to be shut off for nonpayment. The HHS used funds to pay the overdue bill, and shortly

thereafter, Morris paid a home visit and observed the appellant strike Shanna and Nicholas.

On August 27, 1991, the appellant again contacted the HHS and told them that her water was being shut off. The appellant also asked if Michelle's father could move in with her. Morris told the appellant that that was not a good idea because of Mr. Smith's past physical abuse of Shanna and because he hit all of the children.See footnote 1 The appellant admitted that the father stayed in the house on the weekends and that she was aware that he hit the children. Michelle's paternal grandmother, Pat, was already living with the appellant and the children, and was believed to be a poor influence.

On September 11, 1991, Morris visited the home again and noted that the children were bruised and the baby, Michelle, was left unattended on an elevated changing table. Michelle also had a case of diaper rash so severe that she was bleeding. Morris reported that the water was still off and that water was being kept in large, unrefrigerated, unprotected containers, in which the children played. On that date, the appellant signed a protective services plan whereby she agreed to provide a safe, clean, and healthy environment for the children, and keep all her utilities on and paid by budgeting her finances. However, by September 16, 1991, all the children were sick with varying degrees of fever, diarrhea, congestion, and coughing. Morris took the appellant and the children to the emergency room, and it was determined that Nicholas had pneumonia and an ear infection. At that time, the appellant was given several prescriptions for the children and asked to bring stool samples back to the hospital in order to determine the cause of the diarrhea. Follow-up appointments were also made.

On September 19, 1991, the appellant signed a protection plan to prevent the removal of her children. The plan stated as follows:

[T]he children are not to be left alone with any member of the _____ family, Mike, [Michelle's father,] and Pat, [Michelle's grandmother], included, or any other person who is not suitable, intoxicated, or under the influence of drugs. The children are not to be hit in any way. Discipline shall be enforced by time-outs or standing in the corner. All shots are to be caught up by October 30th. All medical attention shall be sought as soon as any child appears ill. Follow-up for this treatment will be done as directed . . . . [T]he children were to attend pre-school and/or daycare every day unless ill or services aren't available . . . Diapers will be checked every hour and changed if at all messy . . . and . . . rent and utility bills will be paid on time because the utilities had all been shut off.

Unfortunately, the appellant failed to follow any part of that plan. Prescriptions were not filled, no samples were returned to the hospital, and the children were not taken back for their follow-up appointments, with the exception of Shanna, who saw a physician who wanted tests performed. Those tests were not done. By October 4, 1991, all four children had pneumonia.

On October 4, 1991, the HHS filed a petition in the Circuit Court of Wood County seeking temporary custody of the four children. By order dated October 15, 1991, the

court granted the HHS' request. On November 8, 1991, the court held an adjudicatory hearing, and the appellant stipulated to the allegations regarding the medical neglect. The court ruled that the children were neglected children as defined by W.Va. Code § 49-1-3(c) and § 49-1-3(g)(1)(A) (1991), but allowed the appellant an out-of-home improvement period during which the children remained in foster care.See footnote 2

On December 15, 1991, the court signed an agreed order approving the family case plan prepared by the Department of Human Services. On February 4, 1992, the oldest child, Lacey, was returned to the appellant's home because she had been acting out in school and it was believed that her conduct occurred because she missed her mother. The other children remained in foster care. On March 20, 1992, the court conducted a review of the improvement period. At that time, the evidence showed that the appellant had not complied with any of the requirements in the family case plan. Further, since Lacey had been returned to the appellant's care on February 4, 1992, the child had missed several days of pre-school, her behavior was quite violent while she was with her mother, and the child was dressed in old, ill-fitting, inappropriate clothes instead of wearing the new clothes purchased for her while she was in foster care. It was also revealed that the appellant was approximately four months pregnant, although she had not received any prenatal care. The appellant stated that she had intended to have her tubes tied after Michelle was born, but had not had it done.

On May 1, 1992, the court reviewed the improvement period and ordered it discontinued. On June 12, 1992, a dispositional hearing was held, and the court terminated the appellant's parental rights. Evidence taken at that hearing was essentially the same as that heard in October, 1991, and March 20, 1992. The appellant's caseworker, Ms. Morris, also recommended termination of the parental rights. Ms. Morris noted that during the improvement period, the appellant only made an effort to follow the plan while living at the Eve Shelter, where she attended some meetings and had two hours of counseling. Once she left the shelter, Ms. Morris stated the appellant reverted to her old habits. The court then ordered that:

> [I]nasmuch as the respondent-mother has indicated upon the record that she desires to be surgically sterilized after the birth of this unborn child, the Court hereby ORDERS that the Department of Health and Human Services assist the respondent-mother and ensure that such procedure is performed after the birth of this child, and to provide financial assistance as is available for such procedure to be performed.

The court also held that the Department of Human Services "shall take protective custody . . . and maintain such custody until further order of the Court" following the birth of the fifth child. It appears that the child is, at this moment, still in the appellant's home. Following the birth of the fifth child, the appellant voluntarily opted for a five-year Norplant contraceptive implant rather than a tubal ligation.

It is from this ruling that the appellant files the current appeal. Specifically, the appellant argued that the court erred in (1) terminating the respondent's improvement

period early; (2) terminating the respondent's parental rights; (3) making its findings based upon "abundantly clear" evidence rather than by clear and convincing evidence as required by W.Va. Code § 49-6-2(c); (4) that the court exceeded its jurisdiction when it ordered the West Virginia Department of Health and Human Services to insure that the respondent mother be sterilized; and (5) that the court exceeded its jurisdiction when it ordered the West Virginia Department of Health and Human Services to take custody of the unborn child.

I.

The appellant argues that the court erred in terminating her improvement period after only six months, when the March 9, 1992, report of the Department of Health and Human Services provided for a twelve-month improvement period. Specifically, the appellant contends that W.Va. Code § 49-6-5(6)(c) (1992) forbids the court from terminating the improvement period less than six months after it was granted. We disagree.

As in any child welfare case, the best interests of the child are foremost in cases involving the termination of parental rights. "[A]ll parental rights in child custody matters are subordinate to the interests of the innocent child." David M. v. Margaret M., 182 W.Va. 57, 385 S.E.2d 912, 916 (1989). In syllabus point 1 of Interest of Darla B., 175 W.Va. 137, 331 S.E.2d 868 (1985), this Court held:

"[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980).

While there is no absolute right to an improvement period in this State, W.Va. Code § 49-6-2(b) provides that an improvement period shall be allowed unless there are compelling reasons to justify the denial of an improvement period. See Matter of Jonathan P., 182 W.Va. 302, 387 S.E.2d 537 (1989). Thus, the Legislature clearly intended to encourage improvement periods prior to the termination of any parental rights. In State ex rel. W.Va. Department of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987), the Court quoted State v. Stritchfield, 167 W.Va. 683, 692-93, 280 S.E.2d 315, 321 (1981):

. . . the statute presumes the entitlement of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child neglect or abuse proceeding is based pending final adjudication, no doubt in recognition of the fundamental right of a parent to the custody of minor children until the unfitness of the parent is proven . . . . Id. at 184.

At the November 8, 1991, hearing, the appellant was granted an improvement period for an indefinite time. The improvement period was terminated after approximately six months.See footnote 3 Contrary to the appellant's argument, nothing in W.Va. Code § 49-6-5(6)(c) or § 49-6-2(b) mandates a twelve-month improvement period. West Virginia Code § 49-6-2(b) permits a pre-dispositional improvement period:

In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-d of this chapter. (Emphasis added.)

By contrast, W.Va. Code § 49-6-5(6)(c) contemplates a post-dispositional improvement period not to exceed twelve months:

The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently terminated and the court shall require the parent to rectify the conditions upon which the determination was based. No more than one such post-dispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section. (Emphasis added.)

Thus, neither the post-dispositional improvement period nor the pre-dispositional improvement period is required to extend for twelve months.See footnote 4

In this case, the improvement period was allowed under W.Va. Code § 49-6-2(b), the pre-dispositional improvement period section, which allows a time frame of three to twelve months. The appellant's improvement period lasted approximately six months, well beyond the three-month minimum. Further, regardless of which Code section permitted the improvement period, nothing in either W.Va. Code § 49-6-2(b) or W.Va. Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period if the court is not satisfied that the defendant is making the necessary progress before the twelve-month time frame has expired. The only minimum time necessary by statute is the three months required in the pre-dispositional section, W.Va. Code § 49-6-2(b).

Unfortunately, there is little evidence of any attempt by the appellant to ameliorate the circumstances which precipitated the removal of her children. The only evidence of any improvement occurred while the appellant lived in a shelter, when she attended a few Al-Anon and AA meetings, as well as a women's support group and two hours of counseling. As soon as she left the shelter, however, she reverted to her old habits and failed to attend any meetings, counseling sessions, classes, do the STEP book reports, journals, or the required volunteer work. Further, at the March 20, 1992, hearing, it was revealed that she was living with another man with a drinking problem. She also missed several scheduled visits with her children. Thus, it was clear to the lower court, as it is to this Court, that if she could not achieve even a few of the goals in her improvement plan while the children lived away from her, then she would have even less success while she had to care for five children. Consequently, we conclude that the Circuit Court of Wood County did not exceed its authority in terminating the improvement period when it did.

II.

In her second argument, the appellant contends that her parental rights were improperly terminated under W.Va. Code § 49-6-5(c), which provides that parental rights shall not be terminated during the improvement period. In this case, the parental rights were terminated after the improvement period was discontinued. Thus, W.Va. Code § 49-6-5(6)(c) was not violated. Since the appellant does not argue that the court erred in terminating the parental rights based upon the merits of the case, neither shall we. Suffice it to say that the facts more than supported the court's decision to terminate her parental rights based upon her neglect of the children.See footnote 5

III.

The appellant next complains that the court used the wrong standard in making its decision to terminate parental rights. The appellant argues that W.Va. Code § 49-6-2(c) requires that any finding be made by "clear and convincing" evidence rather than the "abundantly clear" evidence standard used by the Wood County Circuit Court in this case. Again, we disagree.

While we agree that the standard of proof for terminating parental rights is clear and convincing evidence, we have never required that those magic words be uttered in order to properly terminate parental rights. State v. Krystal T., 185 W.Va. 391, 407 S.E.2d 395 (1991). The State claims that the phrases "abundantly clear" and "clear and convincing evidence" are interchangeable. In James M. v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991), the Court affirmed a termination of parental rights, stating that "the record is abundantly clear that these parents were unfit, and that accordingly, the lower court should have terminated parental rights . . . ." Id. at 409. Although it would be preferable for the trial courts to use the phrase "clear and convincing evidence," we cannot find that the use of the words "abundantly clear" was enough to negate the finding in this case.

IV.

The appellant's final claim is perhaps the most provocative. The appellant argues that the trial court exceeded its jurisdiction by ordering that the Department of Health and Human Services insure that she be sterilized.See footnote 6 The appellant argues that her right to bear children is a "fundamental and natural right" under the United States Constitution, being one of those rights which "grows out of the nature of man and not law." She also argues that the court order violates her personal rights under the United States Constitution because the order invades her right to personal security in her life, limb, body, health, and personal liberty.See footnote 7

The State counters that it did not order the appellant sterilized; instead, it ordered the HHS to assist the appellant in her expressed desire to be sterilized.See footnote 8 Further, although the appellant appealed the court's order, she voluntarily obtained a five-year Norplant contraceptive implant. Thus, the issue of whether the court could order that the defendant be sterilized is moot. It seems, however, that such an order could not be upheld. Another jurisdiction has concluded that statutory authority is required before the court can order involuntary sterilization even in felony child abuse cases.See footnote 9 No case law seems to exist in any jurisdiction in which involuntary sterilization was ordered in situations involving misdemeanor child abuse or unprosecuted cases of child abuse.

Accordingly, we affirm the June 12, 1992, order of the Circuit Court of Wood County. Affirmed.

Footnote: 1In October, 1990, while Michelle's father, Mike, and her grandmother, Pat, were watching the children, Shanna was severely beaten and bruised by either the father or Pat. There are also other incidences where teachers or daycare providers noted bruises on the children. At one point, Lacey told the daycare provider that her mother hit her with a board. They also noted that the children's clothes were often filthy, ill-fitting, and inappropriate.

Footnote: 2As part of the improvement period, the court required that the appellant do the following:

(1) read a chapter of the STEP book and write a one page report each week; (2) attend the next available STEP classes; (3) secure a doctor and dentist and take children to all routine appointments; (4) seek medical and dental help when the children become ill or need services; (5) enroll children in and have them regularly attend programs to enrich their development; (6) volunteer at the Wee People Pre-school; (7) attend Al-Anon meetings; (8) have no contact with any member of the family of Michelle's father; (9) initiate individual therapy; (10) keep a journal of thoughts, ideas and daily activities; (11) seek employment or apply for AFDC when children are returned; (12) make a monthly budget; (13) move to safe, adequately-sized housing; (14) obtain utilities in her name; (15) notify her case worker whenever she moves; (16) provide a list to the Department with the name and number of two places where she

sought employment; (17) attend all regularly scheduled visits with the children; and (18) notify the Department if she cannot visit her children (R. at 23-27).

Footnote: 3The improvement period in this case began following the November 8, 1991, adjudicatory hearing and terminated on May 1, 1992. Counsel made references to a twelve-month period, but no definite time limitation was set out at that hearing.

Footnote: 4The procedure under which an improvement period and subsequent termination of parental rights can happen is structured by statute. In State v. T.C., 172 W.Va. 47, 303 S.E.2d 685 (1983), this Court stated that before any court can make any of the dispositional alternatives found under W.Va. Code § 49-6-5, the court must have held a hearing under W.Va. Code § 49-6-2 to determine whether the child was abused or neglected. Id. at 688. Only after a determination of neglect or abuse under W.Va. Code § 49-6-2 can the HHS proceed under W.Va. Code § 49-6-5. Id. Under § 49-6-5, the HHS is required to file with the court a copy of the child's case plan, describing what is planned for the child.

Once the court has the case plan, the court will then proceed with a dispositional hearing, with both the petitioner and respondents having an opportunity to be heard. Following the dispositional hearing, the court has the following options: (1) Dismiss the petition; (2) Refer the child, the parents and other family members to an agency for assistance and dismiss the petition; (3) Return the child to the parent's home under the supervision of the state department; (4) Order terms of supervision meant to assist the child and parents; or (5) Upon finding that the abusing parent was unwilling or unable to provide adequately for the child's needs, commit the child to a welfare agency or a suitable person who will be appointed guardian by the court. W.Va. Code § 49-6-5(a) (1992). Under W.Va. Code § 49-6-5(c), the legislature permitted the court to allow, as an alternative disposition, the parents a second chance at an improvement period not to exceed twelve months.

Footnote: 5The appellant also claimed that the trial court erred in placing her unborn child in protective custody. Nothing in W.Va. Code § 49-6-1 et seq. forbids the court's actions. Indeed, given her history, the court would have been remiss to not flag HHS that the child's care needed to be monitored. The infant is currently living with the appellant and is being monitored by Ms. Morris for HHS. "Protective custody" merely means the child would come under the auspices of HHS once born. No decision to terminate parental rights could happen until the statutory requirements, listed in footnote 4, were met.

Footnote: 6West Virginia Code § 27-26-1 et seq. (1992) authorizes the sterilization of mental defectives, as opposed to criminals.

Footnote: 7See also Note, Sterilization Under Federally Funded Family Planning Programs, 11 New England Law Review 589 (1976).

Footnote: 8This Court acknowledges the appellant's constitutional argument regarding her right to bear children. However, just as the Constitution limits our right to free

speech in cases of "fighting words" or speech that endangers public safety, so too must any right to bear children be limited by actions which endanger the safety of those children. This Court has an equal duty to protect the constitutional rights of children, set out in Amendment XIV to the United States Constitution. The Constitution guarantees their right not to be deprived of life, liberty, or property without due process of law. Further, Article III of the Constitution of the State of West Virginia [Bill of Rights] provides:

§ 1. All men [persons] are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

The right to bear children carries with it the responsibility for both parents to care for, nurture, and provide for the children to the best of their joint abilities. At a minimum, the parents must see to the children's health and safety and equip the children, through parenting and education, to provide for themselves as adults. In other words, the parents must help the child to obtain a quality and productive life.

The facts of this case show parents who care little for the welfare of their children. Unfortunately, this is not an isolated situation -- similar cases appear before this Court on an increasingly regular basis. We find ourselves settling for temporary solutions, such as removing the abused children to foster care, rather than doing anything to prevent reoccurrences. Most of these children have little or no chance of achieving their constitutional rights to property, happiness and safety, let alone a normal life.

Sex education is a necessity in a state with a high rate of teenage pregnancies and illegitimate births. Of even greater necessity is a program emphasizing the awesome responsibilities that parents owe their children, particularly where there seems to be a complete lack of responsibility for the children they create. While it seems unlikely that this State would require sterilization of men and women who are convicted of a felony related to the neglect and/or abuse of the children they conceive, the introduction of a long term but temporary contraceptive implant (Norplant) makes this option more palatable. However, this decision belongs in the hands of the Legislature or HHS, not the Court. What we do emphasize is that something must be done to stop the tide of neglected, abused children. It is not fair to them, and the State cannot afford the results of unchecked neglect. As we noted above, a constitutional right is guaranteed only until abused. Neither this State nor the children can afford to let this abuse continue.

Footnote: 9See Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) for an early decision approving of a Virginia statute which permitted the sterilization of "imbeciles." See also Smith v. Superior Court of the State of Arizona in and for Coconino County, 725 P.2d 1101 (Ariz. 1986), in which the Arizona Supreme Court held that the trial court did not have jurisdiction to require that defendants convicted of felony child abuse be sterilized as a condition of a reduced sentence, absent statutory authorization. The Arizona Court noted that some jurisdictions recognized the power of courts to order sterilization, although the Court found the majority of jurisdictions required statutory authorization:

Admittedly, there is a minority view authorizing sterilization of incompetents without specific statutory authority." Wyatt v. Aderholt, 368 F.Supp. 1383 (M.D.Alaska 1974); In re C.D.M., 627 P.2d 607 (Alaska 1981); In re Guardianship of Hayes, 93 Wash. 228, 608 P.2d 635 (1980). The California Supreme Court has gone so far as to invalidate a specific statute prohibiting sterilization. Conservatorship of Valerie N., 40 Cal.3d 143, 154, 707 P.2d 760, 771-72, 219 Cal.Rptr. 387, 404 (1985). . . .

More recent cases have held that sterilization should not be allowed absent a specific statute authorizing such procedure. This appears to be the majority view. See In re C.D.M., 627 P.2d at 607; Guardianship of Tulley, 83 Cal.App.3d 698, 700, 146 Cal.Rptr. 266, 268 (1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1519, 59 L.Ed.2d 783 (1979); Annot., "Jurisdiction of Court to Permit Sterilization of Mentally Defective Person in Absence of Specific Statutory Authority," 74 A.L.R.3d 1210, 1212 (1976). 725 P.2d at 1103-04. See Annot., Validity of Statutes Authorizing Asexualization or Sterilization of Criminal or Mental Defectives, 53 A.L.R.3d 960, 963-64 (1973).

232 W. Va. 104, 750 S.E.2d 657

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2013 Term

No. 12-1066

FILED
October 25, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

v.

JASON PAUL LAMBERT,
Defendant Below, Petitioner

Appeal from the Circuit Court of Marion County
The Honorable David R. Janes, Judge
Felony Action No. 11-F-36

AFFIRMED

Submitted: October 16, 2013
Filed: October 25, 2013

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Solicitor General
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JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. "The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syl. Pt. 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E.321 (1927).

3. "'Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.' Syllabus Point 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006)." Syl. Pt. 1, *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010).

4. Where the out-of-court statements of a non-testifying individual are introduced into evidence solely to provide foundation or context for understanding a defendant's

responses to those statements, the statements are offered for a non-hearsay purpose and the introduction of the evidence does not violate the defendant's rights under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

5. "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)

6. "'"A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. Pt. 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966).' Syllabus point 4, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996)." Syl. Pt. 4, *State v. Mann*, 205 W. Va. 303, 518 S.E.2d 60 (1999).

7. "'An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.' Syl. Pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971)." Syl. Pt. 3, *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996).

8. "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result

in manifest injustice." Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

9. "Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

Workman, Justice:

The petitioner, Jason Paul Lambert, was convicted in the Circuit Court of Marion County, West Virginia, of one count of sexual abuse by a parent, guardian or custodian, and one count of distribution and display of obscene matter to a minor. The victim, S.W.,[1] who was four years old at the time of the offenses, was deemed incompetent to testify. On appeal, the petitioner claims that admission at trial of certain of S.W.'s out-of-court statements violated his rights under the United States Constitution, Amendment VI, and the West Virginia Constitution, article III, section 14; and that the prosecuting attorney's closing argument contained statements so egregious as to constitute plain error.[2]

After careful consideration of the parties' briefs, the oral argument, the appendix record, and the applicable law, we affirm the judgment of the circuit court.

I. PROCEDURAL AND FACTUAL HISTORY

The petitioner was indicted in the February, 2011, term of court for the felony offenses of sexual abuse by a parent, guardian or custodian, West Virginia Code § 61-8D-5

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[1]Because of the sensitive nature of the facts alleged in this case, we follow our normal practice and refer to the child by her initials rather than by her full name. *See In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007); *In re Randy H.*, 220 W. Va. 122, 125 n.1, 640 S.E.2d 185, 188 n.1 (2006); *In re Clifford K.*, 217 W. Va. 625, 630 n.1, 619 S.E.2d 138, 143 n.1 (2005); *State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

[2]There was no contemporaneous objection made at trial to the closing argument.

(2010), and distribution and display of obscene matter to a minor, West Virginia Code § 61-8A-2(a) (2010). Both offenses were alleged to have occurred on December 4-5, 2010, at a time when the petitioner was caring for the victim, S.W., and her sister. The factual underpinning for the charges was that the petitioner, with S.W. present and observing, went into his bedroom and masturbated to ejaculation while watching a pornographic film on his television set. The petitioner's defense, boiled down to its essence, was that although the child was in the bedroom while these acts took place, the petitioner didn't intend for her to see what he was doing.

The investigation that led to the charges against the petitioner began after S.W. reported to her mother that "Uncle Jason" had "showed me his tail." Thereafter, Trooper Adam Scott spoke with S.W.'s mother, conducted a forensic interview of the child, and took a statement from the petitioner. Trooper Scott's interrogation technique included confronting the petitioner with information allegedly given to him by S.W. – whether true or not – to test his initial protestations of innocence. Ultimately, the petitioner admitted to Trooper Scott that he had masturbated in his bedroom while watching a pornographic film, but that he didn't realize S.W. was present, or, alternatively, that S.W. was positioned in such a way that she could not have seen either the masturbation or the pornography. Significantly, although the petitioner maintained that he never intentionally exposed himself to the child, he admitted that she had probably seen him and that's why he asked her "not to tell."

During the discovery phase of the criminal proceedings, S.W. was evaluated by a psychologist to determine her competency to testify. Based on the psychologist's report, and after a full evidentiary hearing at which the psychologist testified, the circuit court held that

> as a matter of law, the Court finds that S.W. the alleged victim in this matter is not competent to testify, and does GRANT the defendant's motion to preclude said minor child's testimony and all testimony regarding the statements of said minor child in this matter. The Court's finding is based on the conclusion that because of the age of the child the probative value is outweighed by the prejudicial effect of her testimony and statements to the defendant (sic) in this proceeding.

During the trial, the issue of S.W.'s out-of-court statements came up in three different contexts. First, S.W.'s mother was permitted to testify as to the child's disclosure to her of the incident, *see* text *supra*. The circuit court deemed this testimony admissible because it was offered not for the truth of the child's statement, but to show how and why the criminal investigation began. Second, Trooper Scott was permitted to play a tape recorded interview of the petitioner, during the course of which interview the trooper referred several times to information that S.W. had allegedly given him. The court deemed this testimony admissible because it was offered not for the truth of the child's statements, but to illustrate the officer's investigative technique, and to give context to the petitioner's answers to the officer's questions. Third, Stacy Miller, a Child Protective Services worker, was permitted to reiterate the child's statement to her mother; further, she testified that in a search of the petitioner's home, she and Trooper Scott found "[l]otions that the child had referenced." The court deemed the former testimony admissible because it was offered not for the truth of the child's

statement, but to show how and why CPS became involved in the case. With respect to the latter testimony, the court instructed the witness: "Just don't reference what was told to you by the child since she will not be testifying. Leave her out of it. Just say what you saw."

With respect to the testimony of all three of these witnesses, the circuit court specifically admonished the jury that S.W.'s statements were not being offered for the truth of what the child had said. Following the testimony of S.W.'s mother, the court instructed the jury that

> [t]his child is five years old. She won't testify. She's not old enough to testify, or mature enough to testify, which is not uncommon. This comment that she made to her mother is not offered for the truth of that matter. It's not offered to prove that it actually happened. It's just offered to you for your consideration to kind of show you how this investigation got started. Okay? Not that the child's statements were true, but rather those statements to her mother are what started the investigation.

During the testimony of Trooper Scott, the court instructed the jury that

> [t]he Court has previously determined as a matter of law that this [tape recorded statement of the petitioner's interview] is admissible for your consideration. Let me mention one thing also. The trooper has talked about his interview techniques. I don't know whether you've seen *Law and Order* on TV or that sort of thing, but sometimes when troopers ask questions of suspects, they don't always – the troopers don't always tell the truth. They may sometimes use techniques in which they lie to the suspect to try to trick them and that sort of thing. I don't know whether that happens in this case. I haven't seen this transcript and I haven't heard the interview. But the trooper may refer to things that he may in his conversation with Mr. Lambert [sic], he may mention things that he says the child said

> to him, this four-year-old child that I've determined cannot testify. What he says the child said to him, what the trooper says the child said to him, may or may not be true. And it's not being offered for that truth. Just like yesterday when I told you, I think Ms. Kragenbrink testified to what the child told her, and I told you that you couldn't consider that statement for the truth of the statement of the child, it's the same thing with what Trooper Scott says to Mr. Lambert. What Trooper Scott says the child said to him isn't being offered for the truth of those statements, but rather that's the technique employed by Trooper Scott in getting responses from Mr. Lambert. All right? So if you would please view those statements of Trooper Scott in the CD with caution. Ms. Hawkins, go ahead.

During the testimony of the CPS worker, the court instructed the jury that "[l]et me give the jury the same cautionary instruction that I did before. That testimony by Ms. Miller is not offered for the truth of those reports, but rather to demonstrate what caused the investigation by CPS."

At the conclusion of the trial, the jury found the petitioner guilty on both charges. The circuit court denied the petitioner's Motion for Judgment of Acquittal or in the Alternative a New Trial, and on May 11, 2012, sentenced him to a ten to twenty year term of imprisonment on the sexual abuse charge, to be served concurrent with a five year term of imprisonment on the display of pornography to a minor charge. This appeal followed.

II. STANDARD OF REVIEW

In this case, we are initially called upon to address a challenge to the admission of evidence by the trial court. As a general matter, we have held that "'[r]ulings on the

admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983). However, the admissibility issue raised in this case is challenged on constitutional grounds. As framed, the issue presents a question of law. This Court has held that "[w]e review questions of law *de novo*." *May v. May*, 214 W. Va. 394, 398, 589 S.E.2d 536, 540 (2003); *see also State v. Whitt*, 220 W. Va. 685, 690, 649 S.E.2d 258, 263 (2007) ("Our review of the constitutional issue raised in this case is plenary."); *United States v. Powers*, 500 F.3d 500, 505 (6th Cir. 2007) ("Generally, we review alleged violations of the Confrontation Clause de novo." (citation omitted)).

With respect to the petitioner's claim that the State's closing argument was improper, this Court has held that

> In reviewing allegedly improper comments made by a prosecutor during closing argument, we are mindful that '[c]ounsel necessarily have great latitude in the argument of a case,' *State v. Clifford*, 58 W. Va. 681, 687, 52 S.E. 864, 866 (1906) (citation omitted), and that "[u]ndue restriction should not be placed on a prosecuting attorney in his argument to the jury.' *State v. Davis*, 139 W. Va. 645, 653, 81 S.E.2d 95, 101 (1954), *overruled, in part, on other grounds, State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955). Accordingly, "[t]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.' Syllabus Point 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E. 321 (1927).

State v. Messer, 223 W. Va. 197, 203, 672 S.E.2d 333, 339 (2008) (citing *State v. Graham*, 208 W. Va. 463, 468, 541 S.E.2d 341, 346 (2000)).

III. DISCUSSION

A. Confrontation Clause Challenge

The petitioner claims that admission of the out-of-court statements of the victim, one of which was recounted verbatim by S.W.'s mother and the others which could be inferred[3] from Trooper Scott's interrogation of the petitioner and the testimony of Stacy Miller, violated his right to confront the witnesses against him. U.S. Const. amend. VI; W. Va. Const., art. III, § 14.

> 'Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to *the United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.' Syllabus Point 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

Syl. Pt. 1, *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010). In this regard, it has been established that only hearsay statements fall within the prohibition of the *Crawford/Mechling* rule. *See State v. Waldron*, 228 W. Va. 577, 581, 723 S.E.2d 402, 406

[3]*See* text *infra*. Trooper Scott intimated to the petitioner during questioning – whether true or not – that information about the offense had been given to him by S.W., and Ms. Miller let it be known that S.W. had said something to her about the petitioner's use of lotion.

(2012) (holding that "[i]t is important to emphasize again that, aside from the testimonial versus nontestimonial issue, a crucial aspect of *Crawford* is that it only covers hearsay, *i.e.*, out-of-court statements 'offered in evidence to prove the truth of the matter asserted.'" (quoting *United States v. Tolliver*, 454 F.3d 660, 665-66 (7th Cir. 2006), *cert. denied*, 549 U.S. 1149 (2007)). Mindful of this authority, we turn to the specific statements at issue in this case.

The statement made by S.W. to her mother, that "Uncle Jason" had "showed me his tail," was not hearsay, as it was offered "not to prove the truth of the matter asserted, but to explain why [the mother] took [S.W.] to [the authorities]." *State v. Edward Charles L.*, 183 W. Va. 641, 657, 398 S.E.2d 123, 139 (1990); *see also State v. James B., Sr.*, 204 W. Va. 48, 52-54, 511 S.E.2d 459, 463-65 (1998); *Jessica Jane M.*, 226 W. Va. at 248-49, 700 S.E.2d at 308-09; *State v. Simmons*, No. 35540, slip op. at 4 (W. Va. filed Feb. 11, 2011) ("The mother's testimony describes what her daughter told her, which was the explanation as to why she called her pastor and took A.M. to the hospital. The child's statement was the impetus for the mother's actions.").

Clearly, under our case law there is no *Crawford/Mechling* question presented with respect to the statement made by S.W. to her mother, and the statement, not being offered to prove the truth of the matter asserted, was properly admitted at the petitioner's trial.

The statements of the child fairly inferrable from Trooper Scott's interrogation of the petitioner are likewise not hearsay as they were not introduced at trial to prove the truth of the matters therein. Trooper Scott testified as follows:

> Q: You're allowed to lie during these interviews, aren't you?
>
> A: We're allowed to what we call bluff. We may bluff about evidence we may or may not have. We're allowed to talk about polygraph examinations and the possibility of a person taking it and how he would come out upon that. And we are constitutionally, and it's been deemed in the supreme court, valid uses of interrogation to sometimes present a false statement, yes.
>
> Q: Well, this bluff, that means you can lie, doesn't it?
>
> A: Sure.
>
> Q: Tell them false information?
>
> A: Yes.
>
> Q: And in fact, you did tell false information to Mr. Lambert, didn't you?
>
> A: I believe there was a small aspect of it, yes.

Consistent with Trooper Scott's testimony, the circuit court instructed the jury that "[the trooper] may mention things that he says the child said to him . . . . What he says the child said to him, what the trooper says the child said to him, *may or may not be true*." (Emphasis supplied).

In *Waldron*, where the issue was whether the out-of-court statements of an informant,

made during a recorded conversation with the defendant, were hearsay, we concluded that they were not, noting that "the informant's statements gave *context* to the Defendant's admissible statements." 228 W. Va. at 583, 723 S.E.2d at 408 (emphasis supplied); *see United States v. Barraza*, 365 Fed.App'x 526, 530 (4th Cir. 2010) (non-testifying informant's statements made in tape recorded conversation with defendant are not hearsay, as "they are offered at trial only to provide context for the defendant's statements and not for the truth of the matter asserted."); *Tolliver*, 454 F.3d at 666 ("In this case, as pointed out by the government, Shye's statements were admissible to put Dunklin's admissions on the tape into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.") (internal footnote omitted); *United States v. Walter*, 434 F.3d 30, 35 (1st Cir. 2006) ("*Crawford* . . . does not call into question this Court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay, and as such, do not run afoul of the Confrontation Clause."); *Restivo v. Lattimore*, No. SA CV 08-1028-MMM(E), 2010 WL 5563893, at *9 (C.D.Cal. Sept. 7, 2010) ("Ochoa's alleged statements were not introduced for the truth of the matters asserted. Rather, the court allowed the jury to hear Detective McShane's assertions concerning Ochoa's alleged statements for the sole purpose of giving context to Petitioner's interview statements."); *State v. Roque*, 141 P.3d 368, 388 (Ariz. 2006) (en banc) ("In this case, however, there was no evidence presented that Dawn actually made the statements that the detectives used in questioning Roque . . . . [b]ecause the statements allegedly made by Dawn were never introduced for their truth, they

were not testimonial hearsay statements barred by the Confrontation Clause.").

In a case closely on point factually with the instant case, *Estes v. State*, 249 P.3d 313 (Alaska Ct. App. 2011), the defendant, Estes, objected to admission of her statement given to state troopers on the ground that during the interrogation, the "troopers referred to out-of-court statements purportedly made by Estes' husband, Deremer . . . admitt[ing] his guilt of the murder, but . . . also incriminat[ing] Estes." *Id*. at 315. The Court of Appeals of Alaska held that the introduction of this evidence did not violate the Confrontation Clause because

> the State did not offer this evidence as proof of the matters asserted in the statements attributed to Deremer. Rather . . . the troopers' assertions about what Deremer said, were offered to provide the foundation or context for understanding the statements *Estes* made when she *responded* to these assertions about what Deremer purportedly said. As [the trial court] recognized, the probative aspect of this evidence was not that Deremer had said these things (if, in fact, Deremer did say these things). Rather, the probative aspect of this evidence lay in the fact that Estes *was told* that Deremer had said these things, and in how she responded to these assertions.

Id. The court concluded that

> because the evidence of Deremer's purported out-of-court statements was offered for a non-hearsay purpose, the introduction of that evidence did not implicate Estes's Sixth Amendment right of confrontation. As the United States Supreme Court explained in *Crawford v. Washington*, the Sixth Amendment's confrontation clause bars evidence that is *both* "testimonial" and "hearsay", but it does not bar testimonial evidence if that evidence is not hearsay: 'The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' *Crawford*, 541 U.S. at 59 n.9, 124 S.Ct. at 1369.

Estes, 249 P.3d at 316.

We agree with the reasoning of the *Estes* court, which is consistent with both our case law and also the substantial weight of authority from other jurisdictions. Accordingly, we hold that where the out-of-court statements of a non-testifying individual are introduced into evidence solely to provide foundation or context for understanding a defendant's responses to those statements, the statements are offered for a non-hearsay purpose and the introduction of the evidence does not violate the defendant's rights under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

In light of the foregoing, we conclude that there is no *Crawford/Mechling* question presented with respect to the child's out-of-court statements which were inferrable from the testimony of Trooper Scott; and those statements, not being offered to prove the truth of the matter asserted, were properly admitted at the petitioner's trial.

The statement made by S.W. to her mother and then reiterated by Stacy Miller, the CPS worker, was offered to explain why CPS was contacted,[4] and was therefore not hearsay.

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[4]The circuit court specifically instructed the jury "[t]hat testimony by Ms. Miller is not offered for the truth of those reports, but rather to demonstrate what caused the investigation by CPS."

(continued...)

See text *supra*. Ms. Miller's testimony that during Trooper Scott's search of the petitioner's home he found "[l]otions that the child had referenced[,]" is more problematic, because it served to tell the jury both that the petitioner had used lotions as an aid to masturbation and that this information came from S.W.[5] The circuit court was obviously concerned about this testimony and took prompt action to curtail further problems, instructing the witness: "Just don't reference what was told to you by the child since she will not be testifying. Leave her out of it. Just say what you saw." Thereafter, Ms. Miller made no further references to anything that S.W. had said.

Under these circumstances, and upon a full review of the record, this Court concludes that even if the reference to S.W.'s out-of-court statement about lotion was error under *Crawford* /*Mechling*, any error was harmless beyond a reasonable doubt. "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974); *see also State v. Kelley*, 192 W. Va. 124, 130, 451 S.E.2d 425, 431 (1994). In this case, the statement was a fleeting reference in a trial otherwise free of error. In his statement to Trooper Scott, the petitioner admitted all of the

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[4](...continued)

[5]Neither the prosecutor at trial, nor the State on appeal, put forward a non-hearsay rationale to support admission of this statement.

factual allegations underpinning the charges against him; his defense was that he didn't *intend* for the child to see him masturbate and didn't *intend* for the child to see the pornographic movie. Thus, the fact that S.W. may have mentioned lotion at some point to Stacy Miller was negligible in light of the totality of the evidence against the petitioner. The circuit court admonished the witness, and the witness complied by thereafter "leav[ing S.W.] out of it."

B. The State's Closing Argument

The petitioner alleges that certain comments made by the State in its rebuttal closing argument were prejudicial; that they were an attempt to bolster the credibility of S.W., who had not testified at trial; and that they infected the integrity of the proceedings and denied the petitioner due process of law, such as to require reversal under the plain error doctrine.

Upon careful review of the record, this Court deems it unnecessary to reach the issue of plain error, because the comments complained of, even if error, were invited. In this regard, it is well established in our case law that "'"[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. Pt. 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966).' Syllabus point 4, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996)." Syl. Pt. 4, *State v. Mann*, 205 W. Va. 303, 518 S.E.2d 60 (1999). As Justice Cleckley explained in *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996),

> 'Invited error' is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

Id. at 627, 482 S.E.2d at 612.

With these principles in mind, we turn to the petitioner's argument that the State's closing argument was improper and prejudicial. The relevant portion of the State's rebuttal argument is as follows:

> The child's not being credible is not the same as the child not being competent. I wish, oh how I wish you could have heard her talk or met her or seen her. But she's four. And you have to reach a certain developmental level to be a witness in a trial . . . But when you're four you're just not old enough to be able to be a witness in court. That doesn't mean she wasn't telling the truth, that she's a liar or anything like that. She didn't have any reason to make up these allegations against Jason Lambert. She had nothing to gain.

Not mentioned by the petitioner is the fact that these comments were made in direct response to defense counsel's closing argument, in which counsel stated that

> [t]he only professional who interviewed this child was the forensic clinical psychologist whose report and testimony resulted in the Court's determination that the child was not competent to testify, because she lacked the ability to know the difference between telling the truth and a lie. That she did not

> have the ability to understand the importance and duty to tell the truth. Because she did not have the capacity to observe, remember, and relate events accurately.

Defense counsel's comments were both a mischaracterization of the psychologist's report[6] – which was not, in any event, before the jury – and also a mischaracterization of the circuit court's basis for deeming S.W. to be incompetent to testify. In the court's order of November 17, 2011, the court's conclusion that the child was incompetent was "based on the conclusion that because of the age of the child the probative value is outweighed by the prejudicial effect of her testimony and statements to the defendant in this proceeding." This was completely consistent with the court's instruction to the jury that "[t]his child is five years old. She won't testify. She's not old enough to testify, or mature enough to testify, which is not uncommon."

Under these circumstances, it is apparent that the petitioner's complaint falls squarely within the invited error doctrine. "'An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.' Syl. Pt. 2, *State v. Bowman*, 155 W. Va. 562, 184

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[6]The psychologist who examined S.W. opined that she had the ability, albeit marginal, to distinguish between telling the truth and a lie, and that he was "leaning" toward finding her competent after his first interview. After his second interview, he deemed the child to be incompetent based primarily on her inability to consistently recall details about a recent trip to Florida.

S.E.2d 314 (1971)." Syl. Pt. 3, *Crabtree*, 198 W. Va. at 623, 482 S.E.2d at 608; *see State v. Flippo*, 212 W. Va. 560, 588 n.44, 575 S.E.2d 170, 198 n.44 (2002); *Mann*, 205 W. Va. at 312-13, 518 S.E.2d at 69-70. Here, the petitioner's counsel argued to the jury, in misleading fashion and based upon evidence not before the jury, that the reason S.W. had been deemed incompetent was because she was a liar. The State responded, reasonably in our view, that because the child was too young to take the witness stand, that "doesn't mean she wasn't telling the truth, that she's a liar or anything like that."[7]

Finally, we note that even if we were to view the State's closing argument as error, we would not reverse this case on that ground. "A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). Further,

> [f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish

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[7]There is an exception to the invited error doctrine "when application of the rule would result in a manifest injustice[,]" *Crabtree*, 198 W. Va. at 628, 482 S.E.2d at 613, and where application of the exception to the rule "'is necessary to preserve the integrity of the judicial process or to prevent a miscarriage of justice.'" *Id.* (citing *Wilson v. Lindler*, 995 F.2d 1256, 1262 (4th Cir. 1993)). As clearly demonstrated by the facts herein, *see* text *supra*, this case does not fall within the exception to the rule.

> the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *Sugg*, 193 W. Va. at 393, 456 S.E.2d at 474. The ultimate test "is whether the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 405, 456 S.E.2d at 486 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

In the instant case, the petitioner fails to meet any of the factors set forth in *Sugg*. The prosecutor's remarks did not have a tendency to mislead or prejudice the jury; to the contrary, they were intended to rebut an argument made by defense counsel that *did* have a tendency to mislead the jury. The remarks were isolated, and were offset by the circuit court's repeated instructions to the jury that any statements made by S.W. to her mother, the trooper or the CPS worker were not introduced for the truth of the matter. Absent the remarks in the prosecutor's rebuttal closing argument, the State's evidence against the petitioner was strong; that evidence included, inter alia, the petitioner's admissions that he had masturbated and watched a pornographic video while the child was "probably" in the room, and pictures of the room demonstrating that the petitioner could not have been unaware of the child's presence and that the child could not have been shielded from seeing what the petitioner was doing. Finally, the remarks were not made to divert the jury's attention with extraneous matters; again, the petitioner's counsel invited the remarks by telling the jury that S.W. had been deemed incompetent because she didn't tell the truth – a

misrepresentation of the psychologist's report, which was not in any event in evidence at trial.

In short, there was no manifest injustice that would require this Court to reverse the petitioner's conviction. The petitioner had a fair trial and his conviction will stand.

IV. Conclusion

The judgment of the Circuit Court of Marion County, West Virginia, is affirmed.

Affirmed.

231 W. Va. 170, 744 S.E.2d 280

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

FILED
June 5, 2013
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Nos. 12-1178 and 12-1186

In Re: LILITH H., WYLLOW H., and NATALIE H.

Appeal from the Circuit Court of Gilmer County
The Honorable Jack Alsop, Judge
Case Nos. 11-JA-14, 11-JA-15, and 11-JA-16

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: May 15, 2013
Filed: June 5, 2013

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "W. Va. Code, 49–1–3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, *In re Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988).

3. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant

child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

5. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the . . . case [will be] remanded for compliance with that process[.]" Syl. Pt. 5, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

6. "To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect*

Proceedings [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations." Syl. Pt. 5, *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006).

7. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948).

8. "In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child." Syl. Pt. 6, *In re: Timber M. and Reuben M.*, No. 12-1138 (W. Va. June 5, 2013).

9. "Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49–6–5(a)(6) (1998) (Repl. Vol. 2001) on the record or in the order, the order is inadequate." Syl. Pt. 4, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001).

Per Curiam:

Petitioners/respondents below, Matthew H. and April B., challenge the Circuit Court of Gilmer County's October 3, 2011, and September 12, 2012, orders adjudicating them abusive and neglectful and terminating their parental rights, respectively, to Lilith H., Wyllow H., and Natalie H. in this consolidated appeal. Petitioners assert that the circuit court erred in finding that an altercation involving Matthew H. and April B.'s father, which was witnessed by the children, constituted abuse and/or neglect and further that the circuit court erred in terminating their parental rights following what they contend was a successful completion of their respective improvement periods.

Upon careful review of the briefs, the appendix record, the arguments of the parties, and the applicable legal authority, we find that the circuit court erred in adjudicating Matthew H. and April B. abusive and neglectful and in terminating their parental rights on the basis of allegations which were not the subject of the adjudication. Therefore, we reverse the circuit court's adjudication and subsequent disposition and remand this case for further proceedings, as appropriate, consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On August 6, 2011, a physical altercation occurred between petitioner Matthew H. and Randy B.,[1] petitioner April B.'s father, at petitioners' home; the home was owned by Randy B., but petitioners were living there. Randy B. was riding past the home on an ATV when Matthew H. made an obscene gesture toward him. Randy B. stopped his ATV and approached Matthew H. and a verbal argument ensued, followed by an exchange of blows. It is unclear who threw the first punch; however, the parties indisputably engaged in mutual combat. Randy B. admitted to choking Matthew H., who was later diagnosed with a fractured eye socket. At the time the altercation began, petitioner April B. was inside the house with the children, Lilith H., Wyllow H., and Natalie H.[2] As the altercation progressed, April B. came out of the house to attempt to intervene; she then also became involved in the physical altercation and struck her father. At some point during April B.'s involvement in the altercation--whether simultaneously with or subsequent to is unclear--the three children also came outside and observed the altercation. Matthew H. then threatened to get a gun and went into the house; Randy B. left and Matthew H. alleges that Randy B. also threatened to return with a gun. Witnesses indicated that Matthew H. then emerged from his house with his hands behind

[1] We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties. *See*, e.g., *West Virginia Dept. of Human Services v. La Rea Ann C.L.*, 175 W.Va. 330, 332 S.E.2d 632 (1985).

[2] The children were ages 5, 7, and 8, respectively, at the time of the altercation.

his back as though he had a weapon, but there is no evidence that he actually obtained a weapon. The police were called to the scene and domestic battery charges were filed against Matthew H., April B., and Randy B. Notably, April B. immediately filed a domestic violence petition against her father, Randy B.

The Department of Health and Human Resources (hereinafter "DHHR") filed an abuse and neglect petition on August 10, 2011, alleging that there existed "an imminent danger to the children's physical well being" inasmuch as they "witnessed their father and grandfather fighting and punching each other" and "their father and grandfather have both threatened to shoot each other." As to April B., the petition alleged that she "appear[ed] emotionally and mentally unable to protect the children." The petition further alleged that the children "had head lice, and fleas upon their person. Their clothing and bodies were dirty and the body odor indicated poor hygiene."[3] Finally, the petition also noted that the petitioners had been investigated twice previously—in January, 2007, and May, 2011--but that "no abuse or neglect was substantiated."

[3] These allegations were apparently not substantiated inasmuch as the case worker who filed the petition testified that the children "were not so filthy as to seem neglected." Further, no witness testified to seeing fleas upon the children, and the case worker was uncertain whether the children actually had head lice. Moreover, as discussed more fully *infra*, although there was testimony about the cleanliness of the home in which the children were living at the time of the altercation, no such allegations were ever made part of the petition, nor were they identified as part of the basis of the circuit court's adjudication or disposition.

At the preliminary hearing on August 18, 2011, the investigating officer testified consistent with the above version of events, but noted that there had been previous altercations between Matthew H. and Randy B. involving gun threats. When he served the criminal complaint on Matthew H., he noted that there were "animals everywhere," flies and gnats in the house around the lights, and the floor was dirty. He observed no food lying around, but characterized the house as "disgusting." The DHHR caseworker who filed the petition testified that during her initial home visit subsequent to the petition, she observed many exotic and other animals,[4] noted the home was "cluttered," a trash can overflowing, dishes with rotting food on them in the sink, as well as an odor. Although she did not include the condition of the home in her petition because she had not yet been there at the time of filing, she testified she thought it was serious enough to include. However, the record reveals no formal amendment of the petition to include the condition of the home.

The circuit court found that sufficient imminent danger existed such as to remove the children from the home and ordered petitioners to undergo psychological evaluations; they were granted six hours of unsupervised visitation every weekend. The court predicated its ruling on the "domestic violence" which occurred in front of the

[4] The worker testified that she observed an alligator, four to five chinchillas, fifteen to twenty aquariums full of rats, an iguana, a toucan, a snake, a spider, a lizard, and an inside dog.

children, rejecting Matthew H.'s argument that the underlying cause of the violence had been addressed by virtue of the domestic violence petition filed against Randy B.

On September 1, 2011, an adjudication hearing was held during which the court heard testimony from various witnesses regarding the altercation, including Randy B., who testified consistent with the facts noted above, adding that 1) the verbal altercation began because he was evicting petitioners from the home effective August 23; and 2) he and Matthew H. had a history of verbal altercations and threats. Notably, no testimony was adduced regarding the condition of the children, the home, or any issues between April B. and Matthew H. and the circuit court made no reference to any such issues in its oral findings or order. Nonetheless, the circuit court adjudicated the children abused and neglected, finding that Matthew H. "had an altercation . . . with the maternal grandfather and threatened to get a firearm in the presence of the Infant respondents" and April B. "failed to protect the Infant Respondents."[5] The circuit court granted six hours a week supervised visitation because the guardian ad litem expressed concerns that the children were being "coached" and that the case was being discussed with them.

[5] During its ruling, although not contained in the adjudication order, the circuit court stated that April "failed to take appropriate action to protect the health, safety and welfare of the children by *bringing them to the scene* where this altercation was occurring[.]" (emphasis added). As indicated above, the undisputed testimony indicates that the altercation took place outside the petitioners' home, from which petitioners contend the children emerged unbeknownst to anyone, during the course of the altercation.

Subsequent to the adjudication, the guardian ad litem filed a motion to compel the DHHR to amend its petition or file a new one to include allegations regarding the condition of the children and home. At a hearing on the motion on September 22, 2011, the guardian ad litem argued that she had interviewed the children, who noted that they did not like foster care because they had to bathe every day. She testified that the children stated that they did not previously bathe every day because their mother had to heat the water on the stove. The guardian ad litem further represented that she had visited the home and taken photos a few days after the family moved out, noting that the condition of the home was "very, very poor."

The circuit court ruled that since adjudication had already occurred, the petition could not be amended to include new allegations, but all parties agreed that the court could consider the condition of the home for purposes of disposition.[6] As such, the

[6] The court stated,

> the Court is of the opinion that any relevant information as to the condition of the home, as to conditions that need to be addressed, can be presented at the dispositional hearing, and neither the State of West Virginia nor the Guardian Ad Litem would be prohibited from submitting evidence in regards to these alleged deficiencies. *I don't think we're limited to the deficiencies outlined in the petition for adjudication or the time before this adjudication.* As it comes to disposition I think the Court can and the Court will address all deficiencies out of which this case arises.

(emphasis added). Although petitioners' respective counsel objected to the motion to compel, they agreed that allegations regarding the home and children could be considered (continued . . .)

State called the DHHR caseworker, who testified that the residence did not appear to be a safe, fit, and habitable place for the children to reside, but noted further that the petitioners had subsequently moved into a residence she had not inspected. Nevertheless, she recommended an improvement period for petitioners.

As a result of the foregoing testimony, the court "reluctantly" granted a six-month post-adjudicatory improvement period to include a substance abuse evaluation,[7] drug counseling, anger management, individual and family counseling, batterers' counseling, and parenting classes. On March 12, 2012, petitioners were granted a ninety-day extension of their improvement period. On June 11, 2012, the court changed visitation to two, four-hour supervised visits per week due to reports that the parents were "still arguing and did not disclose to the MDT team that they were getting evicted"; the court further found that the petitioners were "blaming and threatening everyone involved

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by the court at disposition and were prepared to go forward with the hearing. This ruling was not assigned as error in this appeal. However, as discussed *infra*, neither the condition of the children nor the home ultimately formed the basis of the court's disposition, based on the order and transcript.

[7] Evidence was adduced during the September 22, 2011, hearing regarding Matthew H.'s positive drug test at the preliminary hearing; he tested positive for THC and proxyphene, a narcotic pain reliever. April B.'s drug test was negative. However, the substance abuse evaluation apparently revealed that petitioners had no substance abuse issues and therefore, services were unnecessary in that regard. During oral argument, however, counsel represented that post-termination visitation was recently suspended, in part, due to Matthew H. testing positive for methamphetamine.

in the case rather then [sic] taking responsibility for their own actions and behaviors." The court then set the case for disposition.

On August 30, 2012, the court held a dispositional hearing and terminated the petitioners' parental rights. The court heard testimony from a variety of service providers, whose testimony centered exclusively around the allegedly contentious relationship between April B. and Matthew H.[8] No testimony was adduced regarding the relationship between Matthew H. and Randy B., the condition of the children, or the home. With the exception of seven batterers' intervention classes out of a total thirty-two classes required, the witnesses testified that petitioners completed all aspects of their

[8] In particular, the court heard testimony from April B.'s counselor, who testified that Matthew H. was "mentally and verbally abusive" to April B. when he was not taking his medications and "says mean and hurtful things to her" and "calls her names to the girls." The counselor further testified, however, that she thought that since Matthew H. had recently obtained employment, it was likely that the "psychological abuse" would cease. A co-worker of April B. further testified about an incident which occurred just prior to the hearing where Matthew H. showed up at April B.'s workplace, raising his voice to her and attempting to confront her regarding what Matthew H. described as allegations that April B. had been unfaithful to him.

Matthew H.'s therapist testified that initially he was uncooperative in counseling sessions, but had substantially improved in the two months preceding the hearing. She testified that he was being "open-minded" and "putting into practice the anger management that we have been going over." She testified that he called in for sessions when he was out of town working, even when his insurance would not cover it.

improvement period.[9] The worker who supervised petitioners' visitation testified that no visits were cancelled and that all interactions were familial and affectionate.

Nevertheless, the DHHR caseworker testified that it was in the children's best interest to remain in the custody of the DHHR. In support, she stated that the children advised her that their parents argued in front of them; however, she further testified that the kids loved their parents and had a strong bond with them. She noted that in petitioners' "provider reports" that Matthew H. had threatened the lives of "everyone in the case." The guardian ad litem likewise argued in support of termination, stating to the court that the petitioners had failed to take responsibility for the acts giving rise to the proceedings and simply "didn't get it."

The DHHR representative was further critical of April B. because she had "remained in the relationship with Matthew." She conceded April B. had successfully completed services, but "she continues to maintain contact and live in the same residence where there's emotional, psychological violence and even physical violence that was

[9] The DHHR worker testified that Matthew H. had attended twenty-five out of thirty-two batterers' intervention sessions as well as counseling and psychiatric appointments. She was critical of his failure to attend the final seven sessions of batterers' intervention, but testified that he had obtained employment in Pennsylvania and that the program could not accommodate his travel schedule. Petitioners testified that they attempted to coordinate an alternate program in Pennsylvania where he could complete the sessions, but were unsuccessful.

reported[.]" [10] However, April B. testified that she remained committed to her relationship with Matthew H., but "if it comes to the point between him and my children, of course, I would choose my children." Critically, when pressed on why she had not previously acted on her willingness to leave Matthew H., she responded that "[a]s of the last MDT meeting, we were all under the impression that you were sending the kids home" and "there was hope that we would still be a family unit and not a broken family." She testified that the CPS worker told her "our goal at CPS is to reunite the family, not break the family up."[11]

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[10] There is no indication in the appendix record of any evidence of physical violence between April B. and Matthew H.

[11] The appendix does not contain any documents reflecting the family case plan established, nor is the content of it mentioned in any of the hearing transcripts. Although we find it unnecessary to assess the petitioners' compliance with their improvement period, as discussed *infra*, we note that April B.'s testimony suggests that the family case plan did not set forth the requirement that April B. leave Matthew H. Certainly, the requirements of the improvement period as set forth in the circuit court's order included no such directive.

As such, we note that in this case, it appears that to the extent successful completion of April B.'s improvement period was conditioned on her termination of her relationship with Matthew H., such requirement was not clearly expressed to her. The clear expression of the meaningful steps required of a parent to successfully complete his or her improvement period is

> designed to foreclose a natural parent from being placed in an amphorous [sic] improvement period where there are no detailed standards by which the improvement steps can be measured. It also provides a meaningful blueprint that the DHS can monitor and which will also give the court specific

(continued . . .)

Following this testimony, the circuit court terminated the petitioners' parental rights. The court noted that April B. appeared physically intimated and fearful of Matthew H., but that she was wholly unwilling to do anything to separate herself from his behavior.[12] The court indicated that she had "several opportunities during the course of this case" to leave Matthew H. but had not done so. The court found that Matthew H. wanted to "blame everybody but himself." As a result, the circuit court found that there were no "reasonable grounds that the conditions out of which this abuse and neglect arose, can or will be corrected within the foreseeable future[.]" This appeal followed.

> information to determine whether the terms of the improvement period were met.

State ex rel. West Virginia Department of Human Services v. Cheryl M., 177 W. Va. 688, 693-94, 356 S.E.2d 181, 186-87 (1987).

[12] The court stated:

> I have never seen a witness that physically appeared to be any more intimidated or fearful of someone than the respondent mother does to the respondent father in this case, but I also have never seen anyone . . . less willing to accept that issue and to correct that situation.

In spite of this finding, the circuit court at no time undertook an analysis of whether April B. was a "battered parent" as defined by West Virginia Code § 49-1-3(3) (2011) and therefore to be afforded such treatment as a "battered parent" with regard to adjudication and disposition.

II. STANDARD OF REVIEW

This Court has held, with regard to our review of abuse and neglect findings:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With these principles in mind, we turn to the petitioners' assignments of error.

III. DISCUSSION

Adjudication

Petitioner Matthew H. asserts that the circuit court erred in adjudicating him abusive and/or neglectful because he merely acted in self-defense during the altercation, which he contends was instigated by Randy B. Petitioner April B. adopts a similar argument and contends that, for her part, she was merely attempting to break up the altercation. Both parties contend that the children "ventured" from the home

unbeknownst to them. The DHHR counters that it was Matthew H. who instigated the fight by gesturing to Randy B. and then refusing to "stand down" when the fight escalated. The DHHR takes the position that April B. chose to protect Matthew H. rather than her children in attempting to intervene in the altercation. The guardian ad litem essentially argues simply that domestic violence occurred in front of the children and is therefore *per se* abuse and/or neglect.

Although the circuit court did not identify the statutory basis for its adjudication and referred simply to the children as being "abused and/or neglected," it presumably based its adjudication on West Virginia Code § 49-1-3(1)(D) (2011), which defines an "abused child" as one "whose health or welfare is harmed or threatened by . . . [d]omestic violence as defined in section two hundred two [§ 48-27-202] article twenty-seven, chapter forty-eight of this code." West Virginia Code § 48-27-202 (2010) defines "domestic violence," as the "occurrence of one or more of the following acts between family or household members," which "acts" include "[a]ttempting to cause or intentionally, knowingly or recklessly causing physical harm to another[.]"[13] Upon determining that Matthew H. abused the children by subjecting them to "domestic

[13] West Virginia Code § 48-27-204 (2002) provides the operative definition of "family or household members." The circuit court, however, did not undertake an analysis of the statutory definition to ensure that the statute contemplated the relationship between Randy B. and Matthew H.; nonetheless, they do appear to qualify as "family or household members" by operation of West Virginia Code § 48-27-204(8).

violence," the circuit court ostensibly then derived April B.'s adjudication from the following:

> W. Va. Code, 49–1–3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Although this Court does have concerns about the health and welfare of the subject children as discussed more fully *infra*, we are nonetheless left with the firm conviction that the circuit court's finding that the children were abused and/or neglected because they witnessed the altercation between their father and grandfather was clearly erroneous. We reach this conclusion without delving into the genuine dispute between the parties as to which combatant is most "at fault" for having instigated the altercation. Rather, we find that this unfortunate, yet isolated occurrence, was not sufficient to constitute abuse and/or neglect on the part of Matthew H., nor was the fact that the children witnessed this occurrence sufficient to constitute abuse and/or neglect on the part of April B. Moreover, during oral argument in this matter, counsel represented that the children are currently placed with Randy B., the fellow combatant and alleged aggressor which gave rise to the adjudication. We can discern no conceivable justice in stripping petitioners of their children for certain behaviors, only to place the children with another who engaged in precisely the same conduct.

While this Court is quick to note that we are disturbed by and strongly disapprove of all three combatants' behavior and seeming disregard for the proximity of small children to their exchange, we find that the circumstances of this particular case are simply too attenuated from the type of household domestic violence from which an abuse and neglect adjudication may derive. To that end, although the altercation may definitionally qualify as "domestic violence" under West Virginia Code § 48-27-202, we note that Randy B. did not reside in the household with Matthew H. and the children; as such, the children's exposure to their vitriol was limited. Randy B. testified that April B. had severely restricted his interaction with the family as a direct result of the animosity. We find that, although both Matthew H. and Randy B. testified to a history of verbal altercations and threats, the record is devoid of any evidence of prior, much less recurrent, physical violence between them. Although previous verbal incidents—at least one of which involved Randy B.—were cursorily alleged in the petition, the DHHR noted that such allegations were unsubstantiated.

With respect to April B., we simply cannot find that her actions, in attempting to intervene and thereby becoming involved in the altercation is tantamount to "aid[ing] or protect[ing]" Matthew H. or constitutes neglect of her children. While cooler heads would certainly indicate that a wiser course would have been to call the police, we cannot say that she neglected her children by choosing in the heat of the moment to attempt to bring the altercation—bearing witness to which the circuit court found caused the children emotional harm—to an end. We find no evidence that petitioners knowingly

subjected the children to this incident, despite the strong likelihood that, as children, they may venture outdoors, curious about the commotion. Finally, we believe the unexpected and isolated nature of this event is underscored by petitioners' efforts to ensure that such an event did not recur by obtaining a DVP against Randy B.

This is not to say, however, that the children were not disturbed by witnessing the altercation and that the contentious relationship between their father and grandfather is not a constant source of anxiety and concern to them. However, neither parents, nor the courts through exercise of the State's *parens patriae* powers, can ensure a childhood experience entirely free from emotional upset and occasional unpleasantness which obtains from the complexities of human relationships. We simply cannot agree, under these particular circumstances, that the petitioners created an environment of abuse and/or neglect which threatened their children's health or welfare sufficient to justify their adjudication as abusive and/or neglectful.

In difficult cases such as this, we have often reminded lower courts that

> [i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. Pt. 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). While we do not lightly—and seldom do—disturb the results of the lower courts' Herculean efforts to

balance the safety and well-being of children, while protecting parents' fundamental rights, this case leaves us with the firm conviction that the circuit court clearly erred in its finding of abuse and/or neglect and we therefore reverse the court's October 3, 2011, order to that effect.

Disposition

Having determined the circuit court's adjudication to be error, it is procedurally unnecessary to determine whether the circuit court likewise erred in terminating the petitioners' parental rights. Nevertheless, we write further to address the troubling development of this case—both factually and legally. This Court cannot turn a blind eye toward the abuse and neglect allegations which lurk in the periphery of this matter, merely because they evaded proper handling below. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). *See also State v. Julie G.*, 201 W. Va. 764, 776, 500 S.E.2d 877, 889 (1997) (Workman, C. J., dissenting) ("Courts are [] statutorily reposed with a strong obligation to oversee and protect each child who comes before them."). Our review of this matter reveals that the DHHR failed to properly amend the petition prior to adjudication and the circuit court failed to permit proper amendment post-adjudication, such as to encompass all of the allegations made evident during the course of the proceeding. Furthermore, we find that the circuit court's analysis and findings in support of the disposition were deficient. These errors are of

such a nature and magnitude such as to render the proceedings below a failure of their essential purpose.

1. Failure to Amend Petition

We observe that the petitioners' second assignment of error regarding the circuit court's termination of their parental rights, merely circles around, but does not identify, the most problematic aspect of the court's disposition. Petitioners contend that the circuit court erred in terminating their parental rights because they successfully completed their improvement periods. Whether or not that is the case, this Court declines to address, as noted above. However, this Court takes notice of the plain error permeating the disposition wherein the circuit court terminated the parental rights on the basis of allegations and issues which were never properly made subject of the adjudication. "[I]t is within the authority of this Court to 'sua sponte, in the interest of justice, notice plain error.'" *Cartwright v. McComas*, 223 W. Va. 161, 164, 672 S.E.2d 297, 300 (2008) (quoting Syl. Pt. 1, in part, *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998)). We find that this error was occasioned by the circuit court's erroneous reading and application of the Rules of Procedure for Child Abuse and Neglect Proceedings regarding amendments to petitions, as well as the DHHR's lack of diligence with respect to additional abuse and neglect issues. To that end,

> [w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has

> been substantially disregarded or frustrated, the . . . case [will be] remanded for compliance with that process[.]

Syl. Pt. 5, in part, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Rule 19 of the Rules of Procedure for Child Abuse and Neglect governs amendments to petitions and provided, at the time of this adjudication, that petitions may be amended at any time until the final adjudicatory hearing, provided that the adverse party was granted sufficient time to respond to the amendment. Critically, Rule 19 further provided that "[a]fter the final adjudicatory hearing begins, a petition *may be amended* if the amendment does not prejudice an adverse party." (emphasis added). During the course of the proceedings below—following adjudication, but prior to disposition—Rule 19 was amended to, in part, provide further direction to circuit courts in dealing with post-adjudicatory amendments. The Rule now reads, in pertinent part:

> (b) *Amendments after the adjudicatory hearing*. – If new allegations arise after the final adjudicatory hearing, the allegations should be included in an amended petition rather than in a separate petition in a new civil action, and the final adjudicatory hearing shall be re-opened for the purpose of hearing evidence on the new allegations in the amended petition. [14]

[14] It should be noted that this amendment merely provides further *procedural* guidance to the circuit court in handling new allegations, i.e. such allegations may be addressed by way of amended petition and re-opening the adjudication, rather than requiring a new action to be filed. In no way does the amendment set forth a "new" requirement that post-adjudicatory allegations must be acknowledged and properly, systematically adjudicated. Any interpretation that Rule 19 previously suggested that post-adjudicatory allegations must simply be disregarded if prejudice would result from their inclusion in the pending proceeding is wildly inconsistent with the "clear language (continued . . .)

West Virginia Rules of Procedure for Child Abuse and Neglect (2012) (footnote added).

In the case below, the guardian ad litem moved to compel the DHHR to amend its petition to include allegations regarding the condition of the children and the home; the circuit court summarily found that such amendment could not occur post-adjudication, in clear contravention of Rule 19, even as it then existed. The circuit court reached this conclusion despite counsel for both petitioners conceding that they were not prejudiced by the court's consideration of such evidence for purposes of disposition. *See* n.6, *infra*. Accordingly, the record is devoid of anything but the initial, troubling evidence regarding the hygiene of the children and unsanitary condition of the home adduced during the preliminary hearing; at the adjudicatory hearing, the parents had moved into a home that the DHHR had not inspected. The DHHR caseworker testified that she believed the condition of the home was serious enough to include in the petition, yet the circuit court did not permit amendment of the petition, nor, more importantly, base any portion of his adjudication on those allegations. Subsequent thereto, there is absolutely no reference to whether proper care and treatment which *directly affected the physical well being of the subject children* was an ongoing concern. As such, these troubling allegations wholly eluded meaningful adjudication and commensurate attention during the improvement period.

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and substantive tenor of abuse and neglect law[.]" *Julie G.*, 201 W. Va. at 776, 500 S.E.2d at 889 (1997) (Workman, C. J., dissenting).

However, despite our concern regarding the neglect allegations regarding the children and the home which "fell through the cracks" due to the circuit court's erroneous handling of the requested amendment, we are most startled by the fact that at no time did the DHHR, the guardian ad litem, or the circuit court even discuss the necessity of amending the subject petition to include the *relationship between the petitioners* as a part of the subject adjudication. April B. and Matthew H.'s contentious relationship overwhelmed the evidence regarding their improvement period and formed the *sole* basis of the court's termination of their parental rights. Yet, at no time did the circuit court make a finding that their interactions, while unsettling, rose to the level of "domestic violence" pursuant to West Virginia Code § 48-27-202, such as to render the children "abused children" pursuant to West Virginia Code § 49-1-3(1)(D). Rather, the circuit court made its erroneous threshold finding that the altercation between Matthew H. and Randy B. rendered the children abused and neglected, then insinuated itself into the quarrelsome relationship between April B. and Matthew H. The circuit court then terminated their parental rights on the basis of their continued acrimony, which was never even alleged to constitute abuse and/or neglect in the petition or at any time during the proceedings. This action served to "back door" adjudication. *See* Syl. Pt. 2, *Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (limiting basis of adjudication to conditions existing at time of, and as alleged in, the petition); *cf.* Syl. Pt. 6, *In re Carlita B.*, 185 W. Va. 613, 408

S.E.2d 365 (1991) (requiring court, at conclusion of improvement period, to determine if sufficient improvement has been made in context of all circumstances of case).[15]

To that end, this Court has provided clear guidance to courts on their authority, if not *obligation*, to compel newly-discovered or developed abuse and neglect allegations to be made part of a petition:

> To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

Syl. Pt. 5, *In re Randy H.*, 220 W.Va. 122, 640 S.E.2d 185 (2006). In *Randy H.*, we found that the circuit court had the authority to compel the DHHR to investigate allegations which arose post-petition and "a duty to make findings of fact and conclusions of law regarding those allegations." *Id.* at 127, 640 S.E.2d at 190; *see also In re T.W.*, 230 W.Va. 172, 737 S.E.2d 69 (2012).

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[15] *See also Julie G.*, 201 W. Va. at 776, 500 S.E.2d at 889 (Workman, C. J., dissenting) ("While . . . evidence concerning matters not alleged in the original petition [may not] alone support an adjudication of abuse and neglect absent an amendment, such evidence is clearly relevant insofar as it would 'tend[] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]'" (citing W.V.R.E. 401)).

It is clear to this Court that there remain unaddressed issues within this family that, due to a confluence of errors, were not appropriately adjudicated. These issues obviously include, but may not be limited to, whether the petitioners cared for the children and their home in a manner which ensured their safety and welfare, and further whether their volatile relationship constitutes "domestic violence" sufficient to render the children abused as a result of their exposure thereto. As described above, none of these concerning allegations were ever properly adjudicated; the purported "domestic violence" between the petitioners arose seemingly out of thin air at some point in the proceedings as the underpinning of the abuse and neglect petition. This Court has recently held:

> In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child.

Syl. Pt. 6, *In re: Timber M. and Reuben M.*, No. 12-1138 (W. Va. June 5, 2013).

Accordingly, upon remand, the DHHR is directed to file an amended petition, if appropriate, to include any and all allegations which it believes threaten the health or welfare of these children, to the extent that adequate grounds exist for such amendment. To the extent an adequate basis exists, such amendment should include but is not limited to any alleged "domestic violence" between the petitioners, allegations of neglect of the children and/or the petitioners' home, and any additional allegations which may have developed during the course of these proceedings. Further, the circuit court is

directed to hold proceedings immediately upon remand for purposes of restoring custody to petitioners. However, before the children are returned to petitioners, in light of the Court's foregoing concerns, the circuit court is directed to 1) undertake any measures necessary to preliminarily ensure that Matthew H. and April B. can currently provide the children with a fit and suitable home; and 2) address the most recent substance abuse allegations against Matthew H., including but not limited to any drug testing protocols it deems necessary pending further proceedings, if any.

2. Deficiencies in Dispositional Findings

Finally, in review of the circuit court's disposition and order, we are once again compelled to remind courts that "[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948). We note that the circuit court's disposition order appears largely perfunctory[16] and further that the disposition hearing was geared more toward castigating and punishing the petitioners rather than engaging in any meaningful analysis of the best interests of the children. The failure of this most critical analysis is mirrored in the deficiencies contained in the order itself.

[16] In particular, most of the orders entered in this matter appear to have been assembled *pro forma* and are lacking in supporting findings. Most critically, however, the disposition order contains no particularized factual findings regarding the improvement period and makes only conclusory statements to partially attempt to track the language of West Virginia Code § 49-6-5(a)(6) (2011), as discussed more fully *infra*.

This Court has held:

> Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49–6–5(a)(6) (1998) (Repl. Vol. 2001) on the record or in the order, the order is inadequate.

Syl. Pt. 4, in part, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620. We note that the disposition order only summarily states that "there is no reasonable likelihood that the condition of neglect or abuse can be substantially corrected in the near future,"[17] with no findings in support of this critical conclusion. Moreover, the remaining findings required by West Virginia Code § 49-6-5(a)(6) are entirely absent including: 1) why continuation in the home is not in the best interests of the children; 2) why reunification is not in the best interests of the children; and 3) a description of the efforts made by the DHHR to preserve and reunify the family.[18] We again caution the circuit courts that "[t]ermination of parental rights [is] the most drastic remedy under the statutory provision covering the

[17] We recognize that the transcript of the disposition hearing contained slightly more detail than the disposition order, but note that the circuit court's conclusions were still lacking in factual findings and support. *But see In re Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999) (upholding termination where transcript, rather than order, supported finding that there was no reasonable likelihood conditions could be corrected).

[18] The circuit court's findings in this particular regard would have proven helpful given the testimony given by the DHHR caseworker regarding April B.'s failure to leave Matthew H.

disposition of neglected children" and must be supported by adequate findings. Syl. Pt. 2, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). The statutory requirements are designed to ensure that this most serious remedy is adequately justified and not utilized improvidently.

IV. CONCLUSION

Based upon the foregoing, we reverse the October 3, 2011 and September 12, 2012, orders of the Circuit Court of Gilmer County and remand this matter for amendment of the petition, as appropriate, and further proceedings consistent with this opinion.

Reversed and remanded with directions.

196 W. Va. 395, 473 S.E.2d 110

Supreme Court Of Appeals Of West Virginia

IN THE MATTER OF LINDSEY C.

No. 23065
Submitted: October 31, 1995
Filed: December 14, 1995

SYLLABUS BY THE COURT

1. Any failure by litigants to observe carefully the requirements of our appellate rules is expressly disapproved; in appropriate circumstances an appeal may be dismissed by reason of a disregard of those rules.

2. The procedure in abuse and neglect cases is governed by provisions internal to W.Va. Code § 49-1-1, *et seq.*, and such other procedural requirements of the Code or general law as obtain. Except for Rules 5(b), 5(e) and 80, the West Virginia Rules of Civil Procedure for Trial Courts of Record are not applicable to such cases.

3. In abuse and neglect proceedings the appointment of a guardian ad litem is required for adult respondents who are involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent.

4. It is error to enter a decree terminating parental rights after a suggestion of involuntary hospitalization for mental illness of the affected parent or custodian without first having appointed a guardian ad litem for such parent or custodian.

5. A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or by mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based.

6. In abuse and neglect cases, service of original process on a guardian ad litem appointed for a parent or custodian involuntarily hospitalized for mental illness whose legal capacity has not been terminated by law cannot be substituted in lieu of service on the hospitalized parent or custodian where the parental rights of such person may be terminated under the process to be served.

7. "In child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel because of the requirements of the Due Process clauses of

the West Virginia and United States Constitutions." Syllabus point 1, *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974).

8. Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *as an incident of the making of the order filing each abuse and neglect petition*. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

9. If the appointment of a guardian ad litem is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of guardian ad litem, with the attendant duties of protecting the interests of the persons for whom such counsel is appointed guardian ad litem and the attendant duty on the court to see to the protection of such person's interests until and unless it later appears that such person's circumstances do not require the continued protection of a guardian ad litem or that the two functions cannot be performed by the same attorney.

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Guardian ad Litem for Lindsey C.

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Albright, Justice:
This is an appeal of a juvenile abuse and neglect case conducted under the authority of W.Va. Code § 49-1-1, *et seq.* Appellant, Terri C., the natural mother of the infant, Lindsey C., born June 1, 1992, now appeals an order entered March 1, 1995, terminating her parental rights after a hearing held by the Circuit Court of Ohio County, West Virginia, February 1, 1995. Appellant argues that the lower court erred in failing to appoint counsel for her in the proceedings below and in terminating her parental rights without properly serving her with copies of the original petition and proper notice. The only appearances noted for appellant in the proceedings below are by letter dated April 17, 1995, filed below May 26, 1995, authorizing appellant's counsel here to investigate the file, and by the filing of this appeal in the circuit clerk's office, June 30, 1995.

A recitation of the factual and procedural history of the case is necessary before we discuss the law as it applies in this instance.

In January, 1992, appellant was committed to a mental hospital in Pennsylvania from which she was released June 8, 1992, following the birth of Lindsey C., June 1, 1992. The discharge summary for that hospitalization, a copy of which was filed in the court record in this proceeding August 24, 1994, discloses that appellant was suffering from a serious mental disorder, controllable at least in part by medication but complicated by "a chronic history of noncompliance with after care treatment and additional stress of bringing up a newborn child". She was discharged to return to West Virginia and, according to the discharge summary, "the Base Service Unit in West Virginia was informed as well as Children and Youth Services . . . ."

In March, 1993, appellant was admitted to Weston State Hospital in West Virginia for psychiatric problems. She remained hospitalized approximately thirty days, during which time her child, Lindsey C., stayed in the actual custody of her father, Zachary C., to whom appellant was married. After appellant's return from Weston she apparently resided in an apartment in Wheeling with her husband. In May of 1993, appellant filed a domestic violence petition against her husband, Zachary C., and an Ohio County magistrate awarded appellant temporary custody of Lindsey C., after which it appears that appellant and her husband did not reside together.

In August, 1993, the Department of Health & Human Resources (hereafter "DHHR" or "the Department") received a referral regarding suspected neglect of Lindsey C. by appellant. According to a DHHR Court Summary dated May 6, 1994, within two days of that referral appellant was again committed to Weston State Hospital. Lindsey C. was delivered into the actual custody of her father, Zachary C., who then apparently occupied the apartment vacated by appellant incident to her hospitalization, probably the apartment from which the child was later removed. The record does not disclose whether any action was taken at that time to vest or confirm legal custody of Lindsey C. in Zachary C. incident to the transfer to him of her actual custody. The record does not disclose any further orders regarding the legal custody of Lindsey C. except those entered in this proceeding, later described. The DHHR commenced a series of visitations to the father's apartment. After several such visits, the DHHR was satisfied with the circumstances in which Zachary C. was maintaining the child and ceased visitations and all other child protective services. During this time, while hospitalized at Weston, Terri C. claimed that Zachary C. had sexually abused their child, but the DHHR found those allegations to be without merit and took no other action with respect to such allegations.

The DHHR Court Summary previously mentioned states that at approximately 9:00 p.m. on Thursday, April 21, 1994, Wheeling police officers received a report that Zachary C. had been seen intoxicated on the street near his residence with Lindsey C. in his custody. Police officers found Lindsey C. in her father's apartment at about 9:55 p.m. that same evening. She was unharmed and with her father, who was said to be drunk and unconscious. The police immediately took Lindsey C. to the home of an acquaintance of her father. According to the summary, Lindsey C.'s father was expected to pick her up from the home of the acquaintance about 5:00 p.m. the next day and had commented that he soon planned to take Lindsey C. to live in Kansas. The DHHR believed the child had been in a dangerous situation in her father's apartment and faced imminent danger if returned to his custody, so the DHHR decided to take immediate custody of Lindsey C. At about 3:30 p.m. that next day, Friday, April 22, 1994, Wheeling police officers removed the child from the home of her father's acquaintance and delivered her to a DHHR child protective service worker, who then placed her in a foster home licensed by the DHHR. The record is silent as to the whereabouts of appellant at that time except that the DHHR Court Summary of May 6, 1994, reports that the nearest relative then known who might have been able to take custody of Lindsey C. was M.B., the maternal grandmother, who lived over one hundred miles away in another state.

On Friday, April 29, 1994, the Circuit Court of Ohio County entered an order, styled an order *nunc pro tunc* as of Tuesday, April 26, 1994, awarding temporary emergency custody of Lindsey C. to the DHHR. This emergency order recites that

on Monday, April 25, 1994, the DHHR filed a petition requesting ratification of emergency custody of the child, Lindsey C., because the parents, Zachary C. and Terri C., the appellant, had neglected and abused the child. Specifically, the petition alleged that appellant abused and neglected the child by abandoning her.

The DHHR petition, which apparently was actually filed Friday, April 29, 1994,See footnote 1 asked the court, *inter alia*, to ratify removal of the child from her parents' custody and place the child in the custody of the DHHR and, ultimately, to terminate the parental rights of both parents.

In the *nunc pro tunc* order entered Friday, April 29, 1994, the circuit court set a hearing for May 6, 1994, and appointed counsel for the child and the father. The order states that an attorney for the mother/appellant "shall be selected later". The order does not address the issue of appointment of a guardian ad litem for appellant nor does it address the service of process on appellant.

The order reflecting the action of the court May 6, 1994, shows that the court took no action regarding service of notice on appellant or appointment of counsel or a guardian ad litem for appellant.

On May 9, 1994, an attested copy of the emergency order and the abuse and neglect petition was sent by certified mail to appellant. The address used for that mailing was that of M.B., the maternal grandmother of Lindsey C., who had earlier been identified for the court below as the "closest known relative" able to take custody of Lindsey C. The petition and order were not successfully delivered as addressed; they were forwarded to a Wheeling address, apparently the address from which the child had been taken by the State, and was returned by the postal service to the circuit clerk May _?_, 1994,See footnote 2 marked "moved, left no address, return to sender".

On May 23, 1994, the court ordered a home study to evaluate the suitability of the home of M.B.,the maternal grandmother, who had expressed interest in receiving temporary custody of Lindsey C. The address for this home study was the same as that to which the copy of the petition and emergency order, addressed to appellant, had been previously, unsuccessfully mailed.

The home study for M.B. and her husband was completed about June 10, 1994, and the court below held another hearing on June 28, 1994. An order for that day recites that the court received information concerning the whereabouts of appellant, but no further action was taken to appoint a guardian ad litem or counsel for her or to serve process on her by any means. Further proceedings on July 11 and August 4, 1994, did not deal with appellant other than to note her absence. On August 4, 1994, the court was advised that the sister and brother-in-law of the

father, Zachary C., were interested in obtaining custody of Lindsey C. The court ordered a child protective service worker to undertake a thorough investigation of their suitability to receive custody of Lindsey C.

Meanwhile, in Minnesota, a petition was filed against appellant on June 6, 1994, seeking her commitment by judicial order to a mental institution. A hearing on the petition was held on June 23, 1994, at which time appellant was represented by Minnesota counsel. An order entered on that date by the District Court, Seventh Judicial District, in Clay County, Minnesota, stated that there was clear and convincing evidence appellant was mentally ill and, although she did not represent a danger to others, she did represent a danger to herself. Appellant was involuntarily committed at a Fergus Fall, Minnesota, mental institution for an initial period of up to six months.

In West Virginia, the court and the DHHR were aware of appellant's hospitalization by August 19, 1994. A paper filed that day, but dated August 16, 1994, contains the following notations regarding appellant: "mother . . . need attorney appointed for her . . . mental institution -- Minn. . . . per [name of child protective service worker] . . . need to notice . . . ." This paper includes the address of the mental institution and the name and phone number of a social worker there as well as an emergency phone number.

Another hearing in the abuse and neglect case was held in Ohio County on August 22, 1994, and the order for that day recites that the child protective service worker had located appellant in Minnesota and given information regarding her whereabouts to the "prosecutor's office". The order also recited that the court received a report of a home study for the sister and brother-in-law of Zachary C., as a potential home for Lindsey C., and required that the comments of the child's guardian ad litem be provided the court "at the next Abuse and Neglect Docket Day".

On August 25, 1994, a postal return receipt for certified mail was included in the court file. This receipt showed that a mailing addressed to appellant at the mental institution previously noted in the file was accepted on August 22, 1994, by a person whose signature is not legible. Appellant claims that no such mailing was ever delivered to her. This mailing is presumably evidence of the State's second attempt to serve appellant by mail with a copy of the petition and other process essential to the commencement of an action charging her with abuse and neglect of Lindsey C. It is noted that the court below also received at that time the copy of the discharge summary describing appellant's Pennsylvania hospitalization in 1992 and had before it the diagnosis of serious mental disorder contained in that summary.

It appears that no further proceedings were had until October, 1994. Two orders reflecting a hearing held on October 11, 1994, noted again that appellant did not appear "in person or by counsel". At that time, the Court ordered certain actions preparatory to awarding custody of Lindsey C. to the sister and brother-in-law of Zachary C., formally appointed them "guardians" of Lindsey C. and ordered that efforts be made to effect delivery of the child to them at their home in a distant state. One of the orders for that day reflects that the court made the following findings with respect to appellant:

> 5. [Appellant] has abandoned and continues to abandon Lindsey [C.].
>
> 6. [Appellant] has neglected Lindsey [C.].
>
> * * *
> 8. [Appellant] is presently unwilling or unable to provide adequately for the needs of Lindsey [C.].
>
> 9. [Appellant] has received actual notice of these proceedings.
>
> 10. That continuation in the home is contrary to the best interests and welfare of the infant based upon the neglect by [Zachary C.] and the neglect and abandonment by [appellant].
>
> 11. That the West Virginia Department of Health and Human Resources made a reasonable effort to prevent placement of Lindsey outside her home given the neglect and abandonment by [appellant] and [Zachary C.'s] unwillingness or inability to provide supervision and care of Lindsey.
>
> 12.That the neglect and abandonment by [appellant] and [Zachary C.'s] unwillingness or inability to provide supervision and care of Lindsey make such efforts unreasonable.

It does not appear from the orders that any sworn testimony was heard that day, October 11, 1994. In any event, we cannot discern from the record before us what reliable evidence was adduced to support these findings.

At an October 30, 1994 hearing, after again noting the absence of appellant, the lower court ordered Lindsey C. delivered to her new guardians. The court also formally received the home study report on the new guardians at a hearing on December 12, 1994, at which time the court again noted appellant did not appear in person or by counsel.

A hearing was held on December 21, 1994, in Minnesota. The court there received a written report from the treatment facility where appellant was incident to the possible termination of her initial commitment there. Appellant was recommitted until March 21, 1995, and transferred to a group home in Little Falls, Minnesota. It appears that appellant remained there in state custody until her release on April 24, 1995.

At a January 13, 1995 hearing in the Circuit Court of Ohio County, a protective service case worker told the court for what appears to be the first time "that [appellant] had made inquiries about Lindsey". On that day, the guardian ad litem for Lindsey C. served a motion, noticed for hearing February 1, 1995, requesting that the court appoint a guardian ad litem for appellant "whose whereabouts are now known and thereafter to address the issue of disposition as to the parental rights of [appellant] in consideration of the court's findings at the October 11, 1995 [sic]" hearing that "appellant had abandoned, neglected and was then unwilling or unable to care for" Lindsey C. and for other relief. A copy of the motion and notice of a February 1, 1995, hearing were apparently sent to appellant by certified mail, addressed to the group home in Minnesota.

A West Virginia protective service worker telephoned the Minnesota group home on January 18, 1995, and left a message with a staff member that if appellant wanted to appear in court, she must come to West Virginia. The West Virginia child protective service worker also spoke by telephone to appellant's caseworker in Minnesota on January 31, 1995. The protective service worker was told that appellant was court-ordered to remain at the group home for at least two more months and that appellant was required to make another court appearance in Minnesota before she could be released.

The order for the proceedings of February 1, 1995, is dated March 1, 1995, and is the order from which this appeal is taken. The order notes again that appellant did not appear in person or by counsel. It recites that the court considered the motion of the child's guardian ad litem that a guardian ad litem be appointed for appellant but reflects no action on that motion. The order further states that the court was "advised" by the assistant prosecuting attorney present that the State mailed a copy of the abuse and neglect petition to appellant. The order fails to state whether the court took any sworn testimony. It does recite that the court heard "representations" by, and received a report from, a child protective service worker and did find that appellant "received NOTICE of these proceedings and her right to be represented by counsel in these proceedings". The court then made findings necessary to termination of appellant's parental rights and ordered the DHHR to file a "permanency plan".

On February 21, 1995, at the direction of the circuit court judge, a letter addressed to the judge, dated February 17, 1995, was filed. It was signed by a new child protective service worker in the case, and related that on February 14, 1995, the assistant director of the group home to which appellant had been committed in Minnesota had spoken to the worker, questioning the termination of appellant's parental rights and reporting that appellant had "received no notification to seek legal representation". The group home director further advised that he intended to advocate strongly in favor of appellant, "in terms of appealing".

At a March 1, 1995 hearing, which again does not note the taking of any sworn testimony, appellant was "enjoined from contacting, harassing or interfering, either directly or indirectly, with Lindsey" or the new guardians. The order further noted that appellant's appeal time would expire four months after the March 1, 1995 date of the order terminating the parental rights of appellant and directs that a copy of the order be sent to appellant at the group home. The court file contains a postal return receipt, signed by "Rita Werner" on March 13, 1995, for mail addressed to appellant at the group home.

By letter dated March 14, 1995, ordered filed by the circuit judge and actually filed in Ohio County on March 20, 1995, appellant's counsel in her Minnesota commitment proceedings advised that appellant had been further committed to involuntary hospitalization for a period of up to twelve months from December 21, 1994. In the same letter appellant's Minnesota counsel stated that neither he nor appellant had been aware of the West Virginia proceedings. He stated that appellant had anticipated reunification with her daughter "in some fashion" and had been "unable to effectively assert her wishes" until shortly before his letter. The letter was concluded with a request that counsel be appointed in West Virginia to "raise the appropriate issues".

Meanwhile, in Minnesota appellant was again alleged to be mentally ill in a petition for judicial commitment filed on March 15, 1995. A hearing was held on March 23, 1995, to determine whether it was necessary to have appellant involuntarily hospitalized until the judicial commitment hearing, and it was determined that she would be hospitalized at the White Shell Facility, Little Falls, Minnesota. A final hearing was held on April 13, 1995, and in an order entered April 25, 1995, the District Court in Minnesota found the state failed to meet its burden and prove by clear and convincing evidence that appellant was mentally ill. Thus, she was released from state custody.

As noted, by letter dated April 17, 1995, and filed with the Circuit Court of Ohio County May 26, 1995, appellant authorized her present counsel to investigate her case, and the present appeal was filed with the circuit clerk of Ohio County, June 30, 1995.

Appellant now argues that the circuit court erred as a matter of law in failing to appoint counsel in this abuse and neglect proceeding and erred in proceeding against her when she had not been served properly with the abuse and neglect petition and notices of hearings. More specifically, appellant argues that an indigent parent must be appointed counsel in a parental rights termination action and that a parent cannot be divested of parental rights if that parent has not been afforded proper notice. The appellees, Zachary C. and the Department of Health and Human Resources, have filed briefs in opposition, as has the guardian ad litem for the child, Lindsey C. In addition, by a cross assignment of error, the Department of Health and Human Resources contends that appellant violated Rule 60(b), Rules of Civil Procedure, by failing to move the trial court for relief prior to filing the appeal and violated the Rules of Appellate Procedure by failing to order transcripts of the hearings below and by failing to serve opposing counsel with a copy of the petition of appeal. Appellee DHHR asks therefore that the appeal be dismissed as improvidently granted.

Any failure by litigants to observe carefully the requirements of our appellate rules is expressly disapproved; in appropriate circumstances an appeal may be dismissed by reason of a disregard of those rules. In this case we note that appellees have appeared and vigorously defended this appeal, notwithstanding the failure of appellant's counsel to timely serve and certify service of the petition of appeal. We have before us a certified record sufficient to decide the crucial issues in the case.

We turn next to the contention of appellee DHHR that Rule 60(b), R.C.P. was violated because that contention focuses the case on the procedural requirements of the case below upon which it turns. This is a juvenile abuse and neglect proceeding, brought under the provisions of W.Va. Code § 49-1-1, *et seq.* Rule 81(a), R.C.P., in pertinent part, provides:

> **Rule 81. Applicability in General.** *(a) To what proceedings applicable.* -- . . .
>
> (7) Juvenile proceedings. -- Rules 5(b), 5(e) and 80 apply, but the other rules do not apply, to juvenile proceedings brought under the provisions of Chapter 49 [§ 49-1-1 et seq.] of the West Virginia Code.

Accordingly, the procedure in abuse and neglect cases is governed by provisions internal to W.Va. Code § 49-1-1, *et seq.*, and such other procedural requirements of the Code or general law as obtain. Except for Rules 5(b), 5(e) and 80, the West Virginia Rules of Civil Procedure for Trial Courts of Record are not applicable to such cases. See footnote 3

As noted, appellant assigns as error that she was not properly served with a copy of the petition and notice of hearing prepared at the commencement of this proceeding. West Virginia Code § 49-6-1(b) mandates the service on a parent or custodian of a copy of any petition charging abuse and neglect of a child, together with a notice of hearing, and provides for service by mail or publication when personal service is not accomplished. See footnote 4

Appellant complains specifically that when service of the petition and notice by mail was attempted in this case in lieu of personal service, she did not sign the postal return receipt upon which the court below apparently based its first finding that the notice and petition had been duly served. Appellant asserts that, in fact, she never received or saw the petition during the pendency of the action below. Clearly, if appellant did not sign the postal receipt, the requirements of W.Va. Code § 49-6-1(b) for service of the notice and petition by mail have not been met. See footnote 5 The record before us is totally devoid of any inquiry by the court below to determine whose signature appears on the postal receipt which might contradict appellant's assertion in this appeal.

Appellees suggest to this Court that if the service of process by mail is defective, such defect is cured by the fact that appellant was found by the court below to have had actual notice of the proceedings. We do not reach the question of whether such a defect would be cured if appellant had actual notice. Anterior to that question is the question of whether the court below was required to appoint a guardian ad litem for appellant and the question of what impact the failure to do so has on the validity of the order below terminating the parental rights of appellant. We conclude that the court was required to appoint a guardian ad litem and that the order terminating the parental rights of appellant must be set aside because of the failure of the court below to do so.

West Virginia Code § 56-4-10 is applicable to juvenile proceedings. It provides, in pertinent part:

> The proceedings in a suit wherein an infant or insane person is a party shall not be stayed because of such infancy or insanity, but the court in which the suit is pending, or the judge thereof in vacation, or the clerk thereof at rules, shall appoint some discreet and competent attorney at law as guardian ad litem to such infant or insane defendant, whether such defendant shall have been served with process or not, and after such appointment no process need be served on such infant or insane person . . . Every guardian ad litem shall faithfully represent the interest or estate of the infant or insane person for whom he is appointed, and it shall be the duty of the court

> to see that the estate of such defendant is so represented and protected . . . . See footnote 6

As early as April 29, 1994, the court below was advised by the fourth allegation in the abuse and neglect petition filed in this case that appellant had a history of mental illness. The DHHR Court Summary received by the court on May 6, 1994, gave some detail concerning that history, including at least approximate dates for prior hospitalizations. Then in August, 1994, the court received and noted information that appellant was in a mental institution in Minnesota. This was followed by the attempted, but apparently ineffective, service of process on appellant by certified mail at that mental institution after the court was advised that appellant had been located there and information regarding appellant's whereabouts had been given to the prosecuting attorney serving as counsel for the DHHR in this proceeding. At various stages throughout the proceedings, opportunities arose by which the court below was repeatedly made aware that appellant was hospitalized and restrained from appearing in court, or claimed not to have been served in a manner consistent with the plain directions of the statute, or was not represented by counsel in Ohio County, or desired to appear and defend and could not. Moreover, in 1995, before the court below made its order terminating the parental rights of appellant, the guardian ad litem appointed for the child, Lindsey C., served notice of a hearing for her motion requesting the appointment of a guardian ad litem for appellant. The order of the court below for that hearing dated February 1, 1995, reflects that the motion "as it relates to representation of" appellant was considered but reflects no action by the court granting or denying the motion. (That order, as previously noted, gives rise to this appeal.)

This Court held long ago that the suggestion of the lack of legal capacity imposes on the court the duty to appoint a guardian ad litem. *Hays v. Camden's Heirs*, 38 W.Va. 109, 18 S.E. 461 (1893), was an action in equity to sell lands allegedly forfeited to the State for non-entry on the land books. The trial court was advised that one of the owners was an infant by an exception taken to the report of a commissioner in chancery. Discussing that circumstance, this Court, citing the predecessor section to the current W.Va. Code § 49- 6-10, said:

> Under section 13, c. 125, Code 1887, it was the duty of the court to have appointed a guardian ad litem to the infant defendant, not because the court was selling the land of the infant, or of any strict construction in this case, but because the law requires it; . . . especially as the guardian, as next friend, appeared and suggested such infancy, and virtually asked such appointment. Under such

> circumstances it would have been done, and would be error not to do, in any court, as far as I know.

Id. at 465.

In the case before us, the mental condition of appellant was clearly and strongly suggested to the trial court by the initial petition and by subsequent events. The court also had before it a written motion, duly set for hearing, asking for the appointment of a guardian ad litem for appellant. The motion was filed and brought on for hearing by the guardian ad litem for the child, Lindsey C., whose interests in a prompt conclusion of the proceeding would have been both protected and advanced by the appointment of a guardian ad litem for appellant. See footnote 7

We are mindful that the court below did not have clear and direct proof before it that appellant was "insane" within the meaning of W.Va. Code § 56-4-10. We have also noted that, although Minnesota had on June 23, 1994, adjudicated appellant to be mentally ill and likely to be a danger to herself, and had required her confinement to continue until April, 1995, the statutory law of Minnesota preserved to appellant her capacity to sue and be sued, notwithstanding her adjudication and involuntary confinement. See footnote 8 Indeed, with respect to persons involuntarily hospitalized in West Virginia, W.Va. Code § 27-5-9(a), enacted in 1974, expressly preserves the legal capacity of persons involuntarily committed to a mental health facility, absent a separate and distinct proceeding to declare the patient "incompetent". See footnote 9 That section was part of a comprehensive updating of mental health law in this State, which now recognizes modern, more enlightened realities about mental illness and mental retardation. West Virginia law now provides persons suspected of suffering from mental illness or mental retardation, as well as patients involuntarily hospitalized, with an array of substantive and procedural protections not fully recognized or not fully articulated in earlier statutory enactments. See footnote 10 Finally, we note that prior to 1974, involuntary hospitalization for an indeterminate period deprived the patient of legal capacity. See footnote 11

Accordingly, we are squarely confronted with the question of whether W.Va. Code § 56-4-10, relating to "insane" persons and last re-enacted by our Legislature in 1931, applies today in abuse and neglect proceedings only to adult persons who have been adjudicated incompetent, or applies with equal force to adult persons who have been involuntarily hospitalized by reason of mental illness but are not deprived of their civil rights in the absence of a separate and distinct declaration of incompetency. We conclude that in abuse and neglect proceedings the appointment of a guardian ad litem is required for adult respondents who are

involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent.

As noted, before 1974, the involuntary hospitalization of an adult for an indeterminate time by reason of mental illness would have required the appointment of a guardian ad litem under the provisions of W.Va. Code § 56-4-10. Put another way, the Legislature, in enacting W.Va. Code § 56-4-10, clearly contemplated that the section would be relied upon to require the appointment of a guardian ad litem for a mentally ill adult person involuntarily committed to a mental institution for an indeterminate period. The action of the Legislature in 1974, preserving capacity to such persons to sue or be sued in the absence of a separate incompetency finding, does not in our view mandate that the courts may not or should not appoint a guardian ad litem to protect the interests of such persons when they sue or are sued. We rely in part on a well recognized rule of statutory construction:

> Legislation is often written in terms which are broad enough to cover many situations which could not be anticipated at the time of enactment . . . . So a statute, expressed in general terms and written in the present or future tense, will be applied, not only to existing but also prospectively to future things and conditions.

As declared by the Tenth Circuit Court of Appeals: '. . . It is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them.'

Norman J. Singer, 2B *Sutherland Statutory Construction* § 49.02, at 2 (5th ed. 1992), *citing Cain v. Bowlby*, 114 F.2d 519 (10th Cir. 1940).

Courts in other jurisdictions which have considered whether a guardian ad litem should be appointed for a person with mental illness who has not been adjudged incompetent appear to have uniformly favored appointment. *See In re the Matter of R.A.D. and J.D.*, 231 Mont. 143, 753 P.2d 862, 870 (1988) (requiring consideration of the appointment of a guardian ad litem even where the adult mentally ill person was represented by counsel); *Williams v. Pyles*, 363 S.W.2d 675, 678 (Mo. 1963) (holding judgment voidable if rendered without appointment of guardian ad litem); *McKenna v. Garvey*, 191 Mass. 96, 77 N.E. 782, 784 (1906) (allowing a mentally ill person not adjudged incompetent to sue and be sued but noting that the appointment of guardians ad litem for such litigants is the general and equitable practice); *Hawley v. New York*, 28 Misc.2d 150, 217 N.Y.S.2d 107 (N.Y. Ct. Cl. 1961); *Sengstack v. Sengstack*, 4 N.Y.2d 502, 151 N.E.2d 887, 891,

176 N.Y.S.2d 337 (1958) (construing statutes authorizing appointment of a guardian ad litem to include unadjudicated incompetents); *Graham v. Graham*, 40 Wash.2d 64, 240 P.2d 564, 566 (1952) (recognizing the duty of the court, after full hearing, to withhold or cancel appointment if a mentally ill but unadjudicated person timely objects and shows cause); and Annotation, *Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name*, 71 A.L.R.2d 1247 (1960).

The practical reasons for requiring appointment of a guardian ad litem in cases of involuntary commitment are readily apparent. First, despite the patient's continuing legal capacity, involuntary hospitalization imposes substantially all of the adverse effects of incarceration. These include the likely inability to freely move about, to prepare one's case, to consult with counsel conveniently, and to travel to and from court and other places that might be necessary or helpful in preparing and assisting in one's case. Second, until the guardian ad litem conducts at least an initial investigation and reports to the court, it can not be known whether the mentally ill person actually received notice of the pending case or, if service of process is on its face good and sufficient, whether the mentally ill person understood the notice and fully appreciated the right to be heard and the right to be represented by counsel. In the case of indigent persons, the right to have counsel appointed to represent the litigant might or might not be fully appreciated. Until and unless an appreciation of such matters is established on the record, the ultimate finality of the court's dispositional orders may be subject to attack, either on direct appeal or by petition for an extraordinary writ. Last, the public interest in the finality of dispositional orders in these cases is a very persuasive, practical reason for the timely appointment of a guardian ad litem in these circumstances. For all these reasons, we hold, as in *Hays*, that it is error to enter a decree terminating parental rights after a suggestion of involuntary hospitalization for mental illness of the affected parent or custodian without first having appointed a guardian ad litem for such parent or custodian. *See Hays v. Camden's Heirs*, 38 W.Va. 109, 18 S.E. 461 (1893).

Having found that the appointment of a guardian ad litem is required in accord with W.Va. Code § 56-4-10 for an adult person involuntarily hospitalized, we caution against complete reliance on the provisions of that Code section with respect to the service of process and notice upon the guardian ad litem in lieu of service on an involuntarily hospitalized person for whom the court does not have before it clear evidence of an adjudication of incompetency. In pertinent part W.Va. Code § 56-4-10 provides, ". . . and after such appointment no process need be served on such infant or insane person". In light of the statute [W.Va. Code § 27-5-9(a)] preserving the civil rights of persons involuntarily hospitalized unless that person has been adjudicated an incompetent in a separate proceeding, service of process and notices on the guardian ad litem alone could result in a failure to

provide that level of notice and opportunity for meaningful hearing that is constitutionally required in any effort by the State to terminate parental rights. *See State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978) (requirements for the content of a petition charging abuse and neglect); *In re Sutton*, 132 W.Va. 875, 53 S.E.2d 839 (1949) (right of parents to notice of hearing); *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974) (right to counsel in parental rights termination cases).See footnote 12 Those constitutionally required rights have been included in the requirements for the initiation of an abuse and neglect proceeding. West Virginia Code § 49-6-1(b) states:

> (b) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice . . . A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

In addition, W.Va. Code § 49-6-2(a) provides:

> (a) In any proceeding under the provisions of this article, the child, his parents, his custodian or other persons standing in loco parentis to him . . . shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. If . . . [such persons] cannot pay for the services of counsel, the court shall, by order entered of record, at least ten days prior to the date set for hearing, appoint an attorney or attorneys to represent [such parties] and so inform the parties . . . The court may allow to each attorney so appointed a fee in the same amount which appointed counsel can receive in felony cases . . . .

A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or by mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based. In the consideration of any waiver of rights by reason of the failure to respond to process or by reason of other inaction, an affirmative record of service of process consistent with due process requirements

of notice and meaningful opportunity to be heard may be pivotal to establishing that such waiver is effective, knowing and intelligent. Accordingly, in abuse and neglect cases, service of original process on a guardian ad litem appointed for a parent or custodian involuntarily hospitalized for mental illness whose legal capacity has not been terminated by law cannot be substituted in lieu of service on the hospitalized parent or custodian where the parental rights of such person may be terminated under the process to be served.

We turn now to the issue of the appointment of counsel. As set out in W.Va. Code § 49-6-2(a), appointment of counsel for parents and other custodians in abuse and neglect cases is contemplated in cases where the parent "cannot pay for the services of counsel . . . ."See footnote 13 "In child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel because of the requirements of the Due Process clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974). Appellant here argues that the court below erred in not appointing counsel for her, at least as soon as it appeared that appellant was confined in a mental institution. It is reasonable to assert on the record before us that the trial court below never had before it any clear, direct evidence from which it might conclude that appellant was unable to "pay for the services of counsel" and therefore never reached the issue of appointing counsel. On the other hand, it is equally reasonable to assert that at least when the court below learned of the hospitalization of appellant, in addition to her history as reflected by the Court Summary filed May 6, 1994, the court below had before it a strong suggestion of indigency.

In considering the contention that the court below erred in not appointing counsel for appellant, we take notice of the exceedingly high percentage of abuse and neglect cases coming before this Court in which appointed counsel appear on behalf of parents or custodians. It is reasonable to conclude that the experience of the trial courts of this State in that regard mirrors the experience here. We believe that that experience justifies the trial courts in indulging a presumption that the parent or parents and custodians entitled by law to be named in abuse and neglect petitions "cannot pay for the services of counsel". This presumption is also justified by the high importance which our State and its citizens attach to prompt and effective protection for abused and neglected children and to full, fair and meaningful opportunity for parents and custodians to be heard when allegations of abuse and neglect are made.

Therefore, circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *as an incident of the making of the order filing each abuse and neglect petition*. Upon

the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law. See footnote 14

We endorse the appointment of counsel for parents or custodians incident to the filing of an abuse and neglect petition as both judicially and financially economical. Judicial economy is achieved by the early appointment of counsel in that the case can then be promptly heard at its various stages with the expectation that all of the parties will be fully advised of the applicable procedures and possible results. It may be expected that all parties will then have a better understanding of the rights to which each party is entitled and the duties and obligations of parents and custodians and that there will be an increased likelihood that any permissible waiver of rights by litigants will be both knowing and intelligent. The ultimate benefit should be earlier finality of whatever dispositional order is justified by the law and the evidence. Financial economy follows from the true achievement of judicial economy. Avoiding delays like those which the facts of this case demonstrate have already occurred and avoiding the type of further delays which will flow from the additional proceedings which must now be had in this case will reduce the attendant costs of public services that have been rendered and will or may be provided to or on account of the litigants. Real savings are likely to be realized because of the timely prosecution, defense and disposition of these cases, that is to say, lower public expense overall, more than enough to compensate for the relatively few cases in which counsel may be appointed for a short time for parents or custodians who may be found able to pay for counsel's services.

If the appointment of a guardian ad litem is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of guardian ad litem, with the attendant duties of protecting the interests of the persons for whom such counsel is appointed guardian ad litem and the attendant duty on the court to see to the protection of such person's interests until and unless it later appears that such person's circumstances do not require the continued protection of a guardian ad litem or that the two functions cannot be performed by the same attorney. Recently, in the case *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), this Court treated counsel appointed for *a child* who was the subject of an abuse and neglect case as the child's guardian ad litem and promulgated guidelines for the duties to be performed by a child's guardian ad

litem. It is entirely appropriate in the case of a child to treat the two functions of counsel and guardian ad litem as being completely identical. The central purpose of an abuse and neglect proceeding is to ascertain and serve the best interests of the child. As we indicated in *Jeffrey R.L.*, counsel for the child is expected to pursue that central purpose even when his or her client, the child, may have a different view of what is in the child's best interests. We said: "The GAL [guardian ad litem] does not necessarily represent a child's desires but should formulate an independent position regarding relevant issues." *Id.* at 175. We also noted there and restate here that: "Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court." *Id.* at 177. Obviously, those recommendations may or may not be identical to those the child would make to the court, left entirely to his or her own choices. However, in the case of a child, justice is clearly best served by requiring that counsel and the court exercise their respective best judgment in all aspects of the case, and that the court have the benefit of counsel's candid and independent assistance in ascertaining the best interests of that child.

Perhaps in most cases in which a guardian ad litem must be appointed for an adult in an abuse and neglect case, the functions of guardian ad litem and of counsel for the adult will likewise be identical in all respects. However, we recognize that in most such cases, the adult parent or custodian is likely to have a strong and clearly adversarial interest in resisting the relief sought for the child, especially the termination of that adult's parental rights. The potential for real conflict between the duties of a guardian ad litem and counsel for that adult is obviously greater. See footnote 15 One authority has identified three particular areas of potential conflict in the roles of guardian ad litem and counsel, even in cases involving counsel and guardians ad litem for children: (1) when the best interests of the ward and the ward's wishes are not identical, (2) when a privileged communication is made, and the attorney's duty to protect that communication conflicts with his or her duty as guardian, and (3) when a court would require a guardian ad litem to actually testify in a case, a function that counsel ordinarily should not perform. See footnote 16 *See* Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Family Law Quarterly 327, 334-336 (1993). Accordingly, while we anticipate that such conflicts will rarely actually arise, we acknowledge that where such a dual status appointment of counsel and guardian ad litem for an adult has been made and actual conflict is deemed likely, the trial court may at any time, *sua sponte* or on the application of an interested party, terminate the dual status of counsel and guardian ad litem for such adult and appoint another attorney guardian ad litem so that counsel originally appointed may zealously represent the adult without concern for such conflict. Nonetheless, considering the relatively few cases in

which a guardian ad litem may be required, the very considerable cost which the provision of publicly paid counsel for indigent parties imposes on this State, and the reported difficulty in obtaining counsel willing to accept court appointments, See footnote 17 we recommend the practice of dual appointment in any case in which, and to the extent which, the trial court finds that may be practical and fair.

In accord with the foregoing, we are compelled to reverse the judgment of the Circuit Court of Ohio County terminating the parental rights of appellant, Terri C., and remand this cause for further proceedings consistent with this opinion. Appellant is now entitled to the appointment of counsel below if she cannot pay for the services of counsel. She is entitled to traverse and otherwise defend against the allegations of the petition and to have full, meaningful hearings of the issues, with the assistance of counsel. The State is required to meet its burden of proof as required by law without regard to any prior determination by the court below adverse to appellant's interests and the parties are entitled to such other relief, including a proper dispositional order, as may be appropriate under the law and the evidence adduced.

Reversed and remanded with directions.

Footnote: 1 The petition reflects that it was verified Tuesday, April 26, 1994 and "filed" Friday, April 29, 1994. The petition, inter alia, seeks court ratification of the non-judicial removal of the child from her parents' custody pursuant to W.Va. Code § 49-6-3(c), the Code section cited in the emergency temporary order. The pertinent portion of that Code section provides:

If a child or children shall, in the presence of a child protective service worker of the division of human services, be in an emergency situation which constitutes an imminent danger to the physical well-being of the child or children, as that phrase is defined in section three [§ 49-1-3], article one of this chapter, and if such worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered, the worker may, prior to the filing of a petition, take the child or children into his or her custody without a court order: Provided, That after taking custody of such child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or a juvenile referee of the county wherein custody was taken, or if no such judge or referee be available, before a circuit judge or a juvenile referee of an adjoining county, and shall immediately apply for an order ratifying the emergency custody of the child pending the filing of a petition . . . . The parents, guardians or custodians of the child or children may be present at the time and place of application for an order ratifying custody, and if at the time the child or children are taken into custody by the worker, the worker knows which judge or

referee is to receive the application, the worker shall so inform the parents, guardians or custodians . . . . Upon such sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order the emergency taking by the worker to be ratified . . . . If the emergency taking is ratified by the judge or referee, emergency custody of the child or children shall be vested in the state department until the expiration of the next two judicial days, at which time any such child taken into emergency custody shall be returned to the custody of his or her parent, guardian or custodian unless a petition has been filed and custody of the child has been transferred under the provisions of section three [§ 49-6-3] of this article.

Careful observance of the provisions of section 3(c) and, in other emergency situations, careful observance of the provisions of W. Va. Code § 49-6-9, authorizing emergency custody by law enforcement officers, is to be encouraged and expected. The apparent intent of these Code sections is to afford protection to the child, the parents, child protective service workers, law-enforcement officers and their respective employers from the potentially serious effects of restraining liberty without due process of law.

Footnote: 2 The date on the copy of the return included in the record is not legible.

Footnote: 3 We note also that the Rules of Practice and Procedure For Family Law, adopted by order of this Court July 21, 1993, and effective October 1, 1993, do not include within their scope actions brought under W.Va. Code § 49-1-1, et seq. The scope of those rules includes only proceedings brought under the authority of W.Va. Code § 48-1-1, et seq., § 48A-1-1, et seq., and habeas corpus proceedings involving child custody. Rule 1, Rules of Practice and Procedure For Family Law.

Footnote: 4 West Virginia Code § 49-6-1(b) provides, in pertinent part:

(b) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice . . . In cases wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person. If said person signs the certificate, service shall be complete and said certificate shall be filed as proof of said service with the clerk of the circuit court. If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with the provisions of article three [W.Va. Code § 59-3-1 et seq.], chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the

proceedings and the fact that such proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

Footnote: 5 We note also that no effort was ever made to effect service of the notice and petition on appellant by publication. Assuming that appellant retained her legal capacity to sue and be sued throughout this proceeding, service by publication in accord with the provisions of W.Va. Code § 49-6-1(b) may well have cured the difficulty presented by an attempted, but ineffective, service by mail.

Footnote: 6 We have noted and considered the somewhat asymmetrical design of W. Va. Code § 56-4-10. It is noted that the section recites that it applies to "[t]he proceedings in a suit wherein an infant or insane person is a party. . .", thus indicating that the section applies to any such proceedings. The section further requires that a guardian ad litem appointed pursuant to the section "shall faithfully represent the interest or estate of the infant or insane person for whom he is appointed . . . ." (Emphasis added.) We have noted that the sentence continues: ". . . and it shall be the duty of the court to see that the estate of the defendant is so represented and protected." (Emphasis added.) The ambiguity thus created must be resolved in favor a construction which avoids an absurd result. As Justice Miller recently commented in another context, common sense dictates that if the section applies to "any" proceedings and the guardian ad litem is to represent the interest or estate of the persons, then the court is also to protect the interest or estate at issue. See State ex rel. Morgan v. Trent, ___ W.Va. ___, ___ S.E.2d ___, ___ (No. 22886, Nov. 17, 1995).

Footnote: 7 We commend the child's guardian ad litem for making and bringing her motion on for hearing, requesting the appointment of a guardian ad litem for appellant. Her attention to this issue was well directed at fully protecting the infant and insuring the finality of any order dealing with the child's future. That desirable finality is now postponed as a result of the failure of the trial court to rule on that motion.

Footnote: 8 Minnesota Statutes Annotated § 253B.23, Subd. 2(a) (West 1994), sets forth the legal results of commitment status as follows:

***Subd. 2. Legal results of commitment status.** (a) Except as otherwise provided in this chapter and in sections 246.15 and 246.16, no person by reason of commitment or treatment pursuant to this chapter shall be deprived of any legal right, including but not limited to the right to dispose of property, sue and be sued, execute instruments, make purchases, enter into contractual relationships, vote, and hold a driver's license. Commitment or treatment of any patient pursuant to*

this chapter is not a judicial determination of legal incompetency except to the extent provided in section 253B.03, subdivision 6.

Footnote: 9 *West Virginia Code § 27-5-9(a) provides:*

(a) No person shall be deprived of any civil right solely by reason of his receipt of services for mental illness, mental retardation or addiction, nor shall the receipt of such services modify or vary any civil right of such person, including, but not limited to, civil service status and appointment, the right to register for and to vote at elections, the right to acquire and to dispose of property, the right to execute instruments or rights relating to the granting, forfeiture or denial of a license, permit, privilege or benefit pursuant to any law, but a person who has been adjudged incompetent pursuant to article eleven [§ 27-11-1 et seq.] of this chapter and who has not been restored to legal competency may be deprived of such rights. Involuntary commitment pursuant to this article shall not of itself relieve the patient of legal capacity.

Footnote: 10 *See W.Va. Code § 27-1-1, et seq.*

Footnote: 11 *See W.Va. Code § 27-5-4 (1965).*

Footnote: 12 *It has been suggested that Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), relieves this State of compliance with one or more of these protections which have been recognized in West Virginia as constitutionally mandated. We suggest that these protections are grounded in Art. III, § 10 of the Constitution of West Virginia in addition to whatever vitality they derive from the federal Constitution.*

Footnote: 13 *See W. Va. Code § 49-6-2.*

Footnote: 14 *"The court may allow to each attorney so appointed a fee in the same amount which appointed counsel can receive in felony cases." W. Va. Code § 49-6-2(a).*

Footnote: 15 *Some jurisdictions require a greater distinction between the offices of counsel and guardian ad litem. See In re the Matter of R.A.D. and J.D., supra, and People In the Interest of M.M., 726 P.2d 1108 (Colo. 1986), the latter case discussing a Colorado procedure by which either but not necessarily both officers are to be appointed. See also Stanton v. Sullivan, 62 R.I. 154, 4 A.2d 269, 270 (1939), and Dawson v. Garcia, 666 S.W.2d 254, 265 (Tex. App. 5 Dist. 1984).*

Footnote: 16 *Conflict can be anticipated from any matter which would actually inhibit the zealous representation of a client's interests or the actual ability of the*

guardian ad litem to employ his or her best independent judgment in pursuit of the best interests of the mentally ill person.

Footnote: 17 We are mindful of the plea, made on oral argument in this case by the counsel to the DHHR from the prosecutor's office in Ohio County, that difficulty had been and would be experienced in finding members of the bar who would take appointments in abuse and neglect cases. We assume that the difficulty will arise with respect to service as either counsel or guardian ad litem. We recognize the financial hardships that are sometimes created for members of the bar, particularly younger lawyers, when they are asked to accept appointments without the assurance of fair payment. We encourage members of the bar to accept these burdens willingly and commend those who accept such appointments. Pursuant to the provisions of W. Va. Code § 49-6-2(a), we suggest that circuit courts should allow fees as permitted by law whenever proper application is made by appointed counsel.

Workman, Justice, dissenting:

HOW MANY ANGELS CAN DANCE ON THE HEAD OF A PIN?

The majority has embarked on an extended and meandering expedition through the law of abuse and neglect. Prior to the enrollment of this opinion in the annals of the law, we had endeavored to develop some semblance of order and ease of application in the requirements of this area of the law. Experience has shown that neglect and abuse law should be kept as simple and humane as possible. The last thing we need in this area is a "how many angels can dance on the head of a pin" approach with lots of meaningless procedural hoops to jump through. It must be remembered: "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." Hormel v. Helvering, 312 U. S. 552, 557 (1941). With the majority's presentation of this obscure and easily misconstrued opinion, I have several significant areas of concern.

I.
NOTICE

First, the majority is troubled by the notice of termination proceedings received by the Appellant in this case. The petition requesting termination of parental rights was apparently filed on April 29, 1994. On May 9, 1994, a copy of the petition was sent by certified mail to the Appellant at her mother's home address. That attempt at service was returned to sender. By August 19, 1994, the court and DHHR were apparently aware of the Appellant's involuntary hospitalization and

the address of the mental institution. On August 22, 1994, the petition was received on behalf of the Appellant at the mental institution by a person whose signature is not legible. The Appellant now claims that she did not receive such mailing. By January 1995, a West Virginia protective services worker had contacted the Appellant's caseworker regarding the termination proceedings, and in the March 1, 1995, order, the lower court found that the Appellant did receive actual notice of these proceedings.

In dealing with this notice issue, the majority quotes West Virginia Code § 49-6-1(b) regarding service of process and acknowledges that if neither personal service nor service by mail can be obtained, notice by publication is required. Noting that notice by publication was not attempted in this case, the majority states that notice by publication "may" have cured the deficiencies of notice in this case. The majority then references the Appellees' argument that since the lower court found that the Appellant did indeed receive actual notice of the termination proceedings, any defect in service of process is cured. Apparently not wishing to confront that assertion, the majority somewhat abruptly concludes that it will "not reach the question of whether such a defect would be cured" by the fact that the Appellant received actual notice. The majority then launches into an examination of the necessity of a guardian ad litem, returns to the notice issue several pages later, requotes section 49-6-1(b), and concludes that notice served upon a guardian ad litem rather than the involuntarily hospitalized parent is insufficient.

Where in that discussion is a precise, unequivocal statement of the law of notice to parents in termination proceedings? Where is a concrete message regarding resolution of the issue of a missing parent See footnote 1 and the inability to serve notice? According to the majority, strict adherence to the provisions of section 49-6-1(b) allowing service by publication "may" have cured the problem in this case. That further fouls the waters by suggesting that even faithfulness to the statutory scheme may not have been enough. This opinion leaves us in great confusion.

My predominant concern is that we do not allow the mechanics of the notice issue to overshadow the obligation to expeditiously resolve the underlying issue of the rights, safety, and custody of the children. In child abuse and neglect cases, the best interests of the child are the paramount concern. Although the majority apparently has difficulty perceiving specificity within section 49-6-1(b), it appears clear to me that those rules unambiguously define the requirements of notice. See footnote 2 Equally evident is the intent that individuals for whom a guardian ad litem is appointed under West Virginia Code § 56-4- 10See footnote 3 are not entitled to personal service of process. That section, relied upon by the majority as justification for requiring a guardian ad litem for the Appellant, specifically provides that "after such appointment no process need be served on such infant or insane person . . . ." The majority feels perfectly comfortable stretching the "infant

or insane" language to include persons involuntarily hospitalized by reason of mental illness in the context of justifying the requirement of a guardian ad litem. Yet the majority draws the line on literal compliance with the same statute when it arrives at the issue of notice, apparently reasoning that such persons have not been formally deprived of their civil rights to service in the absence of a declaration of incompetency.

Why not adhere to the statutes as written? If section 56-4-10 justifies the appointment of a guardian ad litem, why not simply follow the mandate of that section and allow the guardian to accept service of process? Prior to the appointment of the guardian ad litem, section 49-6-1(b) should govern, permitting notice by publication to suffice if personal service or service by mail is not possible. If a parent is absent, our prior statement in syllabus point six of In re Christina, 194 W. Va. 446, 460 S.E.2d 692 (1995), should still govern: "When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W.Va.Code, 49-6-1 (1992)."See footnote 4 Once a guardian ad litem is appointed, the guardian, cloaked with authority to act on behalf of the individual by the very nature of his/her appointment, should be permitted to accept service of process on behalf of the parent, as is the intent of section 56-4-10.

II.
JUMPING THROUGH HOOPS

The majority also fails to identify the time at which a court must appoint a guardian ad litem. Syllabus point three of the majority opinion states the rule that a guardian is required where the person is involuntarily hospitalized, and yet syllabus point four states that it is error to terminate parental rights without a guardian ad litem where there has been a "suggestion" of involuntary hospitalization for mental illness. That leaves the door cracked open on the issue of exactly when this duty to appoint a guardian ad litem is triggered. I disagree with the majority's apparent conclusion that the "suggestion" of the Appellant's mental condition was an adequate basis for the appointment of a guardian ad litem. Unless and until a court is informed of legal incapacity or involuntary commitment, that court should be under no duty to appoint a guardian ad litem. A "suggestion" of a mental condition is much too amorphous and indeterminate to be utilized as a standard for the appointment of a guardian ad litem.

The one saving grace the majority includes in its guardian ad litem requirement is that the trial court may, in its order appointing counsel, provide that the appointment imposes the additional status of guardian ad litem. Now that the

majority has cast so much doubt as to exactly what (even a suggestion or suspicion of mental illness?) may create the obligation to appoint a guardian ad litem and so much confusion as to how a parent with some "suggestion" of mental illness may be notified, I recommend that the circuit courts routinely couch the orders appointing counsel in those terms. In fact, I will propose that the new Rules of Procedure for Child Abuse and Neglect Proceedings now out for public comment until August 15, 1996, include that requirement. Judicial training will have to be held at the next conference, and we'll get this esoteric hoop jumped. Whew! What a lot of trouble -- for what real gain?

III.
CHILDREN ARE PEOPLE, TOO

The majority, in the midst of its discussion of the potential conflict in the roles of a guardian ad litem and an attorney for the parent, states that "[i]t is entirely appropriate in the case of a child to treat the two functions of counsel and guardian ad litem as being completely identical." The majority imparts the impression, to which I object most strenuously, that the adult litigant should have rights which exceed those of the child, suggesting to me that the child is considered a person with a lesser entitlement to rights than the adult. The majority hypothesizes that conflicts could emerge between the roles of guardian ad litem and counsel for the adult, yet deftly dismisses even the possibility that such conflicts could also occur in the roles of guardian ad litem and counsel for the child. If the majority believes an adult may be entitled to both appointed counsel and a guardian ad litem, how can they blithely presume that an individual can always operate in both capacities simultaneously for a child?

We commented upon the general expectations of a guardian ad litem for a child in abuse and neglect proceedings in syllabus point five of In re Jeffrey R. L., 190 W. Va. 24, 435 S.E.2d 162 (1993):

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W.Va.Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.

We also summarized the guardian ad litem's role in syllabus point three of In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991), as follows:

> In a proceeding to terminate parental rights pursuant to W.Va.Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W.Va.Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary.

We further elaborated in syllabus point five of James M. v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991), that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." In syllabus point five of In re Christina, 194 W. Va. 446, 460 S.E.2d 692 (1995), we acknowledged that the wishes of the child regarding continued visitation or other contact with the parent should be considered, as follows:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Just as some circumstances may present conflict between the role of guardian ad litem and counsel for the parent, those roles may also conflict in the case of the child. Part I B-2 of the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, adopted by the American Bar Association in February 1996, provides guidance on this issue and provides as follows:

> Conflict Situations.
>
> (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as child's attorney and withdraw as guardian ad litem. The

lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Comment-

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer- client privilege does not apply when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

The Ohio Supreme Court, in In re Baby Girl Baxter, 17 Ohio St. 3d 229 (1985), resolved a situation of conflict in the two roles by holding:

[W]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause. If the attorney feels there is a conflict between his role as attorney and his role as guardian, he should petition the court for an order allowing him to withdraw as guardian. The court should not hesitate to grant such request.

Id. at 232. As part of Ohio's reformation of temporary and permanent custody actions in 1988, R. C. 2151.281(H) was added to the Ohio Code. Closely tracking the language of Baby Girl Baxter, it provides, in pertinent part, as follows:

> If a person is serving as guardian ad litem and counsel for a child and either that person or the court finds that a conflict may exist between the person's roles as guardian ad litem and as counsel, the court shall relieve the person of his duties as guardian ad litem and appoint someone else as guardian ad litem for the child.

See also In re Shaffer, 540 N.W.2d 706 (Mich. App. 1995) (holding that while one person can simultaneously act as guardian ad litem and attorney for the children in an appropriate case, conflicts in those roles may require appointment of a guardian ad litem separate from the attorney).

In Newman v. Newman, 663 A.2d 980 (Conn. 1995), the Supreme Court of Connecticut expressed concern regarding the creation of "conflict in the attorney's role by conflating the role of counsel for a child with the role of a guardian ad litem or next friend." 663 A.2d at 987.

Typically, the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests, psychologically or financially.

Id. at 987-88. The division of roles may be "necessary to make sure that the attorney for the children will not be faced with the dilemma of reconciling such diverging interests while conforming to her role as advocate." Id. at 990.

The reality is that abused and neglected children frequently want to be returned to their parents, for that is all they know, and despite the abuse, there usually still is an emotional bond. As we explained in Christina, as quoted above, the wishes of the child are not to be disregarded. Id. at ___, 460 S.E.2d at 694, syl. pt. 5. West Virginia Code § 49-6-5(a)(6), regarding the disposition of neglected or abused children, also requires a child's wishes to be considered in some instances. That statute, in pertinent part, emphasis added, provides as follows:

> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child,

> terminate the parental or custodial rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency. If the court shall so find, then in fixing its dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, **the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination.**

Dissimilarly, there is almost always a community of interest in the wishes of an allegedly abusive parent and the legal position adopted on his or her behalf by appointed counsel. Thus, there is far greater potential for a conflict in the representation of a child than in the representation of an adult in an abuse and neglect case.

It is not so much the result in the present case with which I so vehemently disagree; it is the potential ramification of future interpretation and attempted application of this very rambling opinion, full of confusing ideas and standards, which disturbs me profoundly. Lastly, I must observe that the entire tenor of the majority opinion sounds in the rights of the Appellant. We recently observed in syllabus point seven of In re Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995) that "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." It is not simply the rights of the parents with which we must be concerned in an abuse and neglect setting; rather, the rights of the children must be the foremost, preeminent responsibility. The rights of the children cannot be obfuscated under the guise of protection of the procedural rights of the parents.

For the reasons set forth above, I respectfully dissent.

Footnote: 1 In many of these cases, there is a missing or abandoned parent and not a clue as to their whereabouts. The majority now muddies up the waters as to what constitutes proper notice in the event it is ascertained much later that they were institutionalized.

Footnote: 2 The only Rules of Civil Procedure regarding the notice requirement and applicable to child abuse and neglect cases are Rules 5(b) and 5(e), as follows:

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney of record the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last-known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some member of his family above the age of 16 years. Service by mail is complete upon mailing.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, who shall note thereon the filing date, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk; the notation by the clerk or the judge of the filing date on any such paper constitutes the filing of such paper, and such paper then becomes a part of the record in the action without any order of the court.

Footnote: 3 West Virginia Code § 56-4-10 provides as follows, emphasis provided:

The proceedings in a suit wherein an infant or insane person is a party shall not be stayed because of such infancy or insanity, but the court in which the suit is pending, or the judge thereof in vacation, or the clerk thereof at rules, shall appoint some discreet and competent attorney at law as guardian ad litem to such infant or insane defendant, whether such defendant shall have been served with process or not, ***and after such appointment no process need be served on such infant or insane person.*** *If no such attorney be found willing to act, the court, or the judge thereof in vacation, may compel him to act, or appoint some other discreet and proper person in his stead; but the attorney or other person so appointed shall not be liable for costs. Every guardian ad litem shall faithfully represent the interest or estate of the infant or insane person for whom he is appointed, and it shall be the duty of the court to see that the estate of such defendant is so represented and protected. And the court, or the judge thereof in vacation, whenever of opinion that the interest of an infant or insane person requires it, shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court or judge is satisfied that the guardian ad litem has rendered substantial service to the estate of an infant or insane defendant, it may*

allow him reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of such defendant.

Footnote: 4 We recognized in In re Christina that abandonment of a child by a parent "constitutes grounds for termination of parental rights." Id. at ___, 460 S.E.2d at 702.

327 F.3d 748
United States Court of Appeals, Eighth Circuit.
Mark Edward LOMHOLT, Sr., Plaintiff-Appellant,
v.
State of IOWA, Defendant-Appellee.
No. 02-2236.

Submitted: Dec. 9, 2002.
Filed: April 29, 2003.
Rehearing and Rehearing En Banc Denied July 3, 2003.[FN*]

FN* Judge Morris S. Arnold would grant the petition for rehearing en banc. Judge Theodore McMillian did not participate in the consideration or decision of this matter.

Heaney, Circuit Judge, dissented and filed a separate opinion.

Rockne O. Cole, argued, Iowa City, IA, for appellant. Robert P. Ewald, argued, Asst. Atty. Gen., Des Moines, IA, for appellee.

Before WOLLMAN, HEANEY, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

I.

An Iowa jury convicted Lomholt on two counts of second degree sexual abuse under Iowa Code §§ 709.1 and 709.3. Lomholt's victims were B.G., his four-year-old niece, and N.P., her five-year-old, female friend. Evidence against Lomholt included his signed confession as well as testimony from B.G. and N.P. The confession was corroborated by testimony from N.P.'s mother regarding a change in N.P.'s personality following the period of abuse. The confession was also corroborated by evidence that during identified periods of time Lomholt, as a babysitter, was alone with the children and had the opportunity to commit abuse.

The victims were allowed to testify at trial via closed-circuit television pursuant to Iowa Code § 910A.14 (now codified as § 915.38(1)) which permits a court to "protect a minor ... from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate ..." and where there has been "a specific finding by the court that such measures are necessary to protect the minor from trauma." *Id.* Before admitting the closed-circuit testimony from the victims, the Iowa trial court held an evidentiary hearing and set forth factual findings as required by Iowa Code § 910A.14 and *Maryland v. Craig*, 497 U.S. 836, 856, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (holding face-to-face confrontation to be an important but dispensable element of Sixth Amendment confrontation rights and setting forth the requirement that trial courts must make case-specific findings regarding trauma to child victims before the use of testimony via closed circuit television may be admitted).

At the evidentiary hearing, Lomholt presented no evidence nor witnesses to rebut the testimony of the prosecution's only witness, the victims' sex abuse counselor, Ms. Patricia A. Tomson. The Iowa trial court specifically noted that it found Ms. Tomson to be credible. Based on Ms. Tomson's unrebutted testimony, which we discuss in some detail below, the Iowa trial court concluded:

> the State produced credible testimony that testifying in the physical presence of the defendant would be traumatic to each of the alleged victims. In addition, the evidence was convincing that the trauma experienced in testifying would impair the ability of the witnesses to communicate. The court finds that testimony by closed circuit equipment is necessary to protect the alleged victims from trauma.

Iowa v. Lomholt, No. 4311 at 3 (Iowa Dist. Ct. for Mitchell County July 8, 1996) (Ruling on Motion to Permit Testimony by Closed Circuit Television).

Following conviction and denial of a request for post-trial relief, Lomholt advanced his Sixth Amendment argument before the Iowa Court of Appeals. The Iowa Court of Appeals affirmed the trial court's rulings and held the factual findings sufficient to satisfy the requirements of *Craig*, 497 U.S. at 855-56, 110 S.Ct. 3157. The Iowa Court of Appeals held in the alternative that, had the admission of the children's testimony been a Sixth Amendment violation, it would have been harmless error in light of Lomholt's corroborated confession. The Iowa Supreme Court declined further review, and federal habeas proceedings followed.

The district court expressly noted that it believed the factual findings of the Iowa courts to be incorrect. *Lomholt v. Burt*, 219 F.Supp.2d 977, 992 (2002) ("In short, this court agrees with [the federal magistrate's

report and recommendation] that the trial court's findings were 'wrong,' or at least, were based on evidence that this court would not find satisfactory if this court were the finder of fact."). Nevertheless, the district court carefully reviewed the evidence of record, found support for the factual findings, and held the findings to be reasonable under 28 U.S.C. § 2254(d)(2). Accepting the Iowa courts' factual findings as reasonable, the district court proceeded to find the Iowa courts' application of *Craig* to those facts reasonable under the standard set forth in *Williams v. Taylor*, 529 U.S. 362, 409-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

II.

[1] In the habeas setting, a federal court is bound by the AEDPA to exercise only limited and deferential review of underlying state court decisions. 28 U.S.C. § 2254. Under this deferential standard, the federal court may not grant habeas relief to a state prisoner merely because the federal court might have reached a conclusion different than that reflected in the state courts' factual determinations. 28 U.S.C. § 2254(d)(2) and (e)(1). Similarly, the federal court may not grant habeas relief to a state prisoner merely "because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411, 120 S.Ct. 1495. Rather, in the interest of furthering the goal of finality and respecting the principles of federalism,

> [t]he Antiterrorism and Effective Death Penalty Act (AEDPA) mandates that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless" the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)

Robinson v. Crist, 278 F.3d 862, 865 (8th Cir.2002).

[2][3][4] A state court decision is contrary to clearly established Supreme Court precedent if "the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law or ... decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. A state court decision involves an unreasonable application of clearly established Supreme Court precedent "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Finally, a state court decision involves "an unreasonable determination of the facts in light of the evidence presented in state court proceedings,"28 U.S.C. § 2254(d)(2), only if it is shown by clear and convincing evidence that the state court's presumptively correct factual findings do not enjoy support in the record. 28 U.S.C. § 2254(e)(1); *Boyd v. Minnesota*, 274 F.3d 497, 501 n.4 (8th Cir.2001) ("There is sufficient record evidence to support such a finding and, thus, it would not constitute an unreasonable determination of the facts in light of the evidence presented at trial.").

III.

[5] The Iowa courts correctly identified *Craig* as the controlling and clearly established Supreme Court precedent. Under *Craig*, before a defendant may be deprived the opportunity to confront a child witness face-to-face, there must be a case-specific finding that the "use of the one-way, closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify,""that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and "that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.' " *Craig*, 497 U.S. at 855-56, 110 S.Ct. 3157 (citations omitted). The Court did not attempt to define the minimum level of trauma required but noted that the level of trauma would be sufficient if it "would impair the child's ability to communicate." *Id.* at 857, 110 S.Ct. 3157.

Lomholt attacks the reasonableness of the Iowa courts' factual findings and application of *Craig.* There is no allegation that the Iowa courts' legal conclusion was contrary to *Craig* or any other clearly established Supreme Court precedent. Accordingly, our review is limited to two questions: (1) did the Iowa courts make an unreasonable factual determination in light of the evidence presented, or (2) did the Iowa courts unreasonably apply *Craig* to these facts.

We will first examine the Iowa court's factual findings. Lomholt argues that the findings were unreasonable because there was no showing that the

children would be more traumatized specifically by his presence than generally by the courtroom experience and because Ms. Tomson's projections of likely harm to the children described only *de minimis* anxiety rather than trauma as required under *Craig.* While Lomholt attacks the factual bases of Ms. Tomson's testimony and alleges that she was biased, he does not attack her qualifications.

A careful review of the trial court's findings and Ms. Tomson's unrebutted hearing testimony is necessary to address Lomholt's arguments. The Iowa Court of Appeals described her testimony from the evidentiary hearing:

> Tomson testified B.G. became anxious when describing the abuse and wet her pants on one occasion. She stated B.G. indicated she felt "sad and tired" when she thought of Lomholt. Her drawing of herself did not include arms which Tomson stated was an indication of powerlessness. ... Tomson maintained N.P. was afraid of Lomholt and played like a baby when the subject was broached. Tomson testified N.P. said she was frightened of Lomholt and that "she doesn't want to see him. Her words are, I want him to stand in the corner for a long, long time." Tomson further testified it would be "very traumatic" for either child to testify in Lomholt's presence. She stated, "I'm not sure either child would talk." Tomson also thought testifying before Lomholt would impair both girls' ability to testify and make it less likely they would tell the truth.

Iowa v. Lomholt, No. 7-588/96-1965 at 4 (Iowa Ct.App.1998). In addition, Tomson testified that B.G. was reluctant to talk about Lomholt and that when Tomson tried to discuss Lomholt with her, B.G. would resort to talking like a baby, become hard to understand, and engage in distracting behavior. Evid. Hearing Trans. at 16. Finally, Tomson testified that B.G. was "pretty disintegrated emotionally, particularly when thinking about the subject we were talking about which was court ...." Evid. Hearing Trans. at 10.

Whereas Tomson expressly noted that N.P. was afraid of Lomholt, she did not unequivocally state that B.G. was afraid or unafraid of Lomholt.[FN2]

> FN2. Lomholt argues that Tomson specifically testified B.G. was not afraid of Lomholt. The relevant testimony does not support Lomholt's position. The relevant questions from defense counsel and responses from Tomson were as follows:
>
> Q. I want to discuss [B.G.] right now. Is [B.G.] scared of the defendant?
>
> A. When I asked her that question directly, she didn't answer me. She had a relationship with [Lomholt]. He was her care giver. So I'm not certain that she's frightened of him.
>
> Q. How about [N.P.]?
>
> A. Yes, [N.P.] is frightened of [Lomholt].
>
> Q. How do you know this?
>
> A. She has said that she is. She doesn't want to see him. Her words are, I want him to stand in a corner for a long, long time.
>
> Q. How about [B.G.]? Is she apprehensive or scared about testifying in court with [Lomholt] present?
>
> A. [B.G.]'s anxious about talking about the abuse at all. I was present when she talked with you about that. And she sat in my lap and did as many distracting things as she could rather than talk about what had happened to her. The fact that she resorts to baby talk and is very difficult to understand when she starts talking about the abuse. And the fact that she wets her pants or has-now she asks to go to the bathroom, but at first, she didn't. She just wet her pants.
>
> Evidentiary Hearing Transcript at 15-16.
>
> Q. It's your testimony that you don't believe [B.G.] is afraid of [Lomholt]?
>
> A. She has not indicated that to me.
>
> Q. And since she broke off any kind of relationship, you really don't know today what her mental thought pattern is or her ideas are on [Lomholt]?
>
> A. No, I don't.

Evidentiary Hearing Transcript at 23.

Q. You testified that [B.G.] has never told you that she is afraid of [Lomholt]?

A. That's right.

Q. Based on her drawings and based upon your other communications with her, has she indirectly indicated that she's afraid of [Lomholt]?

A. Based on her drawings, there is more indication that of shame about talking about the abuse than of [Lomholt] himself.

Q. Based upon your education, based upon your experience, would testifying in the physical presence of Mark Lomholt impair [B.G. and N.P.]'s ability to communicate?

A. Yes, it would.

Evidentiary Hearing Transcript at 24-25.

Tomson testified in response to questions from the prosecutor that she believed it would be "very traumatic" for the children to testify in court in front of the defendant. The defense attorney challenged this testimony, and Tomson clarified that while the children may have trouble talking in a different room where only the attorneys and the judge would be present, testifying in front of the defendant would be different.[FN3] Finally, Tomson testified about studies involving children other than B.G. and N.P. and stated that, in her expert opinion, it would be traumatic for any children who had been sexually abused to testify in front of their abusers. Evid. Hearing Trans. at 19-20. Lomholt points to these comments in particular to support his argument that the evidence was not sufficiently case-specific.

FN3. Q. And you said that [B.G. and N.P.] would have trouble talking. They may have trouble talking in a different room with just myself, [the prosecutor] and the judge present; is that correct?

A. Yes, they may.

Q. So there actually may be no difference between that and a courtroom setting?

A. I believe there would be a difference.

Evidentiary Hearing Transcript at 22.

[6] In summary, Ms. Tomson provided a detailed account of her counseling sessions with both girls, specifically testified that she believed it would be "very traumatic" for them to testify in front of Lomholt, and specifically noted that testifying in front of Lomholt would be different than testifying outside of his presence. We note that the Court in *Craig* stated that expert testimony could provide a sufficient basis for the factual findings necessary to admit closed-circuit testimony. *Craig*, 497 U.S. at 860, 110 S.Ct. 3157 ("The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence 'will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate.' ") (citations omitted). Here, Lomholt failed to rebut such testimony and the Iowa courts deemed it credible. Further, Ms. Tomson's qualifications were unchallenged. Accordingly, the fact that the Iowa courts' findings were based solely on the testimony of one expert does not provide a basis for finding the Iowa courts' findings unreasonable.

[7] In light of Ms. Tomson's conclusions and her discussion of the children's behavior during counseling sessions, it was not unreasonable for the Iowa courts to conclude that the emotional impact described by Ms. Tomson was "more than *de minimis*, *i.e.* more than 'mere nervousness or excitement or some reluctance to testify.' " *Craig*, 497 U.S. at 856, 110 S.Ct. 3157 (citations omitted). Ms. Tomson specifically noted that testifying before Lomholt would be "very traumatic" and that this trauma would be sufficient to impair the girls' ability to communicate. It is not fatal to Ms. Tomson's testimony that she did not unequivocally state that B.G. was afraid of Lomholt. As noted in footnote 2, supra, Ms. Tomson did not testify that B.G. was *unafraid* of Lomholt. To attribute such a statement to Ms. Tomson would be to ignore the deference owed to the findings of the Iowa courts.

Further, even if she had provided such testimony, the Supreme Court requires a showing of trauma, not necessarily a showing of fear. *See Craig*, 497 U.S. at 856, 857 and 860, 110 S.Ct. 3157 (describing the requisite impact on a child-witness as "emotional trauma," "serious emotional distress," and "serious

emotional distress such that the child cannot reasonably communicate.”). Fear, shame, guilt, and countless other emotions may overwhelm a child victim's ability to communicate. The Court in *Craig* appropriately omitted any narrow descriptions that would have limited the type of trauma necessary to overcome a defendant's confrontation rights. The Iowa courts' refusal to read such a limitation into the definition of trauma does not make their factual findings unreasonable.

[8] Similarly, it was not unreasonable for the Iowa courts to conclude that Ms. Tomson's testimony adequately differentiated between trauma attendant to the general experience of testifying in court and trauma attendant to testifying before Lomholt. She stated that the latter would be “very traumatic” and that this experience would be different than testifying only before the judge and the attorneys. While more testimony in this regard would have strengthened the Iowa courts' conclusions, we cannot find the evidence so lacking that we may declare those conclusions unreasonable.

[9] Turning to the reasonableness of the Iowa courts' application of *Craig*, Lomholt argues that the Iowa courts failed to enforce the case-specific requirement of *Craig.* Specifically, Lomholt argues that Ms. Tomson's blanket statement that all child-victims of sexual abuse would be traumatized if forced to testify in front of their abuser demonstrates that her opinions were not case-specific. If her general statements had comprised the entirety of her testimony, Lomholt's attack might warrant a grant of relief. However, Tomson's general statement concerning all child victims was an isolated statement at the end of her testimony following a detailed discussion concerning her counseling sessions with both victims. As noted by the district court, “the fact that case-specific observations and conclusions are consistent with an expert's general opinions or other studies concerning the reaction of young children to testifying about wrongdoing in the presence of the perpetrator doesn't mean that the expert's opinion concerning the specific children in question wasn't ‘case-specific.’ ” *Lomholt v. Burt*, 219 F.Supp.2d at 998. Given the detailed accounts of sessions with each child and the separate discussions of each child's reactions, it was not unreasonable for the Iowa courts to conclude that Ms. Tomson's testimony satisfied the case-specific requirement of *Craig.*

The district court is affirmed.

HEANEY, Circuit Judge, dissenting.

By finding B.G. would be traumatized by Lomholt's presence at trial, the state trial court unreasonably determined the facts in light of the evidence presented. Similarly, allowing closed circuit television testimony without evidence that it was necessary to protect B.G. from trauma associated with Lomholt's presence is an unreasonable application of *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the governing Supreme Court precedent on this matter. As habeas relief is appropriate both where there has been an unreasonable determination of the facts and where there has been an unreasonable application of the law, *see*28 U.S.C. § 2254(d), I would grant the petition in part in this matter. I therefore dissent from that portion of the majority's opinion that affirms the district court's denial of habeas relief with regard to Lomholt's conviction involving B.G.

Subject to a limited number of exceptions, a criminal defendant enjoys the well-established constitutional right to face his accusers. One of those exceptions exists for child witnesses who would be severely traumatized by testifying in front of their victimizers. *Craig* makes clear that to satisfy the Confrontation Clause when a witness testifies via closed circuit television, the government must establish that testifying in this manner is necessary to protect the welfare of the child. 497 U.S. at 855, 110 S.Ct. 3157 (1990). This inquiry is case-specific; the government cannot rely on general evidence that children as a group are traumatized by testifying. *Id.* Moreover, it does not suffice to show that the child may be traumatized by the court process. The touchstone is whether the defendant's physical presence causes the child harm. *Id.* at 856, 110 S.Ct. 3157 ("[I]f the state interest were merely the interest in protecting the child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.") In other words, to deny a defendant face-to-face confrontation of his accuser, the evidence must establish that "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.*

Consistent with the above standard, in order to allow B.G. to testify by closed circuit television, the state was required to show that B.G. would have be traumatized by Lomholt's presence at trial. The trial court concluded that "the State produced credible testimony that testifying in the physical presence of the defendant would be traumatic to each of the alleged victims." The record simply does not support such a finding as to B.G.

The state produced a single witness, Patricia Tomson, at the hearing on this matter. Tomson testified that, in her expert opinion, it would be traumatic for all four- or five-year-old children to testify in front of their abuser. She also testified that, based on part of a study she had read, she thought it was less likely that children would tell the truth in front of their accusers. She also concluded that based on the children's "anxiousness," testifying in front of the defendant would be "very traumatic and I'm not sure either child would talk." (Evidentiary Hr'g Tr. at 16.)

With regard to N.P., Tomson's specificity supports her conclusion that it would be traumatic for N.P. to talk in front of Lomholt. N.P. had been treated by Tomson for some time, and she specifically told Tomson that she "is frightened of Mark [Lomholt] .... She has said that she is. She doesn't want to see him. Her words are, I want him to stand in a corner for a long, long time." (*Id.* at 15.) Tomson also observed that N.P. would divert attention from talking about the abuse, and would draw pictures that Tomson interpreted to show a feeling of powerlessness and lack of family support.

The evidence did not support such a conclusion for B.G. Tomson testified that she only saw B.G. for a total of three or four weeks, and had not seen B.G. for nearly six weeks before the hearing. She stated that when she first saw B.G., B.G. would become anxious when talking about the abuse and would wet her pants. Tomson went on to testify that Lomholt was B.G.'s uncle, and that B.G. may not be truthful in front of him for fear of getting him in trouble. B.G. had told Tomson that thinking about Lomholt made her feel "sad and tired." (*Id.* at 7.) Notably, when asked specifically if B.G. was frightened of Lomholt, Tomson stated B.G. "had a relationship with [Lomholt]. He was her care giver. So I'm not certain she's frightened of him." (*Id.* at 15.) She reiterated on cross-examination that she did not believe B.G. was scared of Lomholt, but that "[i]t's very hard for people to testify in front of anyone they have a relationship with." (*Id.* at 23.) On re-direct, when asked if B.G. had indicated indirectly that she was afraid of Lomholt, Tomson stated that she interpreted B.G.'s drawings to be "more indication ... of shame about talking about the abuse than of [Lomholt] himself." (*Id.* at 24.) Because B.G. had discontinued treatment with Tomson six weeks prior to the hearing, Tomson conceded that she did not know

B.G.'s current mental state.

Tomson's testimony that any four- or five-year-old would be traumatized by testifying in front of their abuser does not satisfy the Supreme Court's requirements for permitting child witnesses to testify via closed circuit television. *Craig* mandates that the inquiry must be case-specific: The government must show that this particular child, B.G., would be traumatized because of the defendant's presence. *Craig*, 497 U.S. at 855, 858, 110 S.Ct. 3157.

As to the rest of the government's evidence, Tomson testified that B.G. was ashamed of her abuse, and was anxious when talking about it. This is different from being harmed by the defendant's presence in court. Despite several attempts to elicit such testimony, the government could not adduce evidence that B.G. was scared of Lomholt. Other than Tomson's general statements regarding all children, the government also failed to elicit specific evidence that B.G. would be traumatized by Lomholt's presence at trial. Under the governing law of *Craig*, I believe that allowing B.G. to testify by closed circuit television violated Lomholt's Confrontation Clause rights.[FN4]

> FN4. Although the majority notes that Lomholt failed to rebut Tomson's testimony, he is not required to do so. As the *Craig* court made clear, the state bears the burden of proof in these matters. *Craig*, 497 U.S. at 855, 110 S.Ct. 3157. Generalized and conclusory statements from a person who had known the victim for only three or four weeks and had not spoken to the victim for six weeks prior to the hearing is not sufficient to carry the day. Therefore, Lomholt was under no obligation to produce contrary evidence, as the majority suggests.

After finding a violation of Lomholt's constitutional right to confront his accuser, the next question is if any relief is warranted. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681-82, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (holding Confrontation Clause violations are subject to a harmless error inquiry). The proper analysis on remand would be to completely exclude the child witness's testimony, and consider the strength of the remaining evidence against the defendant. *Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

Without B.G.'s testimony, I do not believe there is sufficient evidence to sustain a conviction with regard to her. Lomholt confessed, but he then recanted. Under Iowa law, "[t]he confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense." Iowa Code § 813.2, Rule 20(4). The majority of the remaining evidence appears to be the testimony B.G., or hearsay testimony of the children's mothers, recounting what the children had told them. Excluding all of this testimony, as we are required to do, it does not appear there is enough remaining evidence to convict Lomholt with respect to B.G. Accordingly, I would grant Lomholt's petition as to that conviction.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

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December 12, 2000
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OF WEST VIRGINIA

RELEASED
December 13, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27911

STATE OF WEST VIRGINIA EX REL. NATHANIEL LOWE,
Petitioner

v.

HONORABLE DAVID W. KNIGHT,
JUDGE OF THE CIRCUIT COURT OF MERCER COUNTY, AND
WILLIAM SADLER, PROSECUTING ATTORNEY FOR MERCER COUNTY,
Respondents

Petition for Writ of Prohibition/Mandamus

WRIT DENIED

Submitted: October 3, 2000
Filed: December 12, 2000

William O. Huffman, Esq.
Princeton, West Virginia
Attorney for Petitioner

The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

3. "A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which

the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

4. "A civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to Code, 49-6-1 et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution." Syllabus Point 2, *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997).

Per Curiam:

This case is before this Court upon a petition for a writ of prohibition and/or writ of mandamus filed by the petitioner, Nathaniel Lowe, against the respondents, the Honorable David W. Knight, Judge of the Circuit Court of Mercer County, West Virginia, and William Sadler, the Prosecuting Attorney for Mercer County. The petitioner seeks to prohibit the respondents from prosecuting him on a fifteen-count indictment charging him with sexual abuse and assault of his stepchildren. The petitioner contends that he cannot be prosecuted because of a plea agreement he entered into with the State in a prior abuse and neglect proceeding. We issued a rule to show cause, and now, for the reasons set forth below, deny the writ.[1]

I.

[1]We are troubled by the State's failure to file a response to the rule to show cause and failure to appear at the oral argument of this matter on October 3, 2000. Pursuant to Rule 10 of the Rules of Appellate Procedure, "[t]he failure to file a brief in accordance with this rule may result in the Supreme Court imposing the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Court may deem appropriate." Moreover, "[w]ithout the appearance and statement of the law required of the State, justice cannot be done in our adversary system." *State v. Moore*, 166 W.Va. 97, 112, 273 S.E.2d 821, 831 (1980).

On May 8, 1997, an abuse and neglect proceeding was instituted by the State, naming the petitioner as one of the respondent parents alleged to have abused and/or neglected the petitioner's son and stepchildren. After investigating the allegations, the State reached an agreement with the petitioner whereby the petitioner consented to the termination of his parental rights to his child, and in exchange, the State agreed to limit future criminal prosecution of the petitioner to one count of child abuse resulting in injury as set forth in W.Va. Code § 61-8D-3(a) (1996). The agreement was presented to the circuit court on August 7, 1997, and was incorporated by reference within the parental rights termination order entered on August 27, 1997, in the abuse and neglect proceeding. Thereafter, the petitioner pled guilty to one count of child abuse resulting in injury and was sentenced to an indeterminate term of not less than one nor more than five years imprisonment.

Subsequently, a Mercer County grand jury returned a fifteen-count indictment against the petitioner charging him with sexual abuse in the first degree, sexual abuse by a custodian, child abuse by a custodian, child abuse by a custodian resulting in injury, sexual assault in the first degree, and malicious assault. The indictment which was returned on February 15, 2000, named the petitioner's stepchildren as the victims. On March 15, 2000, the petitioner, by counsel, filed a motion to dismiss the indictment based on the plea agreement limiting potential criminal prosecution entered in the abuse and neglect proceeding. In response, the State asserted that the indictment was proper because at the time the agreement was made, the State was unaware of the facts which constituted the basis for the indictment. Thereafter, the circuit court denied the motion to dismiss.

The petitioner renewed his motion to dismiss on June 2, 2000, and submitted to the circuit court more than 1,600 pages of discovery he received from the State during the abuse and neglect proceeding. The petitioner argued that these documents showed that the State was aware of the facts which constituted the basis for the fifteen-count indictment at the time it entered into the agreement. Again, the circuit court denied the motion to dismiss, and set the matter for trial. The petitioner then filed this petition for a writ of prohibition and/or a writ of mandamus with this Court.

II.

We begin by noting that "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). By contrast, "[a] writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

In this case, the petitioner contends that the plea agreement he made with the prosecutor during the abuse and neglect proceeding prevents his prosecution on the charges set forth in the indictment. We disagree because we find that the plea agreement between the petitioner and the State is void as a matter of public policy. The agreement limiting potential prosecution of the petitioner provided, in pertinent part,

> This Agreement is strictly understood to include any and all parental rights to my said child, and to include my acceptance of the State of West Virginia's offer to limit any potential prosecution arising from any allegations or potential allegations related to the instant abuse and neglect proceeding or any other conduct or activity involving my relationship to Nathaniel G. Lowe [sic - petitioner's son of same name] or any of the other children [petitioner's stepchildren] named in the instant abuse and neglect proceeding.
>
> In exchange for the voluntary relinquishment and consensual termination of my parental rights it is understood and agreed that the State of West Virginia will limit its potential criminal prosecution against me to one count of child abuse resulting in injury under W.Va. Code §61-8D-3(a).

In *In the Matter of Taylor B.*, 201 W.Va. 60, 491 S.E.2d 607 (1997), this Court determined that such plea agreements are invalid. In *Taylor B.*, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") appealed a decision of the Circuit Court of Tucker County concluding that termination of parental rights was not warranted in an abuse and neglect proceeding involving a child that suffered injuries consistent with shaken baby syndrome. In response to the petition for appeal, James B., the appellee, asserted that the abuse and neglect petition filed against him and the child's mother should have been dismissed as part of his *nolo contendre* plea to the misdemeanor offense of presenting false information to attending medical personnel. According to James B., he entered into a plea agreement with the prosecutor whereby he agreed to enter a no contest plea to this misdemeanor charge, and the State promised to terminate the abuse and neglect proceeding. The circuit court refused to accept the plea agreement, but ultimately concluded that the evidence did not support a termination of James B.'s parental rights.

In considering James B.'s contention that the abuse and neglect proceeding should have been terminated as part of his plea agreement, this Court again recognized the dual role of prosecutors in civil/criminal abuse and neglect cases and explained that,

> "In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through Code, 49-6-10 that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors

> only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings." Syl. pt. 4, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

Syllabus Point 1, *Taylor B.* In this context, this Court concluded that the circuit court's refusal to dismiss the abuse and neglect petition against James B. and the child's mother pursuant to the plea agreement was proper. In reaching this conclusion, this Court held in Syllabus Point 2 of *Taylor B.*:

> A civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to Code, 49-6-1 et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

Although the plea agreement in this case resulted in the relinquishment of the petitioner's parental rights as opposed to dismissal of the abuse and neglect petition, the agreement is nevertheless void. As we stated in *Taylor B.*, "civil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." 201 W.Va. at 66, 491 S.E.2d at 613. While the actions of the prosecutor in this case may not have been adverse to the interests of the DHHR, it is simply against public policy for the prosecutor to threaten criminal prosecution in a civil abuse and neglect case.

Moreover, an agreement terminating parental rights is only valid if it is entered into in circumstances free of duress. W.Va. Code § 49-6-7 (1977) provides that, "[a]n agreement of a natural

parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud." When an agreement to terminate parental rights is made within the context of criminal proceedings and specifically conditions the dismissal of certain criminal charges on the relinquishment of parental rights, it can never be "free of duress" as required by this statute.

Accordingly, for the reasons set forth above, we find that the plea agreement in the underlying case is void as a matter of public policy. Therefore, the petitioner's request for a writ of prohibition and/or a writ of mandamus is denied.

Writ denied.

No. 27911 - State of West Virginia ex rel. Nathaniel Lowe v. Honorable David W. Knight, Judge of the Circuit Court of Mercer County, and William Sadler, Prosecuting Attorney for Mercer County

FILED
January 5, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the result of the majority opinion -- because, as the majority holds, prosecutors should not threaten criminal prosecution to get people to give up custody of their children.

However, I am concerned that this particular defendant may have suffered prejudice in his criminal case, as a result of his good-faith reliance upon the custody agreement. Upon remand, the circuit judge should be certain that nothing that the state obtained, by virtue of the invalidated custody agreement, is used against the defendant in any criminal case.

236 W. Va. 108, 778 S.E.2d 338

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2015 Term

FILED
November 4, 2015
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 14-1206

IN RE: M.M., B.M., C.Z., AND C.S.

Appeal from the Circuit Court of Roane County
The Honorable Thomas C. Evans, III, Judge
Case No. 14-JA-8-11

AFFIRMED

Submitted: September 22, 2015
Filed: November 4, 2015

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JUSTICE BENJAMIN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In reviewing challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review applies. The final order and ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 2, *Walker v. WV Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

3. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

4. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]" Syl. Pt. 1, in part, *In re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

5. "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49–6–5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49–6–5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Benjamin, Justice:

The instant action is before the Court upon the appeal of Petitioners Leslie S. and Samuel S. from a disposition order entered October 27, 2014, denying the Petitioners' motions for improvement periods and terminating their parental and custodial rights.[1] The circuit court found that the Petitioners could not correct the conditions of abuse and neglect in the near future and termination was necessary for the children's welfare. Upon review of the parties' arguments, the record before us on appeal, and applicable legal precedent, we affirm the circuit court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Department of Health and Human Resources ("the DHHR") filed an abuse and neglect petition alleging that the Petitioners were arrested on February 1, 2014, for committing domestic battery and domestic assault against their son, C.S., at a youth basketball league game in the presence of numerous witnesses.[2] According to the petition, the Petitioners cursed at C.S., calling him a "son of a bitch" and "mother fucker"

[1] Because this case involves minors, initials are used to identify individuals in accordance with Rule of Appellate Procedure 40(e).

[2] Petitioner Leslie S. is the biological mother of all four children involved in this case. Samuel S. is the biological father of C.S., age 11, and the step-father of the other children, all teenage boys. The children have lived in the family home located in Spencer, West Virginia, since moving from the state of Florida approximately six years ago. The two older boys, M.M., age 18, and B.M., age 17, have had no contact with their biological father, M.M., Sr., for many years. C.Z., age 15, has had only limited personal contact with his biological father, Max Z., since the family moved from Florida.

and physically abused him by pulling him, slinging him into a wall, grabbing his face, and knocking his head into a door multiple times. During the incident, C.S. was crying profusely and trying to escape from the Petitioners. Witnesses called law enforcement, and the Petitioners were arrested for domestic battery and assault.

The DHHR was notified of the incident and it began an investigation. A protection plan was put into place during the investigation, which allowed all four of the children to stay with a family who had been present during the incident and were affiliated with the church and the basketball league. The children were removed from the Petitioners' home by emergency ratification and a petition alleging abuse and neglect was filed on February 13, 2014.[3] However, the petition failed to allege facts constituting imminent danger. A Multidisciplinary Treatment Team ("MDT") immediately convened and the parents originally agreed to allow the children to remain with the placement family until after the initial court appearance. The Petitioners subsequently changed their minds and all of the children, except C.S., were required to return home. C.S. stayed with the placement family because a condition of the Petitioners' bonds did not allow

[3] The petition also contained allegations against the biological fathers of M.M., B.M. and C.Z. as well; however, as their rights are not at issue in this appeal, the facts herein pertain only to the Petitioners. The circuit court's October 27, 2014, order terminated the parental rights of M.M. and B.M.'s biological father for abandonment. C.Z.'s biological father remains involved in the abuse and neglect case.

contact with him. The Petitioners were subsequently convicted of misdemeanor criminal charges relating to the case.

The circuit court held an adjudicatory hearing on the DHHR's petition on March 10, 2014. Both M.M. and B.M. testified in camera regarding the abuse and neglect they suffered at the hands of the Petitioners and the circuit court concluded that the children were in imminent danger of further emotional abuse and ordered that the remaining three children be removed from the home.[4] The circuit court granted the DHHR custody of the children and they were placed in foster care. The Petitioners waived their right to a preliminary hearing on the removal and the circuit court granted the Petitioners supervised visitation with C.S. and C.Z.

At a subsequent hearing on April 22, 2014, Petitioner Samuel S. admitted to the allegations of abuse and neglect contained in the DHHR's petition. Specifically, he admitted that he verbally abused C.S. at the basketball game, that he has disciplined the

[4] Both M.M. and B.M. originally testified at an in camera hearing that neither wanted to return home because of the abuse they endured. They testified that if they were required to return home, both would leave the home as soon as they turned eighteen. B.M. has been steadfast in his desire to have nothing to do with the Petitioners, refusing visitation opportunities with them during the pendency of this case. He has expressed multiple times that he would be fine with termination of parental rights. In her testimony, Leslie S. admitted that she would be willing to give up her custodial rights to B.M., and that he should not be forced to return home. She expressed that she hoped he would one day change his mind, and did not want to "close the door" on that possibility.

children by requiring them to stand in the corner for hours at a time, that he curses at the children, and that he and Petitioner Leslie S. yell and curse at each other in the children's presence.

Following that hearing, the children have been moved to multiple foster homes located in different counties.[5] The guardian ad litem reports that M.M., who has turned eighteen and is no longer subject to the jurisdiction of the circuit court, has recently moved back in with the Petitioners.[6] The three younger boys remain in foster care in two different counties. B.M. and C.Z., who have been in a total of four foster homes since the case commenced in March 2014, were placed in a foster home together in January 2015 and they have been adjusting well. B.M. is a straight A student and athlete, and C.Z., who previously struggled in school, is now an A/B student in high school.

C.S., the youngest child, is currently in a new foster home in a different county, his eighth placement in the last nineteen months. C.S. has had a number of inpatient hospitalizations for emotional issues. According to the guardian ad litem, C.S.'s

[5] The DHHR represents that it was difficult to find foster home placements for the children within their home county. The DHHR also states that it was unable to find a suitable foster placement that could accommodate all four children together.

[6] The guardian ad litem represented that M.M. has recently moved back into the family home with his pregnant girlfriend. She reports that although M.M. is a bright young man, he has chosen not to further his education or seek employment at this time.

new specialized foster home appears to be a good fit for him, as his foster parents seem to have a good understanding of C.S.'s emotional problems. The boys' foster families have agreed to facilitate monthly visitation between them.

Pursuant to the request of the guardian ad litem, the Petitioners underwent psychological evaluations at Saar Psychological Services in August 2014 in order to determine parental fitness and what terms and conditions would be required to remedy any concerns raised in the evaluation if an improvement period were to be granted. The evaluations took an inordinate amount of time to complete, taking several hours over the course of two days. In the evaluations, Leslie S.'s prognosis was "guarded" and Sam S.'s prognosis was "very guarded."

On September 5, 2014, the circuit court conducted the first of two evidentiary hearings regarding the Petitioners' motions for improvement periods. The guardian ad item filed her report in which she indicated that she had "very mixed feelings about whether an improvement period should be granted to [the Petitioners]. However, [she was] leaning against it." The DHHR filed its case plan recommending that the circuit court grant the Petitioners an improvement period. At the beginning of the hearing, the circuit court clarified whether there was an objection to the Petitioners receiving an improvement period, to which the guardian ad litem responded "yes." Counsel for the Petitioner Leslie S. indicated that she was aware that the guardian ad

litem might oppose an improvement period and that they were prepared to proceed with an evidentiary hearing. The circuit court then heard testimony regarding whether the Petitioners should be granted an improvement period or if their parental rights should be terminated.

According to the evidence presented during the evidentiary hearing, Leslie S. admitted that she mentally and emotionally abused her children and that she had begun services with therapist Susan Greathouse and parent educator Lora Davis to correct the abuse. She testified that she would be willing to give up her custodial rights to B.M. and that she would do anything asked of her to rectify the conditions of abuse and neglect. She testified that she would like C.S. to come home, but that he still needs a lot of help and that he is not ready to come home.

The circuit court heard testimony that Leslie S. was involved in a previous incident at the Spencer City Pool in 2012, where she was accused of physically assaulting M.M. Instead of filing a petition, the DHHR arranged for in-home services through Children's First, which occurred once weekly from August 2012 through February 2013. These services were designed to remedy that situation, which is substantially similar to the circumstances of the instant case. The records admitted into evidence show that significant effort on the part of the service provider was undertaken to deal with many major family problems, but that, by the end of the services, little if any progress had been

made by the Petitioners. The record reflects that the services ended, not because the problems were solved, but because the provider had used up all of the allotted time. When asked what she learned from her months of services in 2012, Leslie S. responded, "I didn't really learn nothing."

The circuit court also heard testimony that the children were previously removed from Leslie S.'s custody while living in Florida after she was found to have failed to protect them from her ex-husband, Max Z.'s abuse. The children resided with Leslie S.'s mother for a period of approximately five years. Leslie S. received parenting classes during that court process as well. After her mother died, Leslie S. returned to court in Florida and was awarded custody of her children. Evidence was also presented that Leslie S. receives disability benefits and does not work outside the home. She is prescribed multiple medications and spends a significant amount of time in bed, virtually unable to function.

There was also evidence presented that Samuel S., also a recipient of disability benefits, is likewise prescribed multiple medications. His treating family physician, Dr. Carroll Christiansen, testified that Samuel S. has a psychiatric diagnosis of Bipolar I and an adjustment disorder with depressed mood, in addition to several other medical issues related to back pain, hypertension, diabetes, and heart disease. He has a prior felony record involving witness tampering.

Testimony continued at a second hearing conducted on September 17, 2014. During this hearing, Petitioner Samuel S. testified that he was working on anger control problems with therapist Susan Greathouse. Although Samuel S. testified that he has learned to use "I-messages" to improve his communication thanks to his therapist, Susan Greathouse was not called to testify at the hearing. He also testified that Lora Davis, parent educator, provided services to help him communicate better. He testified that he needed to correct his attitude, anger management, and that he needed to communicate better.

Lora Davis, who worked with this family on a weekly basis for five months, testified that in her eight years of working with Family Advantage, this family is one of the most challenging. She reports that after months of working with them, the Petitioners have made only minimal progress. She explained that her efforts to explain the basic course material have been continuously met with resistance from the Petitioners, particularly Samuel S. She opined that Samuel S. needs anger management, and that both parties need a psychiatric consultation to determine whether their medications are effectively treating their mental conditions. She stated that if the children were to return home at this point, the situation would be "absolutely the same."

Jennifer Bogar, the therapist for M.M., B.M., and C.Z. also testified. She testified that M.M. wanted to return to the Petitioners' home and to his school of origin, but she opined that this desire was probably influenced more by wanting to return to his school. She testified that she had reservations about M.M. returning to the Petitioners' home and that he may become emotionally unstable if he returned. In regards to B.M., Ms. Bogar testified that he does not want to return to the Petitioners' home, that he declined every opportunity for visitation with the Petitioners, and that he believes the cycle of behavior will continue if he returns to the Petitioners' home. With respect to C.Z., Ms. Bogar testified that he wants to return to the Petitioners' home but has concerns that the situation may not be as good as the Petitioners promised him it would be. Ms. Bogar testified that she was concerned that the Petitioners' home would continue to be detrimental for C.Z. without additional services, despite Samuel S.'s testimony that he has changed.

Finally, Child Protective Services worker Jerry Burge testified regarding the DHHR's recommendations for the Petitioners. Mr. Burge testified that the DHHR recommended an improvement period for the Petitioners and had developed a case plan with terms and conditions that had been reviewed by all the parties. However, Mr. Burge also testified that the Petitioners did not benefit from the six months of services they received in 2012 to address the same issues as presented in this case. He further testified

that he has worked with the family off and on for the past two years and that he has not seen many changes in the Petitioners' behaviors.

Following these two evidentiary hearings, the circuit court entered a dispositional order on October 27, 2014. The circuit court found that from August 2012 through February 2013, the Petitioners received services designed to remedy the same abusive and neglectful behaviors that they exhibited in this case. The circuit court found that by the end of those services, "little, if any, progress had been made by [the Petitioners]." The circuit court explained that the goal of the previously offered services was to prevent further abuse and neglect, but the mechanisms taught, "simply did not work and another one of the children was injured." The circuit court also stated that the Petitioners had been provided services in this case for approximately the length of an improvement period with little progress.

In determining to deny the Petitioners an improvement period and to terminate the parental and custodial rights, the circuit court explained,

> [t]he fact is that [the Petitioners] have been involved with the service providers for two stints, without progress, and despite education in appropriate parenting skills, [C.S.], their youngest son, was physically assaulted in front of a myriad of witnesses. Simply put, these adult respondents have not responded to or followed through with rehabilitative efforts of social and other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the children, as evidenced by the continuation of conditions which threatened the health, welfare or life of their children.

The circuit court found that the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the children. The circuit court concluded that continuation in the Petitioners' home was not in the best interests of the children. In addressing Petitioner Leslie S.'s rights to M.M., B.M., and C.Z., who are all children fourteen years or older, the circuit court considered their wishes and ruled accordingly. Petitioner Leslie S.'s custodial rights were terminated only to M.M. and C.Z., because they did not desire that her full parental rights be permanently terminated. Upon B.M.'s request, Petitioner Leslie S.'s full parental rights to him were terminated. C.S., ten years old at the time, was too young to have his wishes considered, but the court ordered termination of all parental rights as to C.S. as well. It is from this order that the Petitioners now appeal.

II. STANDARD OF REVIEW

This Court has held that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review applies. The final order and ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. Pt. 2, *Walker v. W.Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

As it pertains specifically to abuse and neglect cases, this Court has held,

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With these standards in mind, we now turn to the issues before us.

III. ANALYSIS

The first issue before us is whether the circuit court erred in its consideration of the Petitioners' performance in pre-disposition services when it denied the requested improvement periods. We also consider a second issue of whether the circuit court erred in denying the Petitioners' post-adjudication improvement periods where, to the contrary, the DHHR's initial case plan recommended that improvement periods be granted.

With respect to the first issue before us, the Petitioners argue because of their positive performance in pre-disposition services, the circuit court erred by denying them improvement periods. The Petitioners contend that they admitted their problems, which they claim are "easily correctable," and that they testified to their willingness to work towards that improvement of those problems. Therefore, the Petitioners claim that they met their burden to prove by clear and convincing evidence that they are "likely to fully participate in the improvement period[s]," as required by this Court's extensive case law and the improvement-period statute, West Virginia Code § 49-6-12 (1996). They claim that their therapist, Susan Greathouse, believes there has been a recent breakthrough and that she recommended that the improvement period go forward.[7] The Petitioners claim that although there was a petition detailing their problems, they had no means of relating the services to the correction of the problems because they had no case plan or "road map" to guide them.

The DHHR responds that although it originally recommended that the Petitioners be granted an improvement period at the dispositional hearing, it cannot now say that the circuit court abused its discretion because the Petitioners have not demonstrated any change in their abusive behaviors after participating in services. The DHHR argues that despite the Petitioners' argument that they are willing to participate in

[7] We observe, however, that the therapist, Ms. Greathouse, was not called to corroborate this information at the hearing.

services, the Petitioners' attitudes toward parenting have not changed during their participation in services to this point. The DHHR asserts that although the Petitioners did not get a formal improvement period, they did receive services for a substantial period of time prior to the plan being filed, and they did have a service provider who testified to their "minimal progress." The DHHR also notes that the Petitioners previously had services in 2012 due to a similar incident of domestic violence toward the oldest son, M.M. The DHHR maintains that the circuit court did not err in denying the motions for improvement periods, as they are not automatically entitled to such, given the facts of this case.

The guardian ad litem likewise argues that no error occurred. The guardian ad litem contends that the Petitioners are not entitled to improvement periods, and their history of services without change demonstrates that the circuit court was correct to conclude that the Petitioners were not likely to participate in services now that would amount to parental improvement. In addition to their current "minimal progress" and 2012 domestic violence incident toward the oldest son, M.M., the circuit court also heard evidence that Petitioner Leslie S. lost custody of her children in Florida for five years due to a domestic incident there in the early 2000s. The guardian ad litem also asserts that Lora Davis, parent educator, provided testimony about her interactions with the Petitioners, including incidents where she believed that Leslie S. was either intoxicated or over-medicated and incidents demonstrative of Samuel S.'s anger issues. Her conclusion

was that despite many months of service, minimal progress, if any, was made in addressing the problems as she had to "explain things over and over again." She also indicated that there did not appear to be a genuine willingness to charge on the part of Samuel S.

West Virginia law allows the circuit court discretion in deciding whether to grant a parent an improvement period. This Court has emphatically stated that "[b]oth statutory and case law emphasize that a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. Where an improvement period would jeopardize the best interests of the child, for instance, an improvement period will not be granted." *In re Charity H.*, 215 W. Va. 208, 216, 599 S.E.2d 631, 639 (2004). The parents bear the burden at the disposition stage to show that they should be granted the opportunity to remedy the circumstances that led to the filing of the abuse and neglect petition. West Virginia Code § 49-6-12(b) states, in pertinent part, that the circuit court *may* grant a respondent parent an improvement period if "[t]he respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period[.]" This Court has also held that in order to receive an improvement period, the parent must acknowledge that the children have been abused and neglected. *In re Kaitlyn P.*, 225 W. Va. 123, 126, 690 S.E.2d 131, 134 (2010).

As this Court has explained, it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [t]he overall attitude and approach to parenting." *W. Va. Dept. of Human Serv. v. Peggy F.*, 184 W. Va. 60, 64, 399 S.E.2d 460, 464 (1990). Fully participating in an improvement period necessarily requires implementing the parenting skills that are being taught through services. There is "no reasonable likelihood that conditions of abuse and neglect can be corrected" if

> the abusing parent or parents have not responded to or followed through with a reasonable family case plan or *other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child*, as evidenced by the continuation of insubstantial diminution of conditions which threatened the health, welfare or life of the child.

W. Va. Code § 49-6-5(b)(3) (2002) (Emphasis added).

We conclude that the circuit court did not err in denying the Petitioners' motions for improvement periods. The circuit court's order lists its consideration of several very relevant factors for its conclusion that the abusive situation was not easily correctable: 1) the history of past abuse of the children; 2) the testimony of both older boys detailing the major dysfunctional relationships and chaotic life at home; 3) the parent educator's testimony; 4) the psychological evaluations of the parents showed that the mother had a "guarded" prognosis and the step-father had a "very guarded" prognosis; and 5) the testimony of both the Petitioners, which allowed the Court to

evaluate their credibility. The records from the 2012 services that the Petitioners received were admitted as evidence. They show that the services were provided to help the Petitioners develop "appropriate parenting and disciplinary techniques due to inappropriate disciplinary techniques and possible mental health issues in the home." A review of the records in their totality demonstrates that the services were addressing the Petitioners' verbal and emotional abuse of the children, verbal altercations between the Petitioners, the Petitioners' favoritism of C.S., and Leslie S.'s inability to properly parent her children or function. These are the same issues of abuse and neglect to which the Petitioners admitted in this case.

In its dispositional order, the circuit court noted that the Petitioners

> received in-home services, including parenting and adult life skills, for several months from Children's First, beginning in August, 2012. These services were arranged by DHHR, as a reasonable effort to prevent removal, after a prior incident involving [Leslie S.'s] physical abuse of [M.M.] Notwithstanding that the services had a goal of preventing this kind of abuse, not quite a year after the services ended did the same sort of physically abusive conduct happen with [C.S.] Moreover, a review of the Children's First records show that many of the problems identified by Lora Davis and those also reported in the psychological evaluations were present at the time Children's First worked with [the Petitioners], and the services were designed to address these problems and offer solutions. The whole goal of the Children's First services was to reduce and prevent further abuse of the children in the future by [the Petitioners], and prevent removal of the children from the home. Unfortunately, those mechanisms which should have been in place to prevent further abuse simply did not work and

> another one of the children was injured, and these petitions were filed.

Taking all of this evidence into consideration, we conclude that the circuit court made a proper determination that the abusive situation was not easily correctable and was unlikely to improve. Accordingly, we affirm the circuit court's ruling on this basis.

Next, the Petitioners argue that the circuit court erred in failing to follow Rule 34 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and this Court's opinions in *In re Ashton M.*, 228 W.Va. 584, 723 S.E.2d 409 (2012) and *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001) by terminating their parental rights when the DHHR's case plan recommended improvement periods.[8] The Petitioners argue that under Rule 34, the circuit court should have 1) objected to the

[8] Rule 34 of the W. Va. Rules of Procedure for Abuse and Neglect Proceedings addresses the circuit court's options in ruling on objections to a child's case plan that are raised at the dispositional hearing. If an objection is raised at the disposition hearing, the rule directs the circuit court to

> [e]nter an order (a) Approving the plan; (b) Ordering compliance with all or part of the plan; (c) Modifying the plan in accordance with the evidence presented at the hearing; or (d) Rejecting the plan and ordering the Department to submit a revised plan within thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.

Id.

case plan, 2) ordered the DHHR and MDT to change the case plan, and 3) ordered another dispositional hearing to allow the parties an opportunity to refuse the lower court's findings. The Petitioners argue that this case is very similar to *Ashton M.*, in which a circuit court failed to follow the DHHR's recommendation in the case plan, and this Court held that the circuit court implicitly rejected that case plan under Rule 34 thereby requiring the scheduling of another dispositional hearing. 228 W.Va. 584, 723 S.E.2d 409. The Petitioners argue that failure to follow Rule 34's requirement to schedule another dispositional hearing for the DHHR to revise its case plan was reversible error.

Conversely, the DHHR argues that *Ashton M.* and *Edward B.* are entirely distinguishable from the instant case because, in those cases, the parents did not know that the case plan would be challenged prior to the dispositional hearing. In *Ashton M.*, the DHHR filed a case plan recommending termination of only the mother's custodial rights and all parties were in agreement with that. 228 W.Va. 584, 723 S.E.2d 409. The mother and her counsel did not know the agreed case plan would be challenged until the circuit court, sua sponte during the dispositional hearing, suggested that termination of all parental rights, rather than just custodial rights, would serve the child's best interests. *Id* at 587, 723 S.E.2d at 412. The mother's counsel objected saying the mother was not prepared to present witnesses to address the termination of all parental rights because she had relied on the agreement reached between the parties. *Id*. at 588, 723 S.E.2d at 413.

Thus, this Court determined that the circuit court committed reversible error in failing to follow Rule 34(d) and set a new dispositional hearing. *Id*. at 591, 723 S.E.2d at 416. The DHHR argues that similarly, in *Edward B.*, this Court held that the circuit court erred in failing to set a new dispositional hearing to allow the parties to present evidence of termination when it rejected the agreed case plan recommending an improvement period because there was no indication before the dispositional hearing that the case plan would be contested. 210 W. Va. 621, 558 S.E.2d 620. To the contrary, the DHHR contends that the Petitioners here knew that the guardian ad litem might object to improvement periods, and the guardian ad litem did in fact object.

We agree with the DHHR and find that the above noted cases are distinguishable from the instant case. In the case sub judice, unlike *Ashley M.* and *Edward B.*, Petitioners knew before the dispositional hearings began that the guardian ad litem herein might not agree with their motions for improvement periods. At the first dispositional hearing on September 5, 2014, Petitioner Leslie S.'s counsel discussed the purpose of the hearing with the circuit court and noted that "I know the Department's recommendation was, before at the MDT, that [it was] going to recommend an improvement period. I think the only one still up in the air is the guardian. And I am willing to put my client on to testify as to the services she's already started." The circuit court then inquired as to whether there was an objection to the Petitioners' motions for an improvement period, to which the guardian ad litem responded, "yes." Thus, in this case,

the Petitioners were aware prior to the hearing that the guardian ad litem might not be in agreement with their request for an improvement period, and the record is clear that because of that knowledge, the Petitioners were prepared to present their evidence regarding their motions.

Further, the circuit court permitted the Petitioners a full opportunity to present evidence at not one, but two, different evidentiary hearings where the parties had full notice of the issues to be considered by the circuit court and a full opportunity to present witnesses and to be heard regarding whether improvement periods should be granted or whether another disposition would be required. Furthermore, the record is also devoid of any objection by the Petitioners to either proceeding with the hearings or to the circuit court's request for proposed findings of fact and conclusions of law. Finally, the Petitioners do not now contend that they had additional witnesses or evidence to present or that they were prohibited from doing so.

In syllabus point five of *In re Edward B.*, this Court held that,

> [w]here it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been *substantially disregarded or frustrated*, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

210 W.Va. 621, 558 S.E.2d 620 (Emphasis added). Based upon the set of facts before us, we conclude that in this particular case, the circuit court order did not substantially disregard or frustrate the disposition process recommendation as required by our holding in *In re Edward B.*

Our holding today comports with our long-standing jurisprudence that, while "[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 (1977) will be employed; . . . courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]" Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Indeed,

> '"[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49–6–5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49–6–5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

The evidence presented at the evidentiary hearings clearly supports the circuit court's determination that there was no reasonable likelihood that the Petitioners

could correct the conditions of abuse and neglect because they did not respond to rehabilitative efforts to correct the conditions of abuse and neglect and because the emotional abuse perpetrated on their children created a degree of family stress and potential for further abuse which precluded the use of further resources to resolve the family's problems. Based upon the evidence presented, we conclude that the circuit court did not err in terminating the Petitioners' parental and custodial rights.

IV. CONCLUSION

For the foregoing reasons, we affirm the October 27, 2014, order of the Circuit Court of Roane County. It is further ordered that the mandate of this Court be issued forthwith.

Affirmed.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

No. 34342

FILED
April 30, 2009
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: MARANDA T.

Appeal from the Circuit Court of Mercer County
Honorable William J. Sadler, Judge
Juvenile Action No. 07-JA-30-WS

AFFIRMED

Submitted: April 7, 2009
Filed: April 30, 2009

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus point 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

3. "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5

[1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*,182 W. Va. 302, 387 S.E.2d 537 (1989).' Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993)." Syllabus point 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

4. "Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement." Syllabus point 4, *In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999).

5. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syllabus point 1, in part, *In Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Per Curiam:

The respondent below and appellant herein, Martha T. (hereinafter "Martha" or "mother"),[1] appeals from an order entered April 16, 2008, by the Circuit Court of Mercer County. By that order, the circuit court denied the mother's motion for a dispositional improvement period, terminated her parental rights to her daughter, Maranda T. (hereinafter "Maranda" or "child"), and granted the mother post termination visitation. On appeal to this Court, Martha argues that the circuit court erred in denying her dispositional improvement period and in terminating her parental rights. Based on the parties' arguments, the record designated for our consideration, and the pertinent authorities, we affirm the rulings made by the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case are undisputed. Maranda was born November 2, 1999, to Martha and Leonard T., Jr. (hereinafter "Leonard" or "father"). When Maranda was seven years of age, Maranda's teacher made a referral concerning Maranda to the Mercer County Department of Health and Human Resources (hereinafter "DHHR"). On January 26, 2007, a worker with Child Protective Services (hereinafter "CPS"), Ms. Akers, traveled to

[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

the school and spoke with Maranda. During that interview, Maranda indicated to Ms. Akers that she needed to tell her something. Maranda then turned around, pulled down her pants, bent over, and spread her buttocks apart. Maranda further stated that she was tired of her parents, Martha and Leonard, sleeping with her in her bed and having sex in her presence.

A home visit was conducted January 26, 2007. During that visit, Maranda showed the DHHR employee a box of syringes and made a statement that the pills are also kept in that box. She indicated that the box belonged to her father. A forensic interview of Maranda occurred on January 31, 2007, during which Maranda indicated that her father touched her "thingy" while pointing to her vagina. Maranda also suggested during this conversation that her father used alcohol and drugs. A safety plan was entered into on January 31, 2007, wherein the mother agreed that "at no time will [Leonard] be allowed in the home with Maranda . . . [that] Maranda [T.] will not be left alone with [Leonard] at anytime . . . ." Further, Martha agreed that failure to comply with this safety plan could result in court action and possible removal of Maranda from her care.

Martha then moved with Maranda out of the home she shared with Leonard and into the home of her parents. A CPS worker with DHHR, Ms. Murphy, visited Martha's parents' home and found it small and extremely cluttered, with dirt and dust over everything. At the time of the visit, the CPS worker noted two men were lying on a bed with Maranda's maternal grandmother, watching television. The CPS worker determined that the home was

not an appropriate place for Maranda to live. Martha and Maranda relocated to a shelter in a neighboring county. However, during the second week of their stay at the shelter, Maranda became sick, prompting Martha to move Maranda back into Martha's parents' residence.

On March 7, 2007, the DHHR was granted temporary custody of Maranda as a result of the filing of a child abuse and neglect petition. An adjudicatory hearing was held April 6, 2007. Ms. Murphy and Ms. Akers, both with the DHHR, testified regarding the events leading to the hearing, especially the alleged sexual conduct. Both women also testified that the familial home contained only one bed and that the father always appeared intoxicated. Further, Ms. Murphy testified that Martha and Leonard had relinquished rights to their other children.[2] A truancy officer with the Mercer County Board of Education also testified that Maranda had been absent from school fifty-five days: thirty-five unexcused and twenty excused. Further testimony was provided by Ms. Woodard, who had conducted the forensic interview, regarding Maranda's disclosure of sexually inappropriate conduct by her father.

[2]While there is little evidence in the record submitted from the circuit court regarding the other children of Martha and Leonard, it appears that Martha and Leonard have a total of seven children. The record details that Martha and Leonard relinquished their rights to their four older children after the State took custody of them. The DHHR appellate brief explains two other children are deceased: one perished in a house fire and one died after falling from the back of a moving truck when the driver was fleeing from the police. Maranda was the only child remaining in the custody of Martha and Leonard at the time of these proceedings.

During the adjudicatory hearing, Martha testified that she had an eighth-grade education and was currently on probation for welfare fraud. She also testified that there are two beds at her place of residence with Leonard, and that he did not drink in front of the children. Martha further stated that she never made love in front of Maranda. Leonard also testified[3] that there are two beds at the home. On the date of the adjudicatory hearing, Maranda was placed in a foster home, and specialized care was imposed because she was found to be developmentally delayed. She was unable to read or write simple words and, during foster care, it was determined that she needed eyeglasses. Maranda also exhibited behaviors such as pulling her arms to her body and walking on her tiptoes, and was either unwilling or unable to dress herself. She also had a tendency to eat until she became sick.[4]

On April 18, 2007, the circuit court entered an order finding Maranda to be a neglected and abused child and that both Martha and Leonard are responsible for such neglect and abuse. The lower court ordered supervised visitation for the mother, but denied visitation for the father because he refused to submit to drug and alcohol tests. On May 11, 2007, and reflected in an order entered May 31, 2007, the mother, Martha, was granted a six-month post adjudicatory improvement period.

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[3]The circuit court noted that Leonard appeared to be testifying while intoxicated.

[4]During oral argument before this Court, it was reported that most of these behaviors improved during foster care, but that Maranda is still developmentally delayed.

On July 6, 2007, a dispositional hearing was held for the father and a review hearing was held on the mother's post adjudicatory improvement period. The father's parental rights were terminated and the lower court set a hearing date of October 5, 2007, to review the mother's post adjudicatory improvement period. During this time, Maranda had supervised visitation with her mother two times per week. It was reported that, during the visits, Martha continued to bring large quantities of junk food, despite being instructed to the contrary, and allowed Maranda to eat whatever amounts she wanted, which caused Maranda to become ill. Martha also failed to take full advantage of the scheduled visitation and left early or cancelled on several occasions.

At the review hearing on October 5, 2007, the guardian ad litem questioned whether reunification with the mother would ever be appropriate. During this review hearing, it was revealed that Maranda had disclosed additional previous sexual misconduct by her father and by other relatives. It was reported that this conduct had occurred when Maranda's mother was present or in an adjacent room watching television. However, it was also stated that Martha continued to cooperate with services and would make some progress, only to revert back to her original skills. Maranda was also scheduled to be tested for an autism spectrum disorder.[5] The lower court extended the mother's post adjudicatory

[5]According to a doctor's report from April 28, 2008, autism spectrum disorder could not be diagnosed. However, the doctor noted the difficulty in making such a diagnosis in children with a history of abuse and neglect. Maranda was diagnosed with static (continued...)

improvement period and set a review hearing for December 21, 2007.

On January 24, 2008, a multidisciplinary team convened. During this meeting, it was revealed that the psychologist who performed the mother's psychological testing and the worker who had been providing parenting and adult life skills classes to Martha now questioned whether she would ever be able to raise a special needs child. They also were concerned with whether Martha would ever be able to generalize the parenting skills that she had been taught.

Subsequently, on February 1, 2008, the lower court held a hearing to review the mother's post adjudicatory improvement period. At this hearing, the lower court recognized that the DHHR was seeking disposition, and ordered services to continue until that time. A hearing was held April 4, 2008, and the DHHR argued that the mother's parental rights should be terminated. At the hearing, the circuit court heard testimony from Cherie Taylor, the testing psychologist, who reported that Martha has a second-grade reading level, which required testing using taped versions, and took several months longer than normal. Ms. Taylor reported that Martha's total intelligence IQ was fifty, and that Martha had limited insight regarding appropriate behaviors and boundaries for children. Further

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[5](...continued)
encephalopathy, developmental coordination disorder, low IQ, adjustment disorder, and attachment disorder.

testimony was elicited from Melanie Thompson, who taught parenting and life skills to Martha. Ms. Thompson reported that she had been working with Martha since February 2007, and that the mother's life skills had improved. However, it was testified to that the mother was not able to assimilate her parenting skills. While Martha was able to mimic specific behaviors, she was not able to adapt those behaviors to other situations. Moreover, Ms. Thompson reported that Martha's parenting skills would be consistent for a couple of weeks, then would revert back to her old skill set. The circuit court also heard testimony that the mother had difficulty controlling Maranda during the supervised visits.

During this hearing, CPS testified that Martha submitted a doctor's note suggesting that someone needed to stay with Martha in case of a medical emergency. Martha asked CPS if Maranda's father, Leonard, could be the one to stay with her. The CPS worker opined that this question illustrated the mother's limited insight into the seriousness of the father's sexual abuse of Maranda, and endangered Maranda. The CPS worker ultimately stated that Martha was unable to make consistent improvement to properly care for Maranda. Gail Murano, the caseworker who supervised the visits between Maranda and her mother, also provided testimony. Ms. Murano testified that Martha was unable to be assertive or discipline Maranda during the visits, despite Ms. Murano's attempts to work with Martha on these skills. Ms. Murano further testified that Maranda plays more of a mother role than Martha does, and that Martha was unable to generalize or apply skills from one situation to another. Ms. Murano also stated that the type of long-term services needed to permit safe

reunification would be services provided to Martha in the home on a constant basis, twenty-four hours a day, seven days per week. Ms. Murano testified that such services were not available. Martha also testified at this hearing. She stated that Maranda has no conditions or limitations that need to be addressed by a doctor. She also stated that Maranda should not be around her father because he was still drinking, and she did not address or recognize the sexual abuse allegations. DHHR argued that Martha clearly is unable to appreciate or recognize the special needs of Maranda, and would be unable to protect Maranda from sexual abuse because she refused to acknowledge it.

As a result of this testimony and by order entered April 16, 2008, the circuit court found by

> clear and convincing evidence that the respondent mother has attempted to follow the Family Case Plan, but she has limitations, and such limitations will not improve to a point where she could care for the infant child, and the Court concludes that basically the respondent mother would need somebody present in the home to actually fulfill the role of the parent for this child.

Accordingly, the circuit court found that "a dispositional improvement period will not provide any added benefit that has not been realized over the past fourteen (14) months." The order by the circuit court went on to find "no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future, and it is necessary for the welfare of the infant child to terminate the parental, custodial, and guardianship rights of the respondent mother." Thus, the circuit court terminated the mother's parental rights to

Maranda and denied a dispositional improvement period, but directed that post termination visitation should continue.[6] From these rulings, the mother, Martha, appeals to this Court regarding the termination of her parental rights and the denial of a dispositional improvement period.

II.

STANDARD OF REVIEW

We previously have explained that, in the realm of an abuse and neglect case,

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the

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[6]While a review of the evidence leads this Court to affirm the disposition made by the circuit court, we are troubled by the lower court's order and its lack of statutorily-required information. W. Va. Code § 49-6-5 (2006) (Supp. 2008) sets forth specific findings that an order terminating parental rights shall contain. *See* Syl. pt. 4, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001) ("Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion, and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an allegedly neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate."). We have previously allowed an inadequate order terminating parental rights to stand when this Court was convinced, upon a review of the record, that the lower court reached the conclusions required by W. Va. Code § 49-6-5(a)(6) before terminating parental rights. *See In re Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999). In the present case, while the order is deficient in regards to the statutorily-required findings, this Court is able to affirm the lower court's rulings based on the record. However, the lower court is henceforth directed to comply with the statutory mandates.

> circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Mindful of these standards, we proceed to consider the parties' arguments.

III.

DISCUSSION

Maranda's mother, Martha, advances two arguments on appeal. She argues that the circuit court erred in denying her motion for a dispositional improvement period and, further, that the circuit court erred in terminating her parental rights. The DHHR responds that the decisions by the circuit court were correct, and asserts that a thorough effort to provide services to this mother was maintained for fourteen months, without benefit. The DHHR continues its argument by alleging that the mother cannot adequately care for her child, even with intensive long-term assistance. The guardian ad litem (hereinafter "guardian") agrees with the circuit court's determinations based on the mother's psychological and emotional limitations. The guardian contends that the evidence shows the

mother would need someone in the home to fulfill the parental role and that a dispositional improvement period would not provide any benefit not already realized during the fourteen months of services previously offered.

This Court has previously explained that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996). Further guidance is provided as follows:

> "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). Syllabus point 4, *In re Jonathan P.*,182 W. Va. 302, 387 S.E.2d 537 (1989)." Syllabus Point 1, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 7, *In re Katie S.*, *id.* Further, "'courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980)." Syl. pt. 7, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). While recognizing the substantial rights of Martha, as the natural mother of Maranda, to the custody of her child, this Court must elevate the health and welfare of Maranda above the parental rights of Martha.

In the present case before this Court, the lower court found "no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future, and it is necessary for the welfare of the infant child to terminate the parental, custodial, and guardianship rights of the respondent mother." The circuit court's determination was based on the mother's "limitations, and such limitations will not improve to a point where she could care for the infant child[.]" A similar issue regarding parental intellectual capacity was addressed by this Court in the case of *In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999), which states as follows:

> Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement.

Syl. pt. 4, *id.*

The parties in the current appeal before this Court agree that *Billy Joe M.* is the controlling case; however, the parties differ as to their interpretations of what constitutes the type of services that would comply with the directives set forth in *Billy Joe M.* Martha argues that, pursuant to *Billy Joe M.*, intensive, in-home services are to be provided before her parental rights can be terminated based on her low intellectual ability. Martha avers that

the DHHR personnel only provided the services that they normally provide. She contends that she is entitled to long-term in-house services of a more permanent nature.[7] Thus, Martha urges this Court to adopt a standard of providing long-term in-home services for her so that she can be reunified with Maranda. As alleged by the guardian and the DHHR, any further "services" for this mother that might result in a safe reunification with her child would require a surrogate parent to be in the home twenty-four hours per day. The DHHR and the guardian both propound that such services are impossible to provide and, further, that *Billy Joe M.* does not require such intensive services. We agree with the position set forth by the guardian and the DHHR.

Billy Joe M. does not require in-home services such as the type argued by Martha. When a parent's intellectual incapacity is a factor in the possible termination of parental rights, *Billy Joe M.* requires that "termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance." Syl. pt. 4, *in part, Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173. Significantly, the case of *Billy Joe M.* involved only allegations of child neglect. The case currently before this Court for consideration involves

[7]During oral argument before this Court , counsel for the mother argued that long-term services might make a difference in her case and provide for a safe reunification with her child. However, while counsel asserted that the mother was entitled to long-term in-home services, he was unable to explain the type of additional services that he sought for his client.

both neglect and sexual abuse. *Billy Joe M.* anticipated such a case and cautioned that "[w]here the charge is abuse as opposed to neglect, the obligation to provide remedial services is far less substantial." *Id.*, 206 W. Va. at 6 n.12, 521 S.E.2d at 178 n.12. The evidence presented to the circuit court alleged that Maranda was sexually abused by her father, and possibly by other male family members. The testimony also indicated that the mother was either present, or in the next room watching television, during these acts. Importantly, the mother's own testimony showed her inability to realize the impact of these allegations, and her request to allow the father back into the home for her own support in case of a medical emergency illustrated her inability to appreciate the gravity of the situation and to protect Maranda from a risk of continued sexual abuse.

The circuit court also heard testimony from the testing psychologist, the guardian, and social service providers to the effect that Martha did not have the ability to retain the skills that were taught to her and, further, did not have the ability to generalize any learned skills and apply them to similar situations. She was only able to mimic skills and apply them in the very narrow context of how she learned them. Such services were offered for fourteen months, without benefit. Thus, the service providers opined that the only way to safely reunite Martha and Maranda would be to place a service provider in the home on a permanent, round the clock, basis. Such services are neither required by *Billy Joe M.* nor would further services benefit a permanent placement finding for Maranda. As acknowledged by *Billy Joe M.*, "the determination of whether the parents can function with

such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement." Syl. pt. 4, in part, *Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173. This Court agrees that the services contemplated under *Billy Joe M.* were provided. Unfortunately, despite her sincere attempts, the mother was not able to realize the benefit of these services. Martha had been granted several post adjudicatory improvement periods and received social services for a period of fourteen months. Requiring more services and granting a dispositional improvement period would not only create possible danger to the child, Maranda, but would also serve to thwart a permanent placement for Maranda. Therefore, we affirm the circuit court's termination of Martha's parental rights and further find that the denial of her request for a dispositional improvement period was appropriate.

Finally, we are reminded that "[c]hild abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Further evidencing the priority placed on cases involving abused and neglected children, this Court has also stated that "matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. pt. 5, in part, *id.* Prompt resolution in such cases attempts to protect children from the turmoil associated

with the lack of stability in their surroundings and in their caretakers. *See* Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians.").

The record reveals that Maranda's permanency plan was adoption. Maranda was placed in a specialized adoptive home while her mother received social services. The original plan was for Maranda to be adopted by this family in the event reunification with her mother was found to be impossible. However, during oral argument before this Court, the guardian revealed that Maranda had been removed from the adoptive placement and is currently in specialized foster care, with the plan of addressing adoption after the end of the school year. While it appears that concurrent planning did occur, wherein a permanent placement for Maranda was simultaneously explored in the event reunification proved unsuccessful, the original plan was not able to be brought to fruition. Thus, we urge the fulfillment of the permanency plan to be implemented in accordance with this Court's directives set forth in our prior case law.

As a final note, in the case before the lower court, the circuit court terminated the mother's parental rights, but directed that the mother's visitation with Maranda should continue. *See* Syl. pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995) ("When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing

parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest."). At this point in time, the parties agree that post termination visitation between Maranda and Martha is in the child's best interests. This Court agrees that visitation between the biological mother and child should continue; however, we are mindful that such visitation should not interfere with the need for stability and a permanent placement for the child in this case, should such become an issue.

IV.

CONCLUSION

For the foregoing reasons, we affirm the rulings made by the circuit court in its April 16, 2008, order, terminating the mother's parental rights and denying her motion for a dispositional improvement period.

Affirmed.

201 W. Va. 265, 496 S.E.2d 215

Supreme Court Of Appeals Of West Virginia

IN RE: MARK M., III

No. 24154

Submitted: September 10, 1997
Filed: October 28, 1997

SYLLABUS BY THE COURT

1. " ' "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).' *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996)." Syl. Pt. 1, *In the Interest of Diva P.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 23928, July 11, 1997).

2. "The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in W.Va.Code, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in W.Va.Code, 49-6-5(a)." Syl. Pt. 4, *In the Interest of S.C.*, 191 W.Va. 184, 444 S.E.2d 62 (1994).

3. "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

4. "Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied." Syl. Pt. 4, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

5. "There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process." Syl. Pt. 3, *State ex rel. Amy M. v. Kaufman*,196 W.Va. 251, 470 S.E.2d 205 (1996).

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Per Curiam: See footnote 1

This appeal arises from a final order issued under the civil abuse and neglect statutes by the Circuit Court of Berkeley County, which order gave custody of the appellant, Mark M., III, (hereinafter Mark M.) to his father the appellee, Mark M., II (hereinafter Mark Sr.). The guardian ad litem for Mark M. argues on appeal that it was error for the circuit court to grant custody of the child to Mark Sr., without a permanency plan being submitted to and approved by the court. Additionally, the guardian ad litem asserts error due to the circuit court's failure to grant the guardian ad litem's motion for a continuance based upon information obtained only a few days before the scheduled dispositional hearing. We agree.

I.

This case was initiated by a civil neglect and abuse petition filed on January 30, 1996, against the child's mother, appellee Elizabeth M. See footnote 2The petition alleged that the child was abused, as a result of being born with traces of cocaine in his blood. At an adjudication hearing held on August 14, 1996, it was determined that the child had been abused due to his mother's use of cocaine while she was pregnant. A dispositional hearing was held on September 20, 1996. At the dispositional hearing the circuit court terminated the parental rights of the mother to the child. Additionally, the circuit court ordered the child be returned to his

father, Mark Sr. The guardian ad litem objected to the child being released without a permanency plan being formulated and approved by the court. The circuit court ruled that there was no need for a permanency plan. The guardian ad litem contends the latter ruling was error.

Additionally, the guardian ad litem argues that three days before the dispositional hearing, the Department of Health and Human Resources (DHHR) abruptly changed its position regarding placement of Mark M. without consultation with or notice to the guardian ad litem. Given the seriousness of the newly-acquired information regarding the father, the father's unwillingness to cooperate and the lack of communication between the DHHR and the guardian ad litem, the guardian ad litem filed motions: (a) requesting the court continue the dispositional phase until an investigation was made; (b) requesting the court's assistance in obtaining information from the father; and (c) requesting the court to order the DHHR to conduct an investigation into the newly acquired information. The circuit court denied the guardian ad litem's motions. The guardian ad litem asserts error. We agree.

II.

The standard of review appropriate here is the clearly erroneous standard. Syl. Pt. 1, *In the Interest of Diva P.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 23928, July 11, 1997). It is mandatory under W.Va. Code § 49-6-5(a) (1996) that a child's case plan, which must include a permanency plan, be submitted to and approved by a circuit court whenever a child is adjudged abused or neglected. *See* Syl. Pt. 4, *In the Interest of S.C.*, 191 W.Va. 184, 444 S.E.2d 62 (1994). Therefore, in the instant proceeding it was reversible error for the circuit court to release the child without a child's case plan being submitted to and approved by the court. On remand the circuit court shall obtain a child's case plan in accordance with W.Va. Code § 49-6-5(a) and *In the Interest of S.C.*

As to the denial of the motion to continue, this Court has long held that "[a] motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979). In syllabus point 4 of *Bush* we held that "[w]hether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied. Our holdings in *Bush* must be reconciled with our decision in syllabus point 3 of *State ex rel. Amy M. v. Kaufman*,196 W.Va. 251, 470 S.E.2d 205 (1996) wherein we held:

> There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their

> clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the *circuit court may not impose unreasonable limitations upon the function of guardians ad litem* in representing their clients in accord with the traditions of the adversarial fact-finding process. (Emphasis added.)

The circuit court's refusal to continue the matter precluded the guardian ad litem from fulfilling his obligations to properly represent the best interests of his client, Mark M. Allowing the motions would have had no impact on the rights of the father. Moreover, granting the motions would have insured that, in fact, the guardian ad litem's report and recommendation on disposition contained all pertinent information. We find that the circuit court abused its discretion in denying the guardian ad litem's motion for continuance.

We therefore reverse and remand this case with directions that the circuit court obtain a child's case plan in accordance with W.Va. Code § 49-6-5(a) and *In the Interest of S.C.* and schedule a hearing during which the guardian ad litem can present his position regarding disposition of the case.

Reversed and Remanded.

Footnote: 1 *We point out that a per curiam opinion is not legal precedent. See Lieving v. Hadley, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n 4. (1992) ("Per curiam opinions ... are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta.... Other courts, such as many of the United States Circuit Courts of Appeals, have gone to non-published (not-to-be-cited) opinions to deal with similar cases. We do not have such a specific practice, but instead use published per curiam opinions. However, if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion.").*

Footnote: 2 *The child's father, Mark Sr., was named in the petition. No allegations of abuse or neglect were made against him.*

231 W. Va. 534, 745 S.E.2d 572

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

FILED
June 19, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 12-0957

IN RE: MARLEY M.

Appeal from the Circuit Court of Morgan County
The Honorable Andrew N. Frye, Jr., Judge
Civil Action No. 12-A-1

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: March 26, 2013
Filed: June 19, 2013

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CHIEF JUSTICE BENJAMIN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49–6–2 and 49–6–5." *In re T.W.*, 230 W.Va. 172, 737 S.E.2d 69 (2012).

3. "Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability." Syl. pt. 2, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 485 S.E.2d 865 (1996).

4. Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

5. A parent whose rights have been terminated pursuant to an abuse and neglect petition may request post-termination visitation. Such request should be brought by written motion, properly noticed for hearing, whereupon the court should hear evidence and arguments of counsel in order to consider the factors established in Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), except in the event that the court concludes the nature of the underlying circumstances renders further evidence on the issue manifestly unnecessary.

BENJAMIN, Chief Justice:

Morgan Y.[1], appeals the July 10, 2012, order of the Circuit Court of Morgan County terminating her parental rights to her daughter, Marley M., born May 5, 2010. Morgan Y. was alleged to have intentionally abused two unrelated, non-household member children, who were alleged to have been left in her care, which allegations formed the basis of the Department of Health and Human Resources' [hereinafter "DHHR"] petition. At the outset of the adjudication hearing, Morgan Y. voluntarily relinquished her parental rights to Marley in lieu of proceeding with the adjudication hearing, which relinquishment was accepted by the circuit court. Morgan Y. then moved for post-termination visitation, which request was immediately denied by the circuit court without receiving evidence pertaining to such request.

Upon careful review of the briefs, the appendix record, the arguments of the parties, and the applicable legal authority, we find that the circuit court erred in failing to enter an order of adjudication and in failing to conduct a hearing and receive evidence on the issue of post-termination visitation. Therefore, we reverse the circuit court and remand this case for further proceedings, as appropriate, consistent with this opinion.

---

[1] We identify the last names of the parties and family members in this case by their initials only, following our practice of protecting the identity of juveniles in sensitive cases. See *State ex rel. West Virginia Dept. of Human Services v. Cheryl M.*, 177 W. Va. 688, 689, n. 1, 356 S.E.2d 181, 182 n. 1 (1987).

I. FACTS AND PROCEDURAL HISTORY

This case arises from an abuse and neglect case filed in January 2012, alleging that Marley M. was an abused and neglected child. The abuse and neglect petition did not allege wrongdoing on the part of Marley M.'s father, Derek M., but did allege that harm befell two other children who each had been left temporarily and on separate occasions in the care of Morgan Y., Marley M.'s mother. The affected children were not Morgan Y.'s children, but were her friends' children.[2]

The petition alleged that the first incident of abuse involved six-week-old Kylie R. who was left in the care of Morgan Y. on October 14, 2011. Morgan Y. told Kylie R.'s mother that the baby had stopped breathing while in her care, and that Morgan Y. had cleared an obstruction from the child's throat. During the course of subsequent hospital treatment, it was determined that Kylie R. had suffered three non-accidental broken bones in her left leg.

The petition further alleged that a second incident of abuse occurred on December 29, 2011, involving another child, Blake P., who was left in Morgan Y.'s care while Blake P.'s mother went outside to talk on the telephone. While in the care of Morgan Y., Blake P. suffered a spiral fracture to the femur.

[2] Additional parties to this proceeding are Tim Y. and Mary Y., Marley M.'s maternal grandparents, who intervened in this proceeding.

Morgan Y. offered explanations for each child's injury and denied any wrongdoing. She was arrested on January 20, 2012, for child abuse causing injury to Blake P.[3]

The abuse and neglect petition filed against Morgan Y. did not contain any allegations of direct harm caused to Marley M. by her mother; instead, the petition and amended petition alleged that the other children left in the care of the petitioner, Kylie R. and Blake P., were harmed by Morgan Y. while in her care. The amended petition further alleged that Marley M. was at risk for abuse and neglect because her mother was a drug abuser and prescription drug addict. Morgan Y. denied the allegations and moved to dismiss the amended abuse and neglect petition.

At the adjudicatory hearing in June of 2012, Morgan Y. argued that the allegations in the petition were insufficient. Morgan Y. posited that there were no allegations of harm or threatened harm specifically regarding Marley M., and as such, the petition should be dismissed. The basis of Morgan Y.'s argument was the fact that the injured children were not related to Marley M. and were never members of Marley M.'s household. She argued that Marley M. was in good health and appeared to have been

[3] The petitioner was later indicted by the Jefferson County grand jury. That indictment was dismissed during the pendency of this appeal. At oral argument the parties advised the Court that the petitioner had again been indicted on these charges and that she awaits trial.

well cared for prior to the filing of the petition. Furthermore, she argued that even if the allegations of harm to the other children were true, Marley M. was not at risk because the children were not her siblings or household members, both statutory requirements for any harm to these children to be considered a risk of harm to Marley M.[4]

The circuit court denied Morgan Y.'s motion to dismiss. After announcing this ruling, the circuit court proceeded forward with the hearing and directed the Department of Health and Human Resources ("Department") to call its first witness. Thereupon, Morgan Y., through her counsel, announced that she wished to voluntarily relinquish her parental rights to Marley M. Specifically, counsel stated as follows:

> THE COURT: Very good. All right. We're back on the record in the Morgan County Circuit Court in M[.], it's 12-JA-1. I understand you've got the issues resolved.
>
> MR. PREZIOSO: Yes, Judge, I have spoken to my client. Of course, we really appreciate the Court's letting us argue these motions. They are interesting issues as Mr. Colvin pointed out and what we've done is I've been talking to my client since day one since she came in here and I've reviewed all the petitions with her and we would like to tender to the Court a relinquishment of all parental rights to the child to the Court and I don't think we're going to have objection from the guardian ad litem. I don't think so or we're going to have objection from respondent, Derek M[.], or from the intervening grandparents. I'm not sure we're going to have a strong objection from the department but for the Court's consideration we would tender that to the Court.
>
> THE COURT: I'll hear the objections.

[4] Derek M., Marley M.'s father, and Tim Y. and Mary Y., Marley M.'s maternal grandparents, joined in this motion to dismiss.

MR. COLVIN: I would have no objection to that, your honor. I think that's in the best interest of my client, Marley. I don't think there's any question about that. I think she's going to be fully protected. I think she's safe and to provide for her safety in the future so I agree with the relinquishment.

MR. PREZIOSO: And I can review the terms with my client.

MS. MCLAUGHLIN: The department does object to the relinquishment without an adjudication. I think the department's position is that it's just best to have an adjudication where there is grounds for the adjudication therefore they would object to the relinquishment short of the adjudication.

THE COURT: The Court finds that the surrender of parental rights is in the best interest of the infant child and Morgan Y[.] therefore the Court will permit the voluntary relinquishment. Exceptions are saved. You may go through the colloquy.

MR. PREZIOSO: I would like to, Judge, just to make sure.

THE COURT: Instead of me.

MR. PREZIOSO: Whatever you prefer, Judge.

THE COURT: No, you go ahead you're right there.

BY MR. PREZIOSO:

Q. All right, Ms. Y[.] would you state your name for the record.

A. Morgan Y[.]

Q. Ms. Y[.], we had a conference in our office yesterday where we drafted up a relinquishment of parental rights and you've had time to review this, correct?

A. Yes.

Q. Any questions you'd have about it about what we drafted up here?

A. No.

Q. You do understand that I think that it does say that the child's going to remain in the custody of the department but actually the child's going to remain in the custody of respondent Derek M[.], correct?

A. Yes.

Q. You understand that we're waiving a disposition and adjudicatory hearing in this matter and you're going to voluntarily relinquish your parental rights to Marley M[.], you understand that?

A. Yes.

Q. And paragraph two which is probably the most important that you understand this is going to result in the termination of your parental rights to Marley M[.] Do you understand that, Morgan?

A. Yes.

Q. You understand that as a consequence of your termination you have no right to custody or visitation. You have no right to participate and determine the care, custody, control, education, training, raising or rearing of the infant child named herein, do you understand that?

A. Yes.

Q. And you are fully understanding you're relinquishing all parental rights and you're waiving your right to a dispositional hearing and that such hearing would not be conducted, you understand that?

A. Yes.

Q. You understand that there are other less drastic alternatives to termination. For instance, we're here today to have an adjudicatory hearing. I filed a motion for a preadjudicatory improvement period but you understand if you went through that adjudicatory hearing that there are possibilities that even if you were found to have abused and neglected you could have an improvement period. You understand that?

A. Yes.

Q. You also understand that if we go forward and there's a disposition hearing you could also be granted an improvement [period]. Do you understand that?

A. Yes.

Q. But by entering this relinquishment you're giving up all rights to your adjudicatory hearing, your disposition hearing, and your right to have the Court put you in an improvement period, you understand that?

A. Yes.

Q. You have to assume that this relinquishment of parental rights is final. This is the final disposition of the custody of the infant in this case as it relates to you and - - well I think I have some superfluous language here about consent to adoption which I don't think is going to be an issue obviously because she's with Derek - - but on down the road if for instance an abuse and neglect proceeding were filed against Derek and he lost custody that if the DHHR were to come back they could adopt this child to someone else. Do you understand that?

A. Yes.

Q. And you understand that you have an attorney and I'm here with you today. Is there anything you feel like we haven't gone over?

A. No.

Q. Do you want to take any time whatsoever to think about this or are you comfortable offering this relinquishment today in court?

A. I'm fine with it.

Q. You're not fine with it but you understand, yes?

A. Um-hum. (Indicating yes.)

Q. You understand that - -

MR. PREZIOSO: And judge, this is an issue maybe that I need to reconsider this. It kind of didn't pan out what I thought was going to happen but would I be entitled to appeal your decision if I relinquish I mean I can always ask but the motion to dismiss because I did put something in there that said we wouldn't be able to appeal the ruling based upon the relinquishment but I mean I may want to consider that if someone else appeals that ruling. I don't know, Judge, could I be given leave to address the issue on appeal or does this relinquishment encompass that?

THE COURT: Well the petitioner's objecting to the termination.

MR. PREZIOSO: Oh, okay.

THE COURT: So I don't think that you're going to be given the right to appeal when I've overruled their objection.

MR. PREZIOSO: I meant the issue on the motion to dismiss, Judge.

THE COURT: I understand that.

MR. PREZIOSO: I understand it too.

MS. MCLAUGHLIN: Yeah, I think once you relinquish I don't think she has standing anymore to file.

THE COURT: Once she relinquishes it's over. Right. As far as I'm concerned she has no standing whatsoever nor does she have any right to consideration for adoption.

MR. PREZIOSO: I understood that, Judge. I put that in there. It was kind of an interesting situation I got to argue the motion to dismiss before we did the relinquishment. I'm going over that with her though.

BY MR. PREZIOSO:

Q. And you understand you've read this relinquishment of parental rights and you full understand the document,. Is that correct?

A. Yes.

Q. And no one's coerced you or threatened you into signing this document and no promises or rewards have been offered in consideration of your signing, is that correct?

A. Yes.

Q. Now by executing this instant voluntary relinquishment you do not make any admissions to any of the allegations raised in the previously filed petition for abuse and neglected, do you understand that?

A. Yes.

Q. Accordingly, you are freely, knowingly and voluntarily relinquishing your parental rights to Marley M[.], you understand that?

A. Yes.

Q. Now, that's your signature on there I'm going to tender this to the Court, okay, and just for the record you understand that you can't be living in the home with the child. You understand that?

A. Yes.

Q. And you understand that means - - you know I'm not sure what the status of your relationship is with the respondent but you can't be living in that home. Do you understand that if the custodial parent gives you any time whatsoever it has to be supervised. You cannot be left alone with that child you understand that?

A. Yes.

Q. And you can I guess theoretically be subject to contempt proceedings for your violation or Mr. M[.] could have problems with keeping this child in his custody do you understand that?

A. Yes.

MR. PREZIOSO: I don't have anything further, Judge.

THE COURT: Anybody else have any questions? The Court has none.

MR. COLVIN: The only question I have I don't know is the respondent mother making any motions for future post-termination visitation? At this point there wouldn't be any visitation with the child absent a Court ruling or petitioning the same.

MR. PREZIOSO: We would make a motion for post-termination visitation. I was going to address that next. I'm not sure if there's going to be objection to that or not considering we have two supervisors in the form of Mr. and Mrs. Y[.] and we have Mr. M[.] who's certainly capable of making sure this child is not injured. I would make a motion for it to leave it at the caregiver's discretion.

THE COURT: I will leave it at the discretion of the DHHR.

MS. MCLAUGHLIN: I don't know that we can do that, Judge.

THE COURT: Don't you have custody?

MS. MCLAUGHLIN: No, the father has custody.

THE COURT: I thought the father had physical but legal was in DHHR.

MS. MCLAUGHLIN: No, unfortunately. The father has both physical and legal custody at this point in time. I think from the standpoint of the best interest of the child, you know, unfortunately there's no way to monitor whether or not the mom is back in the home or not. If you allow supervised visitation with the father essentially you're permitting her to do exactly what we've sought not to happen which is for her to be around this child.

THE COURT: No. I'm not going to allow that period. The order will so reflect.

MR. PREZIOSO: So they'll be no contact between - - -

THE COURT: None. None.

MR. COLVIN: We would seek that, your Honor, in a protective order to be reflected in the order.

MS. WEESE: And note the objection of the grandparents who have an approved home study and I believe would be appropriate supervisors. Currently the child does not live in the home but spends a substantial amount of her time there.

THE COURT: Objection's noted. Anything else?

MR. REDDING: Your Honor, if you would kindly note my objection as well on behalf of Mr. M[.]

THE COURT: Yes sir. Anything else? All through, all done? You're excused. Mr. Colvin, you will do the order please.

MR. COLVIN: Yes, sir.

II. STANDARD OF REVIEW

This Court has held, with regard to our review of abuse and neglect findings:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With these principles in mind, we turn to Morgan Y.s' assignments of error.

III. DISCUSSION

Morgan Y. asserts two assignments of error. First, she asserts that the circuit erred in denying her motion to dismiss the subject petition inasmuch as the allegations of abuse pertained to "stranger infants," i.e. infants to whom Marley M. is not related, nor with whom she resides in the same household. Morgan Y. further asserts that she had no caretaking responsibilities as pertains to the allegedly abused infants. Second, Morgan Y. asserts that the circuit court erred in failing to take evidence regarding post-termination visitation. We decline to address Morgan Y.'s first assignment of error, for reasons stated herein. We do find that the absence of an order of adjudication—whether obtained by full evidentiary hearing or on the basis of the relinquishment—was error. We find further that the circuit court erred in failing to conduct an evidentiary hearing on the issue of post-termination visitation. We will discuss each issue in turn.

A. Termination of Parental Rights

Morgan Y. argued below, and argues upon appeal, that Morgan Y.'s parental rights to Marley M. cannot be terminated on the basis of acts of abuse or neglect inflicted upon another child who does not reside in the same household with Marley M. We decline to resolve this issue, because the record below was limited by Morgan Y.'s voluntary relinquishment, which will be discussed more fully *infra*. The relinquishment

happened at the start of the Department's presentation of evidence on the issue of adjudication. Therefore, there was no evidence adduced at this proceeding on the allegations in the complaint. We cannot discern if the Department would have proceeded to the adjudication on the allegations of harm to other children who may have been in the custody of Morgan Y., or proceeded on the basis of Morgan Y.'s purported drug abuse that may have posed harm to Marley M. Therefore, this Court cannot make a determination of this appeal on this ground.

B. Voluntary Relinquishment

Morgan Y.'s voluntary relinquishment of her parental rights to Marley M. was accomplished prior to the issuance of our recent opinion in *In re T.W.*, 230 W.Va. 172, 737 S.E.2d 69 (2012). In *T.W.*, this Court clarified the statutory requirement that irrespective of a voluntary relinquishment of parental rights, the adjudication and disposition phases of an abuse and neglect proceeding must be conducted:

> In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49–6–2 and 49–6–5.

Syl. pt. 9, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012).

On appeal, Morgan Y. posits that regardless of her relinquishment of her parental rights, the court must take additional action, including completing the adjudicatory and dispositional phases of this proceeding. We agree that the courts cannot avoid the adjudicatory and dispositional phases of an abuse and neglect proceeding simply because a parent has voluntarily relinquished his or her rights. We reverse and remand this case because the circuit court did not conduct these hearings and make these determinations.

Nevertheless, we find it necessary to now address the practical and legal effect of a parent's voluntary relinquishment during a pending abuse and neglect proceeding in light of the *T.W.* holding. Seventeen years ago this Court undertook a careful analysis of the Fifth Amendment privilege against self-incrimination and the competing interests of the protection of children against abusive and neglectful parents. In *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), we addressed a situation where the accused parents of abused and neglected children refused not only to testify on their own behalf, but further failed to present any evidence in their own defense. We found that "[t]here is no basis in law for requiring that a court be disallowed from consideration of a parent's or guardian's choice to remain silent as evidence of civil culpability." *Id.* at 497. 485 S.E.2d at 873. As a result, we held that

> [b]ecause the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course

> of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

Syl. Pt. 2, *Doris S., supra.* We found support for this holding in the United States Supreme Court case of *Baxter v. Palmigiano*, 425 U.S. 308 (1976), which recognized,

> "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.'" *Baxter* at 318, 96 S.Ct. at 1558 (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)); s*ee* 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 5–2(B)(1) (3rd ed.1994).
> \

Id. at 498, 475 S.E.2d at 874. We further agreed with the *Baxter* Court's conclusion that "'in proper circumstances silence in the face of *accusation* is a relevant fact not barred by the Due Process Clause.'" *Doris S.*, 197 W. Va. at 498, 475 S.E.2d at 874 (emphasis added).[5] Moreover, as the Supreme Court further recognized in *Hale*, *supra*, "[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been

[5] *See Baxter* at 319, 96 S.Ct. 1558, citing *Adamson v. California*, 332 U.S. 46, (1947); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–154, (1923); *Raffel v. United States*, 271 U.S. 494, (1926); *Twining v. New Jersey*, 211 U.S. 78, (1908). *United States v. Hale*, 422 U.S. 171, 176–177 (1975); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963); *Grunewald v. United States*, 353 U.S. 391, 418–424, (1957).

natural under the circumstances to object to the assertion in question." *U. S. v. Hale*, 422 U.S. 171, 176, 95 S Ct. 2133 at 2136.[6]

We revisited the issue in the context of purported Fifth Amendment violations relative to a parent's assertion of a vigorous defense in an abuse and neglect proceeding in *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002). In *Daniel D.*, the Court addressed the argument that a parent is confronted with a "Hobson's choice" when compelled to participate in civil abuse and neglect proceedings when criminal charges are pending. The Court re-examined the analysis in *Doris S.* and, finding support in other jurisdictions, concluded that our holding in *Doris S.* was "soundly supported by the authorities and is consistent with the policy of this State which encourages prompt hearing of abuse and neglect cases and a paramount concern for the best interests of the children involved in such proceedings." *Daniel D.*, 211 W. Va. at 87, 562 S.E.2d at 155.

As such, we now hold that where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without

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[6] *See* 3A J. Wigmore, Evidence s 1042 (Chadbourn rev. 1970):

> Silence, omissions, or negative statements, as inconsistent: (1) Silence, etc., as constituting the impeaching statement. A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence.

further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

> As well-stated by the New Jersey Superior Court,
>
> There is no mandatory requirement that [a parent] take the stand and testify. That would be unconstitutional. The constraint upon respondent to give testimony arises here simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution[.]

New Jersey Division of Youth and Family Services v. S.S., 645 A.2d 1213 (1994). The *S.S.* court astutely observed that "[i]t may be a difficult decision for the respondents and their attorneys. [But] it is a question of procedure and legal options for the defense, not one of the constitutionality of incrimination[.]" *Id.* at 1217. Likewise, we do not find ourselves overly concerned that our rule will result in accused parents' refusal to voluntarily relinquish, where they otherwise may spare the State the time and resources necessary to adjudicate. The perceived risks attendant to proceeding to adjudication, which may otherwise compel a parent to voluntarily relinquish, remain. The benefits of avoiding the taking of evidence and asserting a defense by voluntarily relinquishing likewise remain. What is missing is simply the mechanism by which an accused parent may elude adjudication and avoid future Department petitions as to any other, or after-born, children. Moreover, the requirement of adjudication was previously established by this Court in *T.W.*; our decision today simply extends our rationale in *Doris S.* to preserve the utility of voluntary relinquishments during an abuse and neglect proceeding for both

an accused parent and the State. All options are still on the table for an accused parent; he or she now simply faces the import of his choices.

We find this rule simply a natural extension of and a marrying of the concepts and analysis contained in *Doris S.*, *Daniel D.*, *and T.W.* As this Court stated in *Daniel D.*, our new rule "simply confronts the accused parent with a choice": one may voluntarily relinquish their parental rights during the pendency of an abuse and neglect proceeding, resulting in an adjudication on the merits which may be used as the basis for a future petition by the Department or one may "offer such evidence as the accused may alone possess to refute the charge of abuse and neglect." *Id.* at 87, 562 S.E.2d at 155. Our new rule in no way creates an impediment to a parent's right to voluntarily relinquish, nor does it denigrate their Fifth Amendment privilege against self-incrimination. Rather, this rule simply reflects the "force of circumstances" that will necessarily result from the adjudication which now results from a voluntary relinquishment of parental rights while that parent is involved in an abuse and neglect proceeding.

Turning now to the facts of the instant case, we find that inasmuch as our new syllabus point 4 established herein establishes greater consequences arising from a voluntary relinquishment, Morgan Y. is entitled upon remand to revisit her decision to voluntarily relinquish her parental rights. In the event Morgan Y. chooses not to

voluntarily relinquish, the court should proceed with a full evidentiary hearing.[7] In the event Morgan Y. continues to desire to voluntarily relinquish her rights to Marley, the court must enter an order adjudicating her abusive and neglectful pursuant to W. Va. Code § 49-6-2.

C. Post-Termination Visitation

Petitioner next assigns as error the circuit court's refusal to grant her post-termination visitation. It is well-established that

> [w]hen parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Syl. pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995). Although this Court has not expressly so held, *dicta* in certain cases involving remands on the issue of post-termination visitation have customarily instructed the lower court to hold a hearing, receive evidence, and consider arguments of counsel. *See In re Katie S.*, 198 W.Va. 79,

[7] We observe that the Department's amended petition alleged not only that Marley M. was a victim of abuse and neglect because of the alleged abuse of Kyle R. and Blake P., but also because the petitioner was allegedly also a drug abuser and prescription drug addict.

479 S.E.2d 589 (1996) ("On remand, the circuit court should take evidence and hear arguments from all sides on the post-termination visitation[.]"); *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998) ("[T]he circuit court should have taken evidence, heard arguments, and made specific findings of fact on these issues.").

However, we note that in some cases, the facts and circumstances underlying the subject abuse and neglect adjudication may be of such an egregious or aggravated nature that further proceedings on the issue of continued contact with a parent whose rights have been terminated would be an unjustifiable waste of judicial resources. Inasmuch as post-termination visitation has been correctly identified as a right of the child, and not a right of the parent,[8] we find that the circuit court in the exercise of its *parens patriae* power is imbued with the discretion to determine if the totality of the circumstances of the underlying petition and/or evidence renders a hearing and the taking of further evidence unnecessary.

Accordingly, we now hold that a parent whose rights have been terminated pursuant to an abuse and neglect petition may request post-termination visitation. Such request should be brought by written motion, properly noticed for hearing, whereupon the court should hear evidence and arguments of counsel in order to consider the factors

[8] *See Christina L.*, 194 W. Va. at 455 n.9, 460 S.E.2d at 701, n.9.

established in Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), except in the event that the court concludes the nature of the underlying circumstances renders further evidence on the issue manifestly unnecessary. Here, this was not done. There was no properly noticed motion. Consequently, we also reverse the circuit court's order denying post-termination visitation. Should parental rights be terminated, Morgan Y. may seek post-termination by way of advancing evidence and arguments during a hearing properly noticed upon written motion. Finally, we reiterate our admonishment that post-termination visitation should not be entertained if it would "unreasonably interfere with [a child's] permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 260, 470 S.E.2d 205, 214 (1996).

V. CONCLUSION

For the foregoing reasons, the July 10, 2012, order of the Circuit Court of Morgan County is reversed, and we remand to the circuit court for further proceedings as consistent with this opinion.

Reversed and remanded with directions.

197 W. Va. 1, 475 S.E.2d 1

Supreme Court Of Appeals Of West Virginia

MARY ANN P., Plaintiff Below, Appellant

V.

WILLIAM R.P., JR., Defendant Below, Appellee

No. 22959
Submitted: January 16, 1996
Filed: February 29, 1996

SYLLABUS BY THE COURT

1. "In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-prong standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review." Syl. pt. 1, Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995).

2. "Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account[.]" Syl. pt. 1, in part, Henry v. Johnson, 192 W. Va. 82, 450 S.E.2d 779 (1994).

3. "Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court." Syl. pt. 3, Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

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Per Curiam:
Mary Ann P., See footnote 1 the plaintiff below and appellant herein, appeals an order of the Circuit Court of Kanawha County which granted William R.P., Jr., the defendant below and appellee herein, supervised visitation with the couple's two sons. The plaintiff argues the circuit court erred when it failed to find credible evidence of sexual abuse and failed to appropriately consider the evidence that the defendant physically and mentally abused her. After reviewing the record, we find that even if no sexual abuse occurred in this case, the circuit court erred when it failed to take into consideration the defendant's abusive behavior toward the plaintiff and the emotional impact that abuse had on their children. The weight of the evidence supports our conclusion to remand this case to the circuit court with directions to suspend supervised visitation until the defendant undergoes psychological treatment for his behavior. The circuit court also should consider whether the children and the defendant should undergo therapy together to work through their problems before resumption of visitation occurs.

I.
FACTS

The parties were married in March of 1985 and two sons were born of the marriage. William Raphael P. III (Billy) was born in May of 1985 and Mark Patrick P. was born in July of 1986. The record reflects that from the beginning the couple had a troubled marriage. The defendant was physically and mentally abusive to the plaintiff throughout their marriage. In an attempt to improve their relationship, the parties underwent marriage counseling with Chuck Rhodes, a family counselor and therapist. The parties were unable to work through their problems and they separated. The plaintiff filed for divorce in 1988.

The plaintiff received custody of the children as she was determined to be the primary caretaker. The numerous proceedings held before the family law master focused primarily on the defendant's visitation rights which are at issue in this appeal.

At the March 3, 1992, hearing before the family law master, the plaintiff detailed the physical and mental abuse that occurred during the marriage. She testified the defendant did not want her to have either of the boys and he urged her to have abortions both times she became pregnant. He showed little interest in the children when they were infants and openly expressed his disappointment that he had boys instead of girls. The defendant was not at home very much during the early part of the marriage because of his business trips. The plaintiff testified that when she was pregnant with Mark she learned the defendant was having an affair.

The plaintiff also testified the defendant had a violent temper and would yell and curse at her in front of the children. The defendant cursed at her so frequently that

even when the boys were just learning to talk they said explicit curse words. During arguments, the defendant punched and kicked the plaintiff. He threatened her with a knife. He choked her around the neck so hard she had to wear a scarf to hide the bruises. He drug her across the floor by her hair in front of the children. The plaintiff testified that when the children would witness this abuse they would scream and cry and try to hide. The defendant would hit and kick the children's toys and broke toys in front of the children in fits of rage. The plaintiff testified that "[t]he trauma and crying that these children have seen in their life is unreal."

During one argument, the defendant locked the plaintiff out of the house and kept the children inside. She testified she was afraid for the children's safety and put her fist through a window to enter the house. She severed three nerves in her arm and underwent surgery to correct the damage.

Billy and Mark have severe allergy problems and needed frequent medical treatments for ear infections, allergies, and colds when they were infants. The plaintiff testified the defendant was not sympathetic to the children's medical needs and, on certain occasions, blocked her attempts to get medical attention for the boys because he believed the plaintiff was overreacting to the children's symptoms. The defendant continued to smoke in front of the boys even though it caused them respiratory problems.

Despite the foregoing, the plaintiff maintains she encouraged the children's visitation with their father following the separation. However, she stated he exercised his visitation rights sporadically. In July of 1991, following an overnight visitation with his father, Billy informed his mother that the defendant touched him in an inappropriate manner. Billy told his mother that his father touched his penis, his father wanted Billy to touch his father's penis, and his father kissed his penis. The plaintiff believed her son and arranged for him to be counseled by Mr. Rhodes. Mr. Rhodes suggested the plaintiff take Billy to Pam Rockwell, a counselor with the sexual assault program at Family Services of Kanawha Valley.

After interviewing Billy, it was Ms. Rockwell's conclusion that Billy had been sexually abused by his father. Billy was uncomfortable talking about the incident. However, he did whisper in his mother's ear and asked her to tell Ms. Rockwell that when going to the bathroom his dad touched his penis and kissed his penis. Based upon this information, Ms. Rockwell recommended no contact whatsoever with the defendant.

Dr. John MacCallum, a psychiatrist, was first contacted by the defendant because the defendant was seeking evidence that he had done nothing inappropriate with his children. Dr. MacCallum explained he would not advocate the defendant's position, but he would interview him and render an opinion in the case. After

interviewing the defendant, it was Dr. MacCallum's opinion that no sexual abuse or inappropriate sexual contact occurred. He stated the contact Billy spoke of was innocent toilet training touching that was misinterpreted by Billy.

Dr. MacCallum was later asked by the family law master to interview the children and the plaintiff. Following those interviews, Dr. MacCallum affirmed his conclusion that no sexual abuse occurred. Billy told him that his father touched his penis once when they were going to the bathroom. Dr. MacCallum was highly critical of the interview techniques utilized by Ms. Rockwell as shown on a videotape she prepared of her interview. He claimed her questions were unduly suggestive. Based on these findings, Dr. MacCallum recommended the defendant should have no restrictions placed on his visitation rights.

During Dr. MacCallum's interview with the plaintiff, she spoke of several incidences of physical abuse she endured during the marriage. Furthermore, the plaintiff documented some rather deviant sexual behavior and/or interests of the defendant. Dr. MacCallum stated he had no reason to question the veracity of the plaintiff's statements. He also testified the boys clearly dislike their father. However, during Dr. MacCallum's deposition, he stated that for purposes of his evaluation he separated the issue of sexual abuse from questions of the general safety and well-being of the children under the circumstances of visitation.

The plaintiff testified Billy and Mark no longer want to have any contact with their father. It upsets them greatly when they have to visit with him. When the defendant comes to the house to visit, the boys frequently run and hide and have to be coaxed to come out to speak with their father. The plaintiff testified the visitations have had a profound effect on Billy. He has nightmares and acts out aggressively toward other children. Billy builds traps and barricades and frequently checks to see the doors and windows are locked because he is afraid the defendant will enter the house.

Several witnesses who accompanied the defendant on supervised visits testified regarding the boys' and the defendant's behavior. While the evidence is somewhat conflicting, it appears the boys do not want to visit their father and behave poorly in his presence. On more than one occasion, Billy demonstrated his anger at his father by hitting him.

The defendant testified and denied all sexual abuse charges. He also denied the sexual deviation allegations of the plaintiff. He denied some of the physical abuse charges and downplayed certain other charges of physical abuse and their significance in the marriage. He stated his visitations with the children are not as bad as the plaintiff contends. He testified that the plaintiff interferes with his relationship with his children. For instance, he claims the plaintiff suggests they go

to places that have video games so the boys will not have to interact with him. At one point during the hearings, he alleged the plaintiff was an unfit parent because she planted the idea of sexual abuse in Billy's mind and worked to destroy whatever relationship he had remaining with his sons. The defendant agreed to undergo therapy to work on his parenting skills, but he adamantly refused to undergo therapy in regard to sexual abuse because he denies the charges and feels the evidence vindicates him. See footnote 2

Christina Marie Arco, Ph.D., a psychologist at the Process Strategies Institute in Charleston, testified at a hearing held in October of 1994 that she provided therapy for the children. At a hearing held in January of 1995, Dr. Arco testified she was still seeing Billy for therapy. She stated that Billy's anger and aggressiveness are at very high levels. He has fears and anxieties about his father. Billy told Dr. Arco he wished his father were dead so he would not have to worry about him anymore. Dr. Arco testified that any forced visitation with his father would cause serious regression in Billy. She also stated that the negativity the children have about their father is much more motivated by fear, anxiety, and anger than by any negative comments that may have been made by the plaintiff.

Susan Barrows McQuade, the Director of Social Services at Family Services of Kanawha Valley and Chair of the Children's Justice Task Force in the State of West Virginia, stated she reviewed the evidence in this case. Ms. McQuade testified she believed visitation with their father would be detrimental to Billy and Mark and visitation should not be forced.

Jerry Sandoval, a child service worker with the Department of Health and Human Resources, investigated this matter and testified the plaintiff is a good parent and the children are well behaved in the presence of their mother. Based on her interviews with the plaintiff, Billy, and Mark and a review of the evidence, it was Ms. Sandoval's opinion that it is in the children's best interest not to see their father until they are old enough to decide for themselves when and where to see him.

After hearing the foregoing evidence, the family law master rendered his recommended order. He found:

> "It is clear that no sexual abuse occurred in this case, that plaintiff does not like the defendant, and justifiably so because of the history of physical violence in their marriage, but that there can be no further justification whatsoever of any restriction of defendant's right of visitation with his children."

The family law master was highly critical of Family Services of Kanawha Valley in general and Ms. Rockwell's interview techniques in particular. See footnote 3 The family law master stated that, due to the history of domestic violence in the case, for six months the defendant's visitation with the boys would be restricted to the presence of a third person. The family law master made no findings or conclusions as to the nature of the supervision.

The plaintiff filed exceptions to the family law master's recommended decision. The circuit court denied her exceptions but opened the case for further testimony regarding the nature of the defendant's visitation with the children following the plaintiff's motion to stay visitation. After hearing additional evidence on the issue of whether resumption of visitation would be harmful to the children, the circuit court ordered supervised visitation with the defendant until the boys attain an age where enforced visitation would be "meaningless." The circuit court found that "[r]egardless of whether an act of child abuse, such as alleged herein, actually occurred or not, these two children have been so indoctrinated to believe that it did occur that their attitude of distrust towards . . . [their father] renders exercise of visitation virtually impossible." The circuit court also found the record "only partially supports a conclusion that resumed visitation will result in serious psychiatric regression" and that no "high risk of suicide or withdrawal" should occur if visitation resumes.

II.
ABUSE ALLEGATIONS
A. Sexual Abuse

In finding that no sexual abuse occurred in this case, the family law master and the circuit court credited the report of Dr. MacCallum and discredited the reports of the other counselors, particularly Ms. Rockwell and Ms. MacQuade, as well as Billy's version of the events. This Court reviews that factual finding under the clearly erroneous standard and, if it is supported by substantial evidence, we will not overturn that finding even though we would be inclined to make a different finding or draw a contrary inference on the same set of facts. Stephen L.H. v. Sherry L.H., ___ W. Va. ___, ___ S.E.2d ___ (No. 22084 3/6/95). See also Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 577, 105 S. Ct. 1504, 1513, 84 L.Ed.2d 518, 530 (1985). In Stephen L.H., we explained some of the reasons behind the policy that a reviewing court should accord deference to the findings of fact made by a lower tribunal:

> "There are many critical aspects of an evidentiary hearing which cannot be reduced to writing and placed in a record, e.g., the demeanor of witnesses. These factors may affect the mind of a trier of fact in forming an opinion as to the weight of the evidence and the character and credibility of the witnesses. Thus, the importance of

> these factors should not be ignored by a reviewing court. Given a family law master's intimate familiarity with the proceedings, the family law master is in the best position to weigh evidence and assess credibility in making the ultimate ruling on disputed issues.
>
> "As we said in Board of Education v. Wirt, [192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994)]: 'Indeed, if the lower tribunal's conclusion is plausible when reviewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact.' (Citation omitted). This deference given to the lower tribunal in Wirt also is appropriate in the present case because the family law master 'is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match.' Weil v. Seltzer, 873 F.2d 1453, 1457 (D.C. Cir. 1989). (Citation omitted)." ___ W. Va. at ___, ___ S.E.2d at ___. (Slip op. at 26-27). (Footnote omitted).

In this case, the family law master's factual determination that no sexual abuse occurred in this case was adopted by the circuit court. Therefore, we are guided by the standard of review articulated in Syllabus Point 1 of Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264 (1995):

> "In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-prong standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review."

Applying this standard, we cannot find the factual determination that no sexual abuse occurred in this case is clearly erroneous. The family law master and the circuit court's findings are plausible when reviewing the evidence in its entirety. The defendant adamantly denied any sexual abuse occurred. Furthermore, the testimony of Dr. MacCallum supports this conclusion and he had the opportunity to interview all the parties involved, unlike Ms. Rockwell and Dr. Arco who only spoke with the plaintiff and the children.

Our decision to affirm this portion of the circuit court's order, however, is not determinative of the final disposition of this case. We agree with the plaintiff that the final order left unresolved significant issues that must be addressed before the

ultimate determination regarding the defendant's visitation rights is made. We will address these issues below.

B. Physical and Emotional Abuse See footnote 4

The family law master found the plaintiff suffered from physical and emotional abuse during the marriage, See footnote 5 but failed to address the negative consequences such abuse now has on the children's relationship to and visitation with their father. To be clear, we are not speaking of a child's general reluctance to visit with his or her noncustodial parent. What we are dealing with in this case is Mark's and Billy's documented intense fears and anxieties in visiting with their father. All the expert witnesses in this case, excluding Dr. MacCallum whose findings we will address below, recommended that no forced visitation should occur because it would have a disastrous effect on the boys. Dr. Arco testified that forced visitation, even if supervised, would cause serious regression in Billy's development.

A fair reading of the record reveals that the boys' feelings of animosity toward their father are in large part due to their father's treatment of their mother. During counseling sessions, the boys stated their father was "mean" because he did "awful things" to their mother. The plaintiff testified that during the marriage the boys would scream and cry when she and the defendant would fight. The defendant's physical abuse of the plaintiff was witnessed by the boys, and they were terrified of their father because of this abuse.

The evidence of the negative impact the physical abuse that occurred during the marriage had in regard to the children's well-being was not rebutted. Dr. MacCallum failed to render an opinion in regard to the physical and mental cruelty endured by the plaintiff and observed by the children. He clearly stated that he came to his ultimate conclusion to allow the defendant unsupervised visitation based solely on his finding that no sexual abuse occurred.

This Court joins with the majority of jurisdictions in finding that domestic violence evidence should be considered when determining parental fitness and child custody. See footnote 6 In Syllabus Point 1, in part, of Henry v. Johnson, 192 W. Va. 82, 450 S.E.2d 779 (1994), we stated:

> "Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account[.]"

See W. Va. Code, 48-2A-1(a)(2) (1992) (domestic violence statute states that children "may suffer deep and lasting emotional harm from victimization and from exposure to family violence"). Similarly, in the dissenting opinion in Patricia Ann S. v. James Daniel S., 190 W. Va. 6, 18, 435 S.E.2d 6, 18 (1993), Justice Workman recognized that "spousal abuse has a tremendous impact on children" regardless of whether the children were directly abused. See footnote 7

While custody was not at issue in this case, evidence of domestic violence is still relevant in deciding the visitation issue because it appears to be the root cause for why visitation has not been successful. As the expert witnesses testified, continued therapy with the children is necessary. Furthermore, it was recommended the defendant undergo therapy. Therefore, we find it necessary to remand this case to the circuit court to address the issue of physical and mental abuse that occurred during the marriage and the effect such abuse had on the children.

When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such counseling and may in its discretion determine how the cost of such counseling shall be paid. See Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992).

III.
VISITATION

Based on the foregoing, we agree with the plaintiff that supervised visitation should not immediately resume. "In Ledsome v. Ledsome, 171 W. Va. 602, 301 S.E.2d 475 (1983), this Court held that the right to visitation is determined by considering the child's welfare." Lufft v. Lufft, 188 W. Va. 339, 343, 424 S.E.2d 266, 270 (1992). The record is clear that forced visitation at this time would be detrimental to the children and futile on the defendant's behalf without professional intervention. In Mary D. v. Watt, 190 W. Va. at 348, 438 S.E.2d at 528, this Court held that a "family law master or circuit court may condition . . . supervised visitation upon the offending parent seeking treatment." On remand, the circuit court should address this issue. The circuit court should also consider whether it would be beneficial for the defendant and the children to attend counseling sessions together to help build a more positive relationship. "Clearly, counseling for the parties would materially promote the welfare of the children." Patricia Ann S., 190 W. Va. at 14, 435 S.E.2d at 14. The circuit court should also determine when supervised visitation should resume and set forth a specific visitation schedule that takes into account the best interest of the children and the defendant's interest in attaining a close relationship with his sons. See Weber v. Weber, 193 W. Va. 551, 457 S.E.2d 488 (1995); W. Va. Code, 48-2-15(b)(1993). On remand, the circuit court should determine if the parties can agree on a

counseling or therapy setting for these children and their father. If they cannot agree, then the circuit court should take any additional evidence needed and direct the participation in such counseling as a condition of the continuation of the plan for restoring visitation.

In Mary D., Chief Justice McHugh set forth guidelines to help provide children with a safe and secure atmosphere when supervised visitation is exercised. Although Mary D. dealt specifically with supervised visitation following a finding that sexual abuse occurred, we find it just as applicable in this case where the children harbor such strong feelings against their father, whatever the source of such emotional estrangement. It is in everyone's interest to see that supervised visitation goes as smoothly as possible. In Syllabus Point 3 of Mary D., we held:

> "Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court."

Due to the passage of time that has already occurred in this case, the circuit court, on remand, should ensure this matter receives an expedited hearing to resolve the issues raised in this opinion.

IV.
CONCLUSION

Based on the foregoing, the order of the Circuit Court of Kanawha County is affirmed, in part, reversed, in part, and this case is remanded for further proceedings consistent with this opinion.

Affirmed, in part, reversed, in part, and remanded.

Footnote: 1 We follow our traditional practice in cases which involve sensitive facts and do not use the last names of the parties so as not to stigmatize them or their children. See, e.g., Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987); West Virginia Dept. of Human Services v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985).

Footnote: 2 In addition to Dr. MacCallum's report finding no evidence of sexual abuse, the defendant points to the fact the State dismissed the charges of criminal sexual abuse against him.

Footnote: 3 The family law master stated:

"Further, the Family Law Master would remind Family Services that far from being one of the best interviewers around, Pam Rockwell has been thoroughly discredited as an interviewer and investigator in sexual abuse cases and has shown to be a perpetrator of abusive situations where children were forced to make statements later proven untrue. FSKV would do well to make sure that all its employees not only know that but avoid any such situation in the future."

Footnote: 4 The defendant declined to adequately address this issue in his brief before this Court. On the issue of domestic violence, he stated: "[I]n the case before this Court, the only people discussing Domestic Violence . . . [are the plaintiff and her mother] and the indoctrinated children, notwithstanding the fact that the record does not reflect any criminal action." However, we find the evidence of domestic violence certainly relevant as it goes to the children's fear and animosity toward the defendant. Indeed, we have even previously stated that domestic violence in the presence of children may constitute child abuse and that evidence of domestic violence is relevant to the issue of parental fitness. See generally Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992). Furthermore, the fact the plaintiff failed to file criminal charges for abuse against the defendant is of no consequence to the finding that such physical abuse occurred and had a dramatic impact on the children.

Footnote: 5 The family law master stated the "plaintiff does not like the defendant, and justifiably so because of the history of physical violence in their marriage."

Footnote: 6 In note 2 of Henry v. Johnson, 192 W. Va. 82, 86, 450 S.E.2d 779, 783 (1994), we found:

"By 1992, thirty-three states and the District of Columbia required Courts to consider domestic violence in determining custody and visitation. Developments in the Law: Legal Responses to Domestic Violence, 106 HARV.L.REV. 1597, 1603 (1993) (citing Barbara J. Hart, State Codes on Domestic Violence: Analysis, Commentary and Recommendations, 43 JUV. & FAM.CT.J., No. 4, 1992, at I, 29.)."

Footnote: 7 In Patricia Ann S., 190 W. Va. at 18, 435 S.E.2d at 18, Justice Workman quoted the following excerpt from L. Crites & D. Coker, What

Therapists See That Judges May Miss, *The Judges' Journal 9, 11-12 (Spring 1988):*

"'Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved one is acceptable. Children also fail to grasp the full range of negative consequences for the violent behavior and observe, instead, the short term reinforcements, namely compliance by the victim. Thus, they learn the use of coercive power and violence as a way to influence loved ones without being exposed to other more constructive alternatives.

"'In addition to the effect of the destructive modeling, children who grow up in violent homes experience damaging psychological effects. There is substantial documentation that the spouse abuser's violence causes a variety of psychological problems for children. Children raised in a home in which spouse abuse occurs experience the same fear as do battered children. . . .

* * *

"'Spouse abuse results not only in direct physical and psychological injuries to the children, but, of greatest long-term importance, it breeds a culture of violence in future generations.'" (Footnotes omitted).

Workman, Justice, concurring:

I concur with the ultimate conclusion of the majority. Furthermore, I endorse and commend Justice Cleckley for incorporating into the law an immensely important concept:

> When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such counseling and may in its discretion determine how the cost of such counseling shall be paid.

The majority makes clear that such counselling can be ordered as a condition of visitation. In fact, this concept is so important that it should have been a syllabus point. Circuit courts should be aware that they have this discretion, and should exercise it liberally in appropriate situations.

In addition to emphasizing this point, I write separately to disagree in one area and to amplify in another.

SEXUAL ABUSE

First, in reviewing the family law master's finding, which was adopted by the circuit court and upheld by this Court, that there was no sexual abuse in this case, I would look to Justice Cleckley's explanation of our standard of review in In the Interest of Tiffany Marie S., ___ W.Va. ___, 470 S.E.2d 177 (1996):

> A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id., Syl. Pt. 1, in part. Using that standard, I for one am left with the "definite and firm conviction" that sexual abuse did occur, and I believe the case should have been reversed as to that finding. The six-year-old confided to his mother that his father touched and kissed his penis, and asked the child to touch his. Dr. McCallum's explanation that this was innocent touching associated with toilet training is not credible. A report compiled by Duke University after examining the boys over the course of a few days notes that pediatric textbooks generally state that children typically need no assistance in urinating by age four. Further, I cannot imagine what part kissing the penis of a six-year-old boy would play in his toilet training.

In addition to this incident, both children made statements to therapists and counselors See footnote 1 that indicated a knowledge of sexual specifics beyond their tender years. Susan Barrows McQuade, a psychologist who had counseled the boys for over two years, noted in her report that statements such as "He did something with his tongue that felt both good and bad," "He said 'I love you' when he touched my pee-pee," and "It makes me feel scared," made it difficult to think that anything but child sexual abuse had occurred. Billy told at least two interviewers that his father touched his private area or "did awful things" and told him not to tell because they would get into trouble. Dr. Christina Arco, a therapist treating the children, testified that Billy presented particularly violent behavior directed toward his father, including building traps and barricades, and even planning to kill his father. Numerous witnesses testified to how frightened the boys were of their father and how they would hide or lock themselves in the car when he came to pick them up for visitation. One woman who supervised visitation testified that the boys displayed a tremendous amount of hostility to their father, several times attempting to punch him in the penis, and emphasized that this was serious hostility, not mere horseplay. This information about specific incidents of sexually inappropriate activity, together with the behavioral indicators

of sexual abuse noted by various counsellors and therapists, lead me to the conclusion that the circuit court's finding of no sexual abuse was clearly wrong.

The reason that such a finding is important in the long run is that it impacts quiet significantly on the next issue - - - supervised visitation.

SUPERVISED VISITATION

The opinion sets forth the important concept which we established in Mary D. that supervised visitation must be fashioned in a manner designed not only to actually protect the child, but also to make the child feel he is protected.

Where supervised visitation is ordered pursuant to W.Va. Code, 48-2-15(b)(1)[1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Syl. Pt. 3, Mary D. v. Watt, 190 W.Va. 341, 438 S.E.2d 521 (1992) (quoted in syllabus point 3 of the majority opinion). Furthermore, should the issue of supervision arise again in the future, the lower court should look to the standard established in Carter v. Carter:

> Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

___W.Va. ___, 470 S.E.2d 193 (1996). When, as in the case before us, there is credible evidence of sexual abuse, the risk of harm to the child weighs heavily in this balance, and courts should err on the side of caution if necessary to protect children at risk of possible abuse.

Footnote: 1 I cannot leave this concurring opinion without commenting on the fact that the family law master below cast aspersions on the qualifications of counsellor Pamela Rockwell. Similarly, Justice Neely in several concurring and dissenting opinions, cast aspersions on Ms. Rockwell's abilities, indeed characterizing sexual abuse of children as a crime of fashion subject to mass hysteria. See Wilt v. Buracker, 191 W.Va. 39, 55, 443 S.E.2d 196, 212 (1993) (Neely, J., concurring); State v. Delaney, 187 W.Va. 212, 218, 417 S.E.2d 909 (1992) (Neely, J., dissenting); State ex rel. Spaulding v. Watt, 188 W.Va. 124, 128, 423 S.E.2d 217, 221 (1992) (Neely, J., dissenting); State v. Walter, 188 W.Va. 129, 132, 423 S.E.2d 222, 225 (1992) (Neely, J., concurring). The family law master has a duty and a right to determine who he finds credible, and Justice Neely had that right as well. However, after having had the opportunity as a circuit court judge for seven years to hear Ms. Rockwell testify on numerous occasions, I want the law books to reflect that this opinion as to her qualifications in judicial quarters is not unanimous. I have found Ms. Rockwell to have demonstrated extensive knowledge and training in the area of child sexual abuse. Frequently, counsellors and therapists, though not possessing a degree in psychology or psychiatry may have specialized training or experience in child sexual abuse which may render them even more knowledgeable and competent in that area that psychiatrists.

190 W. Va. 341, 438 S.E.2d 521

Supreme Court Of Appeals Of West Virginia

MARY D., Petitioner

v.

HONORABLE CLARENCE WATT, JUDGE OF THE CIRCUIT COURT OF PUTNAM COUNTY, AND GEORGE D., Respondents

No. 20453

Submitted: January 14, 1992

Filed: May 29, 1992

SYLLABUS BY THE COURT

1. Because an allegation of sexual abuse of a child involved in a divorce proceeding is extraordinary, such allegation would constitute "good cause" or grounds for a more expeditious resolution by the circuit court as contemplated by W. Va. Code, 48A-4-1(i) [1991], and accordingly, custody and visitation matters relating thereto may be retained by the circuit court, or, if already referred to a family law master, such referral may be revoked.

2. Prior to ordering supervised visitation pursuant to W. Va. Code, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion.

3. Where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience.

The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Maureen Conley
Legal Aid Society of Charleston
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Attorney for the Petitioner

J. Stephen Max
Charleston, West Virginia
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McHugh, Chief Justice:
This original proceeding is before the Court upon a petition for a writ of prohibition by Mary D. See footnote 1 The respondents are Clarence Watt, Judge of the Circuit Court of Putnam County, and George D. The petitioner seeks to prohibit enforcement of the September 11, 1991 order of the circuit court, which, in effect, granted the respondent, George D., visitation with his and Mary D.'s children.

I

In October, 1989, the petitioner filed a complaint seeking a divorce from George D., based upon cruel and inhuman treatment and irreconcilable differences. See footnote 2 Three children were born to the parties: Sara, who, at the time of the filing of the petition in this Court, was age 12; Susan, age 9; and Jesse, age 6.

The children's pediatrician, Dr. Joan Phillips, discovered that the girls, Sara and Susan, had been sexually abused. Susan named George D. as the perpetrator of such abuse.

In July, 1990, George D. was indicted in the Circuit Court of Putnam County on eight counts, consisting of sexual abuse, sexual assault, and incest. Prior to the indictment, George D. was permitted visitation with the children.

Following trial on the criminal charges in April, 1991, the respondent was acquitted of all eight charges. See footnote 3 Accordingly, subsequent to his acquittal, George D. filed a petition with the family law master requesting visitation with the three children. The family law master granted George D.'s request in an ex parte order, but two days later, that order was reversed by the family law master. See footnote 4

The family law master then ordered that an evidentiary hearing be conducted regarding visitation.

In June, 1991, the petitioner filed a motion requesting that the circuit court appoint a guardian ad litem and transfer the hearing on the custody and visitation issues from the family law master to the circuit court. The circuit court appointed a guardian ad litem, but denied the petitioner's request to hear the custody and visitation issues. The appointed guardian ad litem is Rosalee Juba-Plumbley.

A notice was sent to the petitioner setting the date of the hearing for August 14, 1991. At that hearing, the petitioner requested a continuance, but her request was denied. The family law master heard the testimony of David Wilburn, a psychologist. Both Wilburn and the guardian ad litem, Rosalee Juba-Plumbley, recommended that the respondent, George D., be permitted supervised visitation.

On August 16, 1991, the family law master entered an order recommending supervised visitation and that the petitioner, the respondent, and the children should all undergo an independent psychiatric evaluation. See footnote 5

The petitioner filed a motion to stay the order in the circuit court. The circuit court heard the parties' arguments on the motion and recommended that further argument on the motion be scheduled for a later date, specifically, October 3, 1991. See footnote 6 The circuit court, by ore tenus order, refused to stay the family law master's order permitting visitation by George D.

Before the scheduled October 3, 1991 hearing in circuit court, specifically, on September 19, 1991, the petitioner filed this writ of prohibition in this Court, seeking to prohibit visitation by the respondent, George D. At the initial oral argument, which was held on October 2, 1991, petitioner's counsel represented that the children were to be admitted to the Pines Treatment Center in Portsmouth, Virginia, beginning October 10, 1991. Counsel for the petitioner then moved that this Court continue the matter until the treatment program could be completed.

This Court, in an order prepared on October 4, 1991, issued a stay for 75 days and reset submission of this case for January 14, 1992. See footnote 7

As of the submission of this case on January 14, 1992, this Court was made aware that the children were still at the Pines Treatment Center. See footnote 8

II

The petitioner primarily contends that under W. Va. Code, 48A-4-1(i) [1991], the circuit court was confronted with "good cause" for revoking referral of the custody/visitation matter to the family law master.

W. Va. Code, 48A-4-1(i) [1991] provides that a circuit court may retain jurisdiction over certain matters, including child custody and visitation for "good cause," or "if the matter will be more expeditiously and inexpensively heard by the circuit judge without substantially affecting the rights of the parties[.]"

In support of her contention, the petitioner cites the fact that the respondent, Judge Watt, who presided over the criminal trial of George D., had already heard extensive testimony from the children and experts that the children were sexually abused, and accordingly, could make a finding of abuse in the civil divorce case.

The respondent merely contends that there was no abuse on the part of the circuit court because the very purpose of the family law master system is to allow such proceedings to take place before it, and not the circuit court.

A

Before we address the petitioner's contention that the circuit court abused its discretion by not revoking referral of certain matters to the family law master, we must first dispose of a matter which is constantly raised by the petitioner.

Throughout her pleadings filed in this Court, the petitioner contends that the circuit court has ignored the needs of the children by refusing to follow the procedures outlined in W. Va. Code, 49-6-1, et seq. Those procedures pertain to the processing of civil cases involving child neglect and child abuse. See footnote 9

However, this is not a proceeding brought under chapter 49 of the West Virginia Code. W. Va. Code, 49-6-1 [1977] makes it very clear as to the procedures that are required for presenting a petition where it is alleged that a child is being abused or neglected. W. Va. Code, 49-6-1(a) [1977] provides, in part: "If the state department [of human services] or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides[.]" (emphasis supplied) Accordingly, the petition before this Court is not sufficient to proceed under chapter 49, and there is no authority for this Court, by its original jurisdiction power, to make a "finding" of sexual abuse by the children's father upon which the termination of his parental rights may be based. See footnote 10

B

With respect to the question of whether or not there was an abuse of discretion on the part of the circuit court in not deciding the custody/visitation matter and allowing the family law master to decide such, this Court does not have before it the record of the criminal trial so as to determine if there was enough evidence to believe that "good cause" existed for the circuit court to revoke referral of that

matter to the family law master. Therefore, the specific relief sought by the petitioner, that the circuit court abused its discretion in deciding the revocation issue, cannot be granted by this Court. However, the facts in this case raise troubling prospects which, if not properly addressed under the guidance of clearly set forth principles, may lead to serious problems for the welfare of children in this state.

As quoted previously, W. Va. Code, 48A-4-1 [1991] provides that a circuit court may retain jurisdiction over certain matters if there exists "good cause," or "if the matter will be more expeditiously and inexpensively heard by the circuit judge." This Court has recognized that "[i]t is clear that the powers possessed by a family law master are restricted to those conferred by statute." Segal v. Beard, 181 W. Va. 92, ___, 380 S.E.2d 444, 447 (1989). We believe that because an allegation of sexual abuse of a child involved in a divorce proceeding is extraordinary, such allegation would constitute "good cause" or grounds for a more expeditious resolution by the circuit court as contemplated by W. Va. Code, 48A-4-1(i) [1991], and accordingly, custody and visitation matters relating thereto may be retained by the circuit court, or, if already referred to a family law master, such referral may be revoked. See footnote 11

Permitting retention by the circuit court in such circumstances is especially appropriate due to the harm to a child caused by the delay of an appeal to the circuit court as well as by having to repeat the same testimony in more than one proceeding. The unfortunate realities of cases where a child is abused and the harm incurred by delays relating to the court system have recently been recognized by this Court. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

III

It has been established that "[s]exual abuse of a child by a parent or by others while the child is under the parent's care or control may result in termination or restriction of visitation rights." Child Custody & Visitation Law and Practice § 16.10[1] (J. McCahey gen. ed. 1991). On the other hand, some "courts have allowed visitation between a non-custodial parent and a child to continue even where there is evidence that the child has been sexually abused. Under such circumstances, courts often will continue to allow visitation, but will impose strict supervision." Id. (footnote omitted) "Generally, the decision as to whether visitation should be denied or restricted [under these circumstances] is exclusively that of the court." Id.

In Beckham v. O'Brien, 336 S.E.2d 375 (Ga. Ct. App. 1985), the Court of Appeals of Georgia reversed a lower court's ruling which found a mother in willful contempt for violating an order allowing visitation by the father. There, the father had been indicted for sexually molesting the parties' daughter. In reversing the lower court's order, the appeals court weighed the emotional and psychological aspects of the child's well being against the principle that the father had not been proven guilty in a criminal sense.

While we recognize that the father has not been convicted of molesting this child, we do not see this case as simply an angry mother pointing accusingly at her ex-husband in order to avoid his visitation rights. The father has been indicted by a grand jury. . . . For an indictment to be issued under this jurisdiction, the grand jury must be persuaded that there is probable cause to believe the party is guilty. . . .

> Upon reviewing the record and the transcript of the contempt hearing, we conclude that the trial court abused its discretion in ordering that the father be allowed to exercise visitation rights, albeit 'supervised visitation' rights, while the criminal charge is pending.
>
> 336 S.E.2d at 377 (emphasis in original).

We recognize that in this case, unlike Beckham, the father has already been tried on the charges of sexual abuse and acquitted. However, being found "not guilty" under the criminal standard of "beyond reasonable doubt" will not necessarily ease the emotional and psychological trauma, if any, suffered by the children if visitation, even if supervised, were to continue. Obviously, in a civil case, the standard would not be as stringent. Accordingly, this matter must be explored further by the circuit court.

This is not to imply that supervised visitation is not a reasonable course of action. Often, it is the most attractive option available. See Arnold v. Naughton, 486 A.2d 1204 (Ct. Spec. App.), cert. denied, 493 A.2d 349 (Md. 1985); Corwin v. Corwin, 366 N.W.2d 321 (Minn. Ct. App. 1985). On the other hand, it has been recognized that "[t]he only purpose served by supervision of visits is to allay anxiety. Such anxiety could be reduced with counseling of all parties so that visits could become unsupervised, flexible, and productive of the natural relationship that can exist between children and a noncustodial parent." In re Luke G., 498 A.2d 1054, 1059 (Conn. Super. Ct. 1985). In Luke G., there was no evidence that the children's father was a threat to their physical or emotional safety. Id. at 1059. In this case, that possibility exists as there may be such evidence. Obviously, the question of the propriety of supervised visitation would differ from case to case.

In Mallory v. Mallory, 539 A.2d 995 (Conn. 1988), the Supreme Court of Connecticut held that "the normal civil standard of proof, which is a fair preponderance of the evidence, is applicable in child custody hearings in which there are allegations that a parent has sexually abused his child, at least where that parent retains some visitation rights[.]" Id. at 998. In Mallory, the trial court had ordered that the father, against whom there was evidence that he had sexually abused his daughter, was permitted four hours of visitation per week under the supervision of the Superior Court's Family Relations Division. This portion of the trial court's order was affirmed by the Connecticut Supreme Court by upholding application of the preponderance of the evidence standard.

It has also been recognized that prior to even being considered for supervised visitation, a court may order that the sexually abusive parent enter a treatment program. See S.G.K. v. K.S.K., 374 N.W.2d 525 (Minn. Ct. App. 1985).

In D.L.M. v. L.E.M., 788 S.W.2d 753 (Mo. Ct. App. 1990), it was held that where the evidence demonstrated that the children manifested physical signs of sexual abuse by their father, then supervised visitation was proper under applicable statutory provisions. Similarly, in S.H. v. B.L.H., 572 A.2d 730 (Pa. Super. Ct. 1990), the court affirmed a trial court's ruling that evidence of sexual abuse by a father of his child warranted modification of a custody order to allow only supervised visitation.

The commonality of the cases discussed above is that they all involve a determination by the court or referee who presided over the divorce or family law issues as to whether the child had been sexually abused. We believe that in this case, a similar finding should be made in the family law proceeding prior to ordering supervised visitation if there is evidence that supports such a finding.

W. Va. Code, 48-2-15(b)(1) [1991] provides, in part:

> (b) Upon ordering the annulment of a marriage or a divorce or granting of decree of separate maintenance, the court may further order all or any part of the following relief:
>
> (1) The court may provide for the custody of minor children of the parties, subject to such rights of visitation, both in and out of the residence of the custodial parent or other person or persons having custody, as may be appropriate under the circumstances.
>
> (emphasis supplied)

We believe that this statutory provision contemplates that a court may order supervised visitation if there is evidence that one of the parents has sexually abused a child involved. See footnote 12 In finding that a child has been sexually abused and that supervised visitation is proper, the petitioner urges this Court to adopt a standard of "clear and convincing" proof as used in proceedings to terminate parental rights under W. Va. Code, 49-6-2 [1984].

In syllabus point 6 to In re Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973), this Court held: "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." (emphasis supplied) See Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 53, 399 S.E.2d 192, 196 (1990); syl. pt. 1, In re Adoption of Schoffstall, 179 W. Va. 350, 368 S.E.2d 720 (1988); Nancy Viola R. v. Randolph W., 177 W. Va. 710, 715, 356 S.E.2d 464, 469 (1987).

Although the petitioner contends that clear and convincing proof should be the standard in this context, we do not believe that the standard should be so stringent. Rather, because termination of parental rights is not involved, but only supervised visitation, we believe that credible evidence of such sexual abuse allegations is all that is necessary for a family law master or circuit court to order supervised visitation. Furthermore, the risk of harm of supervised visitation to the parent who allegedly committed the abuse should be weighed against the risk of harm of supervised visitation to the child.

Where a family law master or circuit court is confronted with a case where a previous criminal proceeding was held involving the question of whether one parent sexually abused a child, this issue must be addressed in the civil proceeding. In other words, the family law master and circuit court should not just accept the criminal verdict of acquittal as a basis for ordering visitation, even if it is supervised visitation. Rather, because the visitation matter stems from a civil divorce proceeding, the family law master and circuit court should approach it with a view toward resolving the best interests of the parties involved in the civil proceeding.

Accordingly, we hold that prior to ordering supervised visitation pursuant to W. Va. Code, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation to the parent who allegedly committed the sexual abuse

against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Cf. W. Va. Code, 49-6A-5 [1984] (local state department child protective service agency shall forward copy of report of child abuse and neglect to appropriate law enforcement agency, prosecuting attorney, coroner, or medical examiner). Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion. Such utilization will not only promote the efficient administration of justice, but it will also spare the child witness from having to testify to traumatic matters on more than one occasion. See footnote 13

However, where supervised visitation is permitted, it is of paramount importance that the child's best interests be served by not only what the court deems is in his or best interests, but also, that the child feels safe when such visitation is exercised by the noncustodial parent. Accordingly, the person who supervises such visitation must be one with whom the child is comfortable and feels safe. It is not enough that the person who is appointed to supervise visitation is in the best interests of the child from the court's standpoint, which would merely assure that no further abuse will occur during such visitation. Rather, the fears of the child must be allayed as well so that the child may be protected not only from further physical harm, but also further psychological harm. Therefore, we hold that where supervised visitation is ordered pursuant to W. Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

IV

In this case, there was no record developed on the question of whether, by credible evidence, the respondent, George D., sexually abused the children. Therefore, such a record must be developed. With respect to whether the circuit court should have revoked referral of the custody/visitation matter to the family law master, because this Court does not have before it the record of the proceedings of either the

criminal trial or the hearing on the custody/visitation issue, this matter must be reviewed further by the circuit court so that that court, consistent with this opinion, may determine whether good cause existed for it to retain jurisdiction over the custody/visitation matters, or if retaining jurisdiction over those matters would result in a more expeditious resolution. However, as enunciated herein, the circuit court may utilize the transcript from the criminal proceeding to determine whether credible evidence exists, which is especially appropriate in this case because the same circuit judge presided over both the criminal and civil proceedings. Moreover, with respect to whether there was an abuse of discretion in ordering all parties (including the children) to undergo psychiatric evaluations, this Court cannot conclude that error is present because the record is inadequate in this respect as well. This, too, is a matter for further review by the circuit court. See footnote 14

Therefore, the petitioner's writ of prohibition is granted as moulded.

Writ granted as moulded.

Footnote: 1 Consistent with our practice in cases involving sensitive matters, we use initials rather than full names. See In re Jonathan P., 182 W. Va. 302, ___ n. 1, 387 S.E.2d 537, 538 n. 1 (1989) (citing cases).

Footnote: 2 See W. Va. Code, 48-2-4(a)(4) & (10) [1981].

Footnote: 3 Due to an irregularity in the original indictment procedure, George D. was indicted again on the same eight charges in October, 1990. Consequently, the trial was delayed until April, 1991.

Footnote: 4 The family law master's reversal was based upon W. Va. Code, 48-2-13(e)(1) [1986], which requires a showing that immediate and irreparable injury will result if the ex parte relief is not granted. That section provides, in part:

(e) An ex parte order granting all or part of the relief provided for in this section may be granted without written or oral notice to the adverse party if:

(1) It appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or such party's attorney can be heard in opposition.

Footnote: 5 The family law master's order specified that the supervised visitation shall be conducted in a therapeutic setting and it also specified the psychologist, the location, and the frequency of such visitation.

Footnote: 6 *At the time of the petitioner's motion to stay, the circuit court was in the midst of a criminal trial.*

Footnote: 7 *On October 9, 1991, the respondent, George D., petitioned for a rehearing regarding the October 4, 1991 order. This Court denied that petition.*

On November 25, 1991, the respondent moved to modify the October 4, 1991 order, so as to allow him to communicate with the Pines Treatment Center at the Center's discretion and without the prior permission of the petitioner. This Court granted that relief.

Footnote: 8 *Following the January 14, 1992 submission of this case, this Court was notified by the petitioner herself that the children would be at Pines until February 19, 1992. On February 25, 1992, the petitioner, by letter, notified this Court that she and the children have moved to Florida. On March 30, 1992, the respondent, George D., filed a "motion to proceed," alleging that the petitioner has given custody of the children to the Division of Human Services without notifying him, and requesting that this Court permit the family law master and/or the circuit court to hear the divorce matter but not the custody or visitation issue.*

Footnote: 9 *The petitioner also asserts that the proceeding before this Court is brought pursuant to W. Va. Code, 49-6-1, et seq.*

Footnote: 10 *The petitioner also alleges that the prosecutor never filed an action for termination of parental or custodial rights. W. Va. Code, 49-6-10 [1984] imposes a duty upon a prosecutor to cooperate with the efforts of one seeking relief under W. Va. Code, 49-6-1, et seq. That section provides:*

It shall be the duty of every prosecuting attorney to fully and promptly cooperate with persons seeking to apply for relief under the provisions of this article in all cases of suspected child abuse and neglect, to promptly prepare applications and petitions for relief requested by such persons, to investigate reported cases of suspected child abuse and neglect for possible criminal activity and to report at least annually to the grand jury regarding the discharge of his or her duties with respect thereto.

In this case, though, we are not confronted with the question as to why the prosecutor failed or decided not to participate in the filing of a petition under W. Va. Code, 49-6-1, et seq. We note that the provisions of chapter 49 of the West Virginia Code may undergo comprehensive revision pursuant to S. Con. Res. 16 and H. Con. Res. 21, adopted March 6, 1992. See Journal of the House of Delegates 297-99 (Feb. 4, 1992). We further point out that in its most recent session, the legislature amended various provisions of chapters 48 and 49, as well

as other sections of the West Virginia Code, pertaining to family protection, which, had they been in effect during the pertinent events in this case, may have had some bearing herein.

We also note that W. Va. Code, 49-5-4 [1975] provides, in part: "A person under the age of eighteen years who appears before the circuit court in any capacity shall be deemed to be a ward of the court and protected accordingly."

Footnote: 11 We recently addressed the extraordinary nature of cases involving allegations of sexual abuse of children: "We believe that cases involving sexually abused children are unique. Given the often elusive nature of the evidence in sexual abuse allegations, such cases require a certain attention to detail that may not be as important in other maltreatment cases." Jennifer A. v. Burgess, No. 21009, at 6 (May 15, 1992) (unpublished order).

It has been observed by one commentator, in addressing allegations of sexual abuse with respect to visitation, that

[t]he harm [of sexual abuse] is sufficiently grave that courts should award temporary custody to the nonabusing parent whenever there is reason to believe sexual abuse has occurred or is likely to occur.

While the evidence needed to establish reasonable belief comes from many sources, it is important to remember that child sexual abuse is often very difficult to prove [, so] courts should not place a heavy burden of proof on the petitioner. The threat to the child's welfare is so high if abuse is occurring that temporary custody should be granted when the petitioner raises 'questions going to the merits so serious, substantial, difficult and doubtful, as to make fair ground for litigation and thus for more deliberate investigation.'

. . . Bearing in mind the effects of sexual abuse, and the interim nature of temporary custody, the court should err in the direction of protecting sexually abused children. That is, improvidently granting temporary custody is less likely to harm a child than improvidently denying such custody.

J. Myers, Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection, 28 J. Fam. L. 1, 37 (1989) (emphasis supplied) (internal footnote and citation omitted).

Footnote: 12 Some states have legislative authority which specifically provides for the ordering of supervised visitation. For example, Minn. Stat. Ann. § 518.175(1) (West 1990) provides, in part: "If the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health or impair the child's

emotional development, the court shall restrict visitation by the noncustodial parent as to time, place, duration, or supervision . . . as the circumstances warrant." (emphasis supplied) See also Mo. Ann. Stat. § 452.400(2) (Vernon 1986).

However, as stated above, we believe that the general provisions concerning visitation as contained in W. Va. Code, 48-2-15(b)(1) [1991] authorize a court to order supervised visitation.

Footnote: 13 Moreover, the inherent constitutional safeguards of a criminal proceeding will ensure that the defendant/accused parent will enjoy more protection with respect to what evidence will ultimately go in the civil record.

Footnote: 14 This case illustrates why prohibition is a difficult remedy due to the absence of an adequately developed record. However, in light of our holding, future cases with similar facts should have an adequately developed record so that, if appropriate, this Court may conclusively determine whether there has been an abuse of discretion.

497 U.S. 836, 110 S. Ct. 3157
Supreme Court of the United States
MARYLAND, Petitioner
v.
Sandra Ann CRAIG.
No. 89-478.

Argued April 18, 1990.
Decided June 27, 1990.

Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e.g., Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy*, *supra*, at 1021. Pp. 3162-3166.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 3166-3170.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater

than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 3166-3167.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted similar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e.g., Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 3167-3169.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis.* Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 3169-3170.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 3170.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 3170-3171.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 3171.

J. Joseph Curran, Jr., Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Gary E. Bair* and *Ann N. Bosse,* Assistant Attorneys General, and *William R. Hymes.*

William H. Murphy, Jr., argued the cause for respondent. With him on the brief were *Maria Cristina Gutierrez, Gary S. Bernstein, Byron L. Warnken,* and *Clarke F. Ahlers.* *

* Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth,* Attorney General of Florida, and *Richard E. Doran* and *Bradley R. Bischoff,* Assistant Attorneys General, *Don Siegelman,* Attorney General of Alabama, *Doug Baily,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *Duane Woodard,* Attorney General of Colorado, *John J. Kelly,* Chief State's Attorney of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Warren Price III,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Neil F. Hartigan,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Robert T. Stephan,* Attorney General of Kansas, *Frederic J. Cowan,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *James M. Shannon,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *William L. Webster,* Attorney General of Missouri, *Marc Racicot,* Attorney General of Montana, *Robert M. Spire,* Attorney General of

Nebraska, *Brian McKay*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry*, Attorney General of Oklahoma, *Ernest D. Preate*, Attorney General of Pennsylvania, *Hector Rivera Cruz*, Attorney General of Puerto Rico, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Godfrey R. de Castro*, Attorney General of the Virgin Islands, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Joseph B. Mayer*, Attorney General of Wyoming; for the District Attorney of Kings County, New York, et al. by *Charles J. Hynes, Peter A. Weinstein, Jay Cohen, Robert T. Johnson, Anthony Girese*, and *Howard R. Relin;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the National Association of Counsel for Children et al. by *Jacqueline Y. Parker, Philip J. McCarthy, Jr.*, and *Thomas R. Finn;* for People Against Child Abuse by *Judith D. Schretter, Wallace A. Christensen*, and *Paul A. Dorf;* and for the Stephanie Roper Foundation by *Gary B. Born.*

Briefs of *amici curiae* urging affirmance were filed for the Illinois Public Defender Association et al. by *David P. Bergschneider;* for the National Association of Criminal Defense Lawyers by *Maria Cristina Gutierrez* and *Annabelle Whiting Hall;* and for Victims of Child Abuse Laws National Network (Vocal) by *Alan Silber.*

Briefs of *amici curiae* were filed for the American Psychological Association by *David W. Ogden;* for the Appellate Committee of the California District Attorney's Association by *Jonathan B. Conklin;* for the Institute for Psychological Therapies by *Louis Kiefer;* and for Richard A. Gardner by *Alan Silber.*

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[FN1] To invoke the procedure, the trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

FN1. Maryland Cts. & Jud.Proc.Code Ann. § 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."

For a detailed description of the § 9-102 procedure, see *Wildermuth v. State*, 310 Md. 496, 503-504, 530 A.2d 275, 278-279 (1987).

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate,"§ 9-102(a)(1)(ii), if required to testify in the courtroom. App. 7-59. The Maryland Court of Appeals characterized the evidence as follows:

> "The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig....' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.' " 316 Md. 551, 568-569, 560 A.2d 1120, 1128-1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65-66. The trial court further found that, "based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate." *Id.*, at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md.App. 250, 544 A.2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.*, at 556-562, 560 A.2d, at 1122-1125, but concluded:

> "[U]nder § 9-102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.*, at 566, 560 A.2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9-102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." *Id.* 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U.S. 1041, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990).

II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S., at 1016, 108 S.Ct., at 2801 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749-750, 107 S.Ct. 2658, 2669, 2669, 2670, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality opinion); *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911); *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899); *Mattox v. United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy*, *supra*, 487 U.S., at 1015-1016, 108 S.Ct., at 2800; *Mattox*, *supra*, 156 U.S., at 242, 15 S.Ct. at 339 (Confrontation Clause intended to prevent conviction by affidavit); *Green*, *supra*, 399 U.S., at 156, 90 S.Ct., at 1934 (same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa*, we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial.*' " 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting *Green*, *supra*, 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014-1015, 108 S.Ct., at 2799-2800.

In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that any exception to the right "would surely be allowed only when necessary to further an important public policy"-*i.e.*, only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.*, at 1021, 108 S.Ct., at 2803; see also *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.*, at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*.

[1] The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes

> admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox, supra,* 156 U.S., at 242-243, 15 S.Ct., at 339-340.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath-thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green, supra,* 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. See *Stincer, supra,* 482 U.S., at 739, 107 S.Ct., at 2664 ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans,* 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); *Lee v. Illinois,* 476 U.S. 530, 540, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 514 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland v. Washington,* 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674 (1984).

[2] We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ...That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult"); *Ohio v. Roberts,* 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries * 373-* 374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy,* 487 U.S., at 1017, 108 S.Ct., at 2801 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green,* 399 U.S., at 157, 90 S.Ct., at 1934, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer,* 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts, supra,* 448 U.S., at 69, 100 S.Ct., at 2540 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting *Green, supra,* 399 U.S., at 166, 90 S.Ct., at 1939); see also *Stincer,* 482 U.S. at 739-744, 107 S.Ct., at 2664-2667 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-1110, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer, supra,* 380 U.S., at 406-407, 85 S.Ct., at 1069; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

[3] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. See, *e.g.*, *Mattox*, 156 U.S., at 243, 15 S.Ct., at 339 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"); *Pointer*, *supra*, 380 U.S., at 407, 85 S.Ct., at 1069 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox*, for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240-244, 15 S.Ct., at 338-340. We explained:

> "There is doubtless reason for saying that ... if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.*, at 243, 15 S.Ct., at 339-340.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts*, 448 U.S., at 63, 100 S.Ct., at 2537. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.*, at 64, 100 S.Ct., at 2538 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), and citing *Mattox*, *supra*). We have recently held, for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant-a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[4] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts*, *supra*, 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox*, *supra*, 156 U.S., at 243, 15 S.Ct., at 339-340. "[W]e have attempted to harmonize the goal of the Clause-placing limits on the kind of evidence that may be received against a defendant-with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily*, *supra*, 483 U.S., at 182, 107 S.Ct., at 2782. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e.g.*, *Kirby*, 174 U.S., at 61, 19 S.Ct., at 578 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case"); *Chambers*, *supra*, 410 U.S., at 295, 93 S.Ct., at 1045 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim.L.Bull. 99, 107-108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the

context of the necessities of trial and the adversary process. See, *e.g., Illinois v. Allen*, 397 U.S. 337, 342-343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie*, 480 U.S., at 51-54, 107 S.Ct., at 998-1000 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor v. Illinois*, 484 U.S. 400, 410-416, 108 S.Ct. 646, 653-657, 98 L.Ed.2d 798 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke*, 488 U.S. 272, 280-285, 109 S.Ct. 594, 599-602, 102 L.Ed.2d 624 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. See 487 U.S., at 1021, 108 S.Ct., at 2803 (citing *Roberts, supra*, 448 U.S. at 64, 100 S.Ct., at 2538; *Chambers, supra*, 410 U.S. at 295, 93 S.Ct., at 1045); *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring).

III

[5] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox*, 156 U.S., at 242, 15 S.Ct., at 389; see also *Green*, 399 U.S., at 179, 90 S.Ct., at 1946 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effective confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," *Coy, supra*, 487 U.S., at 1020, 108 S.Ct., at 2802, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts*, 448 U.S., at 66, 100 S.Ct., at 2539. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982); see also *New York v. Ferber*, 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-750, 98 S.Ct. 3026, 3040-3041, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York*, 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of

youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber, supra,* 458 U.S., at 757, 102 S.Ct., at 3354. In *Globe Newspaper,* for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U.S., at 608-609, 102 S.Ct., at 2620-21. This Term, in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that " '[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." ' " *Id.,* at 109, 110 S.Ct. at 1696 (quoting *Ferber, supra,* 458 U.S., at 756-757, 102 S.Ct., at 3354-55).

[6] We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy,* 487 U.S., at 1022-1023, 108 S.Ct., at 2803-2804 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; [FN2] 24 States have authorized the use of one-way closed circuit television testimony in child abuse cases; [FN3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[FN4]

FN2. See Ala.Code § 15-25-2 (Supp.1989); Ariz.Rev.Stat.Ann. §§ 13-4251 and 4253(B), (C) (1989); Ark.Code Ann. § 16-44-203 (1987); Cal.Penal Code Ann. § 1346 (West Supp.1990); Colo.Rev.Stat. §§ 18-3-413 and 18-6-401.3 (1986); Conn.Gen.Stat. § 54-86g (1989); Del.Code Ann., Tit. 11, § 3511 (1987); Fla.Stat. § 92.53 (1989); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Ill.Rev.Stat., ch. 38, ¶ 106A-2 (1989); Ind.Code §§ 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. § 421.350(4) (Baldwin Supp.1989); Mass.Gen.Laws § 278:16D (Supp.1990); Mich.Comp.Laws Ann. § 600.2163a(5) (Supp.1990); Minn.Stat. § 595.02(4) (1988); Miss.Code Ann. § 13-1-407 (Supp.1989); Mo.Rev.Stat. §§ 491.675-491.690 (1986); Mont.Code Ann. §§ 46-15-401 to 46-15-403 (1989); Neb.Rev.Stat. § 29-1926 (1989); Nev.Rev.Stat. § 174.227 (1989); N.H.Rev.Stat.Ann. § 517:13-a (Supp.1989); N.M.Stat.Ann. § 30-9-17 (1984); Ohio Rev.Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla.Stat., Tit. 22, § 753(C) (Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5984 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); S.C.Code Ann. § 16-3-1530(G) (1985); S.D.Codified Laws § 23A-12-9 (1988); Tenn.Code Ann. §§ 24-7-116(d), (e), (f) (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 4 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989); Wis.Stat. §§ 967.04(7) to (10) (1987-1988); Wyo.Stat. § 7-11-408 (1987).

FN3. See Ala.Code § 15-25-3 (Supp.1989); Alaska Stat.Ann. § 12.45.046 (Supp.1989); Ariz.Rev.Stat.Ann. § 13-4253 (1989); Conn.Gen.Stat. § 54-86g (1989); Fla.Stat. § 92.54 (1989); Ga.Code Ann. § 17-8-55 (Supp.1989); Ill.Rev.Stat., ch. 38, ¶ 106A-3 (1987); Ind.Code § 35-37-4-8 (1988); Iowa Code § 910A.14 (Supp.1990); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. §§ 421-350(1), (3) (Baldwin Supp.1989); La.Rev.Stat.Ann. § 15:283 (West Supp.1990); Md.Cts. & Jud.Proc.Code Ann. § 9-102 (1989); Mass.Gen.Laws § 278:16D (Supp.1990); Minn.Stat. § 595.02(4) (1988); Miss.Code Ann. § 13-1-405 (Supp.1989); N.J.Stat.Ann. § 2A:84A-32.4 (Supp.1989); Okla.Stat., Tit. 22, § 753(B) (West Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa. Cons.Stat. §§ 5982, 5985 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 3 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989).

FN4. See Cal.Penal Code Ann. § 1347 (West Supp.1990); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19-3024A (Supp.1989); Minn.Stat. § 595.02(4)(c)(2) (1988); N.Y.Crim.Proc.Law §§ 65.00 to 65.30 (McKinney Supp.1990); Ohio Rev.Code Ann. §§ 2907.41(C), (E) (1987); Va.Code Ann. § 18.2-67.9 (1988); Vt.Rule Evid. 807(e) (Supp.1989).

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth v. State*, 310 Md. 496, 518, 530 A.2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov.1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report* (Dec.1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979, 4,615 cases of child abuse were investigated; in 1984, 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9-102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.*, at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.*, at 517, 530 A.2d, at 285.

Given the State's traditional and " 'transcendent interest in protecting the welfare of children,' " *Ginsberg*, 390 U.S., at 640, 88 S.Ct., at 1281 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7-13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug.1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[7] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.*, 457 U.S., at 608-609, 102 S.Ct., at 2621 (compelling interest in protecting child victims does not justify a *mandatory* trial closure rule); *Coy*, 487 U.S., at 1021, 108 S.Ct., at 2803; *id.*, at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring); see also *Hochheiser v. Superior Court*, 161 Cal.App.3d 777, 793, 208 Cal.Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e.g.*, *State v. Wilhite*, 160 Ariz. 228, 772 P.2d 582 (1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277 (1989); *State v. Davidson*, 764 S.W.2d 731 (Mo.App.1989); *Commonwealth v. Ludwig*, 366 Pa.Super. 361, 531 A.2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth*, *supra*, 310 Md., at 524, 530 A.2d, at 289; see also *State v. Mannion*, 19 Utah 505, 511-512, 57 P. 542, 543-544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate,"§ 9-102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. *Coy, supra*, 487 U.S., at 1019-1020, 108 S.Ct., at 2802-03, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra*, at 3166-3167. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e.g., Coy, supra*, 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18-24; *State v. Sheppard*, 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U. Miami L.Rev. 181, 203-204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich.L.Rev. 809, 813-820 (1987).

[8] In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

[9] The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a " 'case-specific finding of necessity.' " 316 Md., at 564, 560 A.2d, at 1126 (quoting *Coy, supra*, 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify ... should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A.2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.*, at 565, 560 A.2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9-102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.*, at 566, 560 A.2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that "§ 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.*, at 566, 560 A.2d, at 1127; see also *Wildermuth*, 310 Md., at 523-524, 530 A.2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A.2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9-102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102... was not made here." *Id.*, at 570-571, 560 A.2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.*, at 568, 560 A.2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses." *Id.*, at 569, 560

A.2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find-indeed, on the evidence before him, *could not have found*-that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.*, at 570-571, 560 A.2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.*, at 568-571, 560 A.2d, at 1128-1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate,"§ 9-102(a)(1)(ii). See *id.*, at 568-569, 560 A.2d, at 1128-1129; see also App. 22-25, 39, 41, 43, 44-45, 54-57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [*Coy*] before § 9-102 may be invoked," 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante*, at 3167.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I-your father (or mother) whom you see before you-did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante*, at 3166. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante*, at 3163-3164. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for-"face-to-face" confrontation-but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for-"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988), quoting *California v. Green*, 399 U.S. 149, 175, 90 S.Ct. 1930, 1943-44, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' "*ante*, at 3165. (emphasis added by the Court). But *Roberts*, and all the other "precedents" the Court enlists to prove the

implausible, dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial-that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial*, did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante*, at 3166. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"-in 1791 as today-could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.*,"[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him*." The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante*, at 3166. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy*, *supra*, 487 U.S., at 1020-1021, 108 S.Ct., at 2803.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante*, at 3166-3167. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho v. Wright*, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S., at 65, 100 S.Ct., at 2538. We

have permitted a few exceptions to this general rule-*e.g.*, for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States v. Inadi*, 475 U.S. 387, 395, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986). "Live" closed-circuit television testimony, however-if it can be called hearsay at all-is surely an example of hearsay as "a weaker substitute for live testimony," *id.*, at 394, 106 S.Ct., at 1126, which can be employed only when the genuine article is unavailable. "When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts*, *supra* (requiring unavailability as precondition for admission of prior testimony); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[FN1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green*, as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Coy*, 487 U.S., at 1020, 108 S.Ct., at 2802. To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

FN1. I presume that when the Court says "trauma would impair the child's ability to communicate,"*ante*, at 3170, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims,"*ante*, at 3167, an "interest in protecting" such victims "from the emotional trauma of testifying,"*ante*, at 3169. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest-as far as the Confrontation Clause is concerned [FN2]-is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

FN2. A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question-initially, at least, and perhaps exclusively-the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants-specifically, in the present context, innocent defendants accused of particularly heinous

crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am.J.Crim.L. 227, 230-233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra*, at 239-240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, concluded that there was an "absence of credible testimony and [a] lack of significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.*, at 9; answers were suggested by telling the children what other witnesses had said, *id.*, at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.*, at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.*, at 10-11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.*, at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante*, at 3169. If so, that is a defect in the Constitution-which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-

benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

197 W. Va. 415, 475 S.E.2d 507

Supreme Court Of Appeals Of West Virginia

DONALD C. McCORMICK, Plaintiff Below, Appellant,

v.

ALLSTATE INSURANCE COMPANY and DAVID DAILEY,

Defendants Below, Appellee

No. 23261

Submitted: April 24, 1996

Filed: July 18, 1996

SYLLABUS BY THE COURT

1. When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

2. "Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in vindicating its claim; (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience." Syllabus point 1, *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986).

3. To recover attorney fees and net economic loss damages and damages for aggravation and inconvenience under syllabus point 1 of *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), it is not necessary that a plaintiff show bad faith.

4. Damages for aggravation and inconvenience in a claim under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), are not limited to damages associated with loss of use of the personal property but relate as well to the aggravation and inconvenience shown in the entire claims collection process.

5. "An insurer cannot be held liable for punitive damages by its refusal to pay on an insured's property damage claim unless such refusal is accompanied by a malicious intention to injure or defraud." Syllabus point 2, *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986).

6. "An implied private cause of action may exist for a violation by an insurance company of the unfair settlement practice provisions of W.Va. Code, 33-11-4(9);

but such implied private cause of action cannot be maintained until the underlying suit is resolved." Syllabus point 2, *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981).

7. "More than a single isolated violation of W.Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of 'a general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action." Syllabus point 3, *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981).

8. Punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim.

9. The conditions and predicate for bringing a case under *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981), are wholly different from those necessary for bringing an underlying contract action or for bringing an action under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986). Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damages, under *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W.Va. Code 33-11-4(9), where such violation arises from a "general business practice" on the part of the insurer.

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Albright, Justice:
The appellant in this proceeding, Donald McCormick, is appealing from a final order of the Circuit Court of Kanawha County, West Virginia, in an action which was instituted against his automobile insurer under an automobile policy, Allstate Insurance Company (Allstate). In count one of his complaint, the appellant claimed that Allstate not only failed to honor its insurance contract, but also breached its duty of good faith and fair dealing in handling his claim. As we interpret the claims pleaded and tried, the appellant asserted a cause of action under the principles first enunciated by this Court in *Hayseeds, Inc. v. State Farm Firm & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986). In a second count, he claimed that Allstate had violated the West Virginia Fair Trade Practices Act, W.Va. Code 33-11-4(9), and he sought attorney fees and punitive damages under the principles set out in *Jenkins v. J.C. Penney Casualty Insurance Company*, 167 W.Va. 597, 280 S.E.2d 252 (1981).

Before the case was actually tried, the circuit court ordered that the trial be bifurcated, with the *Hayseeds* issues to be tried first and the *Jenkins* issues to be tried later. The *Hayseeds* trial resulted in the jury awarding the appellant $995.00 in compensatory damages. Because this amount was substantially less than what the court found the appellant had initially demanded, the court ruled that the appellant had not "substantially prevailed" in his underlying case and that, as a consequence, he was not entitled to pursue his attorney fees and punitive damages. In so doing, the court effectively precluded the appellant from seeking further his *Hayseeds* and his *Jenkins* relief.

On appeal, the appellant makes a number of assignments of error which, combined, pose the question of whether the court appropriately precluded the appellant from pursuing his claims for *Hayseeds* and *Jenkins* relief after the jury returned its compensatory damages award.

After reviewing the questions raised, this Court cannot conclude that the trial court committed reversible error in denying the appellant attorney fees or in precluding him from seeking punitive damages on the count tried, that is, the *Hayseeds* count. The Court does believe, however, that the trial court erred in denying the appellant a trial on the *Jenkins* issue and reversed and remands on that point.

FACTS

The appellant owned a 1984 Ford Escort, which was insured by the appellee, Allstate Insurance Company (Allstate). This vehicle was damaged in a collision on

August 28, 1988, and the appellant made a claim under his own insurance policy with Allstate for the damages to the vehicle.

David Dailey, the Allstate adjuster who handled the claim, inspected the vehicle and determined it was a total loss. Allstate calculated the loss payable under the policy to be $1,429.50 and on September 9, 1988, issued its check for that amount, payable to the appellant's bank which held a lien on the automobile. The payoff on the vehicle loan at that time was $2,808.36.

In determining the amount of the loss, Mr. Dailey consulted the National Automobile Dealer's Association Used Car Guide (NADA), an approved guide under West Virginia insurance regulations, and determined that the average retail value of the car was $3,100.00. He made the following adjustments to arrive at the $1,429.50 paid the appellant:

> Total Loss: Average Retail Value $3,100.00
>
> Minus: High Mileage $ 940.00
>
> Automobile Reconditioning 595.00
>
> Deductible 250.00 1,785.00
>
> Net: $ 1,315.00
>
> Plus: AM/FM Radio $ 25.00
>
> Taxes 79.50
>
> License fee 10.00 114.50
>
> Total Claim Payment $ 1,429.50

Although the appellant was unhappy with the amount paid by Allstate, there is some dispute as to whether the appellant notified Mr. Dailey of the amount which he felt he was owed and which would reasonably compensate him. We do find that at the trial of this action below, the appellant testified that he never did make a money offer to Allstate or to Mr. Dailey.

On November 4, 1988, appellant filed this action against Allstate and Mr. Dailey. His complaint contained five counts. Two of these counts were strictly against Mr. Dailey, who was later dismissed from the case. Those counts are thus irrelevant to this proceeding. A third count was also eliminated. The two counts which survived, and which are relevant to this appeal, are the *Hayseeds* count against

Allstate and the *Jenkins* count against Allstate, to which considerable reference has already been made. We note that in pleading the first count, the appellant here alleged a breach of good faith and fair dealing. We note later that bad faith is not an element of the *Hayseeds* claim. For the surviving counts, the appellant sought $595.00 in damages under the policy terms, $100,000.00 in resulting economic damages, interest, $3,500,000.00 in punitive damages, attorney fees, and costs.

The litigation had a long and rather involved life below, much of which is irrelevant to this proceeding. However, on July 31, 1992, one particularly important event for the resolution of this appeal occurred -- the trial court, as has previously been indicated, bifurcated the issues for trial purposes by entering an order which provided:

> The trial shall be bifurcated; Phase I to be limited to the Plaintiff's underlying claim and Phase II shall be for the Defendant's [sic - the Court believes that the trial court mean the plaintiff's (or appellant's)] implied private cause of action if any, pursuant to the W.Va. Unfair Trade practices Act . . . .

The situation was complicated further by the fact that the parties and the trial court later apparently agreed that, in the trial of the first count, the question of whether the appellant was entitled to compensatory damages and economic loss would first be tried by the jury, and only after the jury returned its verdict on those matter would the remaining damage questions be presented to the jury. See footnote 1

A jury trial was conducted commencing on May 2, 1994. As tried, the case was restricted to the question of whether Allstate had breached its insurance contract and to what compensatory and economic damages the appellant was entitled, if any.

At the conclusion of the trial, a verdict form was, without objection from either party, submitted to the jury. That form asked the jury to break down the appellant's damages, if any, into property damages, damages for loss of use of the vehicle, and damages for aggravation and inconvenience. It did not request "net economic damages" or punitive damages, and it did not ask if the appellant "substantially prevailed" on his underlying claim.

At the conclusion of the trial, the jury returned a verdict for the appellant for a total of $995.00. This verdict was composed of $595.00 for Allstate's underpayment of damages to the appellant's vehicle and $400.00 for loss of use of the vehicle. No damages were awarded for aggravation and inconvenience.

After the jury returned its verdict, the parties made several post-trial motions and presented several issues to the circuit court. See footnote 2 By far the most important questions presented, and the ones relevant to this appeal, were whether the appellant was entitled to attorney fees and whether he was entitled to proceed and present his punitive damage claim to the jury. On both of these issues the trial court ruled against the appellant, and this set the stage for the present appeal.

In denying the appellant's request or demand for attorney fees, the court found that appellant had not "substantially prevailed" in the first phase of trial and that he was not, therefore, entitled to attorney fees and costs. Additionally, in denying the appellant's request to proceed on the punitive damages issue, the court ruled that the appellant had failed to establish the initial threshold of malice necessary to justify pursuit of the punitive damages claim.

Although from the bifurcation order, the transcripts of the jury trial, the instructions given to the jury, and the arguments of the parties, the trial was restricted to the first bifurcation issue (*Hayseeds*) and in no way involved the separate *Jenkins* Fair Trade Practices issue, it appears that the trial court's post-trial rulings not only denied the appellant's claim for attorney fees and punitive damages on the *Hayseeds* count, but also precluded him from proceeding with the second phase of the bifurcated trial, the phase which, according to the bifurcation order, was to be devoted to the appellant's *Jenkins* count.

In the present appeal, the appellant essentially claims that the trial court factually erred in finding that he had not "substantially prevailed" on his underlying claim. He also claims that, from a legal point of view, the trial court erred in holding that since he did not make an adequate showing of malice in the matters which were tried before the jury, he was precluded from developing further his punitive damages claim. It is also implicit in the appellant's rambling assignments of error that he feels that he was improperly denied a trial on his second bifurcation issue.

STANDARD OF REVIEW

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. "We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995). *See* syllabus point 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995).

DISCUSSION

Before discussing the particular issues in this case, the court feels that it is important to note that it appears that a substantial portion of the difficulty in this

case grows out of the lengthy and complex nature of the proceedings and out of confusion over precisely what was being tried when this case was submitted to the jury. Initially, it was ordered that the trial be bifurcated, the first phase to be what the trial court called "the underlying claim" and second phase to be the *Jenkins* claim. As the first phase of the case was tried, the elements of a *Hayseeds* claim necessary for punitive damages were not presented to the jury. The appellant treated malice as being postponed to phase 2 of the trial, and the court considered the case tried as limited to compensatory damages. When the appellant, in the trial court's view, failed to prevail substantially in part one, the trial court concluded that the appellant was precluded from proceeding to part two of that trial. However, since part two involved attorney fees and punitive damages, the court apparently confused part two of the *Hayseeds* trial with the *Jenkins* trial, which also involved punitive damages and attorney fees, and precluded the appellant from proceeding to his *Jenkins* trial.

The Court also believes that before going into the particular issues it is essential to examine and compare the legal concepts implicit in basic contractual actions on an insurance contract, in *Hayseeds*, and in *Jenkins* and related law.

Before analyzing an action under the authority of *Hayseeds*, the court notes that in an action by an insured against an insurer on an insurance policy covering damage to personal property, the plaintiff is entitled to recover the cost of repair or the value of the property immediately prior to the damage, whichever is less, to the extent of the policy. He is also entitled to recover expenses stemming from the injury including compensation for loss of use. "Damages for annoyance and inconvenience may also be recovered when measuring damages for loss of use to the property," w*hich is an elemen*t of loss of use. *Ellis v. King*, 184 W.Va. 227, 229, 400 S.E.2d 235, 237 (1990). Punitive damages are not normally recoverable in such claims. *Berry v. Nationwide Mutual Fire Insurance Company*, 181 W.Va. 168, 381 S.E.2d 367 (1989), and *Hayseeds v. State Farm Fire & Casualty, supra*. *See also Jarrett v. E.L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977), a real property damages case. Further, since attorney fees are not recoverable by a party in the absence of provisions specifically permitting that recovery in a statute or court rule, attorney fees are not ordinarily recoverable in simple actions on a contract. *Yost v. Fuscaldo*, 185 W.Va. 493, 408 S.E.2d 72 (1991); *Old National Bank of Martinsburg v. Hendricks*, 181 W.Va. 537, 383 S.E.2d 502 (1989); *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986); *Heckler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985); and *Daily Gazette Company, Inc. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985).

Under the authority of *Hayseeds* and its progeny, if the insured suing an insurer on a personal property damage claim "substantially prevails", the insurer is liable, in addition to the damages for breach of the insurance contract, for plaintiff's

reasonable attorney fees incurred in vindicating the claim, net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience. Further, upon a showing that "actual malice" motivated the actions of the insurer, punitive damages may be recovered.

The basic rule was stated in *Hayseeds v. State Farm Fire & Casualty, supra*, in syllabus point 1, as follows:

> Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in vindicating its claim; (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience.

To recover attorney fees and net economic loss damages and damages for aggravation and inconvenience under this syllabus point, it is not necessary that a plaintiff show bad faith. In *Hayseeds* it is specifically stated that:

> [W]e consider it of little importance whether an insurer contests an insured's claim in good or bad faith. In either case, the insured is out his consequential damages and attorney's fees. To impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain.

177 W.Va. at 329, 352 S.E.2d at 79-80.

Further, we perceive that damages for aggravation and inconvenience in a *Hayseeds* claim are not limited to damages associated with loss of use of the personal property but relate as well to the aggravation and inconvenience shown in the entire claims collection process.

Syllabus point 2 of *Hayseeds* further states that, under the appropriate circumstances, an insurer can likewise be held liable for punitive damages. Specifically, syllabus point 2 says: "An insurer cannot be held liable for punitive damages by its refusal to pay on an insured's property damage claim unless such refusal is accompanied by a malicious intention to injure or defraud." See footnote 3

The third type of claim, brought in the present case, arises under the principles set forth in *Jenkins v. J.C. Penney Casualty Insurance Company, supra*. That claim is different from both the underlying contractual claim on the insurance policy and from the *Hayseeds* claim. *Jenkins* arose in the context a third-party action against a tortfeasor's insurer, brought by the person injured by the tortfeasor. Here an

insured is asserting a first-party claim. *Jenkins*-type actions are sometimes characterized as "bad faith settlement" cases. *See Shamblin v. Nationwide Mutual Insurance Company*, 183 W.Va. 585, 396 S.E.2d 766 (1990), and *Poling v. Motorists Mutual Insurance Company*, 192 W.Va. 42, 450 S.E.2d 635 (1994). To show entitlement to recovery in a *Jenkins* claim, the plaintiff must essentially show that there has been a violation or that there have been multiple violations of the West Virginia Unfair Settlement Practices Act, W.Va. Code 33-11-4(9),[(4)] in the management of the plaintiff's claim and that the violation or violations entailed "a general business practice" on the part of the insurer. Operative syllabus points of the *Jenkins* case include syllabus point 2 and syllabus point 3, which state:

> 2. An implied private cause of action may exist for a violation by an insurance company of the unfair settlement practice provisions of W.Va. Code, 33-11-4(9); but such implied private cause of action cannot be maintained until the underlying suit is resolved.
>
> 3. More than a single isolated violation of W.Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of "a general business practice," which requirement must be shown in order to maintain the statutory implied cause of action.

A prevailing plaintiff in a *Jenkins* claim may recover his increased costs and expenses, including increased attorney fees, resulting from the insurance company's use of an unfair business practice in the settlement or failure to settle fairly the underlying claim. He likewise may recover punitive damages in an appropriate case. *See* note 12, *Jenkins v. J.C. Penney Casualty Insurance Company*, *supra*. We have said that to recover punitive damages it must be shown that the conduct of the insurer was wilful, malicious, and intentional.

With this in mind, we now proceed to a discussion of specific issues in the present case.

The first issue is largely a factual issue. The question is whether the trial court erred by concluding that the appellant did not "substantially prevail" in his underlying contractual action. This factual finding is significant because under *Hayseeds*, as has been previously discussed, a plaintiff must "substantially prevail" on his underlying claim before he may recover attorney fees or punitive damages.

In the trial conducted below, the jury was allowed to consider damages to appellant's personal property, damages for loss of use, and damages for aggravation and inconvenience. The exact aggregate amount of damages sought by the appellant after the collision varied from time to time during his negotiations with Allstate and during the proceedings in this case. There was evidence that the

appellant's last demand prior to trial was for $250,000.00 for these items. At another point, his attorney said that he would settle the case for "about $250 million." At another point, counsel said he would take $252,350.00. There is also evidence that the appellant at one point demanded enough "to simply cover the cost of repairs."

The issues of the amounts the appellant was entitled to for property loss, loss of use of his vehicle, and aggravation and inconvenience were submitted to the jury by instruction, and the jury found that the appellant was entitled to $595.00 in property damages, the amount of the deduction made by Allstate for "reconditioning", plus $400.00 for loss of use of his vehicle, and nothing for aggravation and inconvenience.

The trial court weighed the appellant's demands against the verdict which the jury returned, and ruled:

> After the filing of this action by Mr. McCormick, the parties exchanged various settlement offers but plaintiff failed to engage in any meaningful settlement negotiations. At no time did plaintiff indicate a willingness to settle the compensatory portion of his lawsuit for anything approximating the $995.00 jury award. Moreover, when negotiations finally broke down between the parties they were apparently even much farther apart. As the West Virginia Supreme Court of Appeals emphasized in *Hadorn v. Shea*, 456 S.E.2d at 198, "it is the status of the claim as a *whole*, at the time negotiations break down, that determines whether an insured substantially prevails." Apparently as the result of the lack of success in settlement negotiations, defendants moved to refer this case to mediation on August 6, 1993. At the hearing on that motion the plaintiff's counsel, Mr. Peterson, indicated that the parties were far apart in settlement negotiations and stated on the record in open court that plaintiff's demand was Two Hundred Fifty Two Million Dollars ($252,000,000) to settle the entire case and that he was prepared to take Two Hundred Two Thousand Three Hundred Fifty Dollars [sic] ($252,350) to settle the compensatory portion of the case . . . . The Two Hundred Fifty Two Thousand Three Hundred Fifty Dollars ($252,350) demand is the last statement in the record of what the plaintiff would take to settle the compensatory portion of the case. In the face of such demand, the plaintiff cannot reasonably contend that he substantially prevailed with a $995.00 award.

This Court has had the opportunity on different occasions to examine and determine whether parties to an action have substantially prevailed for the purpose

of awarding attorney fees. In *Hayseeds*, *supra*, a restaurant which was insured for $150,000.00 burned down. State Farm Fire and Casualty (State Farm) declined to pay on the grounds of arson. The owner brought an action against the insurance company, and the jury returned a verdict of $150,000.00 on the insurance policy. The insurer appealed. This Court admitted that this was a close case, but found that there was sufficient evidence for the jury to infer that the owners were not at fault in the burning of the building. Consequently, the award of $150,000.00 was allowed to stand, and the policyholders were held to have substantially prevailed. As a result of substantially prevailing, this Court affirmed the award for attorney fees, costs, and consequential damages. However, the punitive damages award was reversed because the policyholders did not "establish a high threshold of actual malice in the settlement process." *Hayseeds*, 177 W.Va. at 330, 352 S.E.2d at 80.

In *Thomas v. State Farm Mutual Automobile Insurance Company*, 181 W.Va. 604, 383 S.E.2d 786 (1989), Ms. Thomas wrecked her pickup truck, which was insured by State Farm. The cost of repair was estimated at $8,200.05 for the pickup; $1,560.00 for the tank and pump apparatus; and $471.00 for painting and relettering. State Farm offered to settle for $4,960.72, which Ms. Thomas refused. She filed an action, and at trial she sought compensatory damages in the amount of $10,465.50 for property damage and $359.00 for towing charges. The jury awarded Ms. Thomas $13,213.00, representing $10,168.00 for property damage and towing and storage fees, and $3,045.00 for economic loss. The trial court found Ms. Thomas substantially prevailed and awarded attorney fees. The insurer appealed. This Court affirmed the trial court and further clarified the meaning of substantially prevail by stating:

> The question of whether an insured has substantially prevailed against his insurance company on a property damage claim is determined by the status of the negotiations between the insured and the insurer prior to the institution of the lawsuit. Where the insurance company has offered an amount materially below the damage estimates submitted by the insured, and the jury awards the insured an amount approximating the insured's damage estimates, the insured has substantially prevailed.

Id. at syllabus point 2.

In *Jordan v. National Grange Mutual Insurance Company*, 183 W.Va. 9, 393 S.E.2d 647 (1990), this Court stated that "the insured is entitled to recover reasonable attorney's fees from his or her insurer, as long as the attorney's services were necessary to obtain payment of the insurance proceeds." *Id*. at 14, 393 S.E.2d at 652.

The case of *Hadorn v. Shea*, 193 W.Va. 350, 456 S.E.2d 194 (1995), involved an action by a policyholder against her underinsured motorist carrier. After a jury returned a verdict of $90,000.00 in favor of the insured against her underinsured motorist carrier, the insured amended her complaint, seeking costs and expenses, including attorney fees, on the basis that she substantially prevailed at trial. This Court affirmed the trial court's granting of summary judgment to the insurer, finding appellant did not substantially prevail at trial. The insured demanded $300,000.00 for personal injury, rejecting the insurer's pretrial final settlement offer of $22,500.00. The jury awarded her $90,000.00. In making its decision, this Court reasoned that the insured failed to make counteroffers in conjunction with her rejection of her insurer's settlement offers. Instead, she appeared not interested in any settlement less than her original demand of $300,000.00. As a basis for affirming the trial court's denial of costs and expenses, this Court stated that "[i]t is not clear that 'but for' Ms. Hadorn's attorney's services she would not have been able to get State Farm to settle for $90,000 without proceeding to trial." *Id*. at 354, 456 S.E.2d at 198. If Ms. Hadorn had engaged in active settlement negotiations, there may have been no need for a trial.

In *Hadorn*, this Court also detailed the standard by which one can determine if an insured has substantially prevailed. This Court stated: "To determine if a plaintiff has substantially prevailed, we compare the plaintiff's last settlement demand before filing suit to the amount awarded by the jury." 193 W.Va. at 353, 456 S.E.2d at 197.

In the case at bar, the appellant contends in his brief filed to this Court that he made a counteroffer prior to filing this action. He claims he "counteroffered with a demand to simply cover the cost of repairs." Unfortunately, appellant has not directed us to the proof of this counteroffer in the record, and we do not find it documented there. We note that the trial judge, after listening to numerous hearings regarding evidence and a fairly lengthy trial, found "Plaintiff McCormick never made a meaningful counteroffer prior to filing this action and made no good faith attempt to settle before trial . . . Having failed to make any offer prior to filing suit, Mr. McCormick cannot be said to have substantially prevailed on any claim made prior to suit." The trial court did not abuse its discretion in reaching this conclusion. Therefore, we move on to the next phase of our analysis.

In *Hadorn*, this Court said that "it is the status of the claim as a *whole*, at the time negotiations broke down, that determines whether an insured substantially prevails." 193 W.Va. at 354, 456 S.E.2d at 198 (emphasis in original). After Mr. McCormick filed the action, the parties exchanged various settlement offers. However, none of the offers made by appellant approximates the $995.00 jury award. Appellant states in the record that his last demand prior to trial was to resolve only the compensatory portion of the case for $250,000.00. See footnote 5

It appears from the record that such an offer was made at a hearing held on August 13, 1993. Appellant's counsel stated he would settle the case for "about $250 million." When questioned by the judge regarding that comment, counsel stated he would settle the compensatory portion of the case for $252,350.00. At that point, negotiations had broken down.

Comparing the demands made by the appellant during settlement negotiations with the award of $995.00 he received from the jury verdict, we cannot say, in view of the overall evidence and status of the case, that the trial judge abused his discretion in failing to find that the appellant substantially prevailed by the test suggested in *Hadorn*, and, as previously indicated, we cannot conclude that the trial court erred in effectively finding that the appellant was precluded, under the *Hayseeds* theory, from seeking attorney fees or punitive damages, since under *Hayseeds* substantial recovery on the underlying claim is a clear predicate to seeking additional *Hayseeds* relief.

Having come to that conclusion, we are troubled by, but do not find reversible error in one facet of the problem. The issue of whether appellant substantially prevailed for the purpose of awarding attorney fees is, in our view, correctly governed by the principles we have just reviewed. However, given the fact that the first phase trial was perceived by the trial court as being limited to compensatory damages, the comparison of the last offers made by appellant to settle the case with the amount of the jury verdict appears to us to be inappropriate. We believe that, on the facts of this case only, that comparison does not serve its intended purpose. Here not all the issues under consideration in the negotiations were submitted to the jury. It may be fair to conclude that the high demand made by the appellant justifies this Court and the trial court in leaving him where he was found, but we note the principles we have reviewed here work as they were intended where all the issues appropriate to a *Hayseeds*-type case have been put before a jury. In the present case, not all elements of damages appropriate under *Hayseeds* were presented to the jury.

SHOWING OF MALICE

The appellant also claims that the trial court erred in effectively ruling that he had to show malice during the first phase of his *Hayseeds* trial before he was entitled to proceed to the second, or punitive damage, phase.

As has already been discussed, a clear predicate to recovering punitive damages in a *Hayseeds* claim is that the plaintiff "substantially prevail" on his underlying claim, and, as has already been discussed, the trial court, without committing reversible error, found that the appellant did not "substantially prevail" on his under lying claim. Accordingly, the Court concludes that the trial court's ultimate

conclusion that the appellant was not entitled to a *Hayseeds* punitive damages trial was proper.

The trial court was also correct in saying that malice must be shown in a *Hayseeds* case before punitive damages may be recovered. In *Hayseeds* itself, we said:

> . . . [P]unitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By "actual malice" we mean that the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim. We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant, such as exists in the law of libel and slander, or the West Virginia law of commercial arbitration. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Board of Education v. Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977). Unless the policyholder is able to introduce evidence of intentional injury -- not negligence, lack of judgment, incompetence, or bureaucratic confusion -- the issue of punitive damages should not be submitted to the jury. Furthermore, a willingness to settle a case of alleged arson can no longer be used as evidence of "bad faith" because the concept of "bad faith" short of actual malice no longer has any place in the law of property damage insurance cases. In fact, to make the matter entirely explicit, an offer of settlement can never be used to show "actual malice" nor be used against an insurance carrier in any way.

Hayseeds, 177 W.Va. at 330-31, 352 S.E.2d at 80-81 (footnotes omitted).

We do, however, note one troubling aspect of the present case. As has already been discussed, by apparent agreement of the parties, the trial of the *Hayseeds* claim was divided into two parts, the first of which related to compensatory damages, and the second of which related to punitive damages. Punitive damages were clearly not an issue in the first part, and malice was not a necessary element of the issues which were tried in the first part. In the circumstances before us in this case, we believe that it was wholly contradictory and erroneous for the trial court to hold that the appellant was precluded from proceeding to the second phase of this case because he failed to introduce evidence of malice in the case tried, after the court clearly limited the case tried to compensatory damages.

TRIAL ON BAD FAITH SETTLEMENT PRACTICES

As previously indicated, an action under *Jenkins v. J.C. Penney Casualty Insurance Company, supra*, and its progeny, is a type of action which is wholly distinct from an underlying contractual action on an insurer's failure to comply with its insurance contract. Such an action is also wholly distinct from a *Hayseeds* action. Further, the conditions and predicate for bringing a *Jenkins*-type case are wholly different from those necessary for bringing an underlying contract action or for bringing a *Hayseeds* action. Whereas under *Hayseeds* it is necessary that a policyholder substantially prevail on an underlying contract action before he may recover enhanced damage, under *Jenkins* there is no requirement that one substantially prevail; it is required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Act, W.Va. Code 33-11-4(9), where such violation arises from a "general business practice" on the part of the insurer.

The fundamental holding of *Jenkins* recognizes a private, implied cause of action for violations of W.Va. Code 33-11-4(9) and permits plaintiff to recover attorney fees and, under the appropriate circumstances, punitive damages, if it can be shown that there was more than a single isolated violation of W.Va. Code 33-11-4(9) and that the violations indicate a "general business practice" on the part of the insurer.

In the body of *Jenkins*, the Court further indicated:

> We conceive that proof of several breaches by an insurance company of W.Va. Code, 33-11-4(9), would be sufficient to establish the indication of a general business practice. It is possible that multiple violations of W.Va. Code, 33-11-4(9), occurring in the same claim would be sufficient, since the term "frequency" in the statute must relate not only to repetition of the same violation but to the occurrence of different violations. Proof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claims agents, or from any person who is familiar with the company's general business practice in regard to claim settlement.

167 W.Va. at 610, 280 S.E.2d at 260.

Since the predicate for seeking relief under *Jenkins* and its progeny does not require that an insured substantially prevail on an underlying action, and since *Jenkins* does allow, under certain conditions, a party to seek reasonable attorney fees and punitive damages, this Court believes that insofar as the trial court's order

in the present case precludes the appellant from seeking attorney fees or punitive damages because the appellant failed substantially to prevail below, the trial court's order in the present case was erroneous.

Additionally, as previously indicated, on July 31, 1992, the trial court entered an order bifurcating the issues for trial in this case and specifically provided that any questions arising under the Unfair Trade Practices Act would be handled in a separate trial. It appears that at the conclusion of the trial, the trial court not only found that the appellant had not substantially prevailed in his underlying action, but refused to allow the appellant to proceed to trial to seek damages or attorney fees under any cause of action.

This Court believes that, in the circumstances of this case, litigation of the *Jenkins*-type claim is appropriate. The appellant has prevailed in the first phase on his claim that Allstate failed to pay the amount to which the appellant was entitled under the insurance contract. Pursuit of the *Jenkins* claim, if either of the parties elects to proceed, will afford full opportunity to litigate the substance of the remaining issues that were not adequately addressed during the first phase trial had below, including, if supported by the evidence, the issue of whether the reconditioning deductions used by Allstate are a "general business practice", whether, under the applicable *Jenkins* rule, punitive damages should be awarded, and whether appellant should be awarded attorney fees for vindicating his *Jenkins*-type claim and, if so, in what amount.

The Court notes that the remainder of the errors assigned by the appellant relate to matters which may be raised in the *Jenkins* phase of the trial and are not prejudicial with respect to the result which we announce today relating to the trial had below, even if they constituted error.

ALLSTATE'S COUNTER ASSIGNMENTS OF ERROR

The Court notes that, among other points, Allstate in the present case assigns as error the fact that the jury's verdict awarded the appellant $400.00 for the loss of use of his vehicle, and Allstate claims that there was no evidence to support such an award.

The evidence which the appellant did adduce to support this was are the fact that he had bought a used car for $300.00 and paid $100.00 to fix it up.

This Court agrees with Allstate that this evidence does not demonstrate loss of use or support the loss of use award. The basic measure of damages for loss of use of personal property is rental value, *O'Dell v. McKenzie*, 150 W.Va. 346, 145 S.E.2d 388 (1965), although as we have indicated above, other factors may be relevant. The cost of a replacement car is not one of those factors. Accordingly, the Court

concludes that the $400.00 loss of use award contained in the jury verdict must be set aside.

We have examined the remaining cross assignments and note that, even if they rise to the level of error, the error, if any, was not prejudicial.

CONCLUSION

For the reasons stated, this Court believes that the judgment of the circuit court, insofar as it relates to the first count of the appellant's complaint, should be affirmed, except that the $400.00 award for loss of use is set aside. Further, while the Court believes that the denial of attorney fees at the conclusion of the trial had was proper, and such denial is affirmed. The judgment of the court denying a phase 2 trial is reversed, and the matter is remanded on the appellant's *Jenkins* unfair trade practices claim for proceedings consistent with this opinion.

Affirmed in part; reversed in part; and remanded with directions.

Footnote: 1 Another event which occurred involved one of the appellant's proposed witnesses, Mr. Jack Lane. When it became apparent that the appellant might call Mr. Lane as a witness, Allstate, in a motion in limine moved to limit his testimony relating to certain other claims against Allstate. Mr. Lane was a former Allstate employee, who, working as an attorney, had examined 167 Allstate West Virginia claims for the years 1983 to 1988 in preparation for Allstate's defense of another lawsuit involving a reconditioning deduction issue analogous to a reconditioning deduction issue which the appellant sought to introduce in the present case.
Allstate, in its motion in limine, took the position that Mr. Lane's knowledge of the 167 cases was protected under attorney/client privilege. The trial court granted the motion in limine, and, in State ex rel. McCormick v. Zakaib, 189 W.Va. 258, 430 S.E.2d 316 (1993), this Court reasoned that since Allstate had already provided the appellant with the 167 cases on discovery, the attorney/client privilege had been waived.

Footnote: 2 One of these occasioned this Court's second involvement with this litigation prior to the granting of this appeal. Appellant previously attempted to appeal the decision of the court below that he had not substantially prevailed. The trial court originally made that determination in its order of May 18, 1994. When appellant undertook to appeal that order, a motion for new trial and other post trial motions were pending. This Court held the new trial motion suspended finality of judgment and made the action unripe for appeal. McCormick v. Allstate Insurance Co., 194 W.Va. 82, 459 S.E.2d 359 (1995.)

Footnote: 3 *In the body of Hayseeds, the Court explained in considerable detail what must be shown to recover punitive damages, as quoted later in this opinion.*

Footnote: 4 *West Virginia Code 33-11-4(9) provides:*
Unfair claim settlement practices. -- No person shall commit or perform with such frequency as to indicate a general business practice any of the following:
(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered;
(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;
(j) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;
(k) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
(l) Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;
(m) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;
(n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;

(o) Failing to notify the first party claimant and the provider(s) of services covered under accident and sickness insurance and hospital and medical service corporation insurance policies whether the claim has been accepted or denied and if denied, the reasons therefor, within fifteen calendar days from the filing of the proof of loss: Provided, That should benefits due the claimant be assigned, notice to the claimant shall not be required: Provided, however, That should the benefits be payable directly to the claimant, notice to the health care provided shall not be required. If the insurer needs more time to investigate the claim, it shall so notify the first party claimant in writing within fifteen calendar days from the date of the initial notification and every thirty calendar days, thereafter; but in no instance shall a claim remain unsettled and unpaid for more than ninety calendar days from the first party claimant's filing of the proof of loss unless there is, as determined by the insurance commissioner, (1) a legitimate dispute as to coverage, liability or damages; or (2) if the claimant has fraudulently caused or contributed to the loss. In the event that the insurer fails to pay the claim in full within ninety calendar days from the claimant's filing of the proof of loss, except for exemptions provided above, there shall be assessed against the insurer and paid to the insured a penalty which will be in addition to the amount of the claim and assessed as interest on such at the then current prime rate plus one percent. Any penalty paid by an insurer pursuant to this section shall not be a consideration in any rate filing made by such insurer.

Footnote: 5 This demand is included in a letter written to appellee's counsel on September 8, 1995.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

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June 30, 2006
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32873

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

JAMES ALLEN MECHLING,
Defendant Below, Appellant

Appeal from the Circuit Court of Monongalia County
Hon. Russell M. Clawges, Jr., Judge
Case No. 04-M-AP-25

REVERSED AND REMANDED

Submitted: April 12, 2006
Filed: June 30, 2006

Marcia Ashdown
Prosecuting Attorney
Morgantown, West Virginia
Attorney of Appellee

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE MAYNARD dissents.

SYLLABUS BY THE COURT

1. "In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus Point 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

2. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

3. "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

4. "For purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception." Syllabus Point 6, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

5. "We modify our holding in *James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court's subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding." Syllabus Point 2, *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999).

6. Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

7. To the extent that *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999), rely upon *Ohio v. Roberts*, 448 U.S. 56 (1980) (*overruled by Crawford v. Washington*, 541 U.S. 36 (2004)) and permit the admission of a testimonial statement by a witness who does not appear at trial, regardless of the witness's unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, those cases are overruled.

8. Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

9. Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.

10. A court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

11. Under the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Starcher, J.:

This is an appeal of a domestic battery conviction from the Circuit Court of Monongalia County. We are asked to examine whether the circuit court erred in permitting the admission of statements made by the victim to three individuals – statements indicating that the victim was battered by the defendant – when the victim did not appear and testify at the defendant's trial.

As set forth below, we find that the statements made by the victim were improperly admitted in violation of the Confrontation Clause of the Sixth Amendment to the *United States Constitution* and Article III, Section 14 of the *West Virginia Constitution*.

I.
Facts & Background

The State contends that on March 20, 2004, defendant James Allen Mechling committed misdemeanor domestic battery against his girlfriend, victim Angela Thorn, in violation of *W.Va. Code*, 61-2-28(a) [2001].[1] To establish guilt under that section, the State was specifically required to prove that the defendant did "intentionally make[] physical contact of an insulting or provoking nature" with a family or household member. The statute stated:

[1]*W.Va. Code*, 61-2-28 was amended by the Legislature on March 13, 2004, and the amendments took effect ninety days later. *See 2004 Acts of the Legislature*, ch. 85. These amendments do not, however, affect the appellant's claims.

> (a) Domestic battery. – Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both.

The defendant was tried and convicted under this statute in magistrate court, and then appealed the conviction to the circuit court. In a *de novo* bench trial in the circuit court on November 8, 2004, the defendant was once again convicted of domestic battery.

The victim, Ms. Thorn, did not appear at either of the defendant's trials. The circuit clerk issued subpoenas for the victim, upon the request of the State. However, it appears that the circuit clerk mailed the subpoenas, rather than formally serving the subpoenas upon Ms. Thorn. The State was apparently unable to call the victim to testify.

Furthermore, no witnesses testified before the circuit court that they saw the defendant "intentionally make physical contact" with the victim. Instead, the State established that the defendant battered the victim through the testimony of three individuals who heard the victim say that the defendant had struck her.

Witness Ralph Alvarez testified that, on March 20, 2004, he was out in his yard by his garage working on his car. Several times he heard a man and woman yelling and arguing, but continued working. However, when Mr. Alvarez heard a child crying, he walked out into his yard and saw – approximately seventy to eighty yards away on the side of a nearby road – a young woman (later identified as Ms. Thorn) getting up off of the

ground. Mr. Alvarez testified that his view of the scene was partly obstructed by a tree, so he took a few more steps across his yard and saw the defendant, James Mechling. Between the defendant and Ms. Thorn was a baby buggy with defendant Mechling's and Ms. Thorn's infant daughter.

Mr. Alvarez stated that he perceived that the defendant was standing up straight, facing across the baby buggy as Ms. Thorn was getting up off the ground. Mr. Alvarez testified that he saw the defendant "take as swing" at Ms. Thorn, but that his view was still partly obstructed by the tree:

> I couldn't tell whether it was a punch, a slap. I could just tell he was swinging – he'd swung at her or something in front of him, the way the tree was situated. . . . I really didn't pay attention to it when I seen what was going on. I just knew there was something happening that shouldn't be.

Trial Tr. at 8-9. Mr. Alvarez could not, however, say whether the defendant's swing "connected with" Ms. Thorn, stating, "I did not physically see him make physical contact with her." Trial Tr. at 7, 13-14, 18.

Mr. Alvarez yelled at the defendant to stop, and the defendant did. Mr. Alvarez went to his daughter's nearby trailer and asked her to call the sheriff's department, and then walked back across the yard toward the defendant and Ms. Thorn. Before Mr. Alvarez reached the defendant, a vehicle pulled to the side of the road and the defendant climbed in and fled the scene.

Over defense counsel's objection, Mr. Alvarez was permitted to testify about his conversation with Ms. Thorn. Mr. Alvarez stated that:

> She said, he hit me in the head and I've got a knot on my head, and I asked her if she was okay, and she said, yes, she would be okay.

Trial Tr. at 11. Mr. Alvarez comforted Ms. Thorn until two sheriff's deputies arrived shortly thereafter.

Deputies Robert Fields and Thornton Merrifield testified that they received a call of a domestic dispute in progress around 9:30 in the morning, and that they arrived on the scene "within 15 minutes." When they arrived at the scene they found Ms. Thorn to be crying and "really shook up." Over the objections of defense counsel, the sheriff's deputies testified to their conversation with Ms. Thorn. Deputy Fields stated that Ms. Thorn "told me that her head hurt from where she was punched in the head." Trial Tr. at 22. Deputy Merrifield stated:

> Deputy Merrifield: [Ms. Thorn] said she'd been struck in the head twice, and she felt her head, and I went ahead and felt, and there was two knots on the right side of her head.
>
> Prosecutor: And she attributed those knots to the defendant's actions?
>
> Deputy Merrifield: Yes, ma'am.

Trial Tr. at 27. As a result of Ms. Thorn's statements identifying the defendant as her assailant, the deputies testified they sought a warrant for the arrest of the defendant.

The defendant invoked his constitutional right not to testify.

At the close of the trial, the circuit court found, beyond a reasonable doubt and "upon the basis of the testimony" that the defendant was guilty of domestic battery for striking the victim "one time in the head." The circuit court sentenced the defendant to be

incarcerated in the regional jail for six months, and imposed a $100.00 fine. The circuit court formalized its decision in an order dated November 19, 2004.[2]

The defendant now appeals his conviction and the court's November 19, 2004 order.

II.
Standard of Review

Our standard of review of the circuit court's judgment after a bench trial was set out in Syllabus Point 1 of *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996):

> In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

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[2]At the November 8, 2004 trial, the circuit court indicated that the effective sentence date was the date of the defendant's arrest, April 12, 2004. Accordingly, the six-month sentence was effectively discharged as of October 6, 2004, because the defendant had been in pretrial incarceration pending the resolution of several felony charges including DUI Resulting in Death, Fleeing the Scene, and Forgery of Public Documents.

This does not, however, mean that the defendant's appeal is pointless or moot. If the defendant is subsequently convicted for additional acts of domestic violence, in this state or another state, a court may be empowered to impose a greater penalty upon the defendant. *See, e.g., W.Va. Code*, 61-2-28(c) (increasing the penalties for second offense of domestic assault or domestic battery) and -28(d) (making third or subsequent domestic assault or domestic battery a felony) [2004].

The defendant, however, alleges that constitutional error occurred in the admission of Ms. Thorn's statements through the testimony of Mr. Alvarez and Deputies Fields and Merrifield. We have stated that the "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975). *In accord*, Syllabus Point 14, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998). "An error in admitting plainly relevant evidence which possibly influenced the jury [or a trial judge] adversely to a litigant cannot . . . be conceived of as harmless." *Chapman v. California*, 386 U.S. 18, 23-24 (1967). "'Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.'" *State v. Jenkins*, 195 W.Va. 620, 629, 466 S.E.2d 471, 480 (1995) (*quoting*, Syllabus Point 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)). Moreover, once an error of constitutional dimensions is shown, the burden is upon "the beneficiary of a constitutional error" – usually the State – "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

With these standards in mind, we consider the defendant's arguments.

III.
Discussion

The defendant argues that his rights under the Confrontation Clause – set forth in the Sixth Amendment to the *United States Constitution* and in Section 14 of Article III of the *West Virginia Constitution* – were violated when the circuit court, over defense counsel's objection, permitted three witnesses to testify regarding oral statements made by the victim accusing the defendant of a crime when the victim did not appear for trial.

The Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* guarantee an accused the right to confront and cross-examine witnesses. The Confrontation Clause contained in the Sixth Amendment provides: "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him[.]" Likewise, the Confrontation Clause contained in the *West Virginia Constitution*, Section 14 of Article III, provides that in the "[t]rials of crimes, and misdemeanors . . . the accused shall be . . . confronted with the witness against him[.]"

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the United States Supreme Court decided that the Confrontation Clause allowed the out-of-court statement of a witness to be admitted against an accused if it was shown that the witness was unavailable for trial, and that the witness's statement bore "adequate 'indicia of reliability.'" 448 U.S. at 66.

This Court has grappled with the *Roberts* decision in three cases. We first adopted the test set forth in *Roberts* in *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), stating at Syllabus Point 2:

> The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1)

> demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement.

In *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), we expanded our holding in *James Edward S.* to state that no independent assessment of the reliability of the witness's out-of-court statement was necessary if the statement was admissible because of an exception to the hearsay rules. We stated, in Syllabus Point 6 of *Mason*, that:

> For purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception.

And finally, in *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999), we concluded that the Confrontation Clause test espoused in *Roberts* applied only to out-of-court statements made by a witness in a prior judicial proceeding. We therefore modified our holding in *James Edward S.*, stating in Syllabus Point 2:

> We modify our holding in *James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court's subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding.

Subsequent to our three decisions interpreting and applying *Roberts*, the U.S. Supreme Court issued *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the

appellant argued that the test adopted by the *Roberts* Court "strays from the original meaning of the Confrontation Clause" and urged the Court to reconsider its holding. 541 U.S. at 42.

The U.S. Supreme Court examined the common law and history surrounding the Confrontation Clause, and concluded in *Crawford* that *Roberts* should be overruled. The Court stated in *Crawford* that, contrary to *Roberts*:

> . . . the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts . . . As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine.

541 U.S. at 53-54 (citation omitted). The Court therefore set forth the following summation of the law behind the Confrontation Clause:

> Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

541 U.S. at 59.

The central holding of *Crawford* is that the testimonial character of a witness's statement separates it from other hearsay statements, and determines whether the statement is admissible at trial or not because of the Confrontation Clause. The Confrontation Clause is a rule of procedure, not a rule of evidence. "If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that

is no longer subsumed by the evidentiary rules governing the admission of hearsay statements." *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004).

The Court acknowledged that its reasoning in *Roberts* was flawed because it allowed a jury to hear evidence that was untested by the adversarial process, and admission of the evidence was based on a mere judicial determination of reliability, a determination usually made under the rules of hearsay. 541 U.S. at 62. The Court determined that the Framers of the *Constitution* did not mean "to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" 541 U.S. at 61. The Court therefore rejected the reasoning of *Roberts*, stating:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

541 U.S. at 62. Because of the unpredictability of the "reliability" concept espoused by the *Roberts* Court, as well as "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude," 541 U.S. at 63, the Court concluded that *Roberts* was "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." 541 U.S. at 67. The Court conceded that lower courts relying on *Roberts* were likely acting in good faith when they found a witness's out-of-court statement to be admissible against an accused merely because it was reliable, but said:

> The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government

> officers, could not always be trusted to safeguard the rights of the people[.] . . . They were loath to leave too much discretion in judicial hands.

541 U.S. at 67. The Court therefore overruled its reasoning in *Roberts*.

The law of *Crawford* is clear: the Confrontation Clause of the Sixth Amendment to the *United States Constitution*, and of Section 14 of Article III of the *West Virginia Constitution*, bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Furthermore, *Crawford* explicitly overrules *Ohio v. Roberts*, thereby undermining the fundamental holdings at least three Confrontation Clause cases of this Court that were directly based upon that case. Accordingly, to the extent that *State v. James Edward S.*, *supra*, *State v. Mason*, *supra*, and *State v. Kennedy*, *supra*, rely upon *Ohio v. Roberts*, *supra*, and permit the admission of testimonial statements by a witness who does not appear at trial, regardless of the witness's unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, this Court overrules those cases.

Crawford makes clear that only "testimonial statements" cause the declarant to be a "witness" subject to the constraints of the Confrontation Clause. Non-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause. While the Court in *Crawford* did not clearly define the term

"testimonial statements," it did leave some clues as to the types of witness declarations which might fit the meaning of "testimonial statements:"

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition – for example, *ex parte* testimony at a preliminary hearing.
>
> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.

541 U.S. at 51-52 (quotations and citations omitted).

The *Crawford* Court, however, "[left] for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68.[3]

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[3]Other clues to the meaning of the "testimonial statements" can be found in *Lee v. Illinois*, 476 U.S. 530, 540 (1986) ("The Confrontation Clause . . . ensur[es] that convictions will not be based on the charges of unseen and unknown – and hence unchallengable – individuals."); *Ohio v. Roberts*, 448 U.S. at 78 (Brennan J., dissenting) ("Historically, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge *his accusers* in a direct encounter before the trier of fact."); *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses."); and *Bruton v.*

(continued...)

In *Davis v. Washington*, 547 U.S. ___, 2006 WL 1667285 (Nos. 05-5444 and 05-5705, June 19, 2006), the U.S. Supreme Court returned to the *Crawford* decision and, for the first time, began to establish some parameters for the term "testimonial." The Court again recognized that it could not produce an "exhaustive classification of all conceivable statements" that were either testimonial or non-testimonial. 547 U.S. at ___ (Slip. Op. at 7). But, within the context of the fact patterns before the Court, the *Davis* Court crafted some diffuse guidelines which, because of the Court's circumlocution, we must now attempt to distill into practical rules.

The *Davis* case was actually a consolidation of two separate domestic violence criminal convictions. In these cases, the Court was asked to determine the effect of the Confrontation Clause upon two forms of out-of-court witness statements made to law enforcement personnel that, when the witness did not appear for trial, were used against the accused: a recording of a 911 call by the crime victim as the crime was occurring; and the testimony of a police officer relating his conversation with the victim some time after arriving at the crime scene.

In the first case, Adrian Martell Davis challenged his conviction for felony violation of a domestic no-contact order involving his former girlfriend. At trial, the victim did not testify. Instead, the prosecution admitted a recording of the victim's 911 call. In a

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[3](...continued)
United States, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

colloquy with a 911 operator, the former girlfriend stated that she was being beaten, and identified Davis as her assailant.[4]

In the second case, *Hammon v. Indiana*,[5] police officers responded to a reported domestic disturbance at the home of Herschel and Amy Hammon. They found Amy alone on the front porch, but she told them that "nothing was the matter." 547 U.S. at ___

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[4]The conversation with the 911 operator began as follows:

> 911 Operator: Hello.
> Complainant: Hello.
> 911 Operator: What's going on?
> Complainant: He's here jumpin' on me again.
> 911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
> Complainant: I'm in a house.
> 911 Operator: Are there any weapons?
> Complainant: No. He's usin' his fists.
> 911 Operator: Okay. Has he been drinking?
> Complainant: No.
> 911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
> Complainant: I'm on the line.
> 911 Operator: Listen to me carefully. Do you know his last name?
> Complainant: It's Davis.
> 911 Operator: Davis? Okay, what's his first name?
> Complainant: Adrian
> 911 Operator: What is it?
> Complainant: Adrian.
> 911 Operator: Adrian?
> Complainant: Yeah.
> 911 Operator: Okay. What's his middle initial?
> Complainant: Martell. He's runnin' now.

Davis, 547 U.S. at ___ (Slip Op. at 2).

[5]The underlying case is *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

(Slip Op. at 4). The officers entered the house and found glass broken on the front of a gas heating unit, and flames coming out. Herschel, who was in the kitchen, told officers that he and his wife had been in an argument, but that it "never became physical." The officers kept the Hammons separated, and one officer again asked Amy what had happened. Amy altered her story and told the officer she had been assaulted by Herschel. The officer then had Amy fill out and sign an affidavit. Amy handwrote the following:

> Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

547 U.S. at ___ (Slip Op. at 4). At a bench trial, Amy was subpoenaed but did not appear. Over the objection of defense counsel, the prosecutor admitted into evidence Amy's affidavit and admitted the police officer's testimony relating his conversation with Amy.[6] Herschel Hammon was convicted of domestic battery and of violating his probation.

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[6]The police officer testified that Amy

> informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.
>
> . . . . .
>
> She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

Davis, 547 U.S. at ___ (Slip Op. at 5).

The U.S. Supreme Court began its analysis of these two cases in *Davis* by considering whether the Confrontation Clause applies only to prohibit the use of formal, courtroom-style "testimonial hearsay." The Court acknowledged that the "perimeter" of the Confrontation Clause includes sworn statements before government officers:

> The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to "witnesses" against the accused – in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid*. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

547 U.S. at ___ (Slip Op. at 8-9)(*quoting Crawford*, 541 U.S. at 51). However, the Confrontation Clause historically applied to statements beyond prior courtroom testimony and formal depositions and included informal statements to government officials:

> [T]he English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it.

Davis, 547 U.S. at ___ (Slip Op. at 11) (citation omitted).

In *Davis*, the Court sought to establish principles regarding the use of witness statements made to police during "interrogations." The Court stated that, when it said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class"

of testimonial hearsay barred from use at trial, what the Court really meant to say was that the Confrontation Clause only bars the use of any statement made during "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at ___ (Slip Op. at 11) (*citing Crawford*, 541 U.S. at 53). In other words, witness statements made to law enforcement officers that are comparable to those that would be given in a courtroom – that is, statements about "what happened" – are testimonial statements the use of which is proscribed by the Confrontation Clause.

The Court therefore set forth the following narrow rule, which the Court felt was necessary to determine the cases before it:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at ___ (Slip Op. at 7). The Court later emphasized that the phrase "ongoing emergency" means just that, and once a government officer has gained the information "needed to address the exigency of the moment" and "the emergency appears to have ended," then any further questioning by the government officer is more likely to elicit testimonial statements from the witness. 547 U.S. at ___-___ (Slip Op. at 13-14).

The guidelines adopted by the Court in *Davis* are flexible and inherently fact-based, and the existence or lack of government interrogation does not necessarily determine whether a statement is testimonial. Similarly, a police officer's declaration that a statement was taken during an "ongoing emergency" does not make it so. *See* 547 U.S. at ___-___ n.6 (Slip Op. at 17-18 n.6) ("While prosecutors may hope that inculpatory 'nontestimonial' evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so."). Instead, the focus of a court attempting to assess whether a witness's out-of-court statement is "testimonial" should be determined by evaluating the witness's statement, not any interrogator's questions. The Court further stated in *Davis*:

> Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations – which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

547 U.S. at ___-___ n.1 (Slip. Op. at 7-8 n.1).

We believe that the Court's holdings in *Crawford* and in *Davis* regarding the meaning of "testimonial statements" may therefore be distilled down into the following three

points. First, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

The Court in *Davis* proceeded to apply these guidelines to the facts of Davis's and Hammon's cases. As to Davis, the Court concluded that circumstances objectively indicated that the primary purpose of the victim's statement in the 911 call was to appeal for police assistance to meet an ongoing emergency. The victim was not "acting as a *witness*; she was not *testifying*. . . . No 'witness' goes into court to proclaim an emergency and seek help." 547 U.S. at ___ (Slip Op. at 13). The Court therefore found that the victim's "early statements identifying Davis as her assailant . . . were not testimonial," and that the

admission of the 911 call into evidence against Davis did not violate the Confrontation Clause.[7] 547 U.S. at ___ (Slip Op. at 14). Davis's conviction was affirmed.

In Hammon's case, however, the Court found a "much easier task" than in Davis's case, 547 U.S. at ___ (Slip Op. at 14), and concluded that the victim's affidavit and statements to a police officer clearly should not have been admitted. The Court found that the statements taken by the police officer took place some time after the events described were over, and the statements were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation." 547 U.S. at ___ (Slip Op. at 17).

> It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct . . . There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and

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[7]The Court did suggest, however, that once it appeared that the emergency ended (when the victim stated that Davis had driven away from the premises), and the 911 operator told the victim to be quiet and began to ask questions comparable to a structured form of police questioning, the 911 operator began to elicit testimonial statements from the victim that might be barred from use by the Confrontation Clause.

> This presents no great problem. . . . [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

547 U.S. at ___ (Slip Op. at 14). The Court went on to point out that Davis's jury did not hear the complete 911 call, and that even if some latter portions of the call were testimonial, a lower court had determined their admission was harmless beyond a reasonable doubt. *Id*. Furthermore, the Court noted that Davis did not challenge the lower court's finding that the admission of the latter portions of the 911 call was harmless.

> saw no one throw or break anything. When the officers first arrived, [the victim] Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the investigation was to investigate a possible crime – which is, of course, precisely what the officer *should* have done.

547 U.S. at ___ - ___ (Slip Op. at 14-15) (citations omitted).

The Court conceded that, particularly in domestic disputes, "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Davis*, 547 U.S. at ___ (Slip Op. at 17) (*quoting Hiibel v. Sixth Judicial Dist. Court of Nev., Humbolt Cty.*, 542 U.S. 177, 186 (2004)). In such exigent circumstances, a law enforcement officer's initial inquiries will often produce non-testimonial statements. But once it becomes objectively apparent that the emergency has passed, the investigation of a past crime – while necessary to prevent future harms and lead to necessary arrests – is likely to elicit testimonial statements from witnesses that will be subject to the constraints of the Confrontation Clause. As the Court said:

> Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that

> provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

547 U.S. at ___ - ___ n.6 (Slip Op. at 17-18 n.6).

The Court in *Davis* concluded that the Confrontation Clause clearly operated to exclude the victim's statements made in an affidavit and made to a law enforcement officer. Accordingly, the Court reversed the lower court judgment affirming Herschel Hammon's conviction, and remanded the case for further proceedings.

We turn now to the case before us.

Defendant Mechling asserts that the circuit court erred in permitting the State, contrary to the Confrontation Clause, to admit Ms. Thorn's statements made to the two sheriff's deputies when she did not appear for trial.[8] Based upon the U.S. Supreme Court's holding in *Davis*, we agree. It is clear from the circumstances that the deputies' interrogation of Ms. Thorn was part of an investigation into possibly criminal past conduct. There was no emergency in progress when the deputies arrived, and the defendant had clearly departed the scene when the interrogation occurred. When the deputies questioned Ms. Thorn, they were seeking to determine "what happened" rather than "what is happening." Objectively viewed, the purpose of the deputies' interrogation was to investigate a possible crime – which is, of course, precisely what the deputies *should* have done. But the statements taken by the deputies could not become a substitute for Ms. Thorn's live testimony, because those

[8]The defendant contends that the State never made a proper record establishing that Ms. Thorn was unavailable. We presume, for purposes of our opinion, that Ms. Thorn was indeed properly served with a subpoena and was unavailable at the time of trial.

statements "do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis*, 547 U.S. at ___ (Slip Op. at 16).

Accordingly, we conclude it was error under the Confrontation Clause for the circuit court to permit the sheriff's deputies to testify as to their conversations with the victim. The record firmly establishes that this constitutionally infirm evidence influenced the trial court's decision,[9] and the beneficiary of this constitutional error – the State – has not attempted to establish beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We must therefore set aside the defendant's conviction, and remand the case for further proceedings.

The defendant also challenges on appeal the State's use of Mr. Alvarez's testimony regarding his conversation with Ms. Thorn. The defendant asserts that Ms. Thorn's statements to Mr. Alvarez were "testimonial hearsay" subject to the Confrontation Clause because an objective witness could have reasonably believed that the statements would be used at a later trial.[10] The record, however, does not reveal the full extent of Mr.

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[9]The circuit court stated that he found the defendant guilty beyond a reasonable doubt "upon the basis of the testimony" in the case, and the only testimony presented was that of Mr. Alvarez and Deputies Fields and Merrifield.

[10]In footnotes 1 and 2 of *Davis*, the U.S. Supreme Court indicated that its opinion was focused upon "interrogations" by law enforcement officers, and thus it was "unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" 547 U.S. at ___-___ n.1 and n.2 (Slip Op at 7-8 n.1 and n.2).

However, in *Davis* the Court cited as authority decisions suggesting that statements made to non-law-enforcement individuals may be testimonial and also be subject to Confrontation Clause limitations. *See* 547 U.S. at ___ (Slip Op. at 13) (*citing King v.*

(continued...)

Alvarez's interaction with Ms. Thorn, and we cannot discern whether the admission of Ms. Thorn's statements through Mr. Alvarez was constitutionally permissible. The U.S. Supreme Court, in *Crawford* and *Davis*, seems to suggest that Ms. Thorn's statements would be non-testimonial to the extent that Mr. Alvarez was intervening to address an emergency and heard Ms. Thorn relate "what is happening." But those statements would be testimonial if the statements related "what happened," and the circumstances reflect a significant lapse of time before the statements were made to Mr. Alvarez. We leave it for the parties on remand to develop a thorough record of the circumstances surrounding Mr. Alvarez's admirable intervention, and for the circuit court to resolve whether the victim's statements to Mr. Alvarez were testimonial or non-testimonial.

We reach our decision in this case with some hesitation. This Court is painfully aware that domestic violence cases inherently present a combination of circumstances that obstruct, yet simultaneously intensify the need for, successful criminal prosecutions: low victim cooperation and high same-victim recidivism. *See* Tom Lininger,

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[10](...continued)
Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779) (wherein a "young rape victim, 'immediately on her coming home, told all the circumstances of the injury' to her mother. . . . The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. By the time the victim got home, her story was an account of past events."). Furthermore, the Court said that readers should not infer from the opinion that "statements made in the absence of any interrogation are necessarily nontestimonial." 547 U.S. at ___ n.1 (Slip Op. at 7 n.1).

Until the U.S. Supreme Court holds otherwise, we interpret the Court's remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.

"Prosecuting Batterers after *Crawford*," 91 Va.L.Rev. 747, 768-71 (2005). Frequently, the victims of domestic violence are deeply conflicted about their plight and refuse to seek police intervention, let alone testify at trial. Society commonly expects a victim of domestic violence to call the police. However, empirical data show that most domestic-violence victims do not call the police, and even when the police are called, the outcome is not always positive. May Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome," 21 Hofstra L. Rev. 1191, 1229 (1993). According to one recent estimate, eighty to ninety percent of domestic violence victims who appeal to the criminal justice system for help recant or otherwise fail to assist the prosecution at some point in the proceedings. Lininger, 91 Va.L.Rev. at 768 n. 103; Douglas E. Beloof & Joel Shapiro, "Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence," 11 Colum. J. Gender & L., 1, 3 (2002).

Yet, without a successful arrest and prosecution, these victims are likely to be battered again. *See* American Medical Association, *Diagnostic and Treatment Guidelines on Domestic Violence* 6 (1992) (stating that 47% of husbands who batter their wives do so three or more times per year).

Some victims do not cooperate with prosecutors because they fear retaliation by the defendant. That fear may be a reasonable projection of past conduct. In other instances, there may be express threats of retaliation or actual retaliatory violence – against

the victim or those close to the victim[11] – by the batterer. Indeed, some studies indicate that such threats and retaliation may occur in the majority of domestic violence prosecutions. *See, e.g.*, Lininger, 91 Va.L.Rev. at 769; Laura Dugan, *et al.*, "Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate-Partner Homicide," 37 Law & Soc'y Rev. 169, 179 (2003); Deborah Epstein *et al.*, "Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases," 11 Am.U.J. Gender Soc. Pol'y & L. 465, 476 and n.38 (2003) (describing a study in which women identified fear of their batterer as the number one reason why they were unwilling to cooperate with government).

Battered women are at an extremely heightened risk of violence – and even death – at the moment they seek to separate from their abusers. Cooperation in a criminal prosecution is often meant and understood, by both the abuser and victim, as a means of formally separating from an abuser – and thus, presents increased danger to the victim. *See, e.g.*, Dugan, 37 Law & Soc'y Rev. at 174. As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their abusers will leave them less, rather than more, safe. Individuals who have experienced domestic violence understand this dynamic; individuals who have not, and who rely on varied notions of law-abiding societal norms, do not understand and compound the victim's

[11]We understand that batterers typically threaten not only the victim, but also the victim's children. Batterers threaten to either harm the victim's children, or to take the children from the victim by force or by judicial proceeding.

already difficult situation by blaming the victim for tolerating the batterer's misconduct. While attitudes are changing, battered women too often are viewed by the criminal justice system as somehow responsible for the crimes against them, further leading domestic violence victims to reject participation in criminal trials. Barbara Hart, "Battered Women and the Criminal Justice System," 36 Am. Behavioral Scientist 624, 626 (1993).[12]

The U.S. Supreme Court was not unmindful of this problem in domestic violence prosecutions when it issued *Crawford* and *Davis*, and neither is this Court. Still, the protections provided by the *Constitution* and the Confrontation Clause cannot be sacrificed by the State upon the altar of expediency to achieve a conviction in a domestic violence case.[13] But those protections may be sacrificed by the accused through a time-tested equitable doctrine: forfeiture.

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[12]Other reasons victims of domestic violence do not testify include economic dependence on their batterer; concern that an immigrant batterer will be deported upon conviction; fear of an adverse reaction from family or community who might regard a victim's participation in the prosecution as a betrayal; apprehension that involvement in the criminal justice system will lead to the loss of child custody to a state child protective services agency; or continuing emotional connections to their batterers. Epstein, 11 Am. U.J. Gender Soc. Pol'y & L. at 477-82; Hart, 36 Am. Behavioral Scientist at 627-28.

[13]Prosecutors claim that a domestic violence conviction can never be obtained without the use of the victim's statement; yet, prosecutors routinely obtain convictions in murder cases without any statement from the victim.

It is important to recognize that, as with all crimes, *some* alleged victims will refuse to testify because their initial accusations were untrue or exaggerated. *Some* alleged victims may falsely accuse their partners of abuse in an attempt to gain an upper hand in the relationship, or in a separate court proceeding. Thus, the function of confrontation as a tool to vindicate the innocent has as much of a role in domestic violence prosecutions as in other criminal prosecutions.

Under the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. In both *Crawford*, 541 U.S. at 62 (*citing Reynolds v. United States*, 98 U.S. 145, 158-59 (1870)) and in *Davis*, 547 U.S. at ___ - ___ (Slip Op. at 18-19), the U.S. Supreme Court identified the doctrine of forfeiture as a means by which an accused might lose the protection afforded by the Confrontation Clause.

The Court recognized that domestic violence crimes are "notoriously susceptible to intimidation of the victim to ensure that she does not testify at trial." *Davis*, 547 U.S. at ___ (Slip Op. at 18).

> When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. . . . But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds."

547 U.S. at ___ (Slip Op. at 18) (citations omitted). *See also*, *United States v. Dhinsa*, 243 F.3d 635, 651 (2nd Cir. 2001) ("threats, actual violence, or murder" forfeit confrontation right); *West Virginia Rules of Evidence*, Rule 804(a)(5) [1994] ("A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of

preventing the witness from attending or testifying."); *Federal Rules of Evidence*, Rule 804(b)(6) [1997] (excluded from the hearsay rule is any "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.").

An accused's coercion or intimidation of a victim of domestic violence so as to trigger forfeiture can take many forms. The most obvious situation is where the accused directly confronts the victim after being charged, and intentionally coerces the victim into changing his or her statement, or simply not testifying. Another likely situation where an accused may trigger forfeiture is when, after being charged, the accused engages in further abuse or intimidation of the victim which is not explicitly intended to alter, but has the effect of altering, the victim's testimony. But, "[b]attered women . . . may perceive danger and imminence differently from men. . . . A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman." *People v. Romero*, 13 Cal.Rptr.2d 332, 336 n.6 (Cal. Ct. App. 1992) (citation omitted). Hence, the most difficult forfeiture situation for courts to assess will be those circumstances where the victim responds to a batterer's actions that precede the domestic violence charge – that is, where the accused's earlier conduct and threats (statements like "don't you ever call the police or else!") cause the victim to decline to testify, claim a lack of memory, or be absent from the trial.

In order for forfeiture to be proven in domestic violence actions, prosecutors, law enforcement officers and courts must secure evidence – possibly from third parties –

prior to trial indicating that these victims are too frightened to testify about the intimidating and coercive character of the accused's actions. If a victim is too scared to testify against the accused, for fear of retribution, the victim will probably also be too scared to testify in any pre-trial forfeiture proceeding.

The U.S. Supreme Court has suggested that the government must meet a preponderance-of-the-evidence standard to establish forfeiture, and suggested that if a hearing on forfeiture is required, hearsay evidence may be considered by the trial court. *Davis*, 547 U.S. at ___ - ___ (Slip Op. at 18-19). The purpose of a court relying upon the forfeiture doctrine is to protect the integrity of their proceedings.

Absent a finding of forfeiture by wrongdoing in this case, the Confrontation Clause of the Sixth Amendment to the *United States Constitution* and of Section 14 of Article III of the *West Virginia Constitution* operates to exclude the sheriff's deputies' testimony – and possibly Mr. Alvarez's testimony – regarding Ms. Thorn's accusations against the defendant. On remand, the circuit court may determine whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

IV.
Conclusion

The circuit court's November 19, 2004 judgment order is reversed, and the case is remanded for further proceedings.

Reversed and Remanded.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2006 Term

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OF WEST VIRGINIA

No. 32722

IN THE MATTERS OF:

MEGAN B., AMBER G. B.,
WILLIAM Z.Q.B., AND SHEEHAN B.

Appeal from the Circuit Court of Grant County
The Honorable Andrew N. Frye, Jr., Judge
Case Nos. 04-JA-9, 04-JA-10, 04-JA-11, 04-JA-12

Reversed

Submitted: January 10, 2006
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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

"In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review." Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

Per Curiam:

This is an appeal by former Grant County Sheriff Charles Kimble (hereinafter "Appellant") from an order of the Circuit Court of Grant County holding him in contempt of court for his failure to serve an order to remove children from a home in an abuse and neglect matter. Upon thorough review of the matters presented in this appeal, this Court reverses the determination of the lower court, finding that the contempt order was improper and should be vacated.

I. Factual and Procedural History

On September 10, 2004, the Department of Health and Human Resources (hereinafter "DHHR") applied to Grant County Magistrate Willard L. Earle, II, sitting as a juvenile referee,[1] for an order permitting the DHHR to take four children into State custody in an abuse and neglect proceeding. Magistrate Earle signed[2] the requested order and sent it to Sheriff Kimble through a DHHR representative with an oral request that the Sheriff

[1]West Virginia Code § 49-1-4(10) (1998) (Repl. Vol. 2004) permits a circuit court to designate one or more magistrates of the county to perform the functions and duties of a juvenile referee.

[2]The order also specified that Magistrate Earle had, by telephonic communication, received oral confirmation of the order from Circuit Judge Phillip Jordan.

promptly serve it on the parents of the juveniles.[3] Sheriff Kimble informed the DHHR representative that he had an important meeting and would be unable to immediately serve the order but could do so in approximately seventy minutes. When Magistrate Earle learned of the Sheriff's refusal to immediately serve the order, he personally went to speak with Sheriff Kimble. Again, the Sheriff explained the situation and informed the Magistrate that he could not immediately serve the order but could serve it seventy minutes later. A state trooper visiting the office offered to serve the order, and the Sheriff maintains that his final understanding of the situation was that the state trooper would "take care of it." The Sheriff testified at the hearing that "that was the end of it and we all went our separate ways." The record reflects that the order did get served by approximately 6:00 or 7:00 p.m. that same evening by the state police.

On September 17, 2004, the lower court entered a show cause order stating that the lower court had become aware of Sheriff Kimble's refusal to serve the emergency order. The show cause order did not include any statement indicating that the proceeding would be in the nature of a contempt proceeding. It explained only that the Honorable Andrew N. Frye, Jr., had learned of the Appellant's "refusal, on September 10, 2004, to accompany the

[3]The record reflects that the need for immediate service of the order arose from the fact that the children had informed authorities that they would be severely punished at home if their parents learned that they had revealed the existence of abuse and neglect to authorities. Thus, the plan was to intervene and remove the children prior to their arrival home from school.

Department of Health and Human Resources Child Protective Services Worker to the . . . children's residence to assist in the removal of said children and to serve the parents with the Emergency Removal Order entered by Magistrate Earle." The show cause order further commanded the Sheriff to appear before the circuit court "to show cause why he failed to discharge his statutorily required duties in this matter."

On October 6, 2004, the lower court conducted a hearing in this matter. The Appellant waived his right to have an attorney, and the lower court did not utilize a prosecutor or empanel a jury. The Appellant and Magistrate Earle testified at the hearing, and the lower court found that the Appellant had failed to serve the order and was therefore in contempt of court as defined by West Virginia Code § 61-5-26 (1923) (Repl. Vol. 2005). The lower court did not specify whether the contempt was criminal or civil in nature.

In an October 12, 2004, written order, the lower court held that the Appellant had failed to exercise his obligation under West Virginia Code § 50-1-14(a) (2004) (Supp. 2005). That statute provides, in part, that the sheriff must "execute all civil and criminal process from any magistrate court which may be directed to such sheriff." The lower court ordered the Appellant to send a letter of apology to the children involved in the underlying abuse and neglect case, to serve ten days in jail, to forfeit ten days' pay, and to place the county deputies on notice that abuse and neglect matters take priority. The jail sentence and

the loss of pay were suspended contingent upon the Appellant's completion of 120 hours of community service.

Upon appeal to this Court, the Appellant contends that the contempt order was in the nature of criminal contempt and therefore required the involvement of a prosecutor, a jury trial, and the utilization of the West Virginia Rules of Evidence. Further, the Appellant contends that he did not receive proper notice that the hearing was a contempt proceeding and that the lower court referenced West Virginia Code § 61-5-26 as the basis for its decision, despite the fact that the underlying order was a magistrate order rather than a circuit court order. The Appellant also contends that the evidence was insufficient to support a finding of contempt. The contempt order was stayed pending the outcome of this appeal.

II. Standard of Review

In syllabus point one of *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996), this Court explained as follows:

> In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

See also Harris v. Harris, 212 W.Va. 705, 575 S.E.2d 315 (2002).

III. Discussion

West Virginia Code § 50-1-14(a), in its entirely, provides as follows: "It shall be the duty of each sheriff to execute all civil and criminal process from any magistrate court which may be directed to such sheriff. Process shall be served in the same manner as provided by law for process from circuit courts." The facts presented in this case reveal a situation in which the Sheriff was orally requested to serve the Order Ratifying Emergency Custody, entered by the Magistrate sitting as a juvenile referee assisting the circuit court. However, neither the order itself nor any other paper issued by the court or its clerk directed the Sheriff to serve the order.

West Virginia Code § 61-5-26 governs the issue of punishment for contempt, providing as follows:

> The courts and the judges thereof may issue attachment for contempt and punish them summarily only in the following cases: (a) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice; (b) violence or threats of violence to a judge or officer of the court, or to a juror, witness, or party going to, attending or returning from the court, for or in respect of any act or proceeding had, or to be had, in such court; (c) misbehavior of an officer of the court, in his official character; (d) disobedience to or resistance of any officer of the court, juror, witness, or other person, to any lawful process, judgment, decree or order of the said court. No court shall, without a jury, for any such contempt as is mentioned in subdivision (a) of this section, impose a fine exceeding fifty dollars, or imprison more than ten days. But in any such case the court may impanel a jury (without an indictment or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment

> according to the verdict. No court shall impose a fine for contempt, unless the defendant be present in court, or shall have been served with a rule of the court to show cause, on some certain day, and shall have failed to appear and show cause.

It is not clear from the record whether the lower court considered the failure of the sheriff to immediately serve the Magistrate's order to constitute "misbehavior of an officer of the court, in his official character. . ." as referenced in subsection (c) above, or whether the Sheriff's conduct was deemed to violate another portion of the statute quoted above. Upon this Court's review of the facts of this case, we do not find any act on the part of the Appellant which is in disobedience to a court order, which constituted misbehavior of the Sheriff in his official character, or which was in violation of West Virginia Code § 61-5-26 in any manner.

Under all of the circumstances, this Court does not believe that the Sheriff's conduct in this case constituted contempt of the Circuit Court of Grant County. The circuit court relied upon a claimed violation of West Virginia Code § 50-1-14(a), which deals with the duty a sheriff owes to the Magistrate Court. Moreover, West Virginia Code § 50-1-14(a) defines a sheriff's duty to execute all civil and criminal process which may be *directed to such sheriff*. The order at issue in this case did not contain any direction to the sheriff regarding service of process.[4]

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[4]This Court recognizes the deficiency in the form for emergency custody and will endeavor to create a supplement or addition to the form to provide express and written direction to a sheriff or other law enforcement officer for such service of process or other assistance as the court may wish to be afforded in a case. In the meantime, it is appropriate (continued...)

Further, the Appellant promised to effectuate service in a short time and could reasonably conclude that the problem was solved when a state trooper volunteered to undertake the task. The order was thereafter served by the state police.[5]

Under the unique facts of the present case, we find that the lower court exceeded its legitimate powers by holding the Sheriff in contempt of court. We find no violation of the

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[4](...continued)
for any court to add to its emergency custody order such specific direction to a sheriff or other law enforcement officer as it deems appropriate to serve and effectuate its order.

[5]This Court's determination in this case is not inconsistent with the rationale of other courts in examining alleged contempt violations within the context of service of process difficulties. In *In re Smith*, 424 S.E.2d 45 (Ga. App. 1993), for instance, a woman had brought a proceeding against a sheriff for contempt regarding the sheriff's failure to arrest her former husband. The ultimate question was explained by that court as follows:

> In light of the foregoing statutes, it is clear that a sheriff can be found in contempt of court by "neglecting" to perform his duties. Stated somewhat differently, a sheriff can be fined for contempt if he fails to perform his duties with "due diligence." Did the sheriff neglect to perform his duties? Did he fail to act with due diligence? The answer to these questions lies in *Heard v. Callaway*, 51 Ga. 314 (1874).
>
> In *Heard*, the Supreme Court of Georgia held that whether a sheriff neglected his duty "would depend on the good faith of his conduct, in view of the circumstances under which he acted, of which the court is to judge." *Id.* at 317. In determining whether the sheriff acted in good faith, the court is to exercise its sound discretion. *Id.*

424 S.E.2d at 46.

Appellant's statutory duties.[6] The contempt order entered by the lower court is reversed.

Reversed.

[6]Our decision today does not condone any failure of a sheriff to render prompt assistance to the courts. In setting aside the instant contempt order, we do not mean to suggest that officers of the court can rely upon technicalities to refuse promptly to execute an oral order of the court given to a sheriff in open court or any order first made orally for expeditious execution to be promptly followed by a proper written order.

202 W. Va. 400, 504 S.E.2d 635

Supreme Court Of Appeals Of West Virginia

IN THE INTEREST OF: MICAH ALYN R.,
A CHILD UNDER THE AGE OF EIGHTEEN YEARS

No. 24878
Submitted: March 24, 1998
Filed: June 22, 1998

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. When a parent is unable to properly care for a child due to the parent's terminal illness, so that conditions which would constitute neglect of the child occur and continue to be threatened, termination of parental rights, without consent, is contrary to public policy, even though there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. In such circumstances, a circuit court should ordinarily postpone or defer any decision on termination of parental rights. However, such deference on the parental rights termination issue does not require a circuit court to postpone or defer decisions on custody or other issues properly before the court. In fact, efforts towards locating prospective adoptive parents shall be made so long as every measure is taken to foster and maintain the bond and ongoing relationship between the parent and child.

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MAYNARD, Justice:
This action is before this Court upon an appeal from a final order of the Circuit Court of Raleigh County entered on October 16, 1997. Pursuant to that order, the circuit court terminated the parental rights of the appellant, Ada R., See footnote 1to her son, Micah Alyn R. The parental termination was based on evidence that Ada R. had physically abused Micah and had on occasion, failed to properly administer his HIV medication. On appeal, Ada R. contends that the circuit court erred by finding that her son was abused and neglected and concluding that the best interests of the child required termination of her parental rights.

This Court has before it the petition for appeal, all matters of record, and the briefs and argument of counsel. Based upon a careful review of the record and for the reasons set forth below, we remand this case to the circuit court for action consistent with this opinion.

I

This case originated on July 11, 1996, when Ada R. placed her son in foster care by filing a voluntary placement agreement. At that time, Ada R. had been diagnosed with AIDS, and Micah, who was two and a half years old, was HIV positive. See footnote 2Ada R. sought foster care for Micah due to both her and her child's severe illnesses. Although Micah was placed in the care of the Department of Health and Human Resources (hereinafter "Department"), Ada R. visited her son regularly.

On September 26, 1996, the Department filed a petition for review of the voluntary placement in the Circuit Court of Raleigh County. A hearing was held on September 27, 1996, at which time appellant and the Department agreed to continue the placement and visitation. On March 25, 1997, the Department filed a supplemental petition seeking to have the parental rights of Micah's father, Hansel R., terminated. See footnote 3The petition indicated that Ada R. wanted Micah to be adopted. However, subsequently, Ada R. changed her mind and decided to pursue full custody.

Hansel R. never appeared for any hearings in this matter and his parental rights were terminated on July 19, 1997. That same day, the Department sought termination of Ada R.'s parental rights. Kim Peck, the social services case worker, testified that she believed Ada R. was unable to physically take care of Micah because of her mental and physical condition. She stated that Ada R. was experiencing mental stress and anxiety and did not have the patience to take care of the child's needs. Ms. Peck further testified that Ada R. had told her that she had shaken and slapped Micah and put her hands around his throat. Ms. Peck was also concerned that Ada R. was not capable of remembering to give Micah the several different medications he was taking for his illness. See footnote 4Ms. Peck explained that at times Ada R. had forgotten to give Micah his medication and that she once gave him the wrong dosage.

JoAnn Gibson, case manager for Timberline Health Group, the agency providing social services to Ada R. in connection with the voluntary placement, testified that on one occasion she observed red marks on Micah's arms and legs. She said that Micah was crying, and he told her that his mother had hit him. Ada R. later admitted that she had hit Micah on the leg with a ruler. Ms. Gibson also testified that once, she had witnessed Ada R. slamming Micah down on the bed when she was changing his diaper. However, Ms. Gibson indicated that Ada R.'s attitude towards Micah had improved dramatically within the past three weeks. She also stated that Ada R. performed household chores well.

Nancy Jones, a support specialist with Timberline Health Group, testified that Ada R. was showing much more patience with Micah. She had worked with Ada R. since September 1996. She stated that Micah never exhibited any actions suggesting that he was afraid of his mother. She also testified that she only had to remind Ada R. once during the last three months to give Micah his medication.

Ada R. testified that she was feeling much stronger and was having less medical complications with her illness. She said that she loved her son very much and wanted him returned to her. Ada R.'s sister testified that she felt that Ada R. was capable of taking care of Micah and that if she needed help, her family was available.

Based on the foregoing testimony, the judge deferred making a ruling until the guardian ad litem had time to submit a recommendation. On June 25, 1997, the guardian ad litem filed a recommendation stating that it was in the best interests of the child to have any decision as to termination of parental rights held in abeyance.

Recognizing the expediency requirement of termination proceedings, See footnote 5 the guardian ad litem explained that he did not feel that the case was mature for a decision given the nature of Ada R.'s illness. The guardian ad litem

recommended that Micah remain in foster care and that Ada R. be granted increased and liberal visitation.

In October 1997, Ada R. requested that the circuit court hold a supplemental termination hearing. In response, the Department filed a court summary which outlined problems that the Department was having with Ada R. regarding visitation and the treatment plan. The report indicated that Ada R. had become verbally aggressive and was alienating the people who were working with her. The Department was also aware that Ada R. had attended some support group meetings where she stated that Micah had been taken away from her for no reason. The report further indicated that Ada R. continues to tire easily, sleeps a lot, and complains of dizziness. The Department did not believe that Ada R. was capable of administering Micah's medication properly or providing his meals. Thus, the Department recommended that Ada R.'s parental rights be terminated, but that she be granted post-termination visitation.

The supplemental termination hearing was held on October 14, 1997. Following additional testimony by Ms. Peck and Ada R., the guardian ad litem recommended termination of Ada R.'s parental rights. As reflected in the final order, Ada R.'s parental rights were terminated, but she was afforded post-termination visitation of two hours per week.

II.

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

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

> *See also* Syllabus Point 4, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E. 2d 607 (1997); Syllabus Point 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997).

As her first assignment of error, Ada R. contends that the evidence of abuse is so weak that it does not meet the definition of abuse as set forth in the statute, especially considering that Micah was never removed from her home. Ada R. does admit to striking Micah with a ruler once and shaking him, but she states that these incidents were minimal and occurred at a time when she was under a great deal of stress. She further contends that there is no evidence that she neglected her son. At the time of the termination hearings, she had been properly administering Micah R.'s medication and had the support of her family to help with his care.

W. Va. Code 49-1-3(a)(1) (1994) defines an "abused child" as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" A "neglected child" is defined by *W. Va. Code* 49-1-3(g)(1)(A) as a child "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with the necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]"

The evidence in the record shows that Ada R. has experienced difficulties in properly administering Micah's medications which are crucial to his health. At times, she has forgotten to give him the medicine, and at least once, she administered the wrong dosage. In addition, Ada R. has admitted to striking her child with a ruler and slapping and shaking him on other occasions. These incidents clearly fit within the statutory definitions of abuse and neglect. Therefore, the circuit court did not err in finding Micah was an abused and neglected child.

Ada R. next contends that the circuit court erred in terminating her parental rights. In this regard, she argues the evidence did not support the circuit court's finding that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the future. She asserts that even with the current knowledge about AIDS, it is difficult to project the progression of the disease on an individual basis. She further asserts that the evidence shows that she has become stronger and is under less stress indicating that any such conditions of abuse or neglect could be corrected.

W. Va. Code 49-6-5 (1996) governs the dispositional phase of abuse and neglect proceedings. Several dispositional alternatives are set forth in the statute with precedence given to the least restrictive alternative appropriate under the circumstances. With respect to these statutory provisions, we have held that:

> 'As a general rule the least restric tive alternative regarding parental rights to custody of a child under *W.Va. Code,* 49-6-5 [1977] will be employed; howe ver, courts are not required t o e xhaust eve ry speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is pa rticularly applicable to children under the age of three years old w ho are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by num erous placem ents.' Syl. pt. 1, *In Re R.J.M.*, [164] W.Va. [496], 266 S.E.2d 114 (1980).

Syllabus Point 1, *In the Interest of Darla B.*, 175 W. Va. 137, 331 S.E.2d 868 (1985). *See also* Syllabus Point 7, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). We have further held that:

> Termination of parent al rights, the m ost drastic rem edy under the statutory provision covering the disposition of neglected children, *W.Va.Code,* 49-6- 5 [1977] may be em ployed wit hout the use of intervening less restrictiv e alternatives when it is found that there is no reasona ble likelihood under *W.Va.Code,* 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

Syllabus Point 2, of *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980). *See also* Syllabus Point 7, *In re Katie S. and David S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

W. Va. Code 49-6-5(b) defines "no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected" as "based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve

> the pr oblems of abuse and ne glect, on t heir ow n or with hel p." Pursuant to the statute, such conditions are deemed to exist in certain circumstances. For instance, if the abusing parent willfully refused or is presently unwilling to cooperat e in the development of a family case plan, a finding of "no reasonab le likelihood that the conditions of ne glect or abuse can be substa ntially corrected" under the statu te

> is warranted. See foot note 6 Li kewise, the sam e findi ng is appropriate whe n t he abusi ng pare nt has repeatedly or seriousl y injured the child physically or emotionally. See footnote 7 Arguably, both of these circumstances exist in the case *sub judice*. However, it appears that the principal reason th at the circuit co urt terminated Ada L.'s parental rights is the tragic fact that she is suffering from a terminal illness.

The evidence in the record indicates that although Ada R.'s health and emotional state did improve somewhat after she initially placed Micah in foster care, by the time the supplemental termination hearing was held, her health had once again declined. See footnote 8She was tiring easily, sleeping a lot, complaining of dizziness, and suffering from occasional memory loss. Ms. Peck indicated that Ada R. was no longer capable of giving Micah his medication as prescribed or preparing his meals as needed. In addition, Ms. Peck stated that at times, Ada R. believed that Micah had been cured. In fact, Ada R. testified at the hearing on October 14, 1997, that she believed Micah would be "healed." Ada R. further testified that after a two-hour visitation with Micah, she became very tired. Given this evidence, the circuit court did not err in finding that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the future. However, we are troubled by the circuit court's conclusion that termination of Ada. R's parental rights was warranted.

This case illustrates the horrible crisis situation confronting many single custodial parents who are suffering from AIDS or some other terminal disease. Sadly, these parents must find someone to take care of their children once they are no longer able to do so. Unfortunately, traditional guardianship law presents only two choices. In order to formally grant another person parental authority while the parent is still living, the parent must relinquish his or her own authority. Testamentary guardianship, the second option, only becomes effective upon the parent's death.

Several states have begun to offer a third alternative by adopting stand-by guardianship statutes. See footnote 9 Generally, standby guardianship statutes allow parents who are at a substantial risk of becoming ill or disabled within a limited time period to select a "standby guardian" to take care of their children at the point when they become too ill or disabled to care for them. The parent does not relinquish any of his or her authority, but instead shares it with the standby guardian. Additionally, the parent may end the standby guardian's authority when he or she chooses to do so. See footnote 10

If the opportunity to choose a "standby guardian" had been available to Ada R., she might well have taken advantage of it. See footnote 11 The record indicates

that Ada R. has expressed a desire throughout this case that the foster parents currently providing for Micah's care eventually be able to adopt him, and apparently, they want to do so. In fact, at one point, Ada R. wanted to proceed with the adoption. However, she decided she could not give up her child and changed her mind.

Ada R.'s heartbreaking struggle to deal with her disease, while, at the same time, not turning her back on her child makes this abuse and neglect case all the more tragic. By doing what she felt was best and voluntarily placing Micah with the Department, Ada R. has ended up not only fighting to remain alive, but also fighting to remain a parent. Unquestionably, she has suffered unbelievable emotional torment. While we certainly do not condone or ignore the physical abuse that Ada R. directed toward Micah and believe that the institution of abuse and neglect proceedings was proper, we find that the circumstances in this case simply do not warrant termination of parental rights. Through no fault of her own, Ada R. has been victimized by a disease which is stealing her life and seriously threatening that of her son. Although she is no longer able to take care of her son or provide for his needs, it is quite evident that Ada R. loves her son very much. In fact, the parental bond that Ada R. shares with her son may now be her only source of comfort.

What is done in this case regarding parental rights has the potential to be very far reaching. If the spread and growth of the AIDS virus remains unchecked, it will eventually touch all families, and then every family will have an Ada or a Micah. Of course, even absent AIDS, the same impossible dilemma is faced by some single parents who become profoundly disabled or who are slowly dying from cancer or other protracted terminal diseases. Would the law countenance terminating the parental rights of a parent dying from lung cancer or breast cancer, for example? We think not.

While we believe that termination of parental rights is not appropriate in this instance, the health, safety, and welfare of the child must continue to be our primary concern. In *In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (1993), we recognized that the rights of the natural parents merit significant consideration, but "the best interests of the child are paramount." As discussed previously, the evidence in this case clearly indicates that Ada R. is unable to take care of Micah. He needs a stable home to provide him the special care that is required because of his medical condition. However, the evidence also indicates that there is a close and significant emotional bond between this parent and child. We refuse to compound the tragedy in this case further by forever severing this parent-child relationship.

However, we must also consider Micah's current placement. He is presently in a good home with foster parents who are providing him with love, care, support, and a nurturing environment in addition to attending to his medical needs. The foster parents' desire to adopt Micah clearly shows that they have established a strong emotional bond with him. Foster parents who are willing to assume such an awesome responsibility are extraordinary. It is not easy to find foster care placement for a child like Micah who is suffering from a severe disease, and it is even more difficult to find an adoptive home. Obviously, these foster parents need assurances that the adoption will be allowed to proceed in the future because they have made a substantial investment of emotional support and time.

W. Va. Code 49-2-14 (1995) does offer some protection for these foster parents. The statute provides:

When a child has been placed in a foster care arrangement for a period in excess of eighteen consecutive months and the state department determines that the placement is a fit and proper place for the child to reside, the foster care arrangement may not be terminated unless such termination is in the best interest of the child and:

> (1) The foster care arrangement is terminated pursuant to subsection (a) of this section; See footnote 12
>
> (2) The foster care arrangement is terminated due to the child being returned to his or her parent or parents;
>
> (3) The foster care arrangement is terminated due to the child being united or reunited with a sibling or siblings;
>
> (4) The foster parent or parents agree to the termination in writing;
>
> (5) The foster care arrangement is terminated at the written request of a foster child who has attained the age of fourteen; or
>
> (6) A circuit court orders the termination upon a finding that the state department has developed a more suitable long-term placement for the child upon hearing evidence in a proceeding brought by the department seeking removal and transfer.

W. Va. Code 49-2-14(b). Although the record is unclear as to exactly how long Micah has been residing with the foster parents who desire to adopt him, See footnote 13 it appears that this statute will soon provide some assurances for them. Certainly, Micah's current placement is in his best interest.

Therefore, we hold that when a parent is unable to properly care for a child due to the parent's terminal illness, so that conditions which would constitute neglect of the child occur and continue to be threatened, termination of parental rights, without consent, is contrary to public policy, even though there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. In such circumstances, a circuit court should ordinarily postpone or defer any decision on termination of parental rights. However, such deference on the parental rights termination issue does not require a circuit court to postpone or defer decisions on custody or other issues properly before the court. In fact, efforts towards locating prospective adoptive parents shall be made so long as every measure is taken to foster and maintain the bond and ongoing relationship between the parent and child.

Accordingly, for the reasons set forth above, the final order of the circuit court is reversed and this case is remanded to the circuit court. On remand, the circuit court shall develop a visitation plan workable for all parties to permit a continued relationship between Micah and his mother. Furthermore, the circuit court shall develop a permanency plan which will provide additional protection for Micah's foster parents by ensuring that they become the adoptive parents at the appropriate time.

Reversed and remanded.

Footnote: 1 *We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. See In re Jonathan P., 182 W. Va. 302, 303, n.1, 387 S.E.2d 537, 538, n.1 (1989).*

Footnote: 2 *Micah R. was diagnosed with perinatally acquired HIV infection shortly after his birth on January 4, 1994.*

Footnote: 3 *Ada R. and Hansel R. were divorced on December 13, 1995.*

Footnote: 4 *The record indicates that Micah takes five different medications several times per day. He also takes other medication on an as needed basis. It is critical that these medications be administered to Micah at the specified times and coordinated with his meals.*

Footnote: 5 *See W. Va. Code 49-6-2(d) (1996).*

Footnote: 6 *W. Va. Code 49-6-5(b)(2) provides: "The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the*

development of a reasonable family case plan designed to lead to the child's return to their care, custody and control[.]"

Footnote: 7 *W. Va. Code 49-6-5(b)(5) provides: "The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child[.]"*

Footnote: 8 *We also note that since this appeal was filed, Ada R. has been hospitalized at least twice.*

Footnote: 9 *See e.g., Cal. Prob. Code § 2105(f) (West Supp. 1998); Conn. Gen. Stat. Ann. §§ 45a-624-624(g) (West Supp. 1998); Md. Code Ann. Est. & Trusts §§ 13-901-908 (Supp. 1991); N.Y. Surr. Ct. Proc. Act Law § 1726 (McKinney 1996).*

Footnote: 10 *See Deborah Weimer, Implementation of Standby Guardianship: Respect for Family Autonomy, 100 Dickinson L. Rev. 65 (1995); Joyce McConnell, Standby Guardianship: Sharing the Legal Responsibility for Children, 7 Md. J. Contemp. Legal Issues 249 (1995-96).*

Footnote: 11 *Unfortunately, our Legislature had not enacted standby guardianship statutes.*

Footnote: 12 *W. Va. Code 49-2-14(a) provides:*

(a) The state department may temporarily remove a child from a foster home based on an allegation of abuse or neglect, including sexual abuse, that occurred while the child resided in the home. If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement and preclude contact between the children and the foster parents. If, after investigation, the allegation is determined to be true by the department or after a judicial proceeding a court finds the allegation to be true or if the foster parents fail to contest the allegation in writing within twenty calendar days of receiving written notice of said allegations, the department shall permanently terminate all foster care arrangements with said foster parents: Provided, That if the state department determines that the abuse occurred due to no act or failure to act on the part of the foster parents and that continuation of the foster care arrangement is in the best interests of the child, the department may, in its discretion, elect not to terminate the foster care arrangement or arrangements.

Footnote: 13 *The record suggests that Micah may have been placed in another foster home at one time.*

Workman, J., concurring:

I write separately to emphasize that the circuit court on remand should not leave Micah's future in limbo. While he, as the majority points out, may be one of few remaining sources of solace and comfort for his mother in her terminal illness, the legal system must not take from Micah what could be the only source of continued commitment and nurturance (to which every child should have a right) that he might ever have. And as tragic a situation as Ada faces, a greater tragedy would be an HIV positive four-year-old child with no one to count on. The foster parents with whom he has lived for almost two years, and with whom he has bonded and formed the mutual emotional attachment that results in real commitment, must know that they will be part of this child's permanency plan. That is something they deserve, but it is something that Micah deserves even more. As the majority points out, AIDS is a disease which, if not defeated, will eventually touch all of us. The pain and suffering that accompany this disease unfortunately leave many HIV positive children without permanent homes, and without parents willing to make the commitment to walk with these children on whatever road the disease takes them. It would be tragic indeed to take from Micah what could be his last chance for a permanent home.

I applaud the majority's suggestion that concurrent planning for permanency should occur even where parental rights are not terminated. This should be the practice in all abuse and neglect cases, so that there is a permanency plan for children where family reconciliation efforts are not successful for whatever reason.

It will be the task for the lower court on remand to see to it that Micah has a place to be, with people willing to make a permanent commitment. In the final analysis, however, it will be up to these two families to make it work for Micah. As we said in Honaker v. Burnside, 182 W.Va. 448, 388 S.E.2d 322 (1989), No matter how artfully or deliberately the trial court judge draws the plan for these coming months, however, its success and indeed the chances for . . . [the children's] future happiness and emotional security will rely heavily on the efforts of these two . . . [families]. The work that lies ahead for both of them is not without inconvenience and sacrifice on both sides. Their energies should not be directed even partially at any continued rancor at one another, but must be fully directed at developing compassion and understanding for one another, as well as showing love and sensitivity to the children's feelings at a difficult time in all their lives.
Id. at 452-53, 388 S.E.2d at 326-27.

202 W. Va. 350, 504 S.E.2d 177

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA, Petitioner Below, Appellant
v.
MICHAEL M., II, and ANGELA H., Respondents Below, Appellees
No. 24879

AND

STATE OF WEST VIRGINIA, Petitioner Below, Appellant
v.
BRIANNA H., infant, TRAVIS H., father, and MELISSA Y., mother,
Respondents Below, Appellees
No. 24961

AND

STATE OF WEST VIRGINIA, Petitioner Below, Appellant
v.
TOBIAS W., infant, et al., Respondents Below, Appellees
No. 24962

Submitted: March 24, 1998
Filed June 22, 1998

SYLLABUS BY THE COURT

1. " When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

2. Where parental rights have been terminated pursuant to *W.Va. Code* § 49-6-5(a)(6) [1996] , and it is necessary to remove the abused and/or neglected child from his or her family, an adoptive home is the preferred permanent out-of-home placement of the child.

3. In determining the appropriate permanent out-of-home placement of a child under *W.Va. Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline

consistent with the child's best interests or where a suitable adoptive home can not be found.

4. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

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McCuskey, Justice:

These are three consolidated child abuse and neglect cases which cause us to decide the important question of whether foster care or an adoptive home is the preferred permanent placement for a child who has been removed from his or her family following a termination of parental rights. In each case, the appellant, West Virginia Department of Health and Human Resources (the "Department"), challenges a disposition order entered by the Circuit Court of Berkeley County . The Department contends that the circuit court abused its discretion by directing that the children involved be placed in permanent foster care, rather than adoptive homes. Also at issue in these cases is the lower court's grant of post- termination visitation rights to the children's parents. While we understand the circuit court's obvious frustration with the delays that too frequently accompany the Department's efforts to execute court orders in matters of this kind, we must, nonetheless, conclude that the circuit court abused its discretion on both points. Accordingly, we reverse, in part, and remand the cases for further action consistent with this opinion.

I. Factual and Procedural Background

These appeals challenge final orders of the Circuit Court of Berkeley County in three child abuse and neglect cases. We have consolidated the appeals for purposes of argument and decision. In the three cases, following termination of parental rights, the circuit judge ordered that the children be placed in permanent foster care and granted their parents post-termination visitation rights. In each case, the Department asks this Court to remand to the circuit court with instructions that the final order be modified to permit the Department to secure adoptive parents for the child or children involved. In two cases, the Department also requests that we instruct the circuit court to deny post-termination visitation as not being in the children's best interests. In the third case, while the Department does not contest the grant of such visitation, the guardian *ad litem* assigns the grant as error.

A. Michael M., II

Angela H. is the natural mother of Michael M., II . See footnote 1 Michael M.'s biological father is deceased. On July 2, 1997, at the age of nine months, Michael M. was examined in the emergency room at City Hospital in Martinsburg, West Virginia , having been taken there by Angela H., his maternal grandmother, and his mother's boyfriend, Robbie G . An x-ray of Michael M.'s right leg showed that he had suffered fractures of both his femur and tibia . The explanation given by Angela H. for her baby's fractured bones was medically implausible, See footnote 2and, consequently, the matter was reported to the Department by hospital personnel as a case of suspected child abuse.

After referral to the Department, the case progressed according to the statutory procedure in cases of child abuse or neglect. *See W. Va. Code §* 49-6-1, *et seq.* On July 8, 1997, the Department filed a petition, alleging that Michael M. was an abused and neglected child within the meaning of *W. Va. Code* § 49-1-3.See footnote 3 On that same date, the circuit judge awarded emergency custody of the infant to the Department . A preliminary hearing was held on July 17, 1997. Following the hearing, the circuit court ordered that Michael M. be placed in the temporary physical custody of his paternal aunt and uncle, provided that the Department found their home to be suitable. On July 22, 1997, that placement was achieved. On August 25, 1997, the lower court conducted an adjudicatory hearing. *See W. Va. Code* § 49-6-2 [1996]. In an Adjudication Order, filed on August 29, 1997, the circuit judge concluded that Michael M. was an abused child as defined in *W. Va. Code* § 49-1-3; ordered the Department to retain temporary custody of Michael M. and develop a permanency plan within 30 days; and ordered that Michael M.'s visitation with his mother continue, but not in the presence of Robbie G., the putative abuser.

On September 19, 1997, the Department filed a child's case plan for Michael M. *See W. Va. Code* §49-6-5(a). In that document, the Department suggested that Angela H.'s parental rights be terminated and that Michael M. be placed permanently in the home of his paternal aunt and uncle, who were willing to adopt him. The Department also recommended that Angela H. be given visitation rights in the event that her parental rights were terminated.

A disposition hearing took place on September 29, 1997. *See W. Va. Code* §49-6-5 . Subsequently, on October 2, 1997, the circuit court entered a disposition order in which it found that there was no reasonable likelihood that the conditions of abuse could be corrected within a reasonable period of time;See footnote 4 terminated Angela H.'s parental rights; and granted Angela H. visitation rights. In addition, the circuit court awarded permanent guardianship of Michael M. to the Department with the direction that he be placed in permanent foster care. In so ordering, the circuit court stated:

However, it does not follow that Angela [H.] should have no future contact with this child and so the Court is of the opinion that visitation rights ought to be granted within limitation. WVDHHR in its permanency plan suggested adoption within the family as being the desired course of action. However, this Court is dismayed by the administrative delays within WVDHHR vis-a-vis adoptions and believes that permanent foster care is more appropriate especially since contact between the natural mother and the child is to be maintained. In this connection, however, WVDHHR is to understand that when the Court directs it to place a child in permanent foster care, the Court intends that there is to be a placement with a family which is willing to serve in that capacity until the child reaches his

majority or is otherwise emancipated and that such a grant of authority does not permit a movement from one foster home to another, which process is deemed by this Court to be injurious to the child.

B. Brianna H.

Brianna H. is the natural daughter of Travis H. and Melissa Y. On April 14, 1997, six-month-old Brianna H. was admitted to City Hospital in Martinsburg, West Virginia at the direction of Dr. Edward Arnett, a local pediatrician . X-rays taken at the hospital revealed that Brianna H. had sustained multiple fractures of her ribs and right leg.

Brianna H.'s injuries were reported to the Department for investigation, and on April 15, 1997, the Department filed a civil petition against Travis H. and Melissa Y. See footnote 5On the same date, the circuit court awarded the Department temporary custody of Brianna H.

On April 24, 1997 , a preliminary hearing was held. After the hearing, the circuit judge entered an order continuing the transfer of custody to the Department and directing the Department to permit supervised visitation between Brianna H. and her parents.

An adjudicatory hearing occurred on July 1, 1997 . In an Adjudication Order filed July 7, 1997, the circuit judge found that Brianna H. was an abused and/or neglected child; See footnote 6 ordered the Department to retain temporary custody of Brianna H. and to continue supervised visitation between Brianna H. and her parents; and required the Department to prepare and submit a "permanency plan" See footnote 7for Brianna H.

On September 30, 1997, the evidentiary portion of a disposition hearing took place. At the hearing, counsel for Travis H. voiced an objection to the child's case plan, which the Department had submitted to the circuit court prior to the hearing. Counsel for all sides agreed that the plan did not fully comply with Rule 28 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* promulgated by this Court. Consequently, the circuit judge ordered the Department to submit a revised case plan within ten days and further ordered the parties to reconvene on October 17, 1997, to conclude the hearing.

On October 10, 1997, the Department submitted a revised child's case plan, recommending that parental rights be terminated and visitation discontinued. The Department also proposed, in the plan, that Brianna H. be placed for adoption, either with a family member or in one of the adoptive homes that had already been approved by the Department.

On October 17, 1997, the disposition hearing was concluded with oral arguments by counsel. On October 20, 1997 , the circuit judge entered a disposition order which departed markedly from the revised child's case plan submitted by the Department. In the order, the circuit judge terminated the parental rights of Travis H. and Melissa Y., as recommended by the Department. However, the circuit court, by its order, also required that Travis H. and Melissa Y. be afforded supervised visitation with Brianna H. Moreover, instead of ordering that Brianna H. be placed in an adoptive home, the circuit court awarded permanent guardianship of Brianna H. to the Department with the direction that she be placed in permanent foster care. See footnote 8

C. Tobias W., Joshua W., and Alicia W.

Kelly S. is the natural mother of three children: Tobias W., born April 1, 1990, Joshua W., born April 2, 1991, and Alicia W., born May 30, 1992. The children's natural father is deceased. On October 3, 1995, the Department submitted a civil petition to the circuit court alleging that Kelly S. had neglected her children. See footnote 9 By an order of the same date, the circuit court awarded the Department temporary custody of the children pending a preliminary hearing. See footnote 10

On October 13, 1995, a preliminary hearing was held. By an order filed on November 14, 1995, the circuit court renewed its award of temporary custody to the Department; granted the Department leave to place the children in foster care or with a suitable relative; and ordered that supervised visitation between Kelly S. and the children be conducted. Thereafter, Tobias W., Joshua W., and Alicia W. were placed in separate foster homes in Morgan County.

On March 18, 1996, Kelly S., her counsel, and two representatives of the Department convened for an adjudicatory hearing, at which time counsel for Kelly S. moved for a preadjudicatory improvement period. See footnote 11 The Department did not object, and by order filed July 31, 1996, the circuit court granted Kelly S. a preadjudicatory improvement period of one year. See footnote 12 By the same order, the circuit judge directed the Department to prepare a "family case plan" See footnote 13 and ordered Kelly S. to complete a drug and alcohol treatment program before the end of the improvement period. On December 17, 1996 , the Department filed a family case plan which outlined a plan for Kelly S.'s recovery from alcoholism and development of parenting skills.

On December 19, 1996, the guardian *ad litem* moved for revocation of the improvement period alleging that Kelly S. had failed to comply with the terms and conditions thereof . At a hearing on February 7, 1997, Kelly S. agreed to revocation of the improvement period and also waived her right to an adjudicatory hearing. By order filed February 28, 1997, the circuit judge found Kelly S. to be

guilty of neglect, as defined in *W. Va. Code* § 49- 1-3; placed her on a six month post-adjudicatory improvement period; required the Department to prepare a family case plan; and granted the Department permission to keep the children in separate foster homes during the improvement period with the stipulation that visitation among them be maintained.

On April 18, 1997, the Department filed a second family case plan, detailing problems of and goals for Kelly S. and her children, including a plan to reunite the children with their mother. By order filed July 21, 1997, the post-adjudicatory improvement period was extended for three months in order to allow the Department sufficient time to complete the reunification. When the extension was ordered, two of the three children had already been returned to Kelly S.

On October 9, 1997, the guardian *ad litem* filed a Motion for Revocation of Improvement Period due to Kelly S. 's alleged failure to overcome her alcohol and substance abuse problems. At a hearing on the motion on October 20, 1997, testimony concerning Kelly S. 's relapse was presented. On October 22, 1997, a disposition order was filed. See footnote 14 In that order, the circuit court terminated Kelly S. 's parental rights; awarded permanent guardianship of the children to the Department with the direction that they be placed in permanent foster care; and granted Kelly S. post-termination visitation rights. See footnote 15

II. Discussion

The issues now before this Court concern the circuit court's direction in its disposition orders, following termination of parental rights, that the children be placed in permanent foster care and that their parents be afforded visitation. On appeal, we apply a two-pronged standard of review, as set forth in Syllabus Point 1 of *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

A. Permanent Foster Care

Chapter 49 of the *West Virginia Code* is entitled "Child Welfare," and *W.Va. Code* § 49-1-3 [1994] therein defines an "abused child" as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" In addition, *W.Va. Code* § 49-1-3 [1994] defines a "neglected child" as a

child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]"

Article 6 of Chapter 49 is entitled "Procedure in Cases of Child Neglect or Abuse" and provides various remedies for the protection of children, including, in certain circumstances, the termination of parental rights. Specifically, pursuant to *W.Va. Code* § 49-6-5(a)(6) [1996], a circuit court may

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency.

Additionally, *W.Va. Code* § 49-6-5(a)(6) provides that if the circuit court makes the finding delineated therein,

> then in fixing its dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper.

Plainly, *W. Va. Code* § 49-6-5(a)(6) is silent on the issue of whether foster care or an adoptive home is the preferred permanent out-of-home placement option See footnote 16 for an abused or neglected child. However, *W. Va. Code* § 49-6-5(a)(6) must be considered in light of *W. Va. Code* § 49-1-1(a) [1997], the purpose clause of the child welfare chapter, which provides generally that

> it is the intention of the Legislature . . . when the child has to be removed from his or her family, to secure for the child custody, care and discipline consistent with the child's best interests and other goals herein set out.

In order to effectuate the legislative intent expressed in *W. Va. Code* § 49-1-1(a) , a circuit court must endeavor to secure for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment,

nurturing and discipline that is consistent with the child's best interests. W e find that adoption, with its corresponding rights and duties , is the permanent out-of-home placement option which is most "consistent with the child's best interests." See footnote 17*W. Va. Code* § 49-1-1(a) . Only through adoption can a child who has been removed from his or her parents achieve a legal and economic status "on a par with natural children." *Wheeling Dollar Sav. & Trust Co. v. Hanes* , 160 W.Va. 711, 716, 237 S.E.2d 499, 502 (1977).

Accordingly, we hold that where parental rights have been terminated pursuant to *W.Va. Code* § 49-6-5(a)(6) [1996] , and it is necessary to remove the abused and/or neglected child from his or her family, an adoptive home is the preferred permanent out-of- home placement of the child. Therefore, we further hold that in determining the appropriate permanent out-of-home placement of a child under *W.Va. Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care , commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.

As indicated above, the circuit court in these consolidated cases made the requisite finding for termination of parental rights, terminated the parental rights of the abusive and/or neglectful parents, and committed the children to the permanent guardianship of the Department with the direction that they be placed in permanent foster care. Neither the circuit court's termination of parental rights nor its commitment of the children to the permanent guardianship of the Department is now before us. Rather, we decide whether the circuit court abused its discretion by ordering that the children be placed in permanent foster care. In that regard, we observe that there is no evidence in the record which indicates that adoption would not be in each child's best interests. Instead, it appears from the record that the trial court's selection of permanent foster care, over adoption, was directly related to the court's overt dissatisfaction with the Department. See footnote 18 While we sympathize with the circuit court's frustration over any unwarranted delays caused by the Department, we cannot allow innocent children to be arbitrarily deprived of the chance to be adopted, especially when doing so would be contrary to the explicit intent of the Legislature embodied in *W. Va. Code* § 49-1-1(a). T hus, under our holding today, this Court concludes that the circuit court committed error in ordering foster care as a permanent placement for the five children without first trying to secure for each of them a suitable adoptive home.

Furthermore, as part of this Court's review of these cases, we entered an order on May 22, 1998, directing the Department "to provide to this Court on or before the 21st day of June, 1998, a complete and detailed report on each child presently

within the custody of the Department, or its authorized agent, who has not been placed by the Department in permanent foster care, an adoptive home, or with a natural parent, pursuant to the intent of the Legislature outlined in W. Va. Code, 49-1-1, et seq." In addition, we ordered that "the Department shall include within its report to this Court a report on the status of all children legally free for adoption through the West Virginia foster care and adoption system." We further ordered that "[t]he Department's report should also include an explanation of the endeavors undertaken by the Department to rectify" its noncompliance with the law respecting adoption transfers, as set forth in Rule 15420 of the DHHR Social Service Manual.

B. *Post-termination Visitation*

In Syllabus Point 5 of *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court held:

When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Moreover, Rule 15 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* states that

[i]f at any time the court orders a child removed from the custody of his or her parent(s) and placed in the custody of the Department or of some other responsible person, the court may make such provision for reasonable visitation as is consistent with the child's well-being and best interests. The court shall assure that any supervised visitation shall occur in surroundings and in a safe place, dignified, and suitable for visitation, taking into account the child's age and condition. . . . In determining the appropriateness of granting visitation rights to the person seeking visitation, the court shall consider whether or not the granting of visitation would interfere with the child's case plan and the overall effect granting or denying visitation will have on the child's best interest.

In these cases, the lower court summarily ordered the Department to provide post-termination visitation between the children and their parents without hearing any evidence or argument, or making any findings, regarding whether such visitation would be detrimental to each child's well being or in each child's best interests. See footnote 19 As indicated earlier, the Department does not contest the grant of

post-termination visitation in *Michael M.* However, we note that the guardian *ad litem* in *Michael M.* assigns the grant as error in an appellate brief lodged with this Court, and, therefore, we review the issue in that case. In *Brianna H.*, the Department recommended against visitation in the child's case plan and now contests the grant of post-termination visitation on appeal. Thus, we proceed to examine the propriety of the grant in *Brianna H.* as well. Lastly, in *Tobias W.*, although we observe that the Department did not object to post-termination visitation in the court below, and "[a] litigant may not silently acquiesce to error . . . and then raise that error as a reason for reversal on appeal," *In Interest of S. C.*, 168 W. Va. 366, 374, 284 S.E.2d 867, 872 (1981), we also find that the guardian *ad litem* failed to file an appellate brief and, further, failed to appear before this Court for oral argument. We conclude that it would be an unjust and rather twisted result for us to refuse to consider the issue in *Tobias W.* simply because the children's guardian completely failed to represent their interests on appeal. Accordingly, we review the circuit court's grant of post-termination visitation in all three cases.

Upon a careful review of the record, this Court finds that no evidence was introduced below on the issues of whether post-termination visitation would be detrimental to each child's well being and whether such visitation would be in his or her best interests. Under *In re Christina L.*, *supra* , and Rule 15 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* , the circuit court should have taken evidence, heard arguments, and made specific findings of fact on these issues. Accordingly, this Court concludes in all three cases that the circuit court committed error in granting post-termination visitation to the children's parents without hearing evidence and making conclusions under the applicable standards. Furthermore, the children will more than likely be placed for adoption on remand, and their individual needs, wishes and "best interests" may significantly change following their placement in adoptive homes. Thus, post-termination visitation must be considered in that context on remand.

III. Conclusion

Upon all of the above, the final orders of the Circuit Court of Berkeley County are reversed to the extent that the Department was directed to place the children in permanent foster care, and these cases are remanded to the circuit court for the entry of an order in each case directing the Department to transfer the child or children involved to the adoption unit and to register each child on the Adoption Exchange, pursuant to Rule 15420 of the DHHR Social Service Manual. Additionally, upon remand in each case, the circuit court shall conduct a hearing, pursuant to *In re Christina L.*, *supra* , and Rule 15 of the *Rules of Procedure for Child Abuse and Neglect Proceedings*, to determine whether post-termination visitation between each child and his or her parent(s) is appropriate. In the event that such visitation is found to be not detrimental to the child's well being and in

the child's best interests, the Department shall prepare and submit a plan of supervised visitation for the circuit court's review. Furthermore, the circuit court shall revisit the issue of post- termination visitation with respect to each child after adoption .

Reversed, in part, and remanded with directions.

Footnote: 1 *We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In Matter of Jonathan P., 182 W. Va. 302, 303 n.1, 387 S.E.2d 537, 538 n. 1 (1989).*

Footnote: 2 *The petition recounts the explanation offered by Angela H. for Michael M.'s injuries, stating:*

7. That upon arrival to the emergency room the mother of the Infant, relayed to staff that the baby had fallen on a hard toy in the playpen.

8. That the mother further relayed that this had happened while her boyfriend was sitting with the Infant.

9. That it was also relayed to the medical staff that the Infant had fallen out of bed .

Footnote: 3 *An Amended Petition was filed by the Department on July 17, 1997, in order to correct a typographical error contained in the original petition.*

Footnote: 4 *W. Va. Code § 49-6-5(a)(6) specifically requires, as a prerequisite to the termination of parental rights, a finding by the circuit court that "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future."*

Footnote: 5 *Rule 3 of the Rules of Procedure for Child Abuse and Neglect Proceedings defines "civil petition" as "the petition instituting child abuse and/or neglect proceedings under W. Va. Code § 49-6-1."*

Footnote: 6 *The grounds for this conclusion are detailed in the Adjudication Order, where the circuit court stated:*

The factual basis for said conclusion is that Brianna has suffered numerous serious injuries, rib and leg fractures, on different occasions . . . injuries that are more consistent with abuse than accident; injuries concerning which no satisfactory explanation as to cause has been forthcoming. At worst this is a case of intentional abuse either by a parent or a member of the parents' extended family; at best this is a case of failure to provide safe supervision for an infant.

Footnote: 7 *As set forth in W. Va. Code § 49-6-5(a), "[t]he term permanency plan refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available."*

Footnote: 8 *The pertinent parts of the disposition order in Brianna H. are substantially the same as the above-quoted language from the disposition order in Michael M.*

Footnote: 9 *The petition alleged, inter alia:*

(b) That the workers from R.E.S.A. and Action Youth Care workers have witnessed animal feces in the rooms the children occupy. . . . (c) That the workers have observed the children being hungry and attempt to eat raw meat. (d) That the workers have observed greasy discarded food on the kitchen floor in a pile. (e) That on the 1st day of October, 1995, infant, Tobias [W.], slipped on the greasy floor and hit his head on the table causing a laceration to his head. (f) That on the 2nd day of October, 1995, the West Virginia Department of Health and Human Resources agent was informed by the mother that she has been allowing a male friend into the home who has communicable tuberculosis.

(g) That the mother has diagnosed mental disorders which need to be addressed.

Footnote: 10 *The petition and temporary custody order were not filed until May 16, 1997. The reason for the delay in filing these documents is not apparent from the record.*

Footnote: 11 *The record in Tobias W. indicates that the guardian ad litem failed to attend the March 18, 1996, hearing. The guardian ad litem also neglected to file a brief with this Court or to appear before us for oral argument. We find it disconcerting that the children's attorney abdicated his duty to represent them at these critical stages of the proceedings. In Syllabus Point 5 of James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), we held that "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." In In re Christina L., 194 W. Va. 446, 454, n.7, 460 S.E.2d 692, 700, n.7 (1995), we admonished guardians ad litem that "it is their responsibility to represent their clients in every stage of the abuse and/or neglect proceedings. This duty includes appearing before this Court to represent the child during oral arguments." The guardian ad litem is also responsible for filing an appellate brief on behalf of his or her child ward. We recognized this duty in In re Katie S., 198 W. Va. 79, 91, n.16, 479 S.E.2d 589, 601, n.16 (1996), stating: "Part of this representation is to file an appellate brief to insure that their clients' interests are presented." We again underscore that guardians ad litem have a duty to fully represent the interests of their child wards*

at all stages of the abuse and/or neglect proceedings, both in the circuit court and on appeal.

Footnote: 12 *By an Amended Order For Improvement Period, filed August 19, 1996, the circuit court preserved any objection which the State of West Virginia and guardian ad litem had to the improvement period .*

Footnote: 13 *Rule 3 of the Rules of Procedure for Child Abuse and Neglect Proceedings defines "family case plan" as "the plan prepared by the Department pursuant to W. Va. Code §§ 49-6-2(b), 49-6D-3 and 49-6-12 following the grant of an improvement period."*

Footnote: 14 *We observe with great concern that more than two years lapsed between the circuit court's initial grant of emergency custody to the Department on October 3, 1995, and the filing of a disposition order on October 22, 1997. We find it particularly disturbing that during that period, Tobias W. was moved from one foster home to another because he was exhibiting "disruptive behaviors," and Alicia W. was removed from a foster home "[b]ased upon allegations of neglect," as evidenced by letters from the Department to the circuit judge, dated January 30, 1996, and May 13, 1997. We note that Judge Steptoe 's involvement in Tobias W. did not begin until approximately February 7, 1997, when he presided at a hearing in the case. In addition, we are cognizant that the various time limits set forth in the Rules of Procedure for Child Abuse and Neglect Proceedings, adopted December 5, 1996, effective January 1, 1997, were not in effect until the later stages of Tobias W. Nevertheless, given the extensive delays mentioned above , we reemphasize that decisions about the permanent placement of a child should not be delayed unnecessarily.*

In Syllabus Point 1 of In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), we recognized that "[u]njustified procedural delays wreak havoc on a child's development, stability and security." In In re Christina L., 194 W. Va. 446, 455, 460 S.E.2d 692, 701 (1995), we criticized delay in considering abandonment by a parent because such delay "leaves the status of the children dangling . . . in 'No Man's Land' with regard to any resolution in their lives." Accord In re Katie S., 198 W. Va. 79, 86, 479 S.E.2d 589, 596 (1996); see also In re Jonathan G., 198 W. Va. 716, 726, 482 S.E.2d 893, 903 (1996). O nce again, we urge circuit judges to resolve abuse and/or neglect proceedings as expeditiously as possible lest those maltreated children who come before the courts be further harmed while within our judicial system.

Footnote: 15 *The disposition order in Tobias W. is, in relevant part, substantially the same as the above-quoted language from the disposition order in Michael M.*

Footnote: 16 *Under Rule 3(j)(3) of the Rules of Procedure for Child Abuse and Neglect Proceedings, "[a] permanent out-of-home placement has been achieved only when the child has been placed in a permanent, court-approved, and ratified foster care home as defined by statute, or the child has been adopted or has been emancipated."*

Footnote: 17 *With regard to the effect of an adoption, W. Va. Code § 48-4-11 [1984] provides:*

(a) Upon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to any such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

(b) For the purpose of descent and distribution, from and after the entry of such order of adoption, a legally adopted child shall inherit from and through the parent or parents of such child by adoption and from or through the lineal or collateral kindred of such adopting parent or parents in the same manner and to the same extent as though said adopted child were a natural child of such adopting parent or parents, but such child shall not inherit from any person entitled to parental rights prior to the adoption nor their lineal or collateral kindred, except that a child legally adopted by a husband or wife of a person entitled to parental rights prior to the adoption shall inherit from such person as well as from the adopting parent. If a legally adopted child shall die intestate, all property, including real and personal, of such adopted child shall pass, according to the statutes of descent and distribution of this State, to those persons who would have taken had the decedent been the natural child of the adopting parent or parents.

Footnote: 18 *Besides stating in its disposition orders that it was " dismayed by the administrative delays within WVDHHR vis-a-vis adoptions," the circuit judge stated as follows at a hearing in Tobias W. on October 20, 1997:*

And with regard to the disposition of the children, the Court is no longer granting guardianship to the department for purposes of seeking adoption. The department for bureaucratic reasons has what I consider to be an intolerable

delay in the placement of children for adoption, so I will grant permanent guardianship to the department with the direction that they place the children in permanent foster care . . . . The Court will not permit the department to go the adoption route unless and until the department shows that it can move those things faster.

Footnote: 19 *In the disposition order in Brianna H., the circuit court gave virtually no basis for its grant of visitation rights, stating merely that "it does not follow that these parents should have no future contact with this child and so the Court is of the opinion that visitation rights ought to be granted within limitation." The disposition orders in the Michael M. and Tobias W. cases were also cursory with respect to post-termination visitation.*

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1999 Term

FILED
December 3, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26639

RELEASED
December 3, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: MICHAEL RAY T., SCOTTIE LEE T., AND TONYA LYNN T.

Appeal from the Circuit Court of Mercer County
Honorable David W. Knight, Judge
Juvenile Action Nos. 98-JA-0030-K; 98-JA-0031-K; and 98-JA-0032-K

AFFIRMED

Submitted: November 2, 1999
Filed: December 3, 1999

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Michael Ray T., Scottie Lee T., and
Tonya Lynn T.

JUSTICE DAVIS delivered the Opinion of the Court.

JUDGE GARY L. JOHNSON, sitting by temporary assignment.

JUSTICE SCOTT did not participate.

SYLLABUS BY THE COURT

1. "The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified." Syllabus point 1, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).

2. "'Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.' Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)." Syllabus point 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).

3. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syllabus point 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995).

4. Former foster parents do not have standing to intervene in abuse and neglect proceedings involving their former foster child(ren).

5. A circuit court may, in its sound discretion, permit former foster parents to present evidence regarding their former foster child(ren) to assist the court in assessing the best interests of such child(ren) subject to an abuse and neglect proceeding.

6. The responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court.

7. "'"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103[, 181 S.E.2d 334] (1971).' Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978)." Syllabus point 3, *Voelker v. Frederick Business Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995).

Davis, Justice:

The appellants herein, and plaintiffs below, Paul and Virginia Williams [hereinafter collectively referred to as "the Williamses"], appeal from an order entered May 11, 1999, by the Circuit Court of Mercer County. By that order, the court denied the Williamses' motion to intervene in the abuse and neglect proceedings concerning their former foster children, Michael Ray T.[1] [hereinafter referred to as "Michael"], Scottie Lee T. [hereinafter referred to as "Scottie"], and Tonya Lynn T. [hereinafter referred to as "Tonya"]. The court further refused to consider the Williamses' motion for custody, wherein they sought the return of these children to their care following the youngsters' removal from their foster care by the West Virginia Department of Health and Human Resources [hereinafter referred to as "DHHR"]. Upon a review of the parties' arguments, the appellate record, and the pertinent authorities, we conclude that the circuit court did not abuse its discretion by refusing the requested intervention. Therefore, we affirm the decision of the Circuit Court of Mercer County.

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[1]Due to the sensitive nature of the facts involved in this appeal and our efforts to protect the privacy of the juveniles involved, we adhere to our usual practice of utilizing the infants' last initials rather than their full surnames. *See, e.g., State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 250 n.1, 496 S.E.2d 198, 200 n.1 (1997); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 559 n.2, 490 S.E.2d 642, 646 n.2 (1997); *In re Tiffany Marie S.*, 196 W. Va. 223, 226 n.1, 470 S.E.2d 177, 180 n.1 (1996).

I.

FACTUAL AND PROCEDURAL HISTORY

The facts underlying the instant appeal are as follows. On April 8, 1998, the DHHR filed a petition in the Circuit Court of Mercer County requesting the immediate and temporary transfer of custody of Michael,[2] Scottie,[3] and Tonya[4] to the DHHR as a result of the perceived imminent danger the children would face if they remained in the home of their biological parents, Frank T. and Lizzie T. The incidents leading to this petition centered around the life-threatening injuries sustained by then six-week-old Michael when he was repeatedly and viciously attacked by rodents in his parents' home on April 4, 1998. Additionally, the DHHR remained concerned that Lizzie would again return to the family home with Michael's siblings despite the persistence of the rodent infestation and warnings by DHHR officials that the home was not safe for children. The circuit court found that "[t]he danger presented by the child(ren)'s present circumstances creates an emergency situation which has made efforts to avoid removing the child(ren) from the home unreasonable or impossible," and transferred their temporary custody to the DHHR.

As a result of the critical injuries he sustained, Michael was hospitalized for

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[2]Michael's birthday is February 19, 1998.

[3]Scottie was born on April 11, 1996.

[4]Tonya's date of birth is June 3, 1994.

an extended period of time at Women and Children's Hospital, in Charleston, West Virginia. His siblings, Tonya and Scottie, were placed with a foster family[5] following their removal from their parents' home. After Michael's partial recovery and release from the hospital, he was placed into foster care with the Williamses[6] on April 16, 1998. Due to the severity of Michael's injuries, Tonya and Scottie were not placed with the Williamses until July, 1998, when their younger brother had recovered further.[7] By order entered August 14, 1998, the circuit court adjudicated the children to have been neglected by their biological parents.[8] On September 11, 1998, the circuit court, during a dispositional hearing, granted Frank and

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[5]Tonya and Scottie were not immediately placed with the Williamses, but rather with a different foster family.

[6]The Williamses had been approved as a specialized foster care home and were sponsored in their provision of such care by Try-Again Homes, Inc.

[7]Because Michael's injuries had been so numerous and severe, there was concern that his siblings might pose a risk of infection to him and that the children would sustain psychological damage if they were reunited before Michael had healed.

[8]The adjudication of neglect was based upon the definition of that term contained in W. Va. Code § 49-1-3(g)(1)(A) (1994) (Repl. Vol. 1996):

> "Neglected child" means a child . . .
>
> [w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian . . . .

For the current definition of this term, see W. Va. Code § 49-1-3(h)(1)(A) (1999) (Repl. Vol. 1999).

Lizzie a six-month post-adjudicatory improvement period, and continued legal and physical custody of the children with the DHHR.

From the time of her placement into the Williamses' home, Tonya exhibited various behavioral and disciplinary problems, believed to be the result of parentification.[9] Although Tonya and Scottie had been having regular supervised visitation with their biological parents since their removal in April, 1998,[10] following one such supervised visit

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[9]When she resided with her biological parents, Tonya reportedly enjoyed a great deal of control over her circumstances and assumed the care of and responsibility for her younger siblings. One of Tonya's counselors explained her behavior thusly:

> The term parentified child or parentification is widely accepted in the field of psychology and counseling to refer to the process in which a child is routinely permitted to assume responsibilities which appropriately belong to parents. For a young child, this is a frightening experience, because, at some level, the child realizes that s/he is unable to adequately assume the responsibilities being given. On the other hand, the child adapts to the situation by enjoying the feeling of power that results from being in charge. Being in charge becomes a survival skill for a young child whose parents do not consistently take responsibility and make decisions. If the child does not take charge, it is possible that nobody else will and this could be potentially life threatening. Therefore, when an adult attempts to assume the responsibilities such a child has been inappropriately given, the child customarily reacts with resistance and resentment, and is likely to fight to retain control. The result is a power struggle between the child and whichever adult is attempting to parent that child.

[10]Frank and Lizzie's supervised visits with Michael began in June, 1998, following his convalescence.

on October 14, 1998, Tonya's conduct worsened dramatically.[11] In an attempt to protect Scottie and Michael from their sister, Mrs. Williams requested respite care for Tonya.[12] Around the same time, Tonya confided in her foster parents that, during the recent supervised visit, she had been sexually abused by her biological mother. The Williamses reported this incident to the Child Protective Services [hereinafter referred to as "CPS"] caseworker who formerly had handled the children's case.[13] Nevertheless, Mr. and Mrs. Williams received the impression that the allegation would not be investigated and that no further action would be taken with regard thereto, due in large part to Tonya's failure to cooperate with DHHR officials by telling them her story.

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[11]Such misconduct included abusive and self-abusive behavior, lying, and stealing.

[12]Generally,

> "respite care" envisions the short-term placement of a child outside of the child's home environment in order to permit the child's parent(s) or guardian(s) and the child a temporary reprieve from a stressful familial situation. Respite care is often sought by families who have children with severe physical, emotional, or mental difficulties as a type of "cooling off" period before the family relationship becomes irreparably damaged.

State ex rel. Paul B. v. Hill, 201 W. Va. at 251 n.9, 496 S.E.2d at 201 n.9.

[13]The Williamses state that although the children's case had recently been assigned to a different caseworker, they contacted the former caseworker because they were more familiar with her.

Following this incident, Tonya's weekly counseling sessions increased in number, and the guardian ad litem and the State jointly moved to temporarily suspend Tonya's visits with Frank and Lizzie. By order entered December 15, 1998, the circuit court suspended, for sixty days, supervised visitation between Tonya and her biological parents.[14] In late December, 1998, the Williamses again requested respite care for Tonya because of her continued defiance of family rules. Upon Tonya's return to the Williamses' home, her demeanor improved.

Thereafter, the DHHR alleges that, as a result of their continuing difficulties with Tonya, the Williamses were admonished and instructed as to acceptable forms of discipline during a multidisciplinary treatment team [hereinafter referred to as "MDT"] meeting on January 12, 1999. Because of the persistent "power struggle" between Tonya and Mrs. Williams, arising from Tonya's defiance and attempt to obtain and retain control, and concerns that the Williamses had inappropriately and negatively discussed Frank and Lizzie in the child's presence, the team also discussed the possibility of removing the children from the Williamses' care.[15] By letter to Mr. and Mrs. Williams dated January 21,

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[14]Frank and Lizzie continued to enjoy supervised visitation with Scottie and Michael.

[15]In the event that Tonya would be removed from the Williamses' care, her siblings would also be relocated to ensure the unity of the sibship. *See State ex rel. Paul B.*, 201 W. Va. at 257, 496 S.E.2d at 207 (alluding to "State's public policy of attempting to unite siblings in foster care placements"). *See also* W. Va. Code § 49-2-14(b(3),d,e,f) (1995) (continued...)

1999, the CPS worker assigned to the children's case reiterated the tenor of the MDT meeting:

> The team members agreed that corrections needed to be made in your approach to dealing with Tonya and that if these corrections can not be made a team meeting will be held to discuss the removal of the T[.] children. . . .
>
> The Department [DHHR] looks forward to maintaining these children in your home *as long as it is in the best interest of the children.*

(Emphasis added).

In February, 1999, the circuit court ordered the gradual resumption of visits between Tonya and her biological parents. On March 26, 1999, the circuit court ordered the extension of the biological parents' improvement period to coincide with the expiration of their period of probation[16] in October, 2002. The circuit court also allegedly ordered the commencement of in-home visitation, whereby the children would visit Frank and Lizzie in their home. The Williamses submit that, upon explaining these visits to Tonya, she revealed that she had sustained numerous additional instances of sexual abuse, involving both of her biological parents and other relatives, before she had been removed from her parents'

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[15](...continued)
(Repl. Vol. 1999) (detailing DHHR's efforts to place siblings with single foster family as long as such placement is in children's best interests).

[16]Frank and Lizzie are on probation in conjunction with the companion case to the neglect proceedings in which they had been charged with criminal child abuse, pursuant to W. Va. Code § 61-8D-1, *et seq.*

home.[17] Apparently out of concern for Tonya's safety and as a result of the perceived inaction by the DHHR in response to the October report of sexual abuse, the Williamses penned a nine-page letter, disclosing the children's full names, revealing certain confidences about them, and detailing Tonya's allegations, and sent it to various government officials and agencies on March 30, 1999.[18] Neither the DHHR nor the children's guardian ad litem had prior knowledge of this correspondence.

Presumably perceiving the letter to be a breach of the Williamses' duty of confidentiality and apparently due to growing concern about their care of the children, the DHHR removed the sibship from the Williamses' home on April 5, 1999, believing such

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[17]Upon learning such information, the children's guardian ad litem moved to suspend visitation between Frank and Lizzie and the three children pending further investigation of the sexual abuse allegations. The circuit court granted this motion on April 16, 1999.

[18]This letter was sent, by facsimile, to the following governmental agencies and officials: "Trooper Hinzman[,] Bob Wise[,] Sen. Rockefeller[,] Sen. Byrd[,] Gov. Underwood[,] The Whitehouse Office of Agency Liaison[,] Mr. Shank at DHHR[,] . . . Justice John E. [sic] McCusky [sic] - WV Supreme Court[,] WV Advocate[,] Joan Ohl[,] Bill Sadler[,] Tom Berry[,] Judge David Knight[,] Kathie King - DHHR CPS Office[,] State Prosecutor's Office[,] State Ethics Committee[,] Hillary Clinton's Office[, and] Dept. of HHS Children's Bureau, Wash[ington], DC."

The appellate record does not indicate whether a prior investigation of these charges had been initiated as a result of Tonya's October allegations, however an investigation was commenced on April 2, 1999, in response to communications by Tonya's counselor to the Princeton detachment of the West Virginia State Police. Failure to report suspected child abuse to the appropriate authorities is a misdemeanor offense. W. Va. Code § 49-6A-8 (1984) (Repl. Vol. 1999).

removal to be in the children's best interests. The children subsequently were placed with another foster family. Following the children's removal from the Williamses' home, Try-Again Homes, Inc., terminated its sponsorship of the Williamses as foster care providers, effective April 5, 1999, citing "the major breach of confidentiality demonstrated by the letter [the Williamses] disseminated to people who are not covered by Try-Again Homes and/or Department of Health and Human Resources release of information."

As a result of the children's removal from their home, the Williamses filed a Motion to Intervene in the children's abuse and neglect proceedings and a motion requesting the circuit court to return the children to their foster care. By order entered May 11, 1999, the circuit court denied intervention and declined to consider whether the children should be returned to the Williamses' care. In so ruling, the circuit court noted that

> a court has the discretion to allow foster parents who have physical custody of a child to intervene in abuse and neglect proceedings. *See In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996). However, in the present case, the Williams [sic] no longer have physical custody of the children.
>
> In their Motion, the Williams [sic] allege that the DHHR "improperly and unlawfully removed" the children from their home. This alleged improper removal, and the request to file a motion to have the three children returned to their foster care would be more appropriately addressed through an extraordinary remedy such as a writ of mandamus.[19] Therefore, this Court will not address whether the DHHR

[19]To date, the Williamses have not attempted to obtain their requested relief through an extraordinary remedy in either the circuit court or this Court.

> should return the children to the foster care of the Williams [sic] at this time.
>
> [T]his Court does not find that the Williams [sic] have a right to intervene . . . .

(Footnote added).[20] From this circuit court decision, the Williamses appeal to this Court.[21]

II.

STANDARD OF REVIEW

Prior to addressing the merits of the Williamses' assignments of error, we must consider the general standard for evaluating the propriety of a circuit court's ruling.

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

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[20]Despite its rejection of the Williamses' motion to intervene, the court recognized "the role the Williams [sic] have played in the children's life and f[ound] that input from the Williams [sic] would be valuable in determining the best interest of the T[.] children." Accordingly, the court held a limited evidentiary hearing on June 10, 1999, at which only the Williamses were permitted to testify and present exhibits, but not additional witnesses, regarding the children's best interests.

[21]Since the Williamses filed their petition for appeal in this Court, on July 19, 1999, the DHHR, during a July 23, 1999, hearing, advised the circuit court that it would not amend the neglect petition to include sexual abuse allegations due to insufficient evidence thereof. Subsequently, by order entered October 8, 1999, the circuit court terminated Frank and Lizzie's parental rights vis-a-vis Michael, Scottie, and Tonya. A farewell visit remains to be scheduled.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997). As more precise standards govern the specific issues presented for our determination, we will incorporate these additional methods of review in our discussion of those issues.

III.

DISCUSSION

On appeal to this Court, the Williamses raise two assignments of error: (1) the circuit court erred in denying their motion to intervene and (2) the circuit court improperly refused to consider their motion for custody. The DHHR, joined by the children's guardian ad litem, rejects the Williamses' contentions and urges this Court to uphold the circuit court's rulings.

A. Motion to Intervene

The Williamses first assign as error the circuit court's denial of their motion to intervene. In the case of *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996), we set forth guidelines regarding foster parents' participation in abuse and neglect proceedings:

> The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact-finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. *The level and type of participation in such cases is left to the sound discretion of the circuit court* with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding

> is inconsistent with *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

Syl. pt. 1, *id*. (emphasis added). From this language, it is apparent that our review of the circuit court's decision regarding the Williamses' intervention motion is for an abuse of discretion. "Typically, a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions." *State v. Allen*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 20 (No. 25980 Nov. 17, 1999). In other words, "'[u]nder the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.'" *Hensley v. West Virginia Dep't of Health & Human Resources*, 203 W. Va. 456, 461, 508 S.E.2d 616, 621 (1998) (quoting *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995)).

Reviewing the circuit court's decision, we note, at the outset, that the Williamses were not actually the foster parents of Michael, Scottie, and Tonya at the time they sought intervention. Rather, they stood in the position of the children's former foster parents. Under a strict application of our holding in *Jonathan G.*, which dealt exclusively with the child's then current foster parents, the Williamses are not entitled to intervene in the children's abuse and neglect proceedings. *See* Syl. pt. 1, 198 W. Va. 716, 482 S.E.2d 893. Nevertheless, we must consider the matter further. As this emerging new body of law has dealt previously only with the intervention rights of current foster parents, the question of

whether a former foster parent has standing to intervene in the abuse and neglect proceeding concerning their former foster child(ren) is a matter of first impression in this Court. *See* Syl. pt. 1, *In re Harley C.*, 203 W. Va. 594, 509 S.E.2d 875 (1998) ("Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions."); Syl. pt. 1, *Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893.

The intervention rights we previously have afforded to current foster parents are limited, both by the circuit court's discretion to grant or deny such intervention and by the primary purpose for such intervention, that is to "provid[e] the circuit court with all pertinent information regarding the child." Syl. pt. 1, in part, *Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893. When assessing the right of individuals to participate in abuse and neglect proceedings, we necessarily must be guided by our oft-repeated mantra that child abuse and neglect proceedings are, without fail, to be resolved as expeditiously as possible in order to safeguard the welfare and best interests of the fragile infant parties to such proceedings. "'Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.' Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)." Syl. pt. 3, *Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893.

Although "we have repeatedly admonished lawyers and the circuit courts

regarding the critical need for prompt resolution of child abuse and neglect proceedings," *Jonathan G.*, 198 W. Va. at 733, 482 S.E.2d at 910, this cautionary is not solely a rule adopted by this Court. Rather, this directive is also a mandate imposed by the Legislature:

> Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under article two-a [§ 48-2A-1 et seq.], chapter forty-eight of this code and actions in which trial is in progress.

W. Va. Code § 49-6-2(d) (1996) (Repl. Vol. 1999).

> "The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syl. Pt. 5, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 6, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893.

This need for rapid finality in abuse and neglect proceedings is attributable to the overriding concern for the subject child's welfare. "'[A] child deserves resolution and permanency in his or her life . . . .'" *Jonathan G.*, 198 W. Va. at 726, 482 S.E.2d at 903 (quoting *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 260, 470 S.E.2d 205, 214 (1996)). Moreover, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). Accordingly, in the interest of expediting the resolution and conclusion of abuse and neglect proceedings, we are hesitant to expand the realm of

intervenors to individuals who are no longer guardians or custodians of the children at issue for fear that "'[u]njustified procedural delays'" undoubtedly would attend the ever-increasing roster of interested participants. *See* Syl. pt. 3, in part, *Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893; Syl. pt. 1, in part, *Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365.

Furthermore, while it is true that former foster parents may have an interest in participating in cases involving children who once were entrusted to their care, we must not forget that, in the present context, the rights of adults are subordinate to those of the involved children. "'"Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).' Syllabus Point 3, *Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997)." Syl. pt. 3, *In re Harley C.*, 203 W. Va. 594, 509 S.E.2d 875. In other words, "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995). It is for these reasons, then, that we hold that former foster parents do not have standing to intervene in abuse and neglect proceedings involving their former foster child(ren). Based upon our decision, we further conclude that the circuit court did not abuse its discretion by refusing the Williamses' intervention motion.

In addition to our recognition of the preeminent rights of the infant child(ren)

subject to abuse and neglect proceedings and our acknowledgment of the detrimental delays that would result from the extension of intervention to former foster parents, we wish to identify the very limited role that former foster parents may have in assisting a circuit court in determining the child(ren)'s best interests. As we noted in *Jonathan G.*, the purpose behind allowing foster parents to intervene is to provide the court with information concerning the child(ren) with whose care they have been charged. Syl. pt. 1, in part, 198 W. Va. 716, 482 S.E.2d 893. Former foster parents, as the former guardians, custodians, and/or caretakers of the subject child(ren), similarly have knowledge of the child(ren) that could be beneficial to a court considering the child(ren)'s best interests and ultimate fate. While complete intervention is not the proper role for former foster parents to participate in abuse and neglect proceedings, we do believe their input would, in many cases, be instructive and facilitate the court's decision. Therefore, we hold that a circuit court may, in its sound discretion, permit former foster parents to present evidence regarding their former foster child(ren) to assist the court in assessing the best interests of such child(ren) subject to an abuse and neglect proceeding. Based upon the record evidence in the instant appeal, we note, with approval, the circuit court's decision to permit the Williamses to testify and present evidence regarding Michael, Scottie, and Tonya, as they were in a position, as the children's former foster parents, to provide pertinent first-hand information for the court's consideration.

At this juncture, we wish also to applaud the Williamses' continued efforts to

vigilantly protect what they perceive to be the best interests of the children previously entrusted to their care. Their dedication and devotion to their former young charges is readily apparent from their appearance before this Court. As we will explain further in Section III.B., *infra*, we are without sufficient information to determine whether the DHHR's removal decision was in error or whether the best interests of the children dictate their return to the Williamses' care. In any event, we do want to emphasize that, while the Williamses do not have a right of intervention in the underlying abuse and neglect proceedings, they may not be completely devoid of remedies should they desire to pursue this matter further. Such alternative remedies at their disposal may include the extraordinary remedies of mandamus, as alluded to in the circuit court's order, and habeas corpus. *See* Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966) ("Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies."); Syl. pt. 2, *West Virginia State Dep't of Pub. Assistance v. Miller*, 142 W. Va. 855, 98 S.E.2d 783 (1957) ("The writ of habeas corpus is a proper remedy to determine the custody of a child, but it will not be issued in a pending suit, of which the court has jurisdiction, involving the temporary custody of such child; nor will a writ of prohibition lie against the judge of the court which has so taken jurisdiction."). As both of these proceedings would be external to the underlying abuse and neglect proceedings, there exists a lesser likelihood of unnecessary and disruptive procedural delay. *See* Syl. pt. 3, *Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893; Syl. pt. 1, *Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365.

B. Motion for Custody

The Williamses' second assignment of error centers around the circuit court's refusal to consider their motion for custody through which they sought the return of the children to their care. In its most basic form, this argument is essentially a challenge to the DHHR's decision to remove the children from their foster placement with Mr. and Mrs. Williams. A thorough review of the limited appellate record presented for our consideration herein fails to reveal any information regarding the DHHR's precise rationale for removing the children from the Williamses' foster care and lacks the circuit court's assessment as to the propriety of such removal or the children's subsequent placement with another foster family. Coupled with the insufficient record is the fact that the circuit court declined to consider the Williamses' custody motion and, thus, did not determine whether the children should or should not be returned to their foster care.

We frequently have stated that parties are duty-bound to preserve evidence in the record to ensure that this Court may conduct a complete review of the challenged lower court proceedings. "In a long line of unbroken precedent, this Court has held that the responsibility and burden of designating the record is on the parties and that appellate review must be limited to those issues which appear in the record presented to this Court." *State v. Honaker*, 193 W. Va. 51, 56, 454 S.E.2d 96, 101 (1994) (footnotes omitted) (citation omitted). Thus, where

> an appellant [has] spurn[ed] his or her duty and drape[d] an

> inadequate or incomplete record around this Court's neck, this Court, in its discretion, either has scrutinized the merits of the case insofar as the record permits or has dismissed the appeal if the absence of a complete record thwarts intelligent review.

State v. Miller, 194 W. Va. 3, 14, 459 S.E.2d 114, 125 (1995) (citations omitted).

Furthermore, a constant refrain of this Court is that we will not consider, for the first time on appeal, a matter that has not been determined by the lower court from which the appeal has been taken. "[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review." Syl. pt. 6, in part, *Parker v. Knowlton Constr. Co., Inc.*, 158 W. Va. 314, 210 S.E.2d 918 (1975). Therefore, "'"[i]n the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103[, 181 S.E.2d 334] (1971).' Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978)." Syl. pt. 3, *Voelker v. Frederick Bus. Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995). *See also* Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) (same).

Absent an adequate record detailing the DHHR's specific reasons for removing the children from the Williamses' home and the lack of a determination of this issue by the

circuit court, we are precluded from reviewing the precise merits of this assignment of error.

Once again, however, we wish to commend the vigilance with which the Williamses sought to protect the perceived best interests of their former foster children, Michael, Scottie, and Tonya. We also appreciate the quintessential catch-22 in which Mr. and Mrs. Williams found themselves when they believed that Tonya's allegations of sexual abuse had not been adequately addressed by the appropriate governmental officials. It is unfathomable that any parent, biological, foster, adoptive, or otherwise, would not be terrified by the prospect that his or her child might be placed into a situation posing a risk of imminent danger and that such parent would not do everything in his or her power to protect his or her child. Nonetheless, we caution individuals entrusted with the care and/or custody of children involved in abuse and neglect proceedings of the utmost confidentiality attending these matters and the statutory prohibition of breaching such confidences. *See* W. Va. Code § 49-7-1 (1997) (Supp. 1997).[22]

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[22]The version of this statutory provision applicable to the events underlying this appeal commands:

> (a) Except as otherwise provided in this chapter, all records and information concerning a child or juvenile which are maintained by a state department, agency, court or law-enforcement agency shall be kept confidential and shall not be released or disclosed to anyone, including any federal or state agency.
>
> . . . .

(continued...)

IV.

CONCLUSION

In conclusion, we find that the circuit court did not abuse its discretion in denying the Williamses' motion to intervene in the underlying abuse and neglect proceedings, as they were not the current foster parents but rather the former foster parents of the infant children involved in such proceedings. Accordingly, we hereby affirm the May 11, 1999, order of the Circuit Court of Mercer County.

Affirmed.

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[22](...continued)

> (e) Any person who willfully violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars, or confined in the county or regional jail for not more than six months, or be both fined and confined. A person convicted of violating the provisions of this section shall also be liable for damages in the amount of three hundred dollars or actual damages, whichever is greater.

W. Va. Code § 49-7-1 (1997) (Supp. 1997). For the current version of this statute, see W. Va. Code § 49-7-1 (1999) (Repl. Vol. 1999).

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

No. 32167

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: MICHAEL S. JR.

Appeal from the Circuit Court of Mingo County
Hon. Judge Michael Thornsbury
Case No. 03JN-43

AFFIRMED

Submitted: May 11, 2005
Filed: July 6, 2005

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The Opinion was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syllabus Point 3, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999).

2. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability, and security." Syllabus Point 2, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999).

3. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus Point 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Per Curiam:

Tina S. ("Tina"), the intervenor below and the appellant before this Court, appeals a final order of the Circuit Court of Mingo County entered on May 27, 2004, terminating the intervenor status of Tina and thus denying her request to adopt Michael S. Jr. ("Michael Jr.").

We affirm the circuit court's ruling terminating Tina's intervenor status; and we agree with the circuit court that it is in the best interest of the child for the West Virginia Department of Health and Human Resources ("DHHR") to immediately begin a search for another adoptive placement option for Michael Jr.

I.

This case arises from a referral received on October 25, 2003, by the DHHR about the living conditions, hygiene, and mental health of Michael Jr., a five year old child. The referral alleged that the homes of his biological parents, Brenda E. and Michael Sr. ("Brenda" and "Michael Sr."), were in deplorable condition; that both parents and child suffered from poor hygiene; that Michael Jr. was not potty trained at age five; and that both parents were substance abusers.

After the DHHR investigated[1] the referral, the DHHR filed a child abuse and neglect petition on December 15, 2003, pursuant to *W.Va. Code*, 49-6-3 [2005] against Brenda and Michael Sr., seeking immediate custody of Michael Jr.

At a December 15 hearing, the circuit judge found sufficient evidence to justify immediate removal of Michael Jr. from the custody of his biological parents. Michael Jr. was directly remanded into the DHHR's custody based on a finding that he was in imminent danger due to aggravated circumstances. Michael Jr. was also appointed a guardian *ad litem* to represent and protect his best interest.

On December 17, 2003, a preliminary hearing was convened and the circuit judge held that Michael Jr. should remain in the legal and physical custody of the DHHR.[2] The appellant, Tina, who is a friend of Brenda, was given intervenor status at this hearing because she expressed an interest in adopting Michael Jr.

At the hearing Tina was told that she would be required to fill out the necessary paperwork, complete a home study, and undergo a psychological evaluation.

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[1]The investigator not only found deplorable living conditions, but was also told by Michael Sr., that he had been previously convicted in Ohio of several counts of gross sexual imposition against minor children.

[2]The judge also found, *inter alia*, that: (1) Michael S. and Brenda E. lived in two separate homes; (2) Brenda E.'s home had large holes in the bathroom and kitchen floors and you could see the ground; (3) Michael Sr., the father, did not have potable water in his home and his source of electricity was an extension cord run from Brenda E.'s home; (4) both homes were unkept and dirty; (5) each home had puppy feces on the floor; (6) [Michael Jr.] lived in the home with Michael Sr. and slept in bed with him; (7) Michael Sr., had been convicted of several counts of gross sexual imposition against children under the age of thirteen; and (8) Brenda E. was aware of prior sexual convictions.

An adjudicatory hearing was held on January 20, 2004. At that hearing the circuit court found that Michael Jr. was a neglected child in accordance with *W.Va. Code*, 49-6-2(c) [2005]. Tina attended this hearing and was informed of the date for her psychological evaluation.

At a February 23, 2004 dispositional hearing, Brenda and Michael Sr. requested a post-adjudicatory improvement period. The circuit court granted a sixty-day improvement period for Brenda, but denied Michael Sr.'s request. Another dispositional hearing was scheduled for April 21, 2004, at 3:30 p.m.

On April 16, 2004, Tina transported Brenda to a supervised visit with Michael Jr. The DHHR caseworker was present at the visit, and reported that there was little interaction between Tina and Michael Jr., and the interaction that did take place showed no signs of an emotional bond between the two.

On April 20, 2004, the day before the scheduled April 21 dispositional hearing, the circuit court changed the time for the April 21 hearing from 3:30 p.m. to 8:30 a.m. Brenda was present for the April 21, 2004 hearing, but Tina did not attend the hearing. Due to the limited record, it is unclear whether Tina informed Brenda of the time change, or if Brenda informed Tina. But it is clear that Tina knew of the hearing and failed to attend. At the hearing, Brenda was granted an extension on her improvement period.

The court held a final dispositional hearing on May 27, 2004. Tina did not attend this hearing in person, but was represented by counsel. Evidence was presented by the DHHR caseworker to the affect that no emotional bond existed between Michael Jr. and

Tina; that Tina did not complete a home study or psychological evaluation;[3] and that Tina had not had any contact with Michael Jr. in more than a month. Tina also failed to attend a multi-disciplinary treatment team ("MDT") meeting where DHHR workers who were working on the Michael Jr. case discussed what was in the best interest of Michael Jr.

The circuit court's order from the May 27 hearing reflected that Brenda voluntarily relinquished her parental rights to Michael Sr. The order also terminated the parental rights of Michael Sr. because of his neglect of Michael Jr. and his non-participation with the hearings and services offered. The order also states that, due to Tina's non-cooperation with the proceedings and her failure to attend visitations or hearings, placement of Michael Jr. with Tina would not be in the best interest of the child. In conclusion the order stated that Michael Jr. should immediately be placed for adoption.

II.

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject

[3]It was later determined that the evaluation was never performed, based on a letter from the doctor who was to perform the evaluation, because Tina had canceled the appointment and never rescheduled.

to a *de novo* review." Syllabus Point 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Also, under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances. *Hensley v. West Virginia Department of Health and Human Resources*, 203 W.Va. 456, 461, 508 S.E.2d 616, 621 (1998).

In cases dealing with children this Court has repeatedly stated that the best interest of the child is the polar star upon which decisions should be based. *In re Erica C.*, 214 W.Va. 375, 589 S.E.2d 517 (2003). Determining what is in the child's best interest is especially important when the child has been abused and neglected by his or her own parents and is currently in limbo as to a permanent home. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability, and security." Syllabus Point 2, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999). With the standard of the best interest of the child guiding this decision, we turn to the issue in the instant case: whether the circuit court erred in ruling against placing Michael Jr. in the adoptive custody of Tina, and in dismissing her as an invervenor.

Tina argues that her dismissal as an intervenor and possible adoptive parent of Michael Jr. was improper because she was not given any notice of a time change for a dispositional hearing, and that the lack of notice caused her to miss the April 21 hearing.

Thus, Tina argues, she was prevented from presenting "her side of the story" as to why she would be an appropriate candidate to adopt Michael Jr.

However, the DHHR points to the fact that the biological mother, Brenda, testified that she spoke with Tina and that Tina did know of the time change for the dispositional hearing. The DHHR also presented evidence showing that it notified Tina of the change in time. Finally, the DHHR points to all of the previous hearings, meetings, and visitations in the case where Tina could have shown a consistent and caring interest in Michael Jr., but did not.

While the limited record from below does not show that formal written notice was given to Tina of the time change, the circuit court found that she was informed of the time change by Brenda. Formal written notice of a time change for a proceeding may be necessary in some instances. However, in the instant case it is clear that Tina had actual notice as to when the dispositional hearing was going to occur, and she did not attend the hearing.

The lack of formal written notice in this instance should not be overlooked, but it is not outcome determinative. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syllabus Point 3, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999). Michael Jr. needs immediate permanency, consistency, and stability to counteract the lack of care and learning of his infant childhood.

Furthermore, Tina's absence from court proceedings, because of an alleged lack of notice or other reasons cannot be taken as meaning that she had a lack of opportunity to have her position considered by the court.

Tina canceled her psychological evaluation, and never scheduled a home study. She did not attend an MDT in which placement options for Michael Jr. were discussed. Tina transported Brenda to visitations with Michael Jr., but Tina herself only visited once with Michael Jr. - then only for a short period of time. During this short visit, the DHHR caseworker noticed no emotional bond between Tina and Michael Jr. Tina never requested additional meetings with Michael Jr., and took no steps to further the possibility of becoming his adoptive parent. The court stated that "[d]ue to Tina S.'s non-cooperation with these proceedings and failure to attend the visitations with the child and the hearings in this matter, placement of the child with Tina S. would not be in the best interests of the child."

From the record before the court, there is more than sufficient evidence to affirm the circuit court's decision to dismiss Tina as intervenor and possible adoptive parent of Michael Jr.

III.

In conclusion, we find that the circuit court did not abuse its discretion in dismissing the intervenor, Tina S., from consideration as the potential adoptive parent for Michael Jr., because she was non-cooperative with the proceedings and failed to attend visitations and hearings. Any further delay in this case would be unjust to Michael Jr. and

would be against his best interest. Accordingly, it is in the best interest of Michael Jr. that he be placed for permanent adoption according to DHHR policy and procedure. The order of the Circuit Court of Mingo County is affirmed.

Affirmed.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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OF WEST VIRGINIA

No. 33226

IN RE: THE MARRIAGE OF:

MISTY D. G.,
Petitioner Below, Appellee

v.

RODNEY L. F.,
Respondent Below, Appellant

Appeal from the Circuit Court of Raleigh County
The Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 02-D-346-B

Reversed and Remanded with Directions

Submitted: April 4, 2007
Filed: June 13, 2007

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo.*'" Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004)." Syl. Pt. 1, *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005).

2. "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 1, *State v. Maynard,* 183 W.Va. 1, 393 S.E.2d 221 (1990).

3. "The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis." Syl. Pt. 5, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

4. "When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), *cert. denied*, 534 U.S. 1142 (2002).

5. "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

6. "Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true." Syl. Pt. 3, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

Per Curiam:

This is an appeal by Rodney L. F. (hereinafter "Appellant") from an order of the Circuit Court of Raleigh County reversing a decision of the Family Court of Raleigh County in this child custody matter.[1] The Appellant contends that the lower court erred in concluding that the family court improperly considered inadmissible hearsay and expert witness opinion evidence in rendering its decision to grant the Appellant's petition for a modification of child custody. The Appellant further contends that even if the circuit court had been correct in its conclusion, the matter should have been remanded to the family court for a determination regarding whether sufficient evidence remained to grant the modification and whether the family court would permit the child to testify in light of the circuit court's ruling. Upon thorough review of the briefs, arguments, record, and applicable precedent, this Court reverses the decision of the Circuit Court of Raleigh County and remands this matter with directions that the November 18, 2005, order of the family court be reinstated.

I. Factual and Procedural History

The Appellant and Misty G. (hereinafter "Appellee") were divorced on August 21, 2003. The parties had one child, L.N.F., born on May 25, 1999. Pursuant to the divorce

[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the last names of the parties. *See In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

decree, primary custody of the child was granted to the Appellant. The parties exercised custodial time with their daughter without incident until November 20, 2003, at which time the Appellant filed a petition for modification and emergency relief, alleging that the child had been sexually abused by the Appellee's boyfriend, Thomas G.[2] The family court temporarily suspended the exercise of custodial rights by the Appellee until such time as a hearing could be held by the court and appointed Stacy Lynn Daniel-Fragile to serve as guardian ad litem for the child.

On January 16, 2004, the family court entered an order granting emergency relief and ordering the Department of Health and Human Resources, Child Protective Services, to investigate and determine whether supervised visitation could be arranged. The family court further ordered as follows: "The child is hereby referred for a sexual abuse assessment by a suitably licensed sexual abuse counselor, Susan McQuaide, and the Department of Health and Human Resources is ordered to assist [the Appellant] ensuring that the child is suitably evaluated by the counselor identified by the Court herein."

On May 4, 2005, and September 8, 2005, the family court conducted hearings on the Appellant's petition. The guardian ad litem submitted a report indicating her conclusion that both the Appellee and Mr. G. had been deceitful concerning Mr. G.'s access

[2]During the pendency of this action, the Appellee married Mr. G.

to the child during the time in which the abuse allegedly occurred. Evidence at the family court hearing also included testimony by the Appellant indicating that the child had begun experiencing vaginal soreness and irritation upon returning from visits at the Appellee's home. The Appellant indicated that the child had also begun acting out in sexually inappropriate manners.[3]

Ms. McQuaide testified that she had counseled the child, that the child had identified Mr. G. as the perpetrator of the abuse, and that the child had explicitly described the elements of the sexual abuse. Based upon the evidence presented in the hearing, the family court found that the Appellee had demonstrated a complete unwillingness to protect the child from abuse by Mr. G. The family court specifically noted that the Appellee had married Mr. G. at a time when she was uncertain of the truth of the allegations of abuse; that the Appellee had not been truthful regarding Mr. G.'s access to her daughter; that the Appellee denied that there were wooded areas around her home where the abuse allegedly occurred; and that other family members had confirmed that such wooded areas did exist. The family court granted the Appellant's petition for modification and ordered that all future visitation between the child and the Appellee should occur under the supervision of the Women's Resource Center Supervised Visitation Program in Beckley, West Virginia.

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[3]The sexually inappropriate actions included attempting to take nude photographs of a child friend, inappropriate sexual touching of a child friend, and demonstration of sexual knowledge beyond that of a young child.

Upon the Appellee's appeal, the circuit court reversed the family court, finding that the family court had improperly considered expert opinion evidence from the child's counselor, Ms. McQuaide, and had applied an improper standard of proof in deciding the Appellant's petition. Specifically, the lower court found that the family court impermissibly permitted Ms. McQuaide to testify regarding whether Mr. G. had abused the child and improperly admitted Ms. McQuaide's testimony, as well as that of other family members, regarding statements the child had allegedly made.[4]

The lower court restored the schedule of visitation initially ordered upon the parties' divorce. The lower court did not remand the matter to the family court for a determination of whether the evidence properly admitted would have been sufficient to

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[4]The circuit court, however, did find that Ms. McQuaide was qualified as an expert in the counseling of sexual abuse victims. The circuit court order explains as follows:

> The record supports the conclusion that Ms. McQuaide has sufficient credentials within the field of counseling sexual offenders and sexual abuse victims. The Family Court was correct in recognizing Ms. McQuaide as an expert on the basis of her knowledge, skill, education and training in the field of counseling of sexual abuse victims.
>
> It appears, however, that the expert opinions offered by Ms. McQuaide were not within her field of counseling. She was permitted to offer an opinion that the Petitioner's husband had committed the acts of abuse. Her opinion on that point is not within her field of expertise, and it was error to admit it into evidence.

sustain the family court's modification of custody arrangements. The Appellant maintains that a remand would also have permitted the family court to reconsider its decision not to allow direct testimony from the child regarding the abuse, a decision initially made based upon the availability of the child's counselor to introduce evidence of the child's statements concerning the abuse.

On May 12, 2006, the lower court entered an order granting the Appellant's request for a stay of the lower court decision pending appeal to this Court.

II. Standard of Review

In syllabus point one of *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005), this Court explained as follows:

> "In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

In evaluating standards of proof, this Court also recognizes that the matter must be assessed within the context of a civil proceeding, rather than a criminal one. In *Sharon B.W. v. George B.W.*, 203 W.Va. 300, 507 S.E.2d 401 (1998), this Court addressed

the evidentiary standards to be employed in determining whether a change in custory was necessary where a mother's boyfriend had allegedly sexually abused a child. This Court clearly articulated that the preponderance of the evidence was the appropriate standard to be utilized. 203 W.Va. at 303, 507 S.E.2d at 404. With these standards of review as guidance, we examine the arguments in this appeal.

III. Discussion

The Appellant presents two assignments of error. First, the Appellant maintains that the lower court erred in finding that the family court had improperly relied upon inadmissible hearsay and expert witness testimony in rendering its decision. Second, the Appellant contends that even if such conclusion had been correct, the lower court should have remanded the matter to the family court for a determination of whether sufficient evidence remained to justify the grant of custody modification and whether the family court would reconsider its decision regarding presentation of testimony from the child. This Court's examination of the Appellant's contentions will focus upon three distinct issues of testimony admissibility: Ms. McQuaide's testimony regarding statements made to her by the child during the course of treatment; Ms. McQuaide's opinion regarding the identity of the perpetrator; and family member testimony regarding statements made by the child.

A crucial component of every facet of this evaluation is the definition of hearsay as provided by Rule 801 of the West Virginia Rules of Evidence. Hearsay is defined

therein as follows: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." While hearsay is generally not admissible, it may be admissible if it is contained within one of the recognized exceptions. In syllabus point one of *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990), this Court explained as follows:

> Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.

A. Testimony by Ms. McQuaide Regarding Statements of the Child

Pursuant to Rule 803(4) of the West Virginia Rules of Evidence, "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:"

> (4) Statements for purposes of medical diagnosis or treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

See also Syl. Pt. 4, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990) (restating that rule). In syllabus point five of *Edward Charles L.*, this Court explained as follows:

> The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

The medical treatment exception to the hearsay rule, as it applies to psychological treatment of alleged victims of child abuse, has received considerable attention in recent years. The unique circumstances involved in such cases have prompted many states to extend the medical treatment exception to situations in which the alleged victim makes statements to a treatment provider regarding the identity of the abuser and information about the abuse. Such discussions are perceived as being pertinent to the treatment being undertaken. *See Eakes v. State*, 665 So.2d 852 (Miss. 1995) (statement to physician as to identity of abuser of child sexual abuse victim admissible under medical treatment exception); *State v. Vosika*, 731 P.2d 449 (Or. App. 1987) (allowed testimony of physician who reasonably relied on child sexual abuse victim's identification of her abuser as a family member in treating); *Goldade v. State*, 674 P.2d 721 (Wyo. 1983), *cert. denied*, 467 U.S.

1253 (1984) (statements by victim to nurse and a physician identifying defendant as abuser were admissible).[5]

Courts have observed that "'testimony pertaining to the identity of the defendant and the nature of the sexual assault [are] wholly relevant and pertinent to proper diagnosis and treatment of the resulting physical and psychological injuries of sexual assault. . . .'" *State v. Cruz*, 792 A.2d 823, 831 (Conn. 2002) (quoting *State v. Kelly*, 770 A.2d 908, 928 (Conn. 2001)). Statements presented under the medical treatment exception which identify the perpetrator of the sexual abuse are deemed allowable because "medical treatment" in sexual abuse cases entails emotional and psychological injuries and the necessity to protect the victim from the abuser. *United States v. George*, 960 F.2d 97, 99-100 (9th Cir.1992).[6]

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[5]The fact that the treating entity is not a physician has not been a consistent determining factor in these analyses. *See Gohring v. State*, 967 S.W.2d 459, 461 (Tex. App. 1998) (allowing play therapist to testify child was abused by her father); *Moyer v. State*, 948 S.W.2d 525, 527-28 (Tex. App.1997) (concluding statements made by patient to paramedic were admissible); *Macias v. State*, 776 S.W.2d 255, 258-59 (Tex. App.1989) (statements made to psychologist admissible because they were made for purpose of medical diagnosis and treatment); *Torres v. State*, 807 S.W.2d 884, 886-87 (Tex. App.1991) (finding emergency room nurse could testify as to victim's statement even though nurse was also collecting evidence).

[6]*See also State v. Gregory*, 338 S.E.2d 110, 112 (N.C. App. 1985) (permitting testimony identifying perpetrator of sexual offenses, reasoning the physician "not only needed to know who the perpetrator was in order to plan for the psychological treatment of the victim, but also to comply with the North Carolina child abuse reporting and treatment statutes.").

Circumstances very similar to those encountered in the present case were addressed in the criminal context in *State v. Pettrey*, 209 W.Va. 449, 549 S.E.2d 323 (2001), *cert. denied*, 534 U.S. 1142 (2002). In syllabus point nine of *Pettrey*, this Court explained as follows:

> When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), *if the declarant's motive in making the statement is consistent with the purposes of promoting treatment* and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony *is inadmissible if the evidence was gathered strictly for investigative or forensic purposes*.

209 W.Va. at 452, 549 S.E.2d at 326 (emphasis supplied); s*ee also State v. Shrewsbury*, 213 W.Va. 327, 329-30, 582 S.E.2d 774, 776-77 (2003). Applying that standard to the circumstances of the present case, Ms. McQuaide's testimony relating the child's statements would be admissible if the child's motive in making the statement was consistent with the purposes of promoting treatment and the content was relied upon by Ms. McQuaide. The testimony would be inadmissible if it was *gathered strictly* for investigative or forensic purposes.

This Court has thoroughly reviewed Ms. McQuaide's testimony, as contained in the video-taped transcript from the family court hearing. The transcript contains extensive discussion regarding the distinctions between forensic (investigative) and clinical (treatment)

elements. Ms. McQuaide unequivocally stated that she worked in a dual capacity, initially evaluating the situation in a forensic manner in order to gather information necessary for evaluation and treatment and subsequently treating the child over the course of numerous counseling sessions. Thus, the information accumulated by Ms. McQuaide was not "gathered strictly for investigative or forensic purposes." *Pettrey*, 209 W.Va. at 452, 549 S.E.2d at 326. The child revealed intimate issues regarding the sexual abuse to her counselor, Ms. McQuaide, in the process of participating in ongoing treatment. The content of the child's statements was reasonably relied upon by Ms. McQuaide for treatment. Consequently, this Court finds that the requirements of *Pettrey* for the introduction of Ms. McQuaide's testimony regarding statements made to her by the child during counseling were satisfied.

The circuit court order acknowledged that *Pettrey* would permit the testimony "if the motive in making the statement is consistent with the purposes of treatment. . . ." However, the circuit court found that *Pettrey* would not permit introduction of this testimony because "the use made of the child's out-of-court statements . . . was to find that the child was sexually abused by the Petitioner's husband." The court concluded that it was therefore "clear that this evidence was considered not for purposes of treatment, but to support the finding of fact that the Petitioner's husband committed the sexual abuse that was alleged. This is an 'investigative or forensic' purpose forbidden by *Pettrey*."

We reverse the circuit court's finding that such testimony was inadmissible. The *Pettrey* standard requires an examination of the *child's motive in originally making* the statement. On the contrary, the circuit court examined the matter in terms of the *use ultimately made* of the child's statement.[7] By so examining the statement, the circuit court erroneously concluded that the testimony was inadmissible.

B. Ms. McQuaide's Opinion Regarding the Identity of the Perpetrator; Family Member Testimony Regarding Statements of the Child

This Court affirms the decisions of the lower court with regard to the inadmissibility of Ms. McQuaide's opinion that Mr. G. committed the abuse and the inadmissibility of the child's family members' testimony regarding statements of the child. The circuit court found that Ms. McQuaide[8] offered opinions beyond the field of counseling when she was permitted to offer her personal opinion that Mr. G. had perpetrated the abuse. Similarly, with reference to family members, the circuit court ruled that testimony by the child's family members regarding statements made by the child constituted inadmissible hearsay.

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[7]As argued by the Appellant, the "Circuit Court incorrectly stated that the admissibility of the statements made by the child during sexual abuse counseling turned on the purpose for which the statements were offered into evidence, rather than the purpose for which the child was seeing the counselor in the first place."

[8]The circuit court found that the record supported the conclusion of the family court that Ms. McQuaide had sufficient credentials to be recognized as an expert on the basis of her knowledge, skill, education, and training in the field of counseling sexual abuse victims.

While we affirm the decisions of the circuit court that such testimony is inadmissible, we find that the family court's error in admitting such testimony was harmless and did not affect the ultimate outcome of this child custody modification matter. We observe that none of the family court's seventeen findings refers to opinion evidence offered by Ms. McQuaide regarding her personal conclusions about the identity of the perpetrator. Nor does the family court appear to rely upon family member testimony regarding the child's statements. The family court's ultimate alteration of custody is based upon the child's statements as properly revealed through her counselor, Ms. McQuaide; testimony regarding the child's physical condition; testimony regarding the child's knowledge and acting out of sexual activity; and testimony from the child's guardian ad litem.

Based upon our review of the evidence and the reasoning of both the family court and the circuit court, we conclude that the family court's error in admitting Ms. McQuaide's opinion that Mr. G. committed the offenses and in admitting the family members' hearsay testimony regarding statements of the child did not result in substantial injustice or prejudice to substantive rights. Therefore, we consider such error harmless. Rule 61 of the West Virginia Rules of Civil Procedure provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court

> inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 103(a) of the West Virginia Rules of Evidence also provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."

As this Court articulated in *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995), *cert. denied*, *Bradshaw v. West Virginia*, 516 U.S. 872, "[t]he harmless error inquiry involves an assessment of the likelihood that the error affected the outcome of the trial." 193 W.Va. at 539, 457 S.E.2d at 476. Our conclusion that the admission of the evidence at issue was harmless is bolstered by the fact that this case was tried before the bench, rather than a jury. "Unlike a jury, a trial judge in a bench trial is presumed to know the law and to follow it and 'this presumption may only be rebutted when the record affirmatively shows otherwise.'" *People v. Thorne*, 817 N.E.2d 1163, 1177 (Ill. App. 2004) (quoting *People v. Mandic*, 759 N.E.2d 138, 141 (Ill. App. 2001)).[9]

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[9]Many courts have specified that there is a presumption that a judge, in reaching a verdict in a non-jury trial, has disregarded any improperly admitted evidence. *See State v. Clay*, 909 S.W.2d 711, 716 (Mo. App. 1995); *State v. Rank*, 849 S.W.2d 230, 232-33 (Mo. App. 1993). In *People v. Kriho*, 996 P.2d 158 (Colo. App. 1999), the court explained that "[t]here is a presumption that all incompetent evidence is disregarded by the court in reaching its conclusions, and the judgment will not be disturbed unless it is clear that the court could not have reached the result but for the incompetent evidence." 996 P.2d at 172; (continued...)

IV. Conclusion

The jurisprudence of this state has invariably adhered to the policy that the best interests of the child must be the guiding force in any custody determination. The Legislature succinctly stated:

> The Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together. In furtherance of this policy, the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced.

W.Va. Code § 48-9-101(b) (2001) (Repl. Vol. 2004). In advancement of this philosophy, this Court has explained that "[i]n visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996). In *Keith Allen A. v. Jennifer J.A.*, 201 W.Va. 736, 500 S.E.2d 552 (1997), this Court reiterated: "'In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the

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[9](...continued)
see also State v. Gutierrez, 618 P.2d 315, 317 (Haw. App. 1980) ("the normal rule is that if there is sufficient competent evidence to support the judgment or finding below, there is a presumption that any incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only.").

paramount and controlling factor must be the child's welfare.'" 201 W.Va. at 744, 500 S.E.2d at 560 (quoting *In re Carlita B.*, 185 W.Va. 613, 629, 408 S.E.2d 365, 381 (1991)).[10]

With specific regard to the protection offered through the mechanism of supervised visitation, this Court has articulated the following at syllabus point three of *Carter*.

> Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

196 W.Va. at 241, 470 S.E.2d at 195. Recognizing that the "best interests of the child are paramount," this Court explained its ultimate rationale very concisely in *In re Jason S.*, 219 W.Va. 485, 637 S.E.2d 583 (2006), by stating simply that "[i]f the allegations of sexual abuse are true, the risk of harm of allowing unsupervised visitation is much greater than any harm caused by limiting . . . visitation rights." 219 W.Va. at 226, 637 S.E.2d at 590.

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[10]*See also* Syl. Pt. 3, in part, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children."); *David M. v. Margaret M.*, 182 W.Va. 57, 60, 385 S.E.2d 912, 916 (1989) (The "child's welfare is the paramount and controlling factor in all custody matters.").

Upon thorough review of this matter, this Court finds that the circuit court erred in reversing the holding of the family court. The family court correctly admitted the testimony of Ms. McQuaide regarding the statements made by the child during treatment. In evaluating the admissible evidence, this Court finds that the preponderance of the evidence supports the family court's conclusion that the child suffered sexual abuse perpetrated by Mr. G., now her mother's husband. Thus, the alteration in custody and supervised visitation ordered by the family court was necessary and justified by the evidence properly presented.

Based on the foregoing, the decision of the Circuit Court of Raleigh County is hereby reversed, and this matter is remanded with directions that the November 18, 2005, order of the family court be reinstated.

Reversed and remanded with directions.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33222

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.

JEREMIAH DAVID MONGOLD,
Defendant Below, Appellant.

Appeal from the Circuit Court of Hampshire County
Honorable Donald H. Cookman, Judge
Criminal Action No. 04-F-33

AFFIRMED

Submitted: May 22, 2007
Filed: June 6, 2007

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syllabus point 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

2. "When offering evidence under Rule 404(b) of the West Virginia Rules

of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus point 1, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

3. Rule 404(b) of the West Virginia Rules of Evidence requires the prosecution in a criminal case to disclose evidence of other crimes, wrongs or acts prior to trial if such disclosure has been requested by the accused; however, upon reasonable notice such evidence may be disclosed for the first time during trial upon a showing of good cause for failure to provide the requested pretrial notice.

4. The fact that a criminal charge against a defendant is dismissed or that he/she is acquitted of the same does not prohibit use of the incident under Rule 404(b) of the West Virginia Rules of Evidence.

5. "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be

cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness', inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syllabus point 4, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982).

6. "Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." Syllabus point 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Davis, Chief Justice:

Jeremiah David Mongold (hereinafter referred to as "Mr. Mongold") appeals an order of the Circuit Court of Hampshire County convicting him of the crime of death of

a child by a parent, guardian or custodian by child abuse. The circuit court sentenced Mr. Mongold to a definite term of imprisonment of forty years. Here, Mr. Mongold has made the following assignments of error: (1) the admission of evidence of a prior child abuse incident, (2) the admission of evidence concerning the reason for his loss of employment, and (3) the admission of autopsy photos of the victim. After a thorough review of the record, briefs and the applicable laws, we affirm the conviction and sentence of Mr. Mongold.

I.

FACTUAL AND PROCEDURAL HISTORY

Mr. Mongold resided in Shanks, West Virginia, with his wife, Shiloh Aumock, and her two children, five-year-old Logan and two-year-old Hannah.[1] According to the testimony of Mr. Mongold, on the morning of May 16, 2004, he got out of bed and provided breakfast for Logan and Hannah.[2] After breakfast, Mr. Mongold began playing with the children. One of the games they played was called "airplane." This game required Mr. Mongold to lie on his back and place one of the children on his raised legs and, while holding the child's hands, twirl the child in the air. Mr. Mongold played airplane with Logan first. Then he began playing with Hannah. He played with Hannah for about four minutes. According to Mr. Mongold, after he played airplane with Hannah, he attempted to pick her

[1]Hannah and Logan were Mr. Mongold's stepchildren.

[2]The record indicates that Shiloh Aumock was at work at the time in question.

up and noticed that she was limp and felt like jello. Mr. Mongold immediately called 911 for help.

In response to the 911 call, two emergency medical technicians (hereinafter referred to as "EMTs") arrived at the home and found Hannah lying on the kitchen floor. The EMTs observed that Hannah was barely breathing, her skin was turning blue, and two bruises were over her right eye. Within minutes of observing Hannah's condition, the EMTs placed her in the ambulance and began transportation to a local hospital. However, after a further examination of Hannah in the ambulance, the EMTs determined that her condition warranted helicopter transportation to a better equipped hospital in Maryland. Consequently, the ambulance proceeded to a local fire station to connect with the helicopter. While en route to the fire station, arrangements were also made by the EMTs for a paramedic to rendevous with the ambulance. The paramedic reached the ambulance and began examining Hannah while still en route to the fire station. The paramedic determined that Hannah's symptoms suggested that she had a head injury.

Once the ambulance arrived at the fire station, Hannah was placed into a helicopter. She was flown to Cumberland Memorial Hospital, in Cumberland, Maryland. While at the hospital, it was determined that Hannah suffered from brain swelling and that she had blood on the surface of her skull. As a result of the severity of Hannah's head injuries, she was transported to Johns Hopkins Hospital in Baltimore, Maryland.

At Johns Hopkins Hospital, tests revealed that Hannah suffered from either asphyxiation/strangulation or severe head trauma. Despite efforts to resolve her brain injuries, Hannah died two days later. Subsequent to her death, an autopsy was performed on Hannah. The autopsy revealed that Hannah had sustained four blunt impacts to her head and that those injuries caused her death.

On September 7, 2004, a grand jury returned a one-count indictment against Mr. Mongold, charging him with causing Hannah's death by a parent, guardian or custodian by child abuse. The case was tried before a jury in March of 2005. During the trial, Mr. Mongold testified on his own behalf. Mr. Mongold's defense was that Hannah's injuries may have been caused when the family dog knocked her down on May 15, or when she fell from the deck of the home on the same day. Alternatively, Mr. Mongold suggested that the injuries to Hannah occurred while he played "airplane" with her on May 16. The State's evidence indicated that the injuries sustained by Hannah could not have been caused by being knocked down by a dog, falling from the deck of the home, or while playing the game of "airplane." The jury rejected Mr. Mongold's defense and convicted him. Subsequent to the conviction, the trial court sentenced Mr. Mongold to a definite term of imprisonment of forty years. All post-trial motions were denied. Mr. Mongold then filed this appeal.

II.

STANDARD OF REVIEW

Three issues are presented in this appeal that generally involve the admission of evidence to which Mr. Mongold objected. We have held as a general rule that "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). *See also State v. Guthrie*, 194 W. Va. 657, 680, 461 S.E.2d 163, 186 (1995) ("[M]ost rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard. . . . [A]n appellate court reviews *de novo* the legal analysis underlying a trial court's decision."). We will provide additional review standards as they apply to each specific issue presented.

III.

DISCUSSION

A. Admission of Evidence of a Prior Child Abuse Incident

The first issue raised by Mr. Mongold involves the State's cross-examination of him relating to a prior child abuse incident. The State was permitted to introduce the evidence under Rule 404(b)[3] of the West Virginia Rules of Evidence.[4] In *State v. LaRock*,

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[3]Rule 404(b) states the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by

196 W. Va. 294, 470 S.E.2d 613 (1996), this Court explained the standard of review for a Rule 404(b) issue as follows:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

196 W. Va. at 310-11, 470 S.E.2d at 629-30 (footnote omitted).

In Syllabus point two of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), this Court outlined the procedure that trial courts must follow in determining whether to admit Rule 404(b) evidence:

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or

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> the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[4]The State initially sought to introduce the evidence pursuant to Rule 404(a)(1). The trial court found that the evidence was inadmissible under that rule.

> conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Finally, in Syllabus point one of *McGinnis* we addressed the usage of Rule 404(b) evidence as follows:

> When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

193 W. Va. 147, 455 S.E.2d 516. In our review of this case we are satisfied that the trial court complied with the requirements of *McGinnis*.

During Mr. Mongold's case-in-chief, he presented witnesses who testified as to his overall good relationship with children and that he was not a violent person.

Additionally, during direct examination of Mr. Mongold and through the testimony of other witnesses, evidence was presented which suggested that Hannah's injuries could have been caused accidentally while, among other things, she was playing the game of "airplane." In an effort to rebut Mr. Mongold's evidence regarding his theories of how Hannah's injuries could have occurred accidentally, the State sought to introduce evidence of an incident involving a five-year-old child that occurred on May 8, 2002. On the date in question, Mr. Mongold "held the child up against the wall by the throat, causing the child to bleed and become unconscious for four or five seconds."

The trial court held an in camera hearing to decide whether the State would be allowed to question Mr. Mongold about the prior child abuse incident. During the in camera proceeding, the trial court took testimony from the child's mother. The mother testified that she and Mr. Mongold had gotten into an argument and that he shoved her through a closet door.[5] The child attempted to assist his mother. Mr. Mongold then grabbed the child by the throat and pinned him against a wall. The mother intervened and wrestled with Mr. Mongold. During the altercation, the child was pinned between Mr. Mongold's legs. As a result of pressure being applied to the child's head by Mr. Mongold's legs, "blood vessels in one of [the child's] eyes were broken, he had a small amount of blood inside his ear and

[5]The mother of the child was Mr. Mongold's former girlfriend.

he . . . urinated [on] himself."[6] The trial court also considered evidence showing that Mr. Mongold had been criminally charged with respect to that incident and that he eventually pled guilty to charges of domestic battery against the mother and the child.[7] After consideration of the arguments from both parties, the trial court ruled that the State had shown by a preponderance of the evidence that the prior incident did occur. The trial court concluded that the evidence was relevant "to show that this was not an accident and that it was intentional," as argued by the State. *See United States v. Sanders*, 343 F.3d 511, 518 (5th Cir. 2003) ("[I]t has been established that the government offered the evidence to prove intent and refute [the defendant's] claim of mistake or accident. These purposes are permissible under [Rule] 404(b)."). It was also found by the trial court "that the probative value [of the evidence] would, in fact, outweigh the prejudicial effect[.]"

After the in camera hearing, the State was permitted to cross-examine Mr. Mongold about the prior child abuse incident.[8] The trial court gave a limiting instruction on how the jury should receive the evidence. Additionally, during the charge to the jury, the trial court again instructed the jury that evidence of Mr. Mongold's past "is not admitted as proof of [his] guilt on the present charge . . . . This evidence is admitted . . . only for the

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[6]The trial court did *not* allow the mother of the child testify about the incident to the jury.

[7]A felony child abuse charge was originally filed against Mr. Mongold. That charge was dropped in exchange for the guilty plea to domestic battery.

[8]The jury was not informed of the criminal conviction that resulted from that incident.

purpose of determining whether the . . . State . . . has proven and established intent in absence of accident."

Very clearly, the record demonstrates that the trial court complied with *McGinnis* by finding that the prior child abuse incident was admissible to show intent and a lack of accident. *See State v. Scott*, 206 W. Va. 158, 166, 522 S.E.2d 626, 634 (1999) (allowing Rule 404(b) evidence to show lack of accident); *State v. Bonham*, 184 W. Va. 555, 559, 401 S.E.2d 901, 905 (1990) (allowing Rule 404(b) evidence to show intent). Even so, Mr. Mongold presents two arguments as to why evidence of the prior child abuse incident should not have been introduced: (1) the lack of pretrial notice and (2) his acquittal of the prior felony child abuse charge. We now address both arguments.

(1) Lack of pretrial notice. Mr. Mongold contends that the prior child abuse incident should not have been introduced because the State failed to provide pretrial notice of its intent to use such evidence. Mr. Mongold states that, during a pretrial hearing, "the court remarked '. . . so suffice to say that there are no 404(b) issues[.]' The prosecuting attorney replied: 'None known to me, your honor.'" Here, Mr. Mongold contends that had he known the State intended to use Rule 404(b) evidence, he may have conducted his trial differently. In contrast, the State argues that it did not know that the prior child abuse incident would be relevant until Mr. Mongold presented extensive evidence showing that Hannah's injuries were accidental.

Rule 404(b) provides that " upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Consequently, and under this provision, we hold, Rule 404(b) of the West Virginia Rules of Evidence requires the prosecution in a criminal case to disclose evidence of other crimes, wrongs or acts prior to trial if such disclosure has been requested by the accused; however, upon reasonable notice such evidence may be disclosed for the first time during trial upon a showing of good cause for failure to provide the requested pretrial notice.

At the outset we note that Rule 404(b) "place[s] an initial duty on the defense to request the prosecution to furnish 'other crimes' evidence." *United States v. Barnes*, 49 F.3d 1144, 1148 (6th Cir. 1995). When no such pretrial request is made, the State is "not obligated to provide pretrial notice." *United States v. Aguilar*, 59 Fed. Appx. 326, 328 (10th Cir. 2003). *See also State v. Zacks*, 204 W. Va. 504, 509, 513 S.E.2d 911, 916 (1998) (prosecutor allowed to introduce Rule 404(b) evidence without pretrial notice because defendant failed to make request). An examination of Mr. Mongold's discovery motion reveals that he made the following two relevant requests:

> (1) A copy of [his] prior criminal record, if any, as is within the possession, custody or control of the State, or the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the State.

> (2) Any evidence of uncharged crimes, wrongs or acts allegedly committed by [him] which the State intends to introduce.

To the extent that the above two requests constitute Rule 404(b) requests, Mr. Mongold has not argued that the State failed to provide the requested information. Instead, Mr. Mongold contends that the pretrial notice requirement was violated because the State indicated prior to trial that there would be no Rule 404(b) issues at trial. To support this argument, Mr. Mongold cites to our decision in *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980). Mr. Mongold argues that, under *Grimm*, "non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial." Put simply, Mr. Mongold misinterprets *Grimm*.

In *Grimm* this Court addressed the issue of the State's failure to turn over a document that was requested during discovery. The State did not produce the document, but the State nevertheless introduced it during the trial. We found the non-disclosure to be erroneous. We held in Syllabus point two of *Grimm*:

> When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.

165 W. Va. 547, 270 S.E.2d 173.

The pretrial notice of other crimes evidence required by Rule 404(b), at issue

herein, is distinguishable from the prosecution's failure in *Grimm* to produce a requested document. In the instant proceeding, there is no allegation that the State failed to turn over any document to Mr. Mongold. Further, *Grimm* does not address the issue of a statement by the State that it did not know of any Rule 404(b) issues that would be litigated. Therefore, *Grimm* does not support Mr. Mongold's position.[9]

The trial court ruled that the State was not precluded from using evidence of the prior child abuse merely because the State initially believed that no Rule 404(b) evidence would be used. The trial court correctly found that, under Rule 404(b), such evidence was admissible during the trial if good cause was shown. *See United States v. Scholl*, 166 F.3d 964, 976 (9th Cir. 1999) ("Although Rule 404(b) requires pretrial disclosure of such evidence, that requirement may be excused 'for good cause shown.'"). The trial court determined that good cause was shown. It was only after Mr. Mongold presented extensive evidence suggesting that Hannah's death could have occurred accidentally while playing the game of "airplane" "that this even became an issue."

To the extent that the State's initial belief that no Rule 404(b) issues would be litigated constituted noncompliance with the rule's pretrial notice requirement, we do not

[9]Mr. Mongold also cited to the decision in *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987). However, *Miller* does not apply to the case *sub judice* because it addressed the issue of a prosecutor's failure to provide the defendant with information pertaining to the substance of incriminating oral statements he made to fellow inmates.

believe the trial court abused its discretion in finding that the State provided good cause for failing to provide pretrial notice. *See United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1241 (10th Cir. 1996) ("[W]here Rule 404(b) evidence is offered during trial, as it was in the instant case, the district court may excuse pretrial notice and admit such evidence on good cause shown."); *United States v. Wei*, 862 F. Supp. 1129, 1134 (S.D.N.Y. 1994) ("Evidence sought to be admitted under that rule for which . . . pre-trial notice was not given shall be admitted only if good cause is shown to excuse the failure to provide such notice."). The record is clear in showing that Mr. Mongold was made aware of the prior child abuse incident through documents supplied during discovery and during the pretrial hearing. The mere fact that the State initially believed that no Rule 404(b) issues existed should not be the basis for excluding the evidence. *See United States v. Morrison*, No. 96-4956, 1998 WL 17049 (4th Cir. Jan. 20, 1998) (permitting government to introduce Rule 404(b) evidence that it initially stated would not be used at trial); *United States v. Holmes*, 111 F. 3d 463, 468 (6th Cir. 1997) (permitting Rule 404(b) evidence even though "the defense asked the government whether it planned to introduce any evidence under Rule 404(b), and the government responded that it had no plans to do so").

The fact that Rule 404(b) permits notice to occur for the first time at trial, upon a showing of good cause, suggests that the rule contemplates situations arising where the State legitimately is unaware of the need for such evidence until *after* the trial begins. "[T]here is no requirement that the State must anticipate a need to disclose such evidence."

Dixon v. State, 712 N.E.2d 1086, 1092 (Ind. Ct. App. 1999). *See also United States v. Makki*, No. 06-20324, 2007 WL 781821 (E.D. Mich. Mar. 13, 2007) (after denying defendant's request for notice of Rule 404(b) evidence because government stated it would not introduce such evidence, trial court warned, "the Government is hereby cautioned that it will need 'good cause' to be able to introduce 404(b) evidence at trial if Defendant is not provided reasonable notice of the general nature of any such evidence at least two weeks in advance of trial"). This is particularly true under the facts of this case. Mr. Mongold put on apparently unanticipated extensive evidence regarding his good relationship with children, and evidence, including expert testimony, suggesting that Hannah's death could have been caused accidentally while playing the game of "airplane." Under these unique circumstances, the trial court properly found good cause for excusing the State's failure to provide pretrial notice and in making an initial statement that no Rule 404(b) evidence would be introduced.[10] *See United States v. Smith*, 383 F.3d 700, 707 (8th Cir. 2004) (good cause shown for failing to provide notice of Rule 404(b) evidence until day of trial); *United States v. Scholl*, 166 F.3d 964, 976 (9th Cir. 1999) (same); *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1241 (10th Cir. 1996) (same); *United States v. Archibald*, 212 Fed. Appx. 788, 795 (11th

[10]Even if this Court had concluded that the trial court abused its discretion in finding good cause had been shown, we would have found that the failure to provide pretrial notice under the facts of this case was harmless error. *See United States v. Watson*, 409 F.3d 458, 465 (D.C. Cir. 2005) ("Even assuming arguendo that the prosecution failed to bear its Rule 404(b) notice obligation, this Court holds that [the defendant] failed to show prejudice from the error."); *People v. Hawkins*, 628 N.W.2d 105, 114 (Mich. Ct. App. 2001) (holding that failure to provide pretrial notice of Rule 404(b) evidence deemed harmless error).

Cir. 2006) (same); *Myrick v. State*, 787 So. 2d 713, 716 (Ala. Crim. App. 2000) (same).

(2) Acquittal of the prior felony child abuse charge. Next, Mr. Mongold argues that evidence of the prior child abuse incident should not have been introduced because he pled guilty to domestic battery and not the original felony child abuse charge. Mr. Mongold equates the dismissal of the felony child abuse charge to an acquittal. To support his argument, Mr. Mongold cites *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). *Grady* holds that

> [t]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

495 U.S. at 510, 110 S. Ct. at 2087, 109 L. Ed. 2d at 557. *Grady* does not support Mr. Mongold's position for two reasons. First, and foremost, *Grady* was expressly overruled by the United States Supreme Court in *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). *Dixon* held:

> We have concluded . . . that *Grady* must be overruled. Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the "same offence," U.S. Const., Amdt. 5, has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The "same-conduct" rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.

Dixon, 509 U.S. at 704, 113 S. Ct. at 2860, 125 L. Ed. 2d at 573.[11]

The second reason that *Grady* does not support Mr. Mongold's position is that *Grady* had nothing to do with the introduction of Rule 404(b) evidence. In *Grady* the defendant had pled guilty in a New York state court to the misdemeanor offenses of driving while intoxicated and failing to keep to the right of the median. After the guilty plea was accepted, the defendant was charged by indictment with, *inter alia*, reckless manslaughter, criminally negligent homicide, and third-degree reckless assault, all of which were based on the same incident which had given rise to the misdemeanor charges. The defendant moved to dismiss the indictment on double jeopardy grounds. The New York trial court denied the motion. The defendant thereafter sought a writ of prohibition from a mid-level appellate court. That court denied the writ. The defendant appealed to New York's highest court. The New York court found a double jeopardy violation and reversed. The prosecutor thereafter appealed to the United States Supreme Court. The United State Supreme Court affirmed the decision of New York's highest court.

In the instant proceeding, the State prosecuted Mr. Mongold for the death of Hannah in 2004, not for the injury to a different child in 2002. Therefore, the issue of *Grady's* double jeopardy principle simply has no application to Mr. Mongold's prosecution

[11]We wish to point out that counsel has a duty to inform this Court that a case he/she seeks to rely upon is no longer good law.

nor to the use of a prior child abuse incident for purposes of Rule 404(b).

Assuming, as argued by Mr. Mongold, that the dismissal of the felony child abuse charge, in exchange for a plea to domestic battery, constituted an acquittal of the felony charge, evidence of the underlying child abuse incident may be used for purposes of Rule 404(b). That issue was addressed by the United States Supreme Court in *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). In *Dowling*, the defendant was prosecuted by the federal government for robbing a Virgin Island bank. During the trial, the government introduced evidence, under Rule 404(b) of the Federal Rules of Evidence,[12] of the defendant's involvement in a burglary and attempted robbery in a home. The trial court permitted the evidence even though the defendant had been tried and acquitted of all charges stemming from the burglary. A jury convicted the defendant of the bank robbery charge, and the conviction was upheld by a federal appellate court. The United States Supreme Court granted certiorari to decide whether double jeopardy principles prohibited use of Rule 404(b) to introduce evidence involving the acquitted burglary charge. The United States Supreme Court ruled that double jeopardy principles did not bar use of the evidence:

> For present purposes, we assume for the sake of argument that Dowling's acquittal established that there was a reasonable doubt as to whether Dowling was the masked man who entered [the victim's] home . . . two weeks after the First

[12]The West Virginia and Federal rules are almost identical.

> Pennsylvania Bank robbery. But to introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt: the Government sought to introduce [the evidence] under Rule 404(b), and, as mentioned earlier, . . . [i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Because a jury might reasonably conclude that Dowling was the masked man who entered [the victim's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite.
>
> Our decision is consistent with other cases where we have held that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.

Dowling, 493 U.S. at 348-49, 110 S.Ct. at 672, 107 L. Ed. 2d at 717-18 (internal quotation marks and citation omitted).[13]

Consistent with *Dowling*, we now hold that the fact that a criminal charge against a defendant is dismissed or that he/she is acquitted of the same does not prohibit use of the incident under Rule 404(b) of the West Virginia Rules of Evidence. Consequently, the fact that the felony child abuse charge against Mr. Mongold was dismissed did not prohibit use of the incident pursuant to Rule 404(b).

B. Evidence Concerning Mr. Mongold's Loss of Employment

[13]The Supreme Court also rejected a due process challenge to use of the evidence.

The second issue raised by Mr. Mongold involves the State's cross-examination of his wife and his father regarding the reason for his loss of employment. Mr. Mongold contends that the trial court committed error in allowing the State to cross-examine his wife and father about the circumstances of his loss of employment. This Court has held that, "[i]n determining whether the scope of cross-examination has been violated, broad discretion is given to the trial court, and we will not disturb that ruling absent a clear abuse of discretion." *State v. Potter*, 197 W. Va. 734, 749, 478 S.E.2d 742, 757 (1996). *See also* Syl. pt. 4, *State v. Carduff*, 142 W. Va. 18, 93 S.E.2d 502 (1956) ("The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in the case of manifest abuse or injustice."). We have also observed that

> [s]everal basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

Syl. pt. 4, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982). *See also* W. Va. R. Evid. 611(b)(2) ("Non-Party Witnesses. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct

examination.”).

(1) Cross-examination of Mr. Mongold’s father. Mr. Mongold’s employment status was first raised by Mr. Mongold during the direct examination of his father:

> Q. Okay. All right. And you were at the home on the weekends, and I assume you work during the week too, right?
>
> A. Yes. Jeremiah [Mr. Mongold] was employed with me.
>
> Q. Where do you work?
>
> A. Lantz Construction Company in Winchester, project superintendent. We do commercial buildings.

The State followed up on the issue of Mr. Mongold’s employment during its cross-examination of his father:[14]

> Q. Does he still work with you at Lantz?
>
> A. No, no, he does not due to the fact of what he’s been going through, missing time. Our work got slow in the winter and — and he had to miss so much time, that they let him off.
>
> Q. Did he get laid off or did he get terminated?
>
> A.Well, I’m not sure which. I mean, I don’t know. You would have to ask Jeremiah about that.

Mr. Mongold continued the issue of his employment during redirect examination of his father:

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[14]Mr. Mongold objected to the questioning on the grounds of relevancy.

> Q. . . . Jeremiah wasn't terminated, let go for misconduct, was he?
>
> A. Not on the job site. They had a Christmas party and something happened there. I was not there.
>
> Q. You don't know what it was?
>
> A. No.
>
> Q. And you say he missed a lot of work?
>
> A. Yes.
>
> Q.What was that a result of?
>
> A. Because of the hearing, hearings and everything mostly due to the incident that happened to Hannah.

The State followed up on the issue of the Christmas party incident during its recross-examination of Mr. Mongold's father:

> Q. So he was not terminated for any misconduct at work?
>
> A. Not that I'm aware of.
>
> Q. He was terminated for some misconduct at the company Christmas party?
>
> A. I didn't get into it a whole lot. I understand that there was a Christmas party; and there was some other people that was involved and there was some drinking going on, and that's all I know about it.

So, to the extent that Mr. Mongold alleges that the trial court committed error in allowing the State to question his father about his employment status, we find no merit to the contention. The record clearly demonstrates that Mr. Mongold was the first to raise the

issue of his employment status during the direct examination of his father. "[T]his Court has recognized that the scope of cross-examination is coextensive with the evidence given on direct examination; that is, a witness may be cross-examined on matters which are raised on direct examination." *State v. Justice*, 191 W. Va. 261, 269, 445 S.E.2d 202, 210 (1994). *See also* Syl. pt. 2, in part, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971) ("An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited[.]").

(2) Cross-examination of Mr. Mongold's wife. The issue of Mr. Mongold's employment status was again raised by him during the direct examination of his wife:[15]

> Q. Okay. All right. Jeremiah, when you all moved in together and even before that, he was employed?
>
> A. Yes.
>
> Q. Where did he work?
>
> A. Lantz Construction out of Winchester.
>
> Q. And generally, what days of the week and what hours

[15]Prior to questioning Mr. Mongold's wife about his employment, the State, during a bench conference on another issue, informed the trial court that it would ask her about his loss of employment. Mr. Mongold argued that the matter was irrelevant. The trial court held that such questioning could occur because Mr. Mongold opened the door to the issue when he questioned his father about the matter. Although we have determined that a different reason justified the questioning, this is of no moment. *See Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.").

of the week would he work?

A. Monday through Friday, I don't know, normal hours, six something to three, sometimes a little later than three.

The State followed up on the issue of Mr. Mongold's employment during its cross-examination of his wife:

Q. Okay. Do you know anything about Mr. Mongold losing his job there at Lantz Construction?

A. Yes, sir, I do.

Q. Do you know why that was?

A. Yes, sir, I do.

Q. And why was that?

A. Jeremiah and I had gotten into an argument at a company dinner and he was being nasty to me, and his friends, they observed him being nasty. And they all got into a confrontation and got into a fight which resulted in the end, Jeremiah punching a hole into the wall. And I guess that is the initial reason why they actually fired him rather than pressing charges.

Mr. Mongold contends that it was error for the trial court to permit the State to elicit testimony from his wife concerning the reason he lost his job. We disagree.

It has been recognized that "'[w]hen the accused calls [his] spouse to testify, the prosecution can cross-examine as to those matters covered, or matters directly related to those matters covered, on direct examination.'" *State v. Bohon*, 211 W. Va. 277, 282 n.3, 565 S.E.2d 399, 404 n.3 (2002) (quoting 1 Franklin D. Cleckley, *Handbook on Evidence for*

West Virginia Lawyers § 5-4(D)(2)(b), at 5-84 (4th ed. 2000)). The record clearly shows that Mr. Mongold asked his wife on direct examination about his employment, including the days and hours that he worked. The issue of his termination from employment was directly related to this line of questioning. Consequently we find no error in the State's cross-examination of Mr. Mongold's wife.[16]

C. Admission of Autopsy Photos of the Victim

The final issue raised by Mr. Mongold concerns the admission of five photographs of Hannah. Two of the photographs depict Hannah's entire body lying on a morgue table, face up and face down. The remaining three photographs are autopsy images revealing parts of Hannah's exposed skull. Mr. Mongold argued that the photographs were gruesome and should not have been admitted into evidence. We disagree.

We begin by observing that "[t]he general rule is that pictures or photographs

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[16]Mr. Mongold contends in this appeal that evidence of the basis for his termination was subject to analysis under Rule 404(b) prior to its admission. We disagree. First, there is nothing in the record which indicates that the State knew what Mr. Mongold's wife would say in response to the question about his employment termination. Second, the only objection to the questioning made by Mr. Mongold was that of relevancy. To the extent that Mr. Mongold believed that the response to the question would implicate Rule 404(b), he should have made an objection on that basis and afforded the trial court an opportunity to determine whether Rule 404(b) applied. "[s]ince an objection only preserves the specific grounds named, if an objection naming an untenable ground is overruled, the ruling will be affirmed on appeal even though a good but unnamed ground existed for exclusion of the evidence." 1 Cleckley, *Handbook on Evidence* § 1-7(C)(2), at 1-94 (footnote omitted).

that are relevant to any issue in a case are admissible." *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 497, 345 S.E.2d 791, 796 (1986). In the case of *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994), Justice Cleckley outlined factors that must be considered in assessing the admissibility of photographs. In Syllabus point 8 of *Derr* we stated "[t]he admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence." 192 W. Va. 165, 451 S.E. 2d 731. In Syllabus point 10, the *Derr* opinion carved out the test for the admissibility of photographs:

> Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Id.

In the instant case, the trial court followed the requirements of *Derr* in admitting the five photographs. The trial court determined that the photographs were relevant in showing the location of Hannah's injuries and in assisting the State's medical expert in describing those injuries to the jury. After finding the photographs to be relevant, the trial court weighed their probative value against their prejudicial nature. In so doing, the

trial court found that the photographs were in black and white and did not show blood. The trial court also found that the autopsy photographs would be cropped so as to minimize showing the full skull. With these considerations in view the trial court held that

> [t]he prosecutor will have witnesses testify about the condition of the child and her injuries. Since the testimony will directly relate to the photographs and may be of a technical nature and because the charge is child abuse by custodian resulting in death of a child which requires proof of an intentional and malicious infliction of physical pain and impairment of physical condition other than by accidental means causing death, the court finds that the probative value outweighs the prejudicial effect on [the] photographs[.]

Although we find that the autopsy photographs may be characterized as gruesome, we do not believe that those photographs were unduly prejudicial. As we noted in *Derr*, "[g]ruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. 'The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. . . . [G]ruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.'" *Derr*, 192 W. Va. at 177 n.12, 451 S.E.2d at 743 n.12 (quoting *People v. Long*, 38 Cal. App. 3d 680, 689, 113 Cal. Rptr. 530, 537 (1974)). We have reviewed all of the photographs, paying particular attention to the autopsy photographs, and do not find that their prejudicial impact outweighed their probative value. Consequently, we do not find that the trial court abused its discretion by admitting the photographs.

IV.

CONCLUSION

The trial court's order convicting and sentencing Mr. Mongold for the crime of death of a child by a parent, guardian or custodian by child abuse is affirmed.

Affirmed.

No. 33222 *State of West Virginia v. Jeremiah David Mongold*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the majority opinion. I write separately to address the issue of the admissibility of Rule 404(b) evidence.

In *State v. Scott*, 206 W.Va. 158, 168, 522 S.E.2d 626, 636 (1999), I stated in my dissent that Rule 404(b) evidence has "become a runaway train in criminal cases." I continue to adhere to this opinion. In far too many cases, prosecutors gain an unfair advantage by telling the jury about a defendant's "other bad acts," thereby tainting the jury's consideration of the evidence relating to the actual offense being tried. For example, once a jury hears that a defendant has been convicted of a similar crime in the past, the jury is far more likely to believe that the defendant is guilty of the charged offense. *State v. Fox*, 207 W.Va. 239, 241, 531 S.E.2d 64, 66 (1998) (Starcher, J. dissenting opinion). Such prejudice is almost inherent in "other bad acts" evidence, and this Court has, far too often, allowed the prosecutors to get away with this unfair practice.

However, the instant case provides a good example of the rare instance when Rule 404(b) "other bad acts" evidence should properly be admitted.[1]

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[1]The text of *West Virginia Rules of Evidence*, Rule 404(b), follows:

> (b) *Other Crimes, Wrongs, or acts.*– Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

In the instant case, the appellant argued that the court erred in admitting testimony about a previous domestic abuse incident involving the appellant, and in admitting testimony about a violent incident at a Christmas party.

However, the evidence of the prior domestic abuse incident involving a child rebutted the appellant's claim of accident or mistake. The appellant claimed that any injury to the child victim in the instant case was accidental and inadvertent. Yet, in the previous incident, the appellant had injured another child, either intentionally or due to a reckless disregard for the child's safety.

Moreover, the appellant offered evidence tending to show that he was a person with a good reputation and a good character. The appellant called neighbors who testified that they were comfortable with leaving the appellant alone with their children. The appellant's counsel specifically asked one witness: "Do you feel comfortable with [the appellant] Jeremiah being around your children?" The prosecutor, therefore, quite reasonably presented evidence of the previous incident to show that the appellant was not, in fact, a man who could be trusted around children.

West Virginia Rules of Evidence, Rule 405(a), states that once the defense has presented evidence of the defendant's character, the prosecution is allowed to inquire into

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> knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide pretrial notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

specific incidents of conduct.[2] Since the appellant "opened the door" to such evidence, the trial court properly admitted the evidence of the prior domestic abuse incident.

The trial court also did not err in admitting evidence about an incident that occurred at a Christmas party, because the appellant again "opened the door" to this evidence.

The appellant's counsel asked the appellant's father about the appellant's employment, in an effort to show that the appellant had a stable living situation. On cross-examination, the prosecutor asked the appellant's father whether the appellant still maintained the employment in question. Learning that the appellant no longer had this employment, the prosecutor asked why. The appellant's father said that there had been an incident, but that he did not know the details. During the subsequent testimony of the appellant's wife, the appellant's counsel again brought up the issue of his employment – again to show the stability of the appellant's living situation. On cross-examination, the prosecutor asked about the incident at the Christmas party that led to the appellant's losing his job.

Normally, the evidence about the incident at the Christmas party would have been inadmissible. However, because the appellant opened the door to this testimony on

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[2]*West Virginia Rules of Evidence*, Rule 405(a), states:

> (a) *Reputation or opinion.*– In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

direct examination by asking his own witnesses about the appellant's employment, the evidence about the Christmas party incident, which refuted the appellant's evidence of his stability, was admissible.

Rule 404(b) evidence is subject to the "probative-versus-prejudicial" balancing test. *See* Syllabus Point 9, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).[3] Of course, the Rule 404(b) evidence in the instant case was highly prejudicial. However, the defendant invited the admission of such evidence when he tried to portray himself as a peaceful person who could be trusted around children.

I believe that the trial court properly weighed the prejudicial versus probative factors, and came to the correct decision to admit the evidence.

For these reasons, I concur with the Court's judgment and decision in affirming the appellant's conviction.[4]

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[3]Although Rules 401 and 402 of the *West Virginia Rules of Evidence* strongly encourage the admission of as much evidence as possible, Rule 403 of the *West Virginia Rules of Evidence* restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

[4]I also agree that the trial court did not err in admitting the autopsy photographs. The medical examiner used the photographs to aid her in her testimony. The photographs were taken in black and white, to avoid some of their gruesome nature. The trial court made a special effort to ensure that the photographs were cropped to reduce any prejudicial effect that they may have had on the jury. The court even excluded one of the photographs, finding that it would be too prejudicial. The court did not err in concluding that the photographs were necessary to the medical examiner's testimony, and showed the victim's injuries in a way that a diagram or a mere description could not.

227 W. Va. 458, 711 S.E.2d 280

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JANUARY 2011 Term

Nos. 35743 and 35744

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: N. A., I. A., C. P. and M. P.

Appeal from the Circuit Court of Mingo County
The Honorable Michael Thornsbury, Judge
Civil Action Nos. 09-JN-34, 35, 36, 37

REVERSED AND REMANDED
WITH DIRECTIONS

Submitted: February 9, 2011
Filed: May 26, 2011

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. Pt. 1, *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996).

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

3. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. Pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973).

4. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991).

5. "[T]he primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

6. "A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent,

or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W. Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005).

Per Curiam:

This case is before the Court upon the consolidated appeals of the Appellant J.G.[1] (also referred to as "Appellant Father"), who is the biological father of M.P., a minor child, and the Appellant Department of Health and Human Resources ("DHHR"). In each of the two cases the parties are appealing the May 21, 2010, final disposition order entered by the Circuit Court of Mingo County, West Virginia, wherein the circuit court denied the Appellant Father custody of M.P. and granted custody of four minor children, including M.P., to the maternal grandparents, D.P. and V.P. (also referred to collectively as "Appellee Grandparents" and individually as either the "Appellee Grandmother" or the "Appellee Grandfather").[2] The assignment of errors for both of the Appellants, are: 1) whether the circuit court erred in denying the Appellant Father custody of his child M.P., where there were no allegations of abuse or neglect against the Appellant Father; and 2) whether the circuit court erred in granting physical custody of the four minor children to the Appellee Grandparents pursuant to a post-adjudicatory improvement period where conditions of neglect existed in the home. Based upon a review of the record, the parties' respective briefs,

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[1]The Court's customary practice in cases involving minors is to refer to the parties by their initials rather than by their full names. *See, e.g., In re Cesar L.*, 221 W. Va. 249, 252 n. 1, 654 S.E.2d 373, 376 n. 1 (2007).

[2]The children's mother, T.P. (referred to as the "children's mother") had her parental rights terminated by the circuit court in the same May 21, 2010, order that is the subject of the instant appeal. The Court refused T.P.'s petition for appeal on November 17, 2010.

including a brief submitted by the guardian ad litem, and oral arguments, the Court reverses the circuit court's decision and remands the case for further proceedings consistent with this opinion.

I. Factual and Procedural Background

On August 27, 2009, a petition for abuse and neglect was filed in the Circuit Court of Mingo County regarding N.A., now eleven, I.A., now eight, C.P., now seven, and M.P., now three. The petition was filed against T.P. ("the children's mother"), who is the biological mother of the children, and the Appellee Grandparents, all of whom were alleged to have care and custody of the children as the children and their mother were residing in the home of the Appellee Grandparents at the time the petition was filed. The petition also listed M.A., the biological father of N.A, I.A. and C.P., as well as Joshua G.,[3] who was initially identified as the father of M.P. and who was also identified as the children's mother's boyfriend.

The petition was based upon allegations of domestic violence between the children's mother and the Appellee Grandfather. The acts of domestic violence occurred in the presence of the children. There were also allegations in the petition of numerous prior

[3]Because Joshua G., who was ultimately found not to be M.P.'s biological father, has the same initials as the Appellant Father, the Court will refer to Joshua G. by his first name and last initial.

referrals to the Appellant DHHR for the children's mother's drug abuse dating back to 2004. Additionally, there was the death of another child in 2007, an infant named P.P., who was in the children's mother's care when he died. The death occurred in the Appellee Grandparents' home and the Appellee Grandfather was at home when the death was reported. There was a criminal investigation into this death; however, an autopsy revealed that the cause of death of the child was undetermined. The medical examiner noted that the head and facial injuries suffered by the child were not consistent with the description of the incident given by the children's mother. The medical examiner further observed evidence of anal stretching that was inconsistent with the children's mother's explanation of the child suffering from constipation. There was not enough evidence to substantiate a finding of abuse and neglect arising out of the child's death.[4]

At the August 31, 2009, preliminary hearing and despite the allegation of domestic violence against the Appellee Grandfather, the circuit court only found probable cause that abuse and neglect of the four children occurred by the children's mother. The circuit court ordered that the children remain in the legal custody of the Appellant DHHR, but granted physical custody of the four children to the Appellee Grandparents. The circuit

[4]There were also allegations regarding M.A., the biological father of I.A., N.A., and C.P., as well as Joshua G., the boyfriend of the children's mother. Those allegations, however, are not relevant to resolving the instant appeal.

court further directed the Appellee Grandparents not to allow their daughter to see the children or contact the children outside the scheduled supervised visitation.

Subsequently, at an adjudicatory hearing on September 29, 2009, the circuit court found clear and convincing evidence that the children's mother had neglected her children. The circuit court ordered that the Appellant DHHR retain legal custody of the children, while physical custody was to remain with the Appellee Grandparents, so long as the children's mother did not live in the home and did not have any contact with the children.

In November 2009, the Appellant DHHR prepared a court summary reflecting that the maternal grandparents were in compliance with the circuit court's order. In a December 2009 court summary, however, the Appellant DHHR stated that the Appellee Grandparents had violated the circuit court's order regarding visitation of the children by the children's mother at their home. It was also noted in the summary that while the Appellee Grandparents had been compliant with the Appellant DHHR's services, the Appellee Grandmother had major medical problems and the Appellee Grandfather had been undergoing radiation treatments for cancer, all of which prompted the Appellant DHHR's worker to suggest that the Appellee Grandparents seek help with the daily caregiving of the

children. Finally, the Appellee Grandparents had not been fully compliant with their home study.

On December 29, 2009, the Appellant DHHR moved for immediate physical custody of the children due to repeated violations of the court order by the Appellee Grandparents regarding visitation of the children by the children's mother in violation of the circuit court's order. In a January 6, 2010, hearing, the Appellee Grandparents failed to appear. Based upon evidence presented at the hearing, the circuit court found that the Appellee Grandparents had been allowing constant contact between the children and their mother in violation of the court's orders. As a result, the children were removed from the Appellee Grandparents' home and placed in a foster home.[5]

On February 22, 2010, the children's mother finally disclosed that the Appellant Father could be the biological father of M.P. The circuit court ordered DNA testing of the Appellant and directed that the Appellant DHHR file an amended petition that

[5]At a hearing that occurred on January 27, 2010, M.A. voluntarily relinquished his parental rights to his children, N.A., I.A. and C.P. It was also brought to the circuit court's attention that Joshua G. was questioning whether he was M.P.'s biological father, despite his name appearing on the child's birth certificate. Joshua G. moved to the court for a DNA test, which motion was joined by the child's mother. The DNA testing revealed that Joshua G. was not M.P.'s biological father. Joshua G. moved to voluntarily relinquish his parental rights regarding M.P. at the hearing on February 22, 2010. At the February 25, 2010, hearing the circuit court granted Joshua G.'s motion.

included him in the action. The Appellee Grandparents requested that the children be returned to their physical custody and the DHHR objected. The circuit court set a separate evidentiary hearing regarding the Appellee Grandparents' request.

The evidentiary hearing was conducted on February 25, 2010. The circuit court heard testimony from the medical examiner regarding the death of P.P. in the home of the Appellee Grandparents. The medical examiner explained that the location of bruising found on the child and the presence of anal stretching were inconsistent with explanations offered by the children's mother. The children's mother had explained that the child had become wedged between the bed and the wall while co-sleeping with her and that the anal stretching was due to constipation. Despite the medical examiner's concerns, the cause of death was listed as undetermined.

Melissa Muenich of the DHHR testified that the Appellee Grandparents had repeatedly cancelled appointments for her to conduct aspects of the home study, which still had not been completed. She testified about going to the Appellee Grandparents' home for a scheduled visit, hearing the youngest child crying, and knocking on the door. No one responded to allow her to enter the home. Ms. Muenich described several attempts to contact the Appellee Grandparents regarding completion of the home study. Ms. Muenich further testified that on her first visit to the Appellee Grandparents' home, she had heard the

Appellee Grandfather threaten the children with a belt. Also, a background check on the Appellee Grandfather revealed a 2005 conviction for battery and a 2009 conviction for domestic battery. Ms. Muenich testified that she had again scheduled the completion of the home study for February 26, 2010.

Ronald May, a Family Options Worker, testified that he saw the children's mother arguing with the Appellee Grandfather in the Appellee Grandparents' home during one of his scheduled visits to offer parenting classes to the Appellee Grandparents.

M.A, the biological father of N.A., I. A. and C. P., testified that when he spoke to the children's mother on the day of the hearing, she told him that she was still residing with the Appellee Grandparents, which was in violation of the circuit court's orders. M.A. recounted that when the children's mother had overdosed on drugs and was in the hospital, he and the Appellee Grandfather had gotten into a physical altercation in the presence of one of the children. The altercation resulted in a battery charge being filed against the Appellee Grandfather.

Vickie Fields, a Child Protective Services ("CPS") worker, testified that the three oldest children soiled their underwear regularly. The CPS worker testified that one child had disclosed to the foster parents that someone had "messed with him." This resulted

in an appointment with Joan Phillips, M.D. The child did not disclose anything to Dr. Phillips and there was no additional evidence offered to substantiate the claim. Ms. Fields further testified that she was present and witnessed when the children were interviewed in connection with the alleged sexual abuse claim. During the interview, I.A. told the interviewer that he had been "whipped with a belt" and C.P. disclosed that he had been "beaten with a broomstick[,]" while also telling the interviewer that N.A. "was whipped more than anybody else," because "he poops on himself and he gets whipped and has to stand in the corner." Ms. Fields testified that the psychological testing ordered to be performed on the Appellee Grandparents had not been completed yet, due to the Appellee Grandfather's cancer treatment. Ms. Fields further testified that she did not believe that the Appellee Grandparents could protect the children from the children's mother given their history, which included telephone calls made by the children's mother to the Appellant DHHR from the Appellee Grandparents' home. Ms. Fields testified that she had discussed with the Appellee Grandparents the importance of keeping the children's mother away from their home.

At the conclusion of this hearing, the circuit court found that there was no concrete evidence of sexual abuse presented during the hearing outside the allegations made by the oldest child to the foster father. The Court ordered the children to remain in the physical and legal custody of the Appellant DHHR pending the final dispositional hearing.

The dispositional hearing was conducted on March 15, 2010. The circuit court first heard from the attorney for the Appellant DHHR that the Appellant Father had been identified as the biological father of M.P. The Appellant DHHR informed the circuit court that it had no allegations against J.G. and moved that he be dismissed from the action and granted intervenor status. The circuit court granted the Appellant DHHR's motion.

Next, the circuit court heard evidence regarding the children's mother, and considered the Appellee Grandparents' request to have physical custody of the children returned to them. Ms. Fields, the CPS worker, testified that the children's mother was totally financially dependent upon the Appellee Grandparents and relied heavily upon them for transportation. Ms. Fields continued her recommendation that the Appellee Grandparents' home was not an appropriate placement. She testified that she did not feel that the Appellee Grandparents would comply with the circuit court's orders based upon a history of violating those orders regarding keeping the children's mother away from the children.

Ms. Fields further testified that the Appellant Father, M.P.'s biological father, had no knowledge that M.P. was his child until he was contacted by the Appellant DHHR. The Appellant Father had been cooperative with the Appellant DHHR. Further, Ms. Fields testified that both the Appellant Father and his current wife were approved foster care

parents. According to the testimony, the Appellant Father and his wife currently had one foster child in their home, which was approved for two children, and the foster child was well adjusted with no problems being reported in the home. The Appellant Father also had another biological child who was in the custody of the biological mother, but with whom the Appellant Father had contact. Additionally, after learning that he was M.P.'s biological father, the Appellant Father indicated that he desired to have custody of the child. Both the Appellant DHHR and the guardian ad litem recommended that the Appellant Father be given custody of M.P. Further, there was testimony that Appellant Father and his current wife were supportive of sibling visitation, which was recommended by both the Appellant DHHR and the guardian ad litem.

The Appellee Grandmother also testified. She confirmed that she suffered from high blood pressure, diabetes, knee problems, heart problems and kidney problems. She also stated that she helped the Appellee Grandfather with cancer treatments. The Appellee Grandmother testified that she desired to have custody of her grandchildren. When questioned about the reports that the Appellee Grandfather whipped N.A. for soiling in his pants, she stated that "I'm going to tell you, them two little boys [referring to her grandchildren] lie." The Appellee Grandfather did not testify at the hearing.

By Order entered May 21, 2010, the circuit court made the following factual findings regarding the Appellee Grandparents:

> 23. The Respondents, . . . [the Appellee Grandparents], have played an active role in the subject children's lives for most of each of the children's lives, has [sic] provided financial and emotional support for each of the children, and have acted as a mother and father figure to the subject children. The Court **FINDS** that the Respondents . . . have been and are for all intents and purposes psychological parents of the subject children.
>
> 24. The Court **FINDS** that the Respondents . . . have neglected the subject children, engaged in domestic violence, failed to protect the subject children, and has [sic] participated in at risk behaviors that have endangered the subject children.

The circuit court, however, went on to find that it "believes it is in the best interests of the children to grant the Respondents . . . one last opportunity to resolve their remaining issues." Thus, the circuit court granted a post-dispositional improvement period for a period of ninety days and declined to terminate the Appellee Grandparents' rights. The circuit court set forth certain conditions and directed that the Appellee Grandparents were to have weekend visitations with the children in their home for four consecutive weeks and that their daughter, the children's mother, was not to be present in the home when the children were present. If, after those visitations had occurred, there were no violations of the conditions of the improvement period, physical custody was to be transferred to the Appellee Grandparents.[6]

[6] According to the court summary, this transfer of physical custody from the foster care parents to the Appellee Grandparents occurred in July of 2010.

Concerning the Appellant Father, the circuit court found in its May 21, 2010, order that he was the biological father of M.P. and had been cooperative with services in the matter. The circuit court further found that both the Appellant Father and his current wife had an approved foster care home and that the Appellant Father had another biological child that he visits. The court also found that the Appellant Father's home was large enough for two children.

Despite the foregoing factual findings, which failed to include any allegations or evidence of abuse, neglect, or unfitness to parent, the circuit court determined that the Appellant Father was entitled only to visitation with M.P. The circuit court ordered regularly-scheduled visitation between the Appellant Father and M.P. The circuit court, however, decided that "it was in the best interests of the children to remain together with their psychological parents and not to be separated."

Also contained in the record, but apparently not considered by the circuit court in its May 21, 2010, order, for reasons not apparent in the record, were the psychological reports concerning the Appellee Grandparents, as well as the completed home study. The psychological reports were both dated April 19, 2010, and the home study was completed on May 3, 2010. According to the psychological evaluation of the Appellee Grandfather, there were significant domestic violence episodes between the Appellee Grandfather and the

children's mother which occurred in the presence of the children. The psychologist's recommendations indicated that the Appellee Grandfather reported "significant impairment with psychological and medical functioning which would interfere with his ability to parent his grandchildren." The report further noted "[p]ersonality maladjustment and significant anger problems are primary concerns and place his grandchildren at risk for abuse and neglect." Significantly, the Appellee Grandfather "shows no remorse or desire to alter his behaviors. . . ."

Similarly, regarding the Appellee Grandmother, the psychologist found that "[s]he is overwhelmed with depression, anxiety and dependency issues and this complicates her ability to effectively make decisions for her family, provide a safe environment for the grandchildren and be emotionally available for the children." Not only did the Appellee Grandmother report being the victim of abuse in the past, but she also acknowledged that she allowed domestic violence between her daughter and the Appellee Grandfather in front of the children without intervention by her. Based upon these evaluations, the psychologist did not recommend placement of the children with the Appellee Grandparents.

Additionally, the home study was completed on or about May 6, 2010. The Appellee Grandparents' home was not approved for placement of the children by the DHHR. In the home study, Ms. Muenich explained the reasoning for the failed approval which

included: 1) the Appellee Grandfather's prior convictions for battery and domestic violence; the Appellee Grandfather had a child maltreatment finding from July 2009;[7] 2) the home did not meet the DHHR standards of providing each child with their own bed as the evidence as that the children were all sharing a bed and that the Appellee Grandfather was sleeping in this bed with them, even though the Appellee Grandfather had his own bed; 3) the home was also noted as having badly soiled carpets and furniture, as well as a dirty odor; 4) the Appellee Grandparents' failure to return a form entitled "Application" despite being asked repeatedly for it; 5) the failure to provide medical reports regarding their physical health; and 6) the Appellee Grandfather's failure to sign a consent to obtain his mental heath treatment records at the Veteran's Administration.[8]

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[7]While there is no more discussion of this maltreatment finding in the completed home study, presumably it was as a result of the domestic violence charge which occurred in the presence of one of the children.

[8]Subsequent to the May 21, 2010, order that is the subject of the instant appeal, in a monthly court summary prepared by DHHR and dated June 7, 2010, the three oldest children reported at therapy and counseling sessions that they had seen their mother, T.P., on the weekend visitation with the Appellee Grandparents. Also, an order entered June 29, 2010, reveals that the Appellant DHHR moved the circuit court for "an Order requiring the Sheriff of Mingo County to accompany any social workers visiting the home of the . . . [Appellee Grandparents]" for purposes of providing supervision of the children for drop in visits to the Appellee Grandparents' home. The circuit court denied the DHHR's motion, but admonished the Appellee Grandparents regarding their behavior and their need to cooperate with the DHHR. In another Order From Judicial Review, that was entered on September 1, 2010, following an August 23, 2010, hearing, the Court noted that the Appellant Father had advised the Court that the Appellee Grandparents "had failed to comply with the Court's prior Order regarding visitation." Additionally, the order reveals that the guardian ad litem, Diana Carter Wiedel, advised the circuit court that the Appellee Grandparents had not been complying with the circuit court's prior order regarding services for the children as the

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II. Standard of Review

The applicable standard of review of the circuit court's order is the two-pronged standard set forth in syllabus point one of *McCormick v. Allstate Insurance Co.*, 197 W. Va. 415, 475 S.E.2d 507 (1996), which provides as follows:

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Id. at 417, 475 S.E.2d at 509, Syl. Pt. 1; *see also* Syllabus, *In re Brandon Lee B.*, 211 W. Va. 587, 567 S.E.2d 597 (2001), *cert. denied*, 536 U.S. 942 (2002); Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998); Syl. Pt. 1, *State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998). Further guidance regarding the standard of review is found in *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996), wherein the Court held that

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case

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[8](...continued)
children had not attended any therapy sessions since being transferred to the custody of the Appellee Grandparents.

> differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Id. at 225-26, 470 S.E.2d at 179-80, Syl. Pt. 1. Keeping the foregoing standards and principles in mind, the Court turns to a discussion of the issues at hand.

III. Discussion of Law

A. Biological Father's Rights

The first issue before the Court is whether the circuit court erred in denying the Appellant Father custody of his biological child M.P., where there were no allegations of abuse or neglect against the Appellant Father. Both the Appellant DHHR and the Appellant Father argue that the circuit court failed to consider that as the biological father, the Appellant Father has a fundamental right to custody of his son where there are no allegations of abuse and neglect against him.[9] While not a model of clarity and with virtually no reasoning, it appears that the Appellee Grandparents, in their appellate brief, argued that the father failed to follow through on his duty to care for and support his child and thus the circuit court did not err in awarding them custody of M.P. The Appellee Grandparents advance this argument despite the fact that the biological father had no knowledge that he was M.P.'s father until the March 2010 hearing.

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[9]The Appellee Grandparents maintain that the DHHR has no standing to raise any argument in favor of the Appellant Father. The Court readily dispenses with this argument finding that it is not supported either by statute, West Virginia Code §§ 49-6-1 to -12 (2009), or case law.

In syllabus point one of *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973), this Court held:

> In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Id. at 225, 207 S.E.2d at 130-131, Syl. Pt. 1. While this right is not absolute it is "limited or terminated by the State, as [p]arens patriae, if the parent is proved unfit to be entrusted with child care." *Id*. at 225, 207 S.E.2d at 131, in part, Syl. Pt. 5. Thus, the Court further stated in *Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989), that

> [a]lthough the welfare of the child is of immeasurable importance, another important principle which must be considered is that of a natural parent's right to raise his or her own child. "The right of a parent to the custody of his or her child is based on natural law and arises because the child is his or hers to care for and rear, . . ." *State ex rel. Harmon v. Utterback*, 144 W. Va. 419, 426, 108 S.E.2d 521, 526 (1959). Although the polar star concept is adhered to by this Court in child custody cases, we have "refused to apply it in cases where the parents have not abandoned the child or have in no manner been proved to be unfit to have the care and custody of such child." *Hammack v. Wise*, 158 W. Va. 343, 347, 211 S.E.2d 118, 121 (1975). This concept "will not be invoked to deprive an unoffending parent of his natural right to the custody of his child." *Hammack*, 158 W. Va. at 347, 211 S.E.2d at 121.

Honaker, 182 W. Va. at 451, 388 S.E.2d at 324.

In the instant case, it is undisputed that J.G. is the biological father of M. P. Further, the record is devoid of any allegations of abuse and neglect committed by J.G.[10] To

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[10]In her November 3, 2010, letter to this Court, the children's guardian ad litem, Ms. Wiedel, states that the Appellant Father "has failed to fully exercise the visitation awarded to him since the dispositional hearing." The guardian ad litem goes on to state that

> [a]t the dispositional hearing, I agreed with the Court's decision not to terminate his parental rights to the child, M[.], but at the present time, I believe that he has not [sic] intention of exercising those rights. Therefore, I believe it would be in the child's best interest to terminate those rights so that the child may be adopted with his brothers.

This statement was predicated upon testimony elicited by the Appellee Grandparents at a post-dispositional evidentiary hearing in which the former foster parent testified that the Appellant Father failed to exercise his visitation as permitted. There, however, is no specific information in Ms. Wiedel's letter setting forth any factual details regarding how the Appellant Father failed to exercise his visitation with his child. Further, Ms. Wiedel failed to attach the hearing transcript containing the testimony of the former foster parent regarding the Appellant Father's visitation with his child, so that hearing transcript is not included in the record on appeal. Significantly, no petition has been brought against the Appellant Father seeking termination of his parental rights and there was no evidence before the circuit court warranting termination of the Appellant Father's parental rights to M.P.

In her summary response, the guardian ad litem, rather than arguing for termination of J.G.'s parental rights, simply asserts that the circuit court did not err in its determination that it was in the best interests of all of the children involved to keep them together and not to separate them.

Since the entry of the May 21, 2010, order, it can be gleaned from the record, as well as from the oral arguments before the Court, that the reason that the Appellant Father may not have been keeping scheduled visitation with M.P may be due to the Appellant Father's fear of the Appellee Grandfather. For instance, at an August 2010 hearing, the Appellant Father informed the circuit court that the Appellee Grandparents were not allowing him the visitation ordered by the circuit court. There was also a request by the Appellant DHHR, reflected in an order entered June 29, 2010, for "an Order requiring the Sheriff of Mingo County to accompany any social workers visiting the home of the . . . [Appellee Grandparents]" for purposes of providing supervision of the children for drop in visits to the Appellee Grandparents' home. Finally, during oral argument before this Court, counsel for

(continued...)

the contrary, the Appellant Father and his wife have been approved as foster care parents. Succinctly stated, there is nothing in the record which supports a finding that the Appellant Father is not a suitable biological parent who has the right to custody of his natural child, M.P. Thus, the circuit court erred in not granting the Appellant Father custody of his child.

It is equally important that the Court also consider whether it is in the best interests of M.P. to a continued relationship with his siblings. *Honaker*, 182 W. Va. at 452, 388 S.E.2d at 325 ("The best interests of the child concept with regard to visitation emerges from the reality that '[t]he modern child is considered a person, not a sub-person over whom the parent has an absolute and irrevocable possessory right. The child has rights. . . .'"). This right is grounded in the best interests of the child as well as "'the need for stability in the child's life . . . . [T]ermination of visitation with individuals to whom the child was close would contribute to instability rather than provide stability.'" *Id*. at 452, 388 S.E.2d at 326 (quoting *Note*, *Visitation Beyond the Traditional Limitations*, 60 Ind.L.J. 191, 221-22 (1984)). To that end, in *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991), the Court held in syllabus point four that

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[10](...continued)
the Appellant Father and the guardian ad litem stated that there was a considerable amount of fear felt by the guardian ad litem, the Appellant Father and his wife, and the DHHR workers in having to deal with the Appellee Grandfather.

> [i]n cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

Id. at 649, 408 S.E.2d at 401.

In the instant matter, both the Appellant DHHR and the guardian ad litem recommended that it would be in the best interests of M.P. to have continued visitation with his siblings. M.P. has grown up with his siblings, having never been separated from them. Under these circumstances where siblings have been together their entire lives, there is a strong presumption that it is in the best interests of the children that they maintain their sibling relationship through continued visitation if possible. Consequently, on remand, the Court directs the circuit court to consider the continued association of M.P. with his siblings under the presumption that the continued association of M.P. with his siblings is in all the children's best interests. If the circuit court determines that continued visitation between M.P. and his siblings is in the best interest of the children, the Court should develop an appropriate sibling visitation plan that will provide for meaningful continued contact between M.P. and his siblings so the siblings are not denied a continued relationship.

B. Post-Adjudicatory Improvement Period

The next issue is whether the circuit court erred in granting physical custody of the four minor children to the Appellee Grandparents pursuant to a post-adjudicatory improvement period where conditions of neglect existed in the home. The Appellant DHHR argues that the circuit court erred in granting any post-adjudicatory improvement period because the Appellee Grandparents failed to demonstrate that there is a reasonable likelihood that they can substantially correct the conditions of neglect in the near future. In contrast, the Appellee Grandparents argue that the circuit court did not err in granting them a post-dispositional improvement period because they were the psychological parents of the children.[11]

As with all abuse and neglect proceedings, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina*

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[11]While the Appellee Grandparents argue on appeal that they are entitled to the grandparent preference as set forth in West Virginia Code § 49-3-1(a) and discussed by the Court in *In re Elizabeth F.*, 225 W. Va. 780, 696 S.E.2d 296 (2010), a review of the circuit court's order reveals that the circuit court's determination to grant the post-adjudicatory improvement period was based upon its determination that the Appellee Grandparents were the children's psychological parents and not based upon the grandparent preference. As the grandparent preference was not raised or considered below, it is not considered by the Court in the instant appeal.

However, this Court has recently held that the grandparent preference is not dispositive, nor does it override the child's best interests. *Kristopher O. v. Mazzone*, 227 W. Va. 184, 193, 706 S.E.2d 381, 390 (2011)("In *In re Elizabeth F.*, this Court explained that 'an integral part of the implementation of the grandparent preference, as with all decisions concerning minor children, is the best interests of the child.'"). Further, the grandparent preference relates to the "adoption of a child in situations wherein the parental rights have been terminated." *Id.*

L.T., 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). This Court has repeatedly stated that "the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

Moreover, this Court recognized the concept of a psychological parent in *In re Clifford K.*, 217 W. Va. 625, 619 S.E.2d 138 (2005). In *Clifford K*, the Court held in syllabus point three that

> [a] psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.*, 183 W. Va. 113, 394 S.E.2d 515 (1990),[12] that case is expressly modified.

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[12]This Court had previously held in *In re Brandon L.E.*, that

> [i]f a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child.

(continued...)

217 W. Va. at 630, 619 S.E.2d at 143, Syl. Pt. 3 (Footnote added).

Simply because a person is found to be a child's psychological parent, however, does not translate into the psychological parent getting custody of the child. Rather, this Court has only gone so far as to hold that the status of "psychological parent" entitles the individual to intervene in a custody proceeding, "when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication." *Id*. at Syl. Pt. 4, in part. Thus, custody determinations regarding a child or children are still controlled by what is in the best interests of the child(ren).

In the case sub judice, the record is replete with the Appellee Grandparents' continued and repeated violations of orders entered by the circuit court regarding visitation by the children's mother with the subject children throughout the proceedings. Despite the circuit court's terminating the children's mother's rights, the Appellee Grandparents have continued to allow visitation between the children and their mother in direct violation of the circuit court's order that is the subject of the instant appeal. Further, there is also evidence in the record that the Appellee Grandparents have violated that order by not allowing the Appellant Father to visit his child and by failing to comply with psychological appointments

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[12](...continued)
183 W. Va. at 114, 394 S.E.2d at 516, Syl. Pt. 4.

scheduled for the children. Additionally, the record contains a failed home study of the Appellee Grandparents' home, as well as the psychologist's opinions after evaluating both of the Appellee Grandparents that their home was not a proper placement for the children. These documents were submitted to the circuit court prior to the entry of the May 21, 2010, order; however, the circuit court failed to address the documents in its order.

Given this Court's continued adherence to the well-established precedent that placement of children with their grandparents must be in the best interests of the children, the circuit court completely overlooked this polar star in reaching its decision. The circuit court gave little consideration to the fact that an infant had died in the Appellee Grandparents' home with the Appellee Grandfather present and with no real explanation by him as to how the death occurred. Moreover, the children reported that the Appellee Grandfather whipped them with belts and broomsticks, with the only explanation offered by the Appellee Grandmother being that the children lie. The children were sharing a bed with their Appellee Grandfather, even though he had his own bedroom. Lastly, the Appellee Grandparents nonchalantly were being allowed by the circuit court to violate its orders, especially regarding visitation with the children's mother, with absolutely no explanation or consequences. The circuit court erred in granting a post-termination improvement period that allowed transfer of the physical custody of the children back to the Appellee Grandparents.

When custody of children is changed, gradual transition periods should be used whenever possible. *See* Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives."). In the instant case, such a gradual transition seems well-warranted. However, given the repeated wilful violation of the circuit court's orders by the Appellee Grandparents, as well as the fear that the guardian ad litem, the Appellant DHHR's workers, and the Appellant Father and his wife have of the Appellee Grandfather, as revealed to the Court during oral argument and as illustrated by the record, this may not be a case in which a gradual transition period is suitable in light of serious questions about the safety and welfare of the children involved.

Upon remand, the lower court should set a hearing forthwith, bringing all the parties and their counsel in for a full hearing on the most effective means of transitioning the children while still protecting their safety. The lower court should make very clear that its orders will be followed without recalcitrance, interference, or hostility, and that if a transition period is established, the Appellee Grandfather and all other parties must work cooperatively

or risk serious sanction. In addition, the circuit court, on remand, may consider whether the children should have continued visitation with their grandparents given the evidence that there is a strong psychological bond between the children and the Appellee Grandparents. *See* Syl. Pt. 11, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996) ("A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child."). It is imperative, however, that the circuit court focus on whether such continued contact is in the best interests of the children involved in light of the Appellee Grandparents' pattern and practice of violating court orders, as well as the Appellee Grandfather's apparent use of fear and intimidation. At a minimum, the circuit court, if examining any issues of visitation between the Appellee Grandparents and the children, should give due consideration to supervised visitation at a neutral location in the event that the circuit court determines that such visitation is warranted.

Also, it is critical in this case for the Appellant DHHR to immediately develop permanency plans for all the children, I.A, N.A., and C.P. While there is some indication in the record that the children's last foster care parents may be a viable permanent placement as the foster care parents continued to visit with the children until the Appellee Grandparents stopped the visitation, counsel for the DHHR, during oral argument, was unable to state that that foster care home, indeed, was a permanent placement for the children. Recently in *State*

ex rel. West Virginia Department of Health and Human Resources v. Pancake, 224 W. Va. 39, 680 S.E.2d 54 (2009), the Court reiterated the following fundament principle concerning the securing of a permanent placement for children:

> The early, most formative years of a child's life are crucial to his or her development. *In re Carlita B.*, 185 W. Va. 613, 623, 408 S.E.2d 365, 375 (1991). We have repeatedly emphasized that "children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 257, 470 S.E.2d 205, 211 (1996).

Pancake, 224 W. Va. at 43, 680 S.E.2d at 58.

The children should not be moved from place to place with no permanency plan and every effort should be made to ensure continued contact between the siblings. Further, the children should be provided with counseling services by the DHHR, and the circuit court should enter an order so directing.

The lower court faces a Herculean task of requiring wisdom, compassion, and the strength to protect the children to the greatest degree possible from physical and emotional harm, and to create stability and safety.

IV. Conclusion

Based upon the foregoing, the May 21, 2010, final disposition order entered by the Circuit Court of Mingo County is hereby reversed and this case is remanded for further expedited proceedings consistent with this opinion. The mandate of this Court shall issue contemporaneously herewith.

Reversed and remanded with directions.

177 W. Va. 710, 356 S.E.2d 464

Supreme Court of Appeals of West Virginia

NANCY VIOLA R.

v.

RANDOLPH W. and Grady W.

No. 17144

April 9, 1987

SYLLABUS BY THE COURT

1. " 'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d [798] (1969)." Syl. pt. 2, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975).

2. A conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

3. Where parental rights of a father have been terminated because of his conviction of the first degree murder of the child's mother, and other acts of violence to her and threats of violence to the child, permanent guardianship may be given to the West Virginia Department of Human Services. *W.Va.Code,* 49-6-5(a)(6) [1984].

Norman Googel, Welch, Joanne Schulman, Van Nuys, Cal., for appellant.

Abishi C. Cunningham, Welch, for appellee.

Carolyn F. Corwin, Alan Tawshunsky, Covington & Burling, Washington, D.C., Barbara Fleischauer, Morgantown, for amicus curiae.

McHUGH, Justice:

This case is before this Court upon the appeal of Nancy R. from the Circuit Court of McDowell County. See footnote 1 Mrs. R. had sought custody of her nephew, Randolph W. II, then age 4. Custody, however, was awarded to the child's paternal uncle, Grady W. The child's father, Randolph W. I, who had been indicted for the first degree murder of the child's mother, had sought to appoint Grady W. as the child's guardian. Mrs. R.

also appeals from the denial of her motion to reconsider the court's previous order of custody to Grady W. because of the subsequent conviction of Randolph W. for the first degree murder of Alesha W., the child's mother. Randolph W. was sentenced to life in prison with a recommendation of mercy. This Court has before it the petition for appeal, all matters of record and briefs. See footnote 2

I

At the time of his wife's death on December 14, 1984, Randolph W. had one child, Randolph W. II, who was three years old at the time of his mother's death. See footnote 3

Throughout her six-year marriage, Alesha W. had been the victim of repeated acts of violence and abuse by her husband. She and the child sought refuge on many occasions with members of her family, including the appellant, Nancy R. Two of Alesha's friends testified that Randolph had, on at least two separate occasions, threatened to kill Alesha, the child and himself. On at least two occasions, Randolph had stabbed Alesha, causing her to receive stitches in her arm, finger and breast. When Alesha and their child left Randolph after these assaults, Grady W., the party who has been awarded custody of the child, never contacted or visited Alesha or the child. Prior to her death, Alesha and the child had been separated from Randolph for about four months.

After Alesha's death, the child resided with the appellant, Nancy R., and her three children. Since Alesha's death in 1984, Nancy R. has been the child's primary caretaker and helped him cope with the loss of his mother.

Grady W. has attempted twice to visit the child at the appellant's home during that period. Shortly before Christmas in 1984, he requested that Randolph W. II be allowed to spend Christmas week with his family. Believing it was too soon after the death of the child's mother and that he was still adjusting, the appellant did not permit him to go with Grady; however, she never refused to allow Grady to visit the child. Grady W. made no further attempts to visit the child until April 3, 1985, after Randolph W. had attempted to appoint him as the child's guardian, at which time he went to the appellant's home intending to take custody of the child. Upon the appellant's refusal to let Grady W. take the child, he and Randolph W. sought to obtain custody by filing a habeas corpus petition.

As a result, the appellant filed this custody proceeding. The trial court ruled that both the appellant and Randolph W. were fit, but that Randolph, as the father of the child, was entitled to designate Grady W. as guardian of the child. The child has remained with Nancy R. during the appeal process.

In the criminal case against Randolph W., the jury heard the testimony of several eyewitnesses to the crime. After this testimony had been presented, Randolph W.

entered a plea of guilty to first degree murder of his wife. As a result of that conviction, Nancy R. sought a reconsideration of the order granting custody of the child to Grady W.

II

Because of the trial court's finding that Randolph W. was a fit parent, we must decide whether or not he was a fit parent and whether or not the evidence is sufficient to support that finding. See footnote 4

This Court has enunciated the standard by which the fitness of a parent is to be judged in several decisions:

> 'A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit pers on because of m isconduct, neglect, immorality, abandonment or other derelic tion of duty, or has waived such right, or by agreem ent or otherwis e has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child w ill be recognized and enforced by the courts.' Syllabus, *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d [798] (1969).

Syl. pt. 2, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975). *Accord,* syl. pt. 2, *Collins v. Collins,* 171 W.Va. 126, 297 S.E.2d 901 (1982); syl. pt. 1, *Leach v. Bright,* 165 W.Va. 636, 270 S.E.2d 793 (1980); syllabus, *Whiteman v. Robinson,* 145 W.Va. 685, 116 S.E.2d 691 (1960).

Under the State's child welfare laws, a parent may lose custody of a child to the State Department of Human Services upon a finding that the child has been abused or neglected and upon a finding that the parent is unwilling or unable to provide adequately for the child's needs. *W.Va.Code,* 49-6-5(a)(5) [1984]. See footnote 5 Furthermore, abuse and neglect proceedings may ultimately result in termination of parental rights pursuant to *W.Va.Code,* 49-6- 5(a)(6) [1984] "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future[.]"

Of particular relevance in the case before us is the fact that the legislature has stated expressly that the "conditions of neglect or abuse" which constitute grounds for termination of parental rights include:

> (1) The abusing parent or parents have habitually abused or are addicted to alcohol ... to the extent that proper parenting skills have been seriously impaired....
> ....

> (5) The abusing parent or parents have repeatedly or seriously injured the child physically *or* emotionally, ... and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve fam ily problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; ...

W.Va.Code, 49-6-5(b)(1) and (5) [1984] (emphasis added).

It is clear from the evidence adduced at the custody proceeding that Randolph W. habitually abused alcohol. During this proceeding, Randolph W. admitted that his drinking habits severely interfered with his personal life. Testimony was also introduced which established that he was continually absent from his home and did not provide adequate support for his family. Thus, there was uncontroverted evidence before the trial court requiring it to find that Randolph W.'s excessive drinking hampered his familial relationships. See footnote 6

In addition to Randolph W.'s abuse of alcohol, we believe that his abuse of his wife is an important consideration in this case. During the marriage of Randolph and Alesha W., she was repeatedly abused. The trial court, however, determined that the only basis for an assertion that Randolph W. was unfit to have custody of his child was the fact that he was under indictment for the murder of his wife.

We have recognized that spousal abuse is a factor to be considered in determining parental fitness for child custody. *Collins v. Collins,* 171W.Va. 126, 297 S.E.2d 901 (1982). In *Collins,* we upheld the trial court's determination that the appellant had demonstrated violent tendencies that rendered her unfit for custody. The trial court concluded that the appellant had " 'demonstrated [a] tendency to be violent as evidenced by her willingness to threaten with and to actually shoot a deadly weapon at human beings when she was upset, but not in any way threatened.' " *Id.* at 902.

Other courts also regard spousal abuse as an important consideration in child custody cases. *See, e.g., In re Marriage of Cline,* 433 N.E.2d 51, 54 (Ind.Ct.App.1982); *In re Marriage of Ballinger,* 222 N.W.2d 738, 739 (Iowa 1974); *Hosey v. Myers,* 240 So.2d 252, 253 (Miss.1970); *Schiele v. Sager,* 174 Mont. 533, 540, 571 P.2d 1142, 1146 (1977).

The Supreme Court of Iowa reasoned that assaults of a spouse reveal violent tendencies which may render a parent unfit for custody of his or her child. *In re Marriage of Snyder,* 241 N.W.2d 733 (Iowa 1976). In *Snyder,* the court, citing evidence that the father had pulled a gun on his child's mother, reversed the trial judge's finding of fitness. Although there was no indication that the father had ever abused the child, the court awarded custody to the mother, holding that the father's "meanness, aggressiveness, and

tendency to[ward] violence expose [the child] to more danger than [the mother's] alleged irresponsibility and moral misconduct." *Id.* at 734. *See also McCurry v. McCurry,* 223 Ga. 334, 335, 155 S.E.2d 378, 380 (1967); *In Re Custody of Williams,* 104 Ill.App.3d 16, 18, 59 Ill.Dec. 791, 793, 432 N.E.2d 375, 377 (1982).

Clearly, the many acts of violence by Randolph W. toward his wife, Alesha, culminating in her death, are directly relevant to the determination of his parental fitness and should have resulted in a finding of unfitness. Undoubtedly, the most convincing evidence of the appellee's unfitness is his conviction of the first degree murder of his wife, Alesha.

Following Randolph W.'s conviction and his sentence to the penitentiary for life with a recommendation of mercy, the appellant petitioned the trial court, based upon that conviction, to modify its previous order awarding custody to Grady W. During the hearing on the modification, Nancy R. requested the trial court to incorporate as part of the record in the custody proceeding, the entire transcript and court records of the criminal action, as well as the confession of Randolph W. The court, nevertheless, declined to consider evidence of Randolph W.'s conviction stating that it would not make further findings in this case based on the results of the criminal trial.

The record of Randolph W.'s conviction was specifically pleaded in the appellant's petition to modify the order. *See* syl. pt. 1, *Carper v. Montgomery Ward & Co.,* 123 W.Va. 177, 13 S.E.2d 643 (1941). Furthermore, Nancy R. requested that the trial court incorporate as part of the record in the custody proceeding the record of the criminal case. *Id.* The trial judge recognized that the record of the criminal case would be part of the appeal to this Court. The record of the criminal case should have been admitted as evidence in the custody proceeding or it should have been judicially noticed. *See generally W.Va.R.Evid.* 201 See footnote 7; *see also* F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 12.3(B) at 670 (2d ed. 1986).

This Court has recognized that a parent can be unfit for custody if he or she engages in "grossly immoral behavior under circumstances that would affect the child." *Stacy v. Stacy,* --- W.Va. ----, ----, 332 S.E.2d 260, 262 (1985). We have further recognized that a parent's conduct may be so outrageous when compared with " 'contemporary moral standards that reasonable [people] would find that [the conduct] warrant[s] a finding of unfitness because of the deleterious effect upon the child['s] being raised by a [parent] with such a defective character.' " Syl. pt. 3, in part, *id., quoting* syl. pt. 4, in part, *J.B. v. A.B.,* 161 W.Va. 332, 242 S.E.2d 248 (1978).

After reviewing the evidence, we conclude that the trial court's finding that Randolph W. was a fit parent is clearly erroneous. A conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution are

significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

The Supreme Court of Illinois, in a case factually similar to the one before us, terminated all parental rights of a father who was found guilty of the first degree murder of the mother of his three-year-old child. *In re Abdullah,* 85 Ill.2d 300, 53 Ill.Dec. 246, 423 N.E.2d 915 (1981). There the court applied an Illinois statute that required a showing of "depravity" in order to terminate parental rights. The court determined that the defendant's premeditated murder of his wife constituted a *prima facie* case of depravity. The court's reasoning is particularly relevant to this case:

> Three separate factors in the evidence showed defendant's depravity. First, he was convicted of m urder, the m ost serious crim inal offense there is. Few acts could be m ore inherently defi cient in the moral sense or rectitude than the intentional and unjustified killing of a fellow human being. Second, the m urder victim was the m other of the child. Defendant thus deprived his son of his m other and further heightened the psychological scarring caused by a fam ily already broken by divorce. Finally, the extended term of im prisonment im posed indicates that the murder was accompanied by exceptionally brutal a nd heinous behavior demonstrating wanton cruelty.

85 Ill.2d at 306-07, 53 Ill.Dec. at 249, 423 N.E.2d at 918. *See also In re Sarah H.,* 106 Cal.App.3d 326, 329-30, 165 Cal.Rptr. 61, 63 (1980); *In re Geoffrey G.,* 98 Cal.App.3d 412, 420-21, 159 Cal.Rptr. 460, 464-65 (1979). See footnote 8

W.Va. Code, 49-6-5(a)(6) [1984] provides in pertinent part:

> Upon a finding that there is no reasona ble likelihood that the conditions of neglect or abuse can be substantially co rrected in the near future, and when necessary for the welfare of the child, [the court shall] terminate the parental ... rights and responsibilities and commit the child to the permanent guardianship of the state department....

Clearly, there is no likelihood that the conditions of abuse in this case will be corrected in the near future. It is in the best interests of the child that we terminate Randolph W.'s parental rights.

Before a court may terminate parental rights, clear and convincing evidence to support that finding must be produced. *W.Va.Code,* 49-6-2(c) [1984]; *State v. C.N.S.,* --- W.Va. ----, ----, 319 S.E.2d 775, 780 (1984); *State v. Carl B.,* --- W.Va. ----, ----, 301 S.E.2d 864, 868 (1983); syl. pt. 6, *In Re Willis,* 157 W.Va. 225, 207 S.E.2d 129 (1973). In the

case before us, the evidence adduced at the custody proceeding reaches that standard. *Cf. State ex rel. West Virginia Department of Human Services v. Cheryl M.* 177 W.Va. 688, 356 S.E.2d 181, 188 (W.Va.1987). Randolph W. had a history of abusing his spouse. That abuse irreparably affected his relationship with his son. Furthermore, his conviction of murder under the circumstances of this case support a finding that his parental rights should be terminated for the welfare of Randolph W. II.

Aside from acts of abuse to the body and mind of a child, first degree murder of a child's parent is the ultimate act of savagery to that child. The emotional and psychological scarring the child has sustained as a result of his mother's death at the hands of his father is no doubt substantial. We can conceive of few circumstances in which the termination of parental rights would be more justified. See footnote 9

Where parental rights of a child's father have been terminated because of his conviction of the first degree murder of the child's mother, and other acts of violence to her and threats of violence to the child, permanent guardianship of the child may be given to the West Virginia Department of Human Services. *W.Va.Code,* 49-6-5(a)(6) [1984].

Accordingly, we commit the child to the permanent guardianship of the West Virginia Department of Human Services pursuant to *W.Va. Code,* 49-6-5(a)(6) [1984].

Although permanent guardianship is given to the Department of Human Services, we do not believe it would be sound to remove the child from the temporary custody of Nancy R. See footnote 10 The trial court below found Nancy R. fit to properly care for the child, and on the state of the record, we agree with that finding. The evidence adduced at the custody proceeding conclusively established that the appellant had been the child's primary caretaker since his mother's death over two years ago. During that time, strong emotional bonds have undoubtedly formed between the two. Nancy R. has obviously been very protective of the child's welfare. *See, e.g., Lemley v. Barr,* ---W.Va. ----, ----, 343 S.E.2d 101, 109 (1986); *West Virginia Department of Human Services v. La Rea Ann C.L.,* --- W.Va. ----, ----, 332 S.E.2d 632, 636-37 (1985). We believe that the child's best interests compel a temporary custody award to Nancy R.

For the foregoing reasons, judgment of the Circuit Court of McDowell County is reversed.

Reversed.

Footnote: 1 We adhere to our past practice in styling domestic and juvenile cases which involve sensitive facts and do not utilize the last names of the parties. See State ex rel. West Virginia Department of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d

181 (W.Va.1987); West Virginia Department of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985).

Footnote: 2 This Court also has before it the brief of amicus curiae filed by the Women's Legal Defense Fund.
Initially, we note that counsel for the appellant urges that Randolph W.'s prolonged incarceration constitutes willful abandonment of his child. Because of our holding in this case, we need not address the abandonment issue, which has far-reaching implications for any parent or guardian who may be incarcerated in a penal institution or becomes a patient in a mental institution.

Footnote: 3 In this case, Alesha W. had designated her son as primary beneficiary and Nancy R. as contingent beneficiary of a $30,000 life insurance policy. The record is unclear as to the use of the proceeds of Alesha W.'s life insurance policy. Counsel for the appellant should ensure that these proceeds are used appropriately for the child, the policy's named beneficiary.

Footnote: 4 We note that this custody dispute is unusual in that in actuality it is not between a natural parent and a third party, but rather between two third parties, the maternal aunt, Nancy R., and the child's paternal uncle, Grady W. However, in resolving this issue, we will look to established statutory and case law regarding custody, or loss thereof, by parents.

Footnote: 5 The legislative definition of "child abuse and neglect" includes the intentional infliction by a parent, guardian or custodian of a "substantial mental or emotional injury, upon the child...." W.Va. Code, 49-1-3(a)(1) and 49-1-3(c) [1984].

Footnote: 6 Attached as an exhibit to the petition for appeal is a psychological evaluation regarding the effects of Randolph W.'s excessive drinking. Although this evaluation and corresponding testimony by the clinical psychologist who prepared it are relevant and probative to this case, neither the evaluation nor the expert testimony was admitted into evidence at the custody hearing.
The trial judge had determined that portions of the evaluation and its corresponding testimony were inadmissible pursuant to W.Va.R.Evid. 403. However, the trial court indicated that testimony regarding the appellee's excessive drinking could be admitted into evidence. Nevertheless, when the psychologist who prepared the report was called to testify in that regard, her testimony was excluded from the record.
From our reading of the record, it is unclear why this evidence was excluded. Not having objected on the record regarding this ruling by the trial judge, the appellant failed to preserve this error for appeal. See W.Va.R.Civ.P. 46; Loar v. Massey, 164 W.Va. 155, 159-60, 261 S.E.2d 83, 86-87 (1979); Konchesky v. S.J. Groves & Sons Co., 148 W.Va. 411, 415, 135 S.E.2d 299, 302 (1964); Shackleford v. Catlett, 161 W.Va. 568,

244 S.E.2d 327 (1978). Appellant, in her brief to this Court, now contends that the trial court erred in excluding such probative evidence pursuant to W.Va.R.Evid. 403. However, there is sufficient evidence in the record upon which we can make a determination of Randolph W.'s fitness.

Footnote: 7 The West Virginia Rules of Evidence became effective on February 1, 1985, and were applicable during the hearing on Nancy R.'s petition to modify the court's previous order which was held on November 19, 1985.

Footnote: 8 Other jurisdictions have determined that spousal abuse which results in the murder of a child's parent establishes a prima facie case of parental unfitness. See, e.g., Bramblet v. Cox, 461 S.W.2d 349, 350- 51 (Ky.1970); In re Welfare of Scott, 309 Minn. 458, 461-62, 244 N.W.2d 669, 671-72 (1976); Shoemake v. Davis, 216 So.2d 420, 421-22 (Miss.1968).

Footnote: 9 Because we have terminated the parental rights of Randolph W., we need not address the issue of whether he, as the child's parent, has the absolute right to designate the child's guardian.

Footnote: 10 Nancy R. may seek permanent custody of the child. We note various proceedings to accomplish this, such as the institution of proceedings for subsidized adoption pursuant to W.Va.Code, 49-2-17(a) [1978], or adoption pursuant to W.Va.Code, 48-4-7 [1984].

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

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June 10, 2005
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32046

NAPOLEON S. and LINDA S.,
Plaintiffs Below, Appellants

v.

MARTHA YEAGER WALKER, SECRETARY
OF WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Defendant Below, Appellee

Appeal from the Circuit Court of Kanawha County
The Honorable Jennifer Bailey Walker, Judge
Case No. 02-AA-119

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: April 6, 2005
Filed: June 10, 2005

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CHIEF JUSTICE ALBRIGHT delivered the Opinion of the Court.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "W.Va.Code § 49-2-14(e) (1995) provides for a 'sibling preference' wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered

only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit *or* that placement of the child with his or her siblings is not in the best interests of one or all of the children." Syl. Pt. 4, *In re Carol B.*, 209 W.Va. 658, 550 S.E.2d 636 (2001).

4. West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

5. By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human

Resources and circuit courts of the best interests of the child, given all circumstances of the case.

6. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Albright, Chief Justice:

This is an appeal by Napoleon and Linda S. (hereinafter "Appellants")[1] from an order of the Circuit Court of Kanawha County affirming a decision of the West Virginia Department of Health and Human Resources Board of Review (hereinafter "DHHR") determining that the Appellants could not become the adoptive parents of their grandson, Tyler S. The Appellants contend that the lower court erred in failing to apply a statutory and DHHR policy preference for grandparent adoption. Based upon a thorough review of the record, briefs, and applicable precedent, this Court finds that the lower court abused its discretion in affirming the DHHR decision refusing to permit the Appellants to adopt Tyler S. We therefore reverse and remand for entry of an order requiring that Tyler be placed with the Appellants for adoption, with the additional conditions specified below.

I. Factual and Procedural History

On December 27, 2000, at the age of two months,[2] Tyler S. suffered a spiral fracture of the left femur and over twenty bruises on his body. He was placed in foster care on January 1, 2001, upon discharge from the hospital, due to the serious injuries which were later determined to have been inflicted upon him by his biological parents, Ryan and Nicole

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[1]As is our practice in cases involving sensitive matters, we use initials to identify the parties' last names. *See In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

[2]Tyler was born on October 23, 2000. He is currently four years of age.

S. In April 2001, the parental rights of the biological parents were terminated by the Circuit Court of Harrison County based upon this abuse. The Circuit Court of Harrison County found that Ryan S. had inflicted the spiral fracture to Tyler's left femur due to Ryan's frustration with Tyler while trying to give Tyler a bath. At the time of termination of parental rights, the CASA representative, Ms. Jeanne Pote, recommended that Tyler be placed for adoption with the Appellants, parents of Ryan S. and paternal grandparents of Tyler.[3] The Circuit Court of Harrison County did not address Ms. Pote's recommendation in the termination order.

Prior to the termination of parental rights, the Appellants had notified the DHHR of their desire to adopt Tyler. A social assessment and home study of the Appellants' home in Florida was completed on May 16, 2001, by the Florida Department of Children and Families. The home study concluded that the Appellants could provide a safe and loving home, despite their difficulty accepting the fact that their son would have intentionally

[3]In her report, Ms. Pote noted that the Appellants had been "very supportive" and had "made numerous trips" to visit Tyler. Somewhat ironically, Ms. Pote later changed her opinion and became convinced through her involvement with the adoption review committee that the Appellants were not an appropriate placement for Tyler.

harmed Tyler.[4] The Florida home study determined that such opinions would not interfere with the Appellants' ability to provide proper care and protection to Tyler.

The adoption review committee thereafter requested psychological evaluations of the Appellants. These evaluations were conducted on January 21, 2002, by Dr. William Fremouw, a licensed psychologist. His report was favorable toward both Appellants and included observations that they would protect their grandson and would not allow Tyler to be alone with his biological father, Ryan. Specifically, Dr. Fremouw concluded that "[w]hile she [Appellant Linda S.] does not believe that her son physically abused her grandson, she is willing to accept the requirement that he have no direct contact with Tyler if she were to adopt him." The report also indicated that Ryan lives approximately 1,000 miles from his parents and would not be expected to be a frequent visitor.

By letter dated February 25, 2002, the Appellants were notified by the DHHR that they had not been selected for the permanent placement of Tyler. The adoption review committee had determined that the best interests of Tyler would not be served by placing

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[4]The home study report explained as follows regarding the Appellants:

> [They] report that they love their own son very much and will not turn their back on him, but are very serious about protecting Tyler and would never let anything happen to him. They report that they do not believe that their son would intentionally hurt Tyler, but that they would abide by any court orders that they need to.

him with the Appellants since the Appellants had failed to acknowledge their son's involvement in inflicting injuries upon Tyler. The guardian ad litem, Ms. Meredith McCarthy, stated the her main concern was Tyler's protection and that the Appellants had continually refused to accept the fact that their son inflicted Tyler's injuries.

The Appellants requested a review of the decision of the DHHR, and an initial grievance hearing was held on July 10, 2002. The original decision was upheld, and the Appellants appealed to the Board of Review of the DHHR. On August 30, 2002, the Chairman of the Board of Review notified the Appellants that their appeal had been denied.

The Appellants appealed to the Circuit Court of Kanawha County, and a hearing was held on November 15, 2002. On February 9, 2004, the lower court entered an order affirming the DHHR decision. The lower court observed that "[b]ecause of the rulings made by the Circuit Court of Harrison County during the pendency of the abuse and neglect hearings, and further because of the distance they must travel from their home in Florida to West Virginia, the [Appellants] have had very little physical contact or opportunity to bond with Tyler since his birth." The Circuit Court of Kanawha County addressed the Appellants' allegations that the grandparent preference had not been properly applied but ultimately found that the DHHR and adoption review committee had not erred in finding that the best interests of the child would not be served by placing him with the Appellants. The court

noted that "[t]his decision was based upon significant concerns that Petitioners could not ensure the safety of the child and the lack of a bond between Petitioners and their grandson." The Appellants appealed to this Court.

The Appellants' affidavits stated that the Appellants were aware that their son, Ryan, "admitted to the Circuit Court of Harrison County at the underlying abuse and neglect hearing that he was responsible for the injury or injuries caused to his son Tyler and that this admission was made under oath." The Appellants also stated: "That I accept our son's admission of responsibility for all of Tyler's injury or injuries." The Appellants each further explain:

> That in the event my spouse and I are given the opportunity to adopt and do adopt our grandson, Tyler, I would, under no circumstances whatsoever, allow any contact, direct or indirect, between Ryan and our adopted son, Tyler. Further, I would make certain that our son Ryan was aware that I would permit no contact.

With regard to any attempts by Ryan to contact Tyler, the Appellants both assert as follows:

> That in the event, that our son Ryan would approach us when Tyler was with either one of us at or outside our home, or if he would contact or attempt to contact Tyler when he was at school or some other activity when I was not present, that I would immediately contact law enforcement authorities and advise them of the situation and request whatever action that would be necessary to protect Tyler and keep Ryan away from him. Further, I would apply to the court for an injunction or protective order to be served against Ryan and do everything in my power to see that the injunction or protective order was fully enforced.

II. Standard of Review

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

III. Discussion

The guidance for consideration of this matter is primarily provided by statute and a DHHR policy reflecting the intent of the statute. West Virginia Code § 49-3-1(a) (2001) (Repl. Vol. 2004) provides, in pertinent part, as follows:

> (a)(1) Whenever a child welfare agency licensed to place children for adoption or the department of health and human resources has been given the permanent legal and physical custody of any child and the rights of the mother and the rights of the legal, determined, putative, outside or unknown father of the child have been terminated by order of a court of competent jurisdiction or by a legally executed relinquishment of parental rights, the child welfare agency or the department may consent to the adoption of the child pursuant to the provisions of article twenty-two [§§ 48-22-101 et seq.], chapter forty-eight of this code.
>
> (2) Relinquishment for an adoption to an agency or to the department is required of the same persons whose consent or relinquishment is required under the provisions of section three hundred one [§ 48-22-301], article twenty-two, chapter forty-eight of this code. The form of any relinquishment so required shall conform as nearly as practicable to the

> requirements established in section three hundred three [§ 48-22-303], article twenty-two, chapter forty-eight, and all other provisions of that article providing for relinquishment for adoption shall govern the proceedings herein.
>
> (3) For purposes of any placement of a child for adoption by the department, *the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child.* Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. *If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents*, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

W. Va. Code § 49-3-1(a) (emphasis supplied).

The Adoption Services Manual utilized by the DHHR mirrors the design of that statute, providing as follows in pertinent part of Section 15510A: "If the home study indicates that the grandparents would be suitable adoptive parents then they must be offered the placement of the child prior to the consideration of any other prospective adoptive parents."

A. Best Interests Analysis

A fundamental mandate, recognized consistently by this Court, is that the ultimate determination of child placement must be premised upon an analysis of the best

interests of the child. As this Court has repeatedly stated, "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). "[T]he best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted).

West Virginia Code § 49-1-1(b) (1999) (Repl. Vol. 2004) also addresses this best interests requirement, providing in pertinent part as follows:

> In pursuit of these goals it is the intention of the Legislature to provide for removing the child from the custody of his or her parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and, when the child has to be removed from his or her family, to secure for the child custody, care and discipline consistent with the child's best interests and other goals herein set out. It is further the intention of the Legislature to require that any reunification, permanency or preplacement preventative services address the safety of the child.

This Court examined that statute in *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998), and explained as follows:

> In order to effectuate the legislative intent expressed in *W.Va.Code* § 49-1-1(a) [1997], a circuit court must endeavor to secure for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment, nurturing and discipline that is consistent with the child's best interests.

202 W.Va. at 358, 504 S.E.2d at 185.

This Court has not had the opportunity to address the interplay between the statute affording grandparents a preference for the placement of a child such as Tyler and the overriding standard of the best interests of the child. In *In re Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001), however, this Court encountered a similar issue regrading sibling placement. In that case, this Court specified that the best interests analysis is to be addressed in conjunction with the statutory preference for placement of a child with his or her siblings. This Court explained as follows at syllabus point four of *Carol B.*:

> W.Va.Code § 49-2-14(e) (1995) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit *or* that placement of the child with his or her siblings is not in the best interests of one or all of the children.

We also explained in *Carol B.* that "[w]e believe that both sibling preference and best interests of the child considerations are incorporated in W.Va.Code § 49-2-14(e). In order to determine how these considerations interact, we look to the clear provisions of the statute." 209 W.Va. at 665, 550 S.E.2d at 643. In *Carol B.*, this Court found that the statute at issue therein provided guidance, and this Court concluded as follows:

> [B]ecause the statute provides that the circuit court is not to order separation, when recommended by the DHHR, in the absence of clear and convincing evidence supporting the DHHR's determination, we believe that it follows that the circuit court is not to disregard the DHHR's recommendation that siblings should be united, unless it finds that clear and convincing evidence indicates to the contrary.

209 W. Va. at 665-66, 550 S.E.2d at 643-44.

Other jurisdictions have struggled with the manner in which relative preference should be implemented in conjunction with the best interests of the child analysis. Under the Minnesota framework for this type of examination, the preference for placement with relatives may be overcome only where the best interests of the child will be jeopardized by placement with relatives. Findings regarding the best interests of the child may support a decision to place the children with the unrelated individuals "if those findings establish either the detriment or good cause necessary to defeat the relative preference." *In re Adoption of C.H.*, 548 N.W.2d 292, 298 (Minn. App. 1996). Thus, the preference typically mandates that adoptive placement with relatives is presumptively in a child's best interests, absent a showing of detriment to the child or other good cause to the contrary. *In re Welfare of D.L.*,

486 N.W.2d 375, 380 (Minn.1992), *cert. denied, Sharp v. Hennepin County Bureau of Social Services*, 506 U.S. 1000. Courts have been swift to emphasize that the existence of a preference does not translate into a perfunctory grant of custody. In *Welfare of D.L.*, for instance, the Supreme Court of Minnesota explained:

> Our holding does not mean that relatives' adoption petitions must be granted automatically. The terms "best interests," "good cause to the contrary" and "detriment" do not lend themselves to standardized definitions. The best interests of potential adoptees will vary from case to case, and the trial court retains broad discretion because of its opportunity to observe the parties and hear the witnesses.

Id. (citation omitted).

In the present case, the governing statute, West Virginia Code § 49-3-1(a), provides guidance on the standard to be employed regarding grandparent preference. As quoted above, the statute provides that the DHHR "shall" offer placement to the grandparents "[i]f the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents." W. Va. Code § 49-3-1(a)(3). Thus, in the view of this Court, West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for

grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child. By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the DHHR and circuit courts of the best interests of the child, given all circumstances of the case.

B. Significance of Statutory Grandparent Preference

The concept of placement with relatives, where appropriate, has long been included in the jurisprudence of this and other states. The Legislature of this state has clearly expressed a preference for placement with grandparents, and the policies of the DHHR properly reflect that intention.

In this Court's evaluation of the matter presently before us, we note that the DHHR initially discouraged permanency planning focused upon grandparent placement due to the perceived potential for family reunification. When such reunification became impossible, however, the DHHR provided only limited assistance to the grandparents, either maternal or paternal, in developing a plan for adoption of Tyler. Moreover, despite a positive home study and a favorable psychological evaluation, the adoption review committee chose to place Tyler with his foster parents rather than his paternal grandparents, the Appellants. While several participants in the review committee indicated that they had

not been convinced, through the home study and psychological report, that the Appellants would adequately protect Tyler, the committee failed to request additional information or evaluation regarding those areas of concern. The members asserted only their trepidation concerning the Appellants' willingness to prevent Tyler from being exclusively in the presence of his father, Ryan. Thus, while perceived deficiencies in the home study and psychological evaluations were claimed, the committee failed to address those issues or attempt, in any meaningful manner, to rectify them. The grandparent preference articulated in West Virginia Code § 49-3-1(a) must be recognized as essential guidance in the determination of child placement. The DHHR failed to observe the directives of that preference or apply it in an appropriate manner in this case.[5]

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[5]According to a July 31, 2002, letter written by Thomas Arnett, State Hearing Officer for the DHHR, the guardian ad litem, Ms. McCarthy, had explained during the grievance hearing that protection of Tyler was her primary concern in not selecting the Appellants to be Tyler's adoptive parents. She had apparently not personally interviewed the Appellants. This Court emphasized the need for guardians ad litem to conduct a "full and independent investigation" in syllabus point five of *In Re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), explaining as follows:

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a

(continued...)

While this Court appreciates the heightened level of scrutiny employed by the committee in this case of extreme abuse and tender age, the evidence furnished concerning the Appellants, through the home study and psychological examinations, does not appear to provide a rational basis for the expressed fears of the committee. The Appellants specifically articulated their earnest commitment to the protection of their grandson Tyler. This was communicated not only by the Appellants themselves but was also the expressed view of the psychologist who interviewed and evaluated the Appellants, with specific emphasis upon the need for protection of young Tyler. In his evaluation of Appellant Mrs. Linda S., Dr. Fremouw found that she was emotionally stable and would follow the directives of the court regarding the limitations of contact between Tyler and his biological father. Additionally, Dr. Fremouw found that Appellant Mr. Napoleon S. "was clear that if he had custody of Tyler, Ryan would not be allowed to be alone with him." Dr. Fremouw concluded, "Overall,

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[5](...continued)
client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians *Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code*, the *West Virginia Rules for Trial Courts of Record*, and the *West Virginia Rules of Professional Conduct*, and provide attorneys who serve as guardians *ad litem* with direction as to their duties in representing the best interests of the children for whom they are appointed.

Elaborating upon the *Jeffrey* requirements in *Carol B.*, this Court specified that "A full and independent investigation includes interviewing all prospective parents when a child's placement is at issue." 209 W.Va. at 668 n. 6, 550 S.E.2d at 646 n. 6.

Mr. [S.] appears clear and committed to not let Ryan have direct contact with Tyler without supervision." Further, Dr. Fremouw found that Mr. S. was "aware of the requirement that Ryan have no contact with Tyler and would enforce that." Both Appellants were also evaluated through the use of MMPI testing,[6] indicating that the Appellants were not distorting their responses to minimize or maximize problems.

While the lower tribunals did not have the benefit of the specific statements made by the Appellants in the affidavits submitted in this Court, such affidavits, as quoted above, support the ultimate conclusion that Tyler's best interests will be served and that he will be competently protected by placement with the Appellants.

C. Tyler's Bonding With Grandparents

In the underlying abuse and neglect case, the Circuit Court of Harrison County granted intervener status to both maternal and paternal grandparents on November 14, 2001. According to the record, all grandparents exercised visitation privileges with Tyler until the Circuit Court of Harrison County terminated visitation between the grandparents and Tyler on May 31, 2002. The record reflects that the absence or limitation of bonding was asserted as one factor relevant in the determination that Tyler should not be placed with the

[6]MMPI is an acronym for Minnesota Multiphasic Personality Inventory. It is a frequently utlized clinical testing mechanism typically employed to provide personality information and to assess psychological adjustment factors.

Appellants. It is unreasonable to contend that the absence of bonding should be a legitimate basis for denying the grandparents an opportunity to adopt when the court system itself eliminated any potential for bonding when it terminated visitation rights on May 31, 2002, months prior to the first grievance hearing and almost two years prior to the lower court order from which the Appellants now appeal. Given Tyler's young age, we believe that it is likely that he will bond easily with his grandparents in a relatively short period of time.

IV. Conclusion

Based upon this Court's analysis of this case, we find that the lower court abused its discretion in affirming the conclusion of the review committee and DHHR and erred in failing to permit the Appellants to adopt Tyler S. We consequently remand for the entry of an order requiring that Tyler be placed with the Appellants for adoption. We further direct the lower court to fashion an order which explicitly prohibits contact between Tyler and Ryan, in accord with the representations of the Appellants in their affidavits filed with this Court.

We further find that a gradual transition period for Tyler would be preferable to an immediate custody change. We have previously encouraged such gradual changes in the custody of children. For example, in *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989), a gradual, six-month transition of custody was approved. 182 W.Va. at 450, 388 S.E.2d at 324. Similarly, in *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991),

this Court required the circuit court to establish a plan for a gradual shift of custody. In syllabus point three of *James M.*, this Court held as follows:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

Thus, upon remand in this case, the lower court should craft a plan for the gradual transition of custody of Tyler. Given the Appellants' intention to reside permanently in Florida, we believe that the transition period should be as short as is practicable, but long enough to assuage reasonable concerns that would arise from an abrupt change of custody and permit the restarting of the bonding process with the Appellants. We respectfully suggest that Appellants should take up temporary residence here in West Virginia during the transition period.

Reversed and Remanded with Directions.

No. 32046 – *Napoleon S. and Linda S. v. Martha Yeager Walker, Secretary of West Virginia Department of Health and Human Resources*

FILED
July 14, 2005
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the majority opinion in this case and write separately only to emphasize that four of the five members of this Court, based upon the entire record, have determined that adoptive placement with Tyler's paternal grandparents is in Tyler's best interests. The single dissenter has questioned the credibility of the grandparents with regard to their willingness to protect Tyler from his biological father. A comprehensive review of the record, however, discloses the grandparents' uncompromising commitment to Tyler and his safety. It is evident that the grandparents have maintained a vigorous effort to adopt Tyler and have repeatedly asserted their dedication to his security and well-being. While these individuals may have initially found it extremely difficult to accept the well-documented fact that their son committed a heinous act of child abuse upon Tyler, their commitment to Tyler's safety has been unfaltering, and they have consistently maintained that they will adhere to the requirements of any order regarding contact between their son and Tyler. The majority opinion firmly states that the lower court is directed to fashion an order which explicitly prohibits contact between Tyler and his biological father.

The single dissenter also suggests that reliance upon the post-argument affidavits was inappropriate. While the acceptance of such affidavits is a practice rarely employed by this Court, we have permitted post-argument affidavits in exceptional

circumstances. In this case, the potential for grandparent adoption had not been favored by the DHHR, and questions had been raised regarding the willingness of the grandparents to permit contact between their son and Tyler. Because this was a pivotal and dispositive issue in this case, affidavits regarding the grandparents' intent provided additional explanation of assistance to this Court in ascertaining the resolution which most effectively promoted Tyler's best interests. The affidavits, in fact, only reiterated the commitments the grandparents had previously articulated.

As the majority opinion noted, for instance, the home study report contained in the record explained that the grandparents are "very serious about protecting Tyler and would never let anything happen to him." Further, the home study stated that the grandparents "would abide by any court orders that they need to." Additionally, the underlying record revealed, as the majority noted, that psychological evaluations indicated that the grandparents were willing to accept the requirement that Tyler could have no contact with his biological father.

Thus, while the affidavits provided further explanation of the grandparents' intent, the position asserted by the grandparents in the affidavits with regard to the protection of Tyler was not inconsistent with the position previously asserted and fully evidenced in the record.

Child placement and custody decisions, particularly subsequent to an appalling instance of child abuse, are fraught with emotional complication and are particularly

frustrating because there are no certainties or guarantees. Tyler has experienced a very difficult start to life. By placing him with loving, committed grandparents, intent on protecting him from further harm, we have attempted to insure that Tyler's future will be bright. To that end, I concur with the majority opinion.

No. 32046 – Napoleon S. and Linda S. v. Martha Yeager Walker, Secretary of West Virginia Department of Health and Human Resources

FILED
July 11, 2005
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

By reversing the decisions of the adoption review committee, the DHHR hearing officer, and the Circuit Court of Kanawha County, and by requiring that Tyler be placed with his paternal grandparents for adoption, the majority has unintentionally disregarded Tyler's best interests by placing him back in dangerous and life-threatening circumstances.

Two-month-old Tyler was viciously beaten and injured by his biological father, Ryan S. Specifically, Tyler suffered a broken leg (spiral fracture of the left femur) and more than twenty bruises on his body. At two months of age! It was found by the Circuit Court of Harrison County that Ryan S. inflicted the spiral fracture to Tyler's left femur after becoming frustrated with Tyler while attempting to give him a bath. Ryan and Nicole S.'s parental rights were rightly terminated because all would agree that Tyler's future safety depends upon his having absolutely no contact with Ryan S.

Yet, the majority now places Tyler back into a situation where he again could easily have contact with his abuser. I truly believe that this child is in harm's way and his personal safety is at great risk. The record is crystal clear that Appellants simply do not

believe that their son, Ryan S., injured Tyler. This is indicated by the findings of both the Florida home study and Dr. Fremouw. For this very reason, the adoption review committee, made up of DHHR officials, Tyler's guardian ad litem, and a CASA representative, concluded that it was not in Tyler's best interests to be adopted by Appellants because Appellants could not ensure Tyler a safe home.

Also troublesome is the fact that the majority's decision is based, at least in part, on affidavits submitted by Appellants to this Court on appeal. Astonishingly, the affidavits were filed *after* oral argument in this case and after being solicited by one or more Justices of this Court. To solicit the affidavits during oral argument; to permit them to be filed post-argument without any stipulation from the opposing party[1] (talk about trial by ambush!); to consider them; and to rely on them in deciding this case is a fugitive procedure

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[1]This Court has stated,

> [T]he law is clear in West Virginia that an appellate exhibit has no evidentiary value on appeal unless it was introduced in the circuit court or it is subject to judicial notice under Rule 201 of the West Virginia Rules of Evidence. Our rule remains steadfast that the record may not be enhanced or broadened on appeal except by the methods discussed or by the stipulation of the parties. *See O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991) (this Court may only consider matters appearing in the trial record).

Powderidge Unit Owners v. Highland Prop., 196 W.Va. 692, 703 n. 16, 474 S.E.2d 872, 883 n. 16 (1996).

unknown to our law, one that outrageously violates our rules of evidence and appellate procedure, and one that is grossly unfair to the losing litigants. This is third-world justice and no other Supreme Court in the United States would allow such a brutally unjust procedure. However, even if these affidavits were properly submitted, it is clear to me, and it should be clear to the majority, that they have absolutely no evidentiary value.

Appellants' sudden change in thinking is too little too late. Below, Appellants were always consistent and adamant in their conviction that their son could not have intentionally injured Tyler. This firm conviction softened only after Appellants lost before the hearing examiner and the circuit court whose decisions were based, in part, on Appellant's refusal to accept their son's actions. Further, their change in thinking can only be described as lukewarm. They now "accept our son's admission of responsibility for all of Tyler's injury or injuries." Notably, they do not accept that their son is responsible for Tyler's injuries, but only that he has admitted that he is responsible. It does not take a genius to see what is going on here. Appellants simply are saying what they think this Court wants to hear in order to get what they want.

In light of the fact that Appellants do not really accept the fact that their son viciously injured their two-month-old grandson, once Appellants adopt Tyler, what possible reason do they have for keeping their son away from Tyler? Without a doubt, due to the majority opinion, Tyler *will* have continued contact with Ryan S., the man who fractured his

left femur and battered his body with bruises merely because Tyler was a little too rambunctious in the bathtub.

It is simply reckless to accept Appellants' affidavits at face value. By placing Tyler in a position where he can easily and will likely come into contact with his abuser, the majority has unintentionally placed Tyler in a dangerous situation and ignored his best interests. Infants and children who have been physically abused, had bones broken and are bruised all over should never be placed in a home where there is any reasonable chance that the same abuser will have another opportunity to beat and maim them.

Finally, in light of my grave fear of the imminent danger and grievous bodily harm or death of this child, and because the West Virginia DHHR cannot monitor this child's welfare in Florida, I intend to send a copy of this dissenting opinion to the West Virginia DHHR and have it serve as a formal request that it contact the analogous Florida agency and request and encourage that agency to open a case file on Tyler. Hopefully the Florida agency will monitor the home to ensure that Tyler has absolutely no contact with his abuser. I realize that this is extremely unusual, but I believe that the circumstances demand it.

For the reasons set forth above, I dissent.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

FILED
June 10, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35307

IN RE: NELSON B.

Appeal from the Circuit Court of Preston County
The Honorable Lawrance Miller, Judge
Civil Action No. 08-JA-20

AFFIRMED

Submitted: April 14, 2010
Filed: June 10, 2010

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The opinion of the Court was delivered Per Curiam.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and

enforced by the courts." Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969).' Syllabus. pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)." Syllabus Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

3. "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus point 6, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

4. "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical

development retarded by numerous placements." Syllabus point 1, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

5. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected." Syllabus point 2, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

Per Curiam:

This case is before this Court upon the father Paul B's (hereinafter referred to as Appellant) appeal of a final dispositional order in the Circuit Court of Preston County entered May 15, 2009, which terminated the custodial rights of Paul B. to Nelson B.[1] and placed the child in the custody of the child's maternal aunt and uncle. In this appeal the appellant claims that the circuit court failed to consider a less drastic placement for the child and that it should have returned the child to his custody under supervision of the Department of Health and Human Resources (hereinafter referred to as the "Department".)

The Court has before it the petition for appeal, the designated record and the briefs of counsel. For the reasons set forth below, the circuit court's order is affirmed.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Nelson B. is the child of the appellant Paul B. and his deceased wife, Donna B. Nelson B. was born on August 17, 2002, and was five years of age at the time of the filing of the original abuse and neglect proceeding on May 30, 2008. The petition alleged

[1]We follow our traditional practice in cases involving sensitive facts and use initials rather than surnames to identify the parties. See *In the Matter of Jonathan P.*, 182 W. Va. 302, 303 n. 1, 387.S.E.2d 537, 538 n. 1 (1989).

that Nelson B. was subjected to emotional, psychological and/or physical abuse and neglect by Paul B. and was at risk of imminent danger if left in the home of his father. Specifically, the petition alleged that Paul B. had a chronic history of mental illness and alcohol abuse and had required hospitalization in the past for treatment of these conditions. The petition alleged that Paul B.'s mental illness regularly reached levels where he was not competent to direct his own actions or correctly perceive reality, placing the child at risk.

The petition detailed an incident on May 21, 2008, when Paul B. contacted emergency officials stating that his home had been broken into by a man with a knife. The minor child, Nelson B., was living with his father in this home. Paul B. advised the emergency personnel that the knife-wielding individual was threatening him. Preston County Sheriff's Department deputies responded to the call and soon discerned that Paul B. had been hallucinating and that there was no man threatening Paul B. or his family with a weapon. The Sheriff's personnel contacted the Department to take emergency custody of the child. Mental hygiene proceedings were instituted against Paul B., who in turn was admitted to a local psychiatric facility for treatment of his condition.

Because of the appellant's mental condition, both an attorney and a guardian ad litem were appointed for him. The child was likewise appointed a guardian ad litem. The

Department was represented by the Preston County Prosecuting Attorney. A CASA[2] representative was likewise involved in this proceeding from its beginning.

At the preliminary hearing, the circuit found that the Department had demonstrated that the circumstances alleged in the petition amounted to imminent danger for the Nelson B. and that there was no reasonable, available or less drastic alternative to removing Nelson B. from the home of his father that would ensure the child's safety. The child was ordered into the legal and physical custody of the Department. Supervised visitation between the father and the child was authorized.

On June 17, 2008, the Department and Paul B. entered into a written stipulation regarding the adjudication of this matter. The circuit court found that Paul B. entered into the stipulated adjudication with the presence of his counsel and his guardian ad litem. Paul B. stipulated and agreed that "he has a chronic history of mental illness and has required hospitalization for these issues in the past. Further, that the Department has provided services to the Respondent Father in the past." The agreed stipulation contained a paragraph indicating that the allegations in the original petition regarding his hallucinations about a gun-carrying intruder were true, and that all of this conduct constituted neglect of

[2]CASA stands for Court Appointed Special Advocate. The role and duties of the CASA are defined in Rule 52 of the Rules of Procedure for Child Abuse and Neglect Proceedings. The CASA's primary role is "to further the best interests of the child until further order of the court or until permanent placement of the child is achieved."

the child, Nelson B. The parties agreed that it was contrary to the child's best interests to be placed in the home of Paul B.

As part of the stipulation, Paul B. moved for, and was granted, a six-month post-adjudicatory improvement period pursuant to West Virginia Code §49-6-12(b) (1996) (Repl. Vol. 2009)[3]

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[3]West Virginia Code §49-6-12(b) states:

> After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:
>
> > (1) The respondent files a written motion requesting the improvement period;
> > (2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;
> > (3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;
> > (4) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and

(continued...)

As part of this post-adjudicatory improvement period and pursuant to the Family Case Plan specifically developed for this family, Paul B. was required to continue all services at Valley Mental Health Services; participate in weekly supervised visits with Nelson B., and make daily telephone calls to the child; participate in individual counseling, if deemed necessary; cooperate with in-home services; take all medications; and cooperate with the multi-disciplinary team.

The course of Paul B.'s improvement period was regularly monitored by the circuit court, the multi-disciplinary team, the Department, the CASA representative, Paul B's counsel and guardian ad litem, as well as the child's guardian ad litem. Because of a waiting list, Paul B.'s individual counseling did not commence at the start of the improvement period. Furthermore, Paul B. continued to experience periods where he sought inpatient treatment for his mental health issues. As a result of these hospitalizations, Paul B. missed visitations with the child.

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[3](...continued)

> (5) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d of this chapter.

Part of Paul B.'s Family Case Plan focused on the need for regular employment and a steady income, as the family's sole source of income was Social Security survivor benefits occasioned from the death of Nelson B.'s mother. At times during the improvement period, Paul B. indicated his intention to seek Social Security Disability benefits in his own name. Caseworkers continued to suggest that Paul B. seek employment with a sheltered workshop. Paul B. did not follow through with these suggestions.

In its dispositional order entered on May 15, 2009, and based upon a hearing held February 19, 2009, the circuit court concluded that despite the best efforts of Paul B. and the Department, Paul B. was presently unable to adequately care for Nelson B.'s needs. The circuit court further concluded that it was not in the best interest of the child for Paul B.'s parental rights to be terminated, but that a permanent placement of Nelson B. was possible by way of a legal guardianship with the maternal aunt and uncle. Continued contact and visitation between Nelson B. and Paul B. was specifically authorized. The court's order clearly left the matter of modification open, by stating as follows:

> The Court is not terminating parental rights, and is further issuing this Order without prejudice so as to permit the Respondent Paul B. to later file a petition with this Court seeking return of custody of Nelson B. if the circumstances are appropriate for the same.

The final order further contemplated increased visitation and a greater role for Paul B. in Nelson B.'s life by ordering that:

> "[A]s the child gets older, the parties should attempt to increase the contact between the child and Respondent Paul B., and shall permit unsupervised visitation when the same becomes safe and appropriate given the child's age and mental health status of Paul B."

The lower court reviewed the permanency placement of Nelson B. on May 15, 2009. By separate order entered June 4, 2009, the circuit court ordered that Nelson B. remain in the legal and physical custody of the Department for continued placement with his maternal aunt and uncle. The order references the pemanency plan of legal guardianship with the child's maternal aunt and uncle but this order does not appear to establish the guardianship. A careful review of the appellate record indicates that on May 12, 2009, a petition for legal guardianship was filed by the maternal aunt and uncle, but no final action has been taken on that petition.

II.

STANDARD OF REVIEW

As set forth above, Paul B. appeals the ruling affecting his parental rights to Nelson B., placing the child with his maternal aunt and uncle and continuing regular visitation with the child. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts

without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

With these standards in mind, we now consider the arguments of the parties.

III.

DISCUSSION

We begin our analysis with the understanding that our law strongly favors the rights of the parent to raise his or her children.

> " ' "A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody

> of his or her infant child will be recognized and enforced by the courts."

Syllabus, *State ex rel. Kiger v. Hancock*, 153 W. Va. 404, 168 S.E.2d [798] (1969)' ' Syl. pt. 2, *Hammack v. Wise*, 158 W. Va. 343, 211 S.E.2d 118 (1975)." Syl. Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987).

> We have previously held:
>
> "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va.Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements."

Syl. pt. 1, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

We have likewise held that in some instances, there is no other remedy short of termination of parental rights when there is no reasonable likelihood that the parenting deficiencies or abuse cannot be substantially corrected.

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code, 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood

> under W. Va. Code, 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected."

Syl. pt. 2, *In re R. J. M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

West Virginia Code §49-6-5(a) (1996) (Repl. Vol. 2009) addresses situations similar to the one faced by the court below in the case *sub judice* by creating a list of possible dispositions, in order of precedence. The potential dispositions include the following: dismissal of the petition; refererral of the child and family to community agencies for needed assistance; as well as return of the child to his or her own home under the supervision of the Department. When, however, it is determined that the conditions that gave rise to the removal of the child from the home cannot be remedied, West Virginia Code §49-6-5(a)(6) (2009) states:

> Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a non-abusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors: (A) The child's need for continuity of care and caretakers; (B) the amount of time required for the child to be integrated into a stable and

> permanent home environment; and (C) other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The court order shall state: (i) That continuation in the home is not in the best interest of the child and why; (ii) why reunification is not in the best interests of the child; (iii) whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made such efforts unreasonable or impossible; and (iv) whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that such efforts were unreasonable due to specific circumstances.

Further, W. Va. Code §49-6-5(b)(6) provides a definition for the phrase "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected." The applicable code section states:

> (b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own

> or with help. Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:
>
> . . .
>
> > (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills
> >
> > . . .

After applying the statutory language to the facts that faced the circuit court, we find that the Department exercised reasonable efforts to reunify Nelson B. with his father. Through a tailored improvement period and with the collaborative effort of many entities, the Department attempted to give Paul B. the ability to be a fit and proper parent to his young son. The course of his mental illness, however, was such that Paul B. continued through the improvement period, to suffer periods of time where he was unable to adequately provide for his young son's needs. In his appeal to this Court, Paul B. encourages us to continue to speculate as to whether he will ever be able to make a home for his child. This case is especially difficult because it is clear that Paul B. loves his son, that the child is bonded to his father and that Paul B. undertook tremendous steps and made some gains during the course of his improvement period. However, despite these efforts by Paul B., as well as the efforts of the Department to reunify this family, Paul B.'s mental illness is such that it appears impossible to safely return Nelson B. to the care of his father. During the course of this improvement period and indeed prior to the filing of the petition that led to this

appeal, the Department sought to assist Paul B. with intensive, in-home parent education and other services. Despite these services, and Paul B.'s hard work to become a safe and suitable parent for his child, Paul B. could not provide a stable home, a stable income or stable transportation. He continued to suffer from the manifestations of a severe and chronic mental illness that from time-to-time required hospitalization. When these events occur, the health, safety and welfare of Nelson B. is certainly adversely impacted.

We believe that the circuit court placed the child in an appropriate permanent placement with his maternal aunt and uncle. The home where the child was placed is a familiar home to this child, inasmuch as Paul B. and Nelson B. resided there at some points in their lives together. And while this is a final placement under our statutory scheme, it appears that Paul B. has been given an extraordinary opportunity to remain active in his child's life despite the limitations on parenting caused by his mental illness, by having regular, meaningful contact with the child, including the chance to increase the time spent with the child. As the guardian ad litem opined in her brief to this Court, "this solution is clearly in the best interest of Nelson B., and is (sic) frankly is probably in the best interest of Paul B."

The circuit court could have decided this case much differently and perhaps terminated Paul B.'s parental rights. In the case of *In re: Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009), this Court affirmed the termination of the parental rights of a mother who

suffered from low intellectual functioning. In *Maranda T.*, the mother attempted to abide by the plan proposed during an improvement period, but because of her intellectual limitations was unable to get to a point of being able to care for her child. In that case, unlike the case before the court today, the mother's parental rights were terminated, with post-termination visitation between the parent and the child ordered. The mother in *Maranda T.* was given approximately 14 months of services before the court terminated her parental rights; in the present case, counting the Department's efforts before the formal petition was filed, Paul B. has received in excess of 21 months of services.[4] The lower court employed a lesser-restrictive alternative and left Paul B. in a position to increase his role and involvement in Nelson B.'s life.

. After carefully reviewing the evidence presented, the record and the briefs of the parties, we conclude that the circuit court did not err in determining that Paul B. was unable to adequately parent his child. Although significant efforts were put forth by Paul

[4]This Court recognizes that the facts in *Maranda T.* were more egregious than the present facts. For instance, the child in *Maranda T.* had been subjected to substance abuse and sexual abuse misconduct by one or more caretakers. Further, the fact that Maranda T. was a special needs child, coupled with the mother's intellectual limitations, the mother's failure to fully appreciate the offered services, and the mother's inability to acknowledge the abuse that had been perpetrated on her daughter, left this Court with the conclusion that the mother had an inability to protect or care for her child. Thus, under the facts of that case, termination was appropriate.

B., and these efforts continue to date,[5] he is currently unable to provide the type of home that his young son requires. As such, the circuit court correctly made the difficult decision to end the custodial parental relationship, while maintaining regular and meaningful contact between the child and his biological father. And because the circuit court declined to terminate the parental rights, if Paul B. were to show significant improvement in the conditions which gave rise to this proceeding, his role in the child's life could be modified.

We are concerned that the permanency plan formulated by the Department has yet to be concluded, depriving Nelson B. of the finality of his placement. While the child's caretakers have filed a petition for infant guardianship in the Circuit Court of Preston County, no discernable action has been taken. Thus, the child remains in the legal and physical custody of the Department, with placement in the home of fit and proper persons willing and able to solidify their relationship with the child through a legal guardianship. The child deserves the finality and permanency of a legal guardianship, and the circuit court should promptly act on the petition now that this appeal has concluded.

[5]In a pleading entitled "Update to Brief for Petition to Appeal," Paul B. advised the Court that he had obtained employment at the local sheltered workshop and had obtained housing in Kingwood Apartments. We applaud the continued efforts of the appellant to better his situation. These recent events, however, do not change the conclusion reached by this Court.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the dispositional order of the Circuit Court of Preston County entered on May 15, 2009, is affirmed.

Affirmed.

187 W. Va. 494, 419 S.E.2d 907

Supreme Court Of Appeals Of West Virginia

MELINDA ANN (BRADLEY) ORTNER, Plaintiff Below, Appellee

v.

AMY PRITT, Defendant Below, Appellant

No. 20890
Submitted: May 6, 1992
Filed: July 17, 1992

SYLLABUS BY THE COURT

"'If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, . . . the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him. . . .' Syl. Pt. 4, in part, In the Interest of Brandon L.E. [183 W. Va. 113], 394 S.E.2d 515 (W. Va. 1990)." Syl., State of FLA., DHRS v. Thornton, 183 W. Va. 513, 396 S.E.2d 475 (1990).

Peter A. Hendricks
Madison, West Virginia
Attorney for the Appellant

No appearance for Appellee

Per Curiam:

This is an appeal by Amy Pritt from an order entered by the Circuit Court of Boone County on November 1, 1990, in a proceeding involving the custody of her infant grandson, John McKinley Pritt, II. The circuit court ordered that, after a transition period, the child should be removed from the actual physical custody of the appellant, and that custody be vested in the infant's mother, Melinda Ann (Bradley) Ortner. On appeal, the appellant argues that the trial court's conclusions were incorrect, and that the trial court erred in transferring custody of the child to Mrs. Ortner. Under the circumstances in this case, we find that it is in the best interests of the child that custody be vested in Amy Pritt.

We note at the outset that the record in this case is incomplete. A transcript of the evidence before the trial court was unable to be obtained despite a writ of mandamus issued by this court ordering transcription of the proceedings below. Furthermore, Mrs. Ortner has not participated in these appeal proceedings. The trial court did not enter a final order in this case for well over three years after this

action was instituted. Time was further extended upon appeal in the unsuccessful effort to obtain the transcript. Despite the great length of time over which this case has been in litigation, we are limited in our review of the facts to three depositions, various psychological reports concerning John Pritt, II, home studies performed upon the parties at the request of the trial court, and the testimony before the trial court as recounted by the appellant's counsel.

John McKinley Pritt, II, was born on February 14, 1983 to John Pritt, Sr. and Melinda Ann (Bradley) Ortner. After the birth of their child, Mr. Pritt and Mrs. Ortner See footnote 1 and their child resided with the appellant, Amy Pritt, in Boone County, West Virginia. However, on October 5, 1983, Mr. Pritt died of a heart attack. Mrs. Ortner thereafter moved from the residence of Amy Pritt into a rented trailer of her own.

Mrs. Ortner married Michael Bradley on November 9, 1984. One child, Chrissy, was born of that marriage in February, 1985. Mrs. Ortner and Mr. Bradley apparently separated in May, 1987, and divorced sometime thereafter.

The evidence before this Court is unclear as to how much time John Pritt, II, spent with either Mrs. Ortner or Amy Pritt prior to the institution of these proceedings by Mrs. Ortner in August, 1987. What can be gleaned from the record is that John, II, spent a considerable amount of time under the care of his grandmother, Amy Pritt, and at one point spent several months under her care when his mother was out of state. See footnote 2

On August 31, 1987, Mrs. Ortner petitioned the Circuit Court of Boone County for a writ of habeas corpus to issue against Kathy Pritt Clendenin, daughter of Amy Pritt, ordering Mrs. Clendenin to produce John, II, at a September 9, 1987 hearing. The writ was issued. At the September 9, 1987 hearing Amy Pritt was added as a respondent. See footnote 3 She and Mrs. Clendenin responded that John, II, had been in their continuous care since August 12, 1986 at the insistence of Mrs. Ortner. Nonetheless, the trial court issued a temporary order, entered December 15, 1987, vesting the custody of John, II, in Mrs. Ortner.

The trial court issued an "Order Upon Writ for Habeas Corpus" on April 5, 1988. Said order decreed that John, II, be removed from the custody of Mrs. Ortner and temporarily placed in the custody of Amy Pritt and Mrs. Clendenin. Mrs. Ortner was granted "reasonable visitation rights . . . bearing in mind that said petitioner shall not remove or otherwise cause said child to be removed from the State of West Virginia while exercising her visitation rights." See footnote 4 The trial court's rationale for the temporary order was its finding that "[Mrs. Ortner's] situation and circumstances [are] so unstable as to find it in the child's best interests to be placed with [Amy Pritt and Mrs. Clendenin]." Apparently the trial

court made this finding based upon a home study done of Mrs. Ortner's Boone County residence which questioned the stability of Mrs. Ortner's household.

The home study performed on Mrs. Ortner's home in Boone County noted that the home was a two-bedroom trailer that "looked clean and had a partially fenced yard." The report noted that John, II, and Chrissy, who were in Mrs. Ortner's custody at that time, "appeared clean, healthy and happy."

The home study performed on Amy Pritt's home stated that her residence was a "neat and well-maintained" three-bedroom ranch style home, with a yard and swing set. The report opined that "[Amy Pritt] seems sensible and mature . . . she seems emotionally and financially stable, and capable of providing a good home for a child."

The April 5, 1988 temporary order of the trial court also directed that John, II, undergo counseling services at Shawnee Hills clinic in Boone County and that a report be forthcoming concerning findings made by those counselors. There is no report from Shawnee Hills clinic in the record before this Court. See footnote 5 The record does reveal, however, that John, II, was admitted to Highland Hospital of Boone County in July, 1988, for a period of several weeks, and during that time came under the care of Dr. Stephen Kissinger, a psychiatrist, and William Hall, M.A., a psychologist.

In a September 1, 1988 deposition, Mr. Hall opined:

> I don't believe that John will ever perceive his biological mother as a mom. I don't believe that he will ever perceive her as entirely nurturing, loving, and someone to be trusted to have his best interests at heart. I would hope that there -- I think it is probably unrealistic to ever expect John and his mother to develop a so-called normal mother/son bond; I don't believe that's going to happen.

Mr. Hall further recommended that John, II, be placed in the custody of Amy Pritt and Mrs. Clendenin, based on his observation of an "obvious psychological bond" existing between those parties.

Also in a September 1, 1988 deposition, Dr. Kissinger noted that "John talked about being hurt by his mother. And when she would call the unit, we would see his behavior deteriorate, in terms of becoming more aggressive, louder." He further opined that:

> In terms of placement as we speak, based on what we know now, it appears from our experience with John that he would feel more

> comfortable with Amy and Kathy rather than his mother. That's not to say that at some point in the future, given therapy or deal with the mother, with the mother and the son, that that might at some time be at least as good; that's not true at the present time.

At some point in late 1987 or early 1988, Mrs. Ortner left Boone County and returned to her native Alabama. In June, 1988, she married Mark Ortner. At the request of the trial court, the Madison County, Alabama, Department of Human Resources conducted a home study of Mrs. Ortner's new home. The report, dated August 16, 1988, stated that Mr. and Mrs. Ortner "seem willing and capable to assume responsibility for the physical or emotional needs of Mrs. Ortner's children . . ." A home study update completed October 13, 1989 recommended that John, II, be placed with Mr. and Mrs. Ortner. The former home study noted that a February, 1988 visit to Mrs. Ortner's residence, when John, II, was in her custody, "determined that there were no problems with physical care and discipline that John was receiving while in his mother's care."

The record also reveals the deposition testimony of Cornelia Turnbow, a psychotherapist from Huntsville, Alabama. Mrs. Turnbow stated that she had seen Mrs. Ortner for 39 counseling sessions over the previous year. The counseling was initiated to help Mrs. Ortner deal with the stress of the litigation concerning the custody of John, II and Chrissy Bradley. See footnote 6 Mrs. Turnbow concluded from her observations of Mrs. Ortner, and Mrs. Ortner's relationship with Chrissy Bradley and Nicole Ortner See footnote 7 that:

> From what I have observed and from what she has, you know, related to me, which is all I can base it on, I can see her as a very warm, loving mother who has a large amount of patience with these two young children and who's very concerned about their well-being, you know, and their care.

On November 1, 1990, the trial court entered its final order in this case. The trial court made, among others, the following findings of fact:

> Prior to this issue coming to Court, both parties had some physical custody of the infant child and maintained varying degrees of control over the infant child and his needs; therefore, the Court finds that neither party is the primary caretaker.
>
> [Mrs. Ortner] has not committed misconduct, neglect or immorality as to establish unfitness and has not abandoned, transferred, or otherwise surrendered custody of the infant child to [Amy Pritt].

> It is in the best interest of the infant child to be in the custody of his natural mother, [Mrs. Ortner].

The trial court ordered that custody be vested in Mrs. Ortner, following a transition period to allow John, II, to obtain counseling to prepare him for the change of custody. This appeal followed.

Importantly, it has been represented to this Court that John, II, is still in the custody of Amy Pritt. Mrs. Ortner has taken no action to physically take custody of John, II, nor has she participated in these appellate proceedings. See footnote 8

In fact, her trial counsel was forced to withdraw from this case without her consent when she moved from her former residence in Alabama and left no forwarding address. She has made no inquiry concerning the status of this case with her trial counsel, trial counsel's former law firm, or this Court.

In the syllabus of State of FLA., DHRS v. Thornton, 183 W. Va. 513, 396 S.E.2d 475 (1990), we held:

> 'If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, . . . the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him. . . .' Syl. Pt. 4, in part, In the Interest of Brandon L.E. [183 W. Va. 113], 394 S.E.2d 515 (W. Va. 1990).

The evidence in the record before this Court shows that John, II has resided with his grandmother for a significant period of time. The only psychiatric and psychological evidence of record shows that Amy Pritt is the child's "psychological parent." This evidence is uncontradicted. In this situation, then, to protect John, II's equitable rights, his "environment should not be disturbed without a clear showing of significant benefit to him." Thornton, supra. (emphasis added).

There is no evidence in the record showing that John, II, would acquire a "significant benefit" by a change of custody as awarded by the trial court. Nor did the trial court make such a finding. And although we are hampered upon appellate review by a lack of a transcript below, Mrs. Ortner has made no effort whatsoever to show this Court any evidence that a change of custody would be of "significant

benefit" to John, II. Without any such evidence, the change of custody ordered by the trial court must be reversed. See footnote 9

Based upon the foregoing, the November 1, 1990 order of the Circuit Court of Boone County is reversed.

Reversed.

Footnote: 1 *Mr. Pritt and Mrs. Ortner did not marry.*

Footnote: 2 *The meager evidence before this Court suggests that John, II, spent anywhere from one-half of his life up to 95% with Amy Pritt. The trial court made no specific finding in this regard, stating only that both parties had exercised some physical custody and maintained varying degrees of control over John, II. The trial court found that neither the mother nor the grandmother was the "primary caretaker" of John, II.*

Footnote: 3 *Mrs. Clendenin was later dismissed as a respondent.*

Footnote: 4 *Counsel for appellant asserts that the visitation rights of Mrs. Ortner were "restricted or guarded" and that this is a reason for reversing the trial court. There is nothing in the trial court's order granting temporary custody in Amy Pritt that suggests the visitation rights of Mrs. Ortner were to be "restricted or guarded" in any way. Furthermore, the trial court specifically decreed that it "[made] no finding of fitness or unfitness of [Mrs. Ortner]" at that time.*

Footnote: 5 *Pleadings before the trial court on behalf of Mrs. Ortner assert that "[John, II] did have an initial intake interview with Shawnee Hills on April 18, 1988, and the health professionals were skeptical of [John, II's] history as related by [Amy Pritt] and Mrs. Clendenin and found [John, II] to be 'remarkably intact.'"*

Footnote: 6 *At the time of Mrs. Turnbow's deposition, Mrs. Ortner had been granted custody of her daughter, Chrissy Bradley.*

Footnote: 7 *Nicole Ortner is Mr. Ortner's child from a previous relationship. She was living with Mr. and Mrs. Ortner at the time of Mrs. Turnbow's deposition.*

Footnote: 8 *We note for the record that Rule 10(e) of the W. Va. R. App. P., applicable to the instant case, states:*

(e) Failure to File Brief. The failure to file a brief in accordance with this rule may result in the Supreme Court imposing the following sanctions: refusal to hear

the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Court may deem appropriate.

Footnote: 9 Nothing in this opinion should be construed as limiting the right of the infant child's natural mother to petition the trial court at some later date for a modification of this custody decree. As we stated in Tucker v. Tucker, 176 W. Va. 80, 82-83, 341 S.E.2d 700, 702 (1986):

In Phillips v. Phillips, 24 W. Va. 591 (1884), this Court recognized the right of a noncustodial parent to have a hearing on a petition to modify the child custody award made in a former divorce decree. We reaffirm that right and hold that under the due process clause, Article III, Section 10 of the West Virginia Constitution, a parent who files a petition for a change of child custody alleging sufficient grounds to warrant such change, Acord v. Acord, [164 W. Va. 562, 264 S.E.2d 848 (1980)] is entitled to a hearing on the merits of the petition.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

FILED
May 4, 2009
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34602

STATE OF WEST VIRGINIA, EX REL.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, and
ANITA D. EVANS, Social Services Worker,
Petitioners,

v.

HONORABLE DAVID M. PANCAKE,
Judge of the Circuit Court of Cabell County,
Respondent.

Petition for a Writ of Prohibition
Civil Action No. 07-JA-68

WRIT GRANTED

Submitted: April 7, 2009
Filed: May 4, 2009

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE BENJAMIN and JUSTICE WORKMAN concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

2. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts." Syllabus Point 1, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

3. "The clear import of the statute [*West Virginia Code* § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syllabus Point 5, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Per curiam:

In this case, the West Virginia Department of Health and Human Resources ("the DHHR") seeks a writ of prohibition to halt the enforcement of a circuit court order dismissing an abuse and neglect petition. The circuit court dismissed the petition as a sanction against the DHHR for failing to timely file an expert's report with the circuit court.

As set forth below, we grant the requested writ.

I.
Facts and Background

On August 2, 2007, the DHHR filed an abuse and neglect petition against respondent Angela H. in the Circuit Court of Cabell County. The DHHR alleged in the petition that Angela H. had screened positive for amphetamine/methamphetamine, cannabinoids, and cocaine during the birth of her new son, K.M., on July 11, 2007, and that she had her parental rights to other children previously terminated in other actions. Angela H. voluntarily admitted to neglect, and the circuit court adjudicated the mother as neglectful and granted her motion for a post-adjudicatory improvement period.

The DHHR moved to terminate Angela H.'s improvement period – ostensibly because she was not complying with drug treatment programs and because of concerns about her parenting skills – and moved to terminate her parental rights to K.M. On August 6, 2008,

the circuit court ordered the DHHR to perform a psychological evaluation of Angela H., and set the matter for a final disposition hearing on October 1, 2008.

However, at the October 1, 2008 hearing, counsel for the DHHR announced that it had not yet begun to conduct a psychological examination of the respondent mother, Angela H. The circuit court then continued the disposition hearing to November 19, 2008. The circuit court also ordered that the DHHR complete the psychological evaluation of Angela H., and file a report of that evaluation with the court, by November 7, 2008. The circuit court explicitly stated that, if the evaluation was not filed by that date, then "the petition will be dismissed as to the respondent mother."[1]

The DHHR filed the required psychological report on November 14, 2008. At the November 19th hearing, the circuit court noted that the report had not been timely filed, as the circuit court had explicitly ordered, and the circuit court announced that the petition was being dismissed. The circuit court expressed frustration with the DHHR's failure to

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[1]The circuit court's October 23, 2008 order states, in pertinent part:

> Based upon the testimony adduced and the record herein, the Court did FIND as follows: . . .
>
> The psychological evaluation of the respondent mother has not been completed. If the psychological evaluation has not been filed on or before November 7, the petition will be dismissed as to the respondent mother. . . .
>
> It is, therefore, ORDERED as follows: . . .
>
> This matter is set for disposition as to the respondent mother on November 19, 2008 at 9:00 am; however, if the psychological evaluation of the respondent mother is not filed with the Court on or before November 7, 2008, the petition shall be dismissed as to the respondent mother.

comply with scheduling deadlines, and indicated that it was "an ongoing problem" that this Court should recognize.[2]

In a written order filed December 12, 2008, the circuit court ordered that the abuse and neglect petition against Angela H. be "dismissed for failure to file the psychological report by November 7, 2008." The circuit court also ordered that the child, K.M., be returned to his mother Angela H.'s custody.

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[2]The following exchange occurred at the November 19, 2008 hearing between the circuit judge, the assistant prosecutor who represented DHHR, and the DHHR case worker:

> The Court: By order entered October 23, 2008, pursuant to our appearance here on October the 1st, 2008, I set this matter for disposition today with the proviso that if the psychological evaluation of the Respondent Mother is not filed with the Court on or before November the 7th, 2008, the petition shall be dismissed as to the Respondent Mother. The psychological [report] was not filed until November the 14th, and the Court is dismissing the petition.
>
> Prosecutor: Will the Court entertain a motion for a stay, so that we can approach the Supreme Court of –
>
> The Court: No. I'm dismissing the petition. You may appeal it.
>
> Case worker: I thought that I had the psychological evaluation brought down here, filed and distributed to everybody on Friday the 7th, and I filed one, again, with my court summary.
>
> The Court: It was filed November the 14th, 2008 at 2:34 p.m. in the circuit clerk's office. . . . This is one I want to go up, because I want the [Supreme] Court to know when we order things, we don't get them done. . . . And it's been an ongoing problem. . . . I ordered that it be filed and it was not filed timely, and I'm going to back up my order. If the Court wants to send it back, they can send it back, that's their decision to make. But this is – I'd actually like someone to take my deposition sometime so I can give them the cases and the deadlines and the time frames that we get. They contract these things with the contractual providers and it just doesn't work. It's dismissed for failure to file it by November the 7th, just like I said. It's dismissed.

The DHHR immediately petitioned[3] this Court for a writ of prohibition to stop the enforcement of the circuit court's oral and written orders dismissing the abuse and neglect petition.[4]

II.
Standard of Review

We have held that "[p]rohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari." Syllabus Point 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), we stated the following standard of review where, as here, a petitioner contends that a trial court has exceeded its legitimate powers:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but

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[3]On November 25, 2008, the petition for the writ of prohibition was filed by an assistant attorney general on behalf of his client, the DHHR. Oddly, the next day, an assistant prosecutor who also represented the DHHR filed a *response* to the writ of prohibition. The *West Virginia Rules of Appellate Procedure* allow a party to file only one merits brief on a petition for a writ of prohibition, not two – and they absolutely do not allow parties to file response briefs to their own petition. And to the extent that the assistant prosecutor filed the brief on her own behalf and not the DHHR, we do not believe that trial counsel is an "affected party" with standing to file a brief in opposition to her client's position. *See W.Va.R.A.P.* Rule 14.

[4]We issued a rule to show cause why the petition should not be granted, and the circuit court has delayed reunification of the child with Angela H. pending the Court's decision.

> only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

III.
Discussion

The DHHR asserts that the circuit court exceeded its authority when it refused to conduct a hearing on the abuse and neglect petition, as required by *W.Va. Code*, 49-6-6 [1977], and issued an order that dismissed the petition as a sanction for the DHHR's failure to timely file a psychological report. The DHHR asserts that a direct appeal of the circuit court's order would be inadequate since the infant, K.M., would return to an alleged unsafe environment in the mother's care pending review of the order on appeal.

W.Va. Code, 49-6-6 requires a trial court to conduct a hearing on any motion made to modify a child's disposition. *W.Va. Code*, 49-6-6 states, in pertinent part:

> Upon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing . . . Adequate and timely notice of any motion for

> modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department.

In the instant case, the circuit court refused to allow the DHHR to present evidence or witness testimony in a disposition hearing. The circuit court was clearly in error, and should have conducted a hearing to take evidence and testimony in support of the DHHR's motion seeking to alter Angela H.'s and K.M.'s disposition.

This is not to say, however, that the circuit court erred in attempting to assess sanctions. The transcript of the November 19, 2008 hearing plainly reflects the circuit court's frustration with the DHHR and its counsel arising from their repeated failures to comply with the circuit court's orders. Our concern is that the remedy of dismissing the petition, without first considering other sanctions, fails to take into consideration the best interests of the child who is the subject of the abuse and neglect petition.[5] As we stated in Syllabus Point 3 of *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996):

> Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect,

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[5]We do not, by our decision today, mean to imply that dismissal of a petition is not permitted. To the contrary, dismissal of the petition is the first disposition a court is to consider when assessing any abuse and neglect petition. As *W.Va. Code*, 49-6-5(a) [2006] says, in part:

> Following a determination . . . wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. . . . The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:
>
> (1) Dismiss the petition[.]

> as in all family law matters, must be the health and welfare of the children.

The early, most formative years of a child's life are crucial to his or her development. *In re Carlita B.*, 185 W.Va. 613, 623, 408 S.E.2d 365, 375 (1991). We have repeatedly emphasized that "children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 257, 470 S.E.2d 205, 211 (1996). We therefore concluded, in Syllabus Point 1 of *In re Carlita B., supra*:

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

The central theme of the statutes which pertain to abuse and neglect is that "matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible." Syllabus Point 5, *In re Carlita B, supra*.

The record in the instant case shows that the circuit court attempted to give this abuse and neglect matter precedence, and attempted to resolve the case as expeditiously as possible. However, the DHHR and its counsel did not comply with the circuit court's directions to timely file a report with the circuit clerk. If the circuit court perceived that the delays in resolving the case resulted from action (or inaction) by the DHHR or its counsel, then any sanctions should first have been directed to the party or to the attorney at fault. But

the overarching rule is that any sanctions first should take into account the health and welfare of the child.

IV.
Conclusion

The circuit court's oral and written orders dismissing the abuse and neglect petition – while understandable – were in error, and failed to take into account the health and welfare of the child and failed to accord the DHHR with the ability to present its evidence and testimony. The writ of prohibition is granted.

Writ Granted.

No. 34602 - State ex rel. WVDHHR v. Pancake

FILED
July 27, 2009
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Chief Justice, concurring:

I concur completely in the majority *per curiam* opinion of the Court. The circuit court's orders dismissing the abuse and neglect petition were in error and the writ of prohibition was properly granted. Our guiding principle in cases such as this is the health and welfare of the child. These cases deservedly receive the highest priority of the court system's attention – a priority which applies to government in general. *In re Carlita B*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

I write separately to acknowledge the apparent frustration demonstrated by the circuit court – a frustration which resulted not from any neglect on the court's part, but rather due to the failures of the Department of Health and Human Resources ("DHHR") to comply in a timely manner with its obligations regarding this child. It is a frustration which I fear is too frequently felt by our courts in matters related to DHHR – and it is a frustration which I sense is too often experienced first hand by the dedicated employees and administrators of DHHR who strive on a daily basis to meet DHHR's legal, and humanitarian, mandate to help families and children in West Virginia. Based upon the DHHR cases which have been before this Court in the last several years, I share this frustration. I sense others on this Court, too, share these frustrations.

As candidly admitted by counsel for DHHR in the oral argument of this case, the resources necessary for DHHR to comply fully with its statutory mandate too frequently are lacking. Based upon the evidence before this Court, I conclude that DHHR's ability to adequately comply herein with its legal obligation was caused not by any desire of a DHHR employee or administrator to do so, nor by the best efforts of DHHR employees and administrators, but rather by the continuing lack of requisite resources which DHHR receives to meet its mission. There is only so much that dedicated DHHR personnel can accomplish without adequate resources. I am deeply troubled and concerned about this continuing resource problem – a problem which I sense may be worsening and may be becoming systemic. This underlying resource problem perhaps deserves the Court's fuller attention.

201 W. Va. 248, 496 S.E.2d 198

Supreme Court of Appeals of West Virginia

STATE of West Virginia ex rel. PAUL and Chris B., Petitioners,

v.

Honorable George W. HILL, Jr., Judge of the Circuit Court of Wood County; Pete and Cynthia L. S.; and Natasha Colette B., Anatoli Josef B., Alevhnia Marie B., and Olya Tess B., Respondents.

No. 24438

Submitted Oct. 15, 1997.

Decided Oct. 24, 1997.

SYLLABUS BY THE COURT

1. "Although a court has jurisdiction of the subject matter in controversy and of the parties, if it clearly appears that in the conduct of the case it has exceeded its legitimate powers with respect to some pertinent question a writ of prohibition will lie to prevent such abuse of power." Syllabus point 2, *State ex rel. State Road Commission v. Taylor,* 151 W.Va. 535, 153 S.E.2d 531 (1967).

2. The inadequacy of allegations contained in an abuse and neglect petition does not, in and of itself, abrogate one's standing to file such a petition pursuant to W.Va.Code § 49-6-1(a) (1992) (Repl.Vol.1996).

3. A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W.Va.Code § 49-6-1, *et seq.*

4. A parent's relinquishment of his/her parental rights either in anticipation of future adoption proceedings or as a part of previously initiated adoption proceedings does not constitute abandonment for abuse and neglect purposes.

David Allen Barnette, Monika J. Hussell, Jackson & Kelly, Charleston, for Petitioners.

Michele Rusen, Parkersburg, for Respondents Pete and Cynthia L. S.

Brian D. Yost, Tom Price, Holroyd, Yost & Evans, Charleston, for Amici Curiae Childplace, Inc., and Burlington United Methodist Family Services, Inc.

Darrell V. McGraw, Jr., Attorney General, Barbara L. Baxter, Assistant Attorney General, Charleston, for West Virginia Department of Health and Human Resources.

Susan D. Simmons, Simmons & Simmons, Elizabeth, Guardian ad Litem for Respondent Minor Children, Natasha Colette B., Anatoli Josef B., Alevhnia Marie B., and Olya Tess B.

DAVIS, Justice:

In this original proceeding for a writ of prohibition, the petitioners, Paul and Chris B., See footnote 1 request this Court to prohibit the respondent judge, the Honorable George W. Hill, Jr., Judge of the Circuit Court of Wood County, from enforcing his August 20, 1997, order. In that order, Judge Hill concluded that the respondents, Pete and Cynthia L. S., See footnote 2 should receive the legal and physical custody of the respondent children, Natasha Colette B., Anatoli Josef B., Alevhnia Marie B., and Olya Tess B., pending further investigation by the West Virginia Department of Health and Human Resources. The circuit court deemed further inquiry appropriate given the *S* family's prior allegations that the *B* family had abandoned their four adoptive children by placing them in respite care with the *S* family and by making arrangements to re-place the children through the Texas adoption agency through which they had adopted them. We issued a rule to show cause. We now grant as moulded the writ of prohibition.

I.
FACTUAL AND PROCEDURAL HISTORY

The facts underlying this proceeding began in approximately May, 1997. At that time, Paul and Chris B., having earlier decided to adopt four children from Russia, traveled to that country to meet their soon-to-be adoptive children and to finalize the adoption arrangements. See footnote 3 Throughout the adoption process, the *B* family had worked with the Gladney Center, an international adoption agency located in Fort Worth, Texas, and Gladney representatives had assured them that the Russian children would have no substantial emotional problems. See footnote 4 On May 15, 1997, the *Bs'* adoption of the four siblings, Natasha Colette, Anatoli Josef, Alevhnia Marie, and Olya Tess, See footnote 5 was finalized in Russia. After retrieving the children from the orphanage in which they had been residing, the *Bs* and their four Russian children resided temporarily in Russia, first with a Russian host family and, later, in a youth hostel, to permit the new family unit to become acquainted with one another before returning to the United States. The *Bs* claim that once the adoption had been finalized, the orphanage informed them that Natasha had exhibited some anti-social behavior and had had occasional outbursts. While residing in Russia, the *Bs* experienced difficulty interacting with the children, and the children would not obey them.

Upon their return to Parkersburg, West Virginia, the *Bs* and their four Russian children were reunited with the *Bs'* other children. See footnote 6 The *Bs* claim that, from the beginning, the relationship between the four Russian siblings and the *Bs'* other children was strained, at best. In this regard, the *Bs* indicate that the Russian children acted violently towards themselves, each other, and the other *B* children, would not obey, and

could not be disciplined. After meeting with a family counselor in early July, 1997, the *B* family learned that the Russian siblings likely suffered from "attachment displacement disorder," an emotional disturbance frequently diagnosed in children who have been adopted from orphanages in foreign countries. The counselor also opined that the Russian children may or may not ever completely recover from this disorder and that the *B* family had little hope of establishing a cohesive family that would include these four siblings.

At this juncture, the *B*s concluded that the Gladney Center had misrepresented the emotional and mental condition of the Russian children. See footnote 7 Determining that they could not continue to jeopardize their family stability and the safety of their other children, See footnote 8 the *B*s pursued the option of relinquishing their parental rights to the Russian siblings and re-placing them with the Gladney Center for a second adoption. The arrangements with the Gladney Center apparently have contemplated that, unlike the *B* family situated in Parkersburg, West Virginia, Gladney, in Texas, can secure the appropriate treatment for children with such severe attachment displacement disorder. These preparations also contemplate the continuation of the sibship unit by placing all four children in the same adoptive home.

Toward the end of July, 1997, Mr. *B* was scheduled to take an out-of-town weekend trip. Based in large part upon Mrs. *B*s' inability to control their newly adopted children and fearing for her own safety and that of her remaining children, the *B*s sought temporary respite care See footnote 9 for their Russian children during Mr. *B*s' absence. The *B* family, having contacted Burlington United Methodist Family Services, Inc., was advised to contact the *S*s to see if they could provide such care. Mr. and Mrs. *S*, who have provided respite care to numerous children, See footnote 10 agreed to temporarily house the *B*s' four Russian children from Thursday, July 17, 1997, to Sunday, July 20, 1997. See footnote 11

On July 17, 1997, the *B* family delivered their four Russian children to the *S* household. See footnote 12 The *S* family indicates that, while the children exhibited some emotional disturbance, they were not violent or in any other way disobedient during their stay. On the following Sunday, July 20, 1997, the *B* family requested the *S* family to extend the respite care, to which the *S*s agreed. The next day, Mrs. *S* contacted the Gladney Center and inquired whether she and her husband could adopt these children. Gladney, in turn, contacted the *B* family who strongly opposed the proposal, particularly because they were purchasing a house in the same subdivision where the *S* family lives and feared the consequences of living in such close proximity to these children. In addition, the *B* s disapproved permanent adoptive placement of the children in the Parkersburg, West Virginia, area because this region is not equipped with services to meet the needs of children with attachment displacement disorder. See footnote 13

On Wednesday, July 23, 1997, the *B* family traveled to the *S* household to pick up their four children, as the *B*s believed the parties had previously agreed to extend the respite care to this date. See footnote 14 En route, the *B*s called the *S*s to let them know they were on their way; a person in the *S* household indicated that the children were not at home because Mrs. *S* had taken all of the children to the library. Upon approaching the *S* household, the *B*s observed Mr. *S* driving quickly through the neighborhood with the *B*s' children in his car. Apparently, Mr. *S* continued his journey, without stopping, even though the *B*s attempted to flag him down. See footnote 15 The *B*s then called the Wood County Sheriff's Department, and, when the police arrived, proceeded to the *S* residence. At the *S* household, the *B*s were informed that Mr. *S* had taken the children out for ice cream. Approximately one hour later, the sheriff's department was informed, by the *S*s' attorney, that Mr. and Mrs. *S* had obtained an emergency temporary custody order covering these children. See footnote 16

On July 25, 1997, the *S*s filed a "Petition for Appointment of Guardian and for Intervention by the West Virginia Department of Health and Human Resources" [hereinafter abuse and neglect petition], essentially requesting the Circuit Court of Wood County to appoint a guardian *ad litem* for the children and charging the *B* family with abandonment of the children constituting abuse and neglect. During the July 25, 1997, hearing of this matter, counsel for the *B* family contended that the *S* family lacked standing to charge the *B*s with abuse and neglect by abandonment, claiming that the *B*s' intentions to relinquish their parental rights and to re-place the children for adoption did not rise to the level of abandonment. Circuit Court Judge Hill, viewing the best interests of the children, decided otherwise and ordered an inquiry by the West Virginia Department of Health and Human Resources [hereinafter DHHR]. The court also granted legal custody of the four children to the DHHR and physical custody to the *S* family pending resolution of the matter. However, by final order dated August 20, 1997, Judge Hill granted both legal and physical custody of the children to the *S* family until the DHHR had completed its report and the court had an opportunity to hold an evidentiary hearing. See footnote 17

On September 2, 1997, the *B*s petitioned this Court for a writ of prohibition to prevent Judge Hill from enforcing his order and to permit them to continue with their planned relinquishment and re-placement. We issued a rule to show cause and now proceed to determine the propriety of the requested relief. See footnote 18

II.
DISCUSSION

Before this Court, the petitioners request that we prohibit the respondent Judge Hill from enforcing his order vesting legal and physical custody of these four children with the *S* family pending investigation of the *S*s' charges that the *B*s' intention to relinquish their parental rights to these children and to re-place them for adoption constituted abuse and

neglect by way of abandonment. Following a brief discussion of the appropriate standard of review, we address the merits of the petitioners' contentions. See footnote 19

A. Standard of Review

The right to relief through the original jurisdiction proceeding of prohibition is statutorily recognized in this State. W.Va.Code § 53-1-1 (1923) (Repl.Vol.1994) provides that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." Stated otherwise, "[a] writ of prohibition ... will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va.Code,* 53-1-1." Syl. pt. 2, in part, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977). Accordingly, "[a]lthough a court has jurisdiction of the subject matter in controversy and of the parties, if it clearly appears that in the conduct of the case it has exceeded its legitimate powers with respect to some pertinent question a writ of prohibition will lie to prevent such abuse of power." Syl. pt. 2, *State ex rel. State Road Comm'n v. Taylor,* 151 W.Va. 535, 153 S.E.2d 531 (1967). *See also* Syl. pt. 1, *White Sulphur Springs, Inc. v. Ripley,* 124 W.Va. 486, 20 S.E.2d 794 (1942) ("Under Code, 53-1-1, a trial court having jurisdiction of a cause of action and of the parties thereto, may, nevertheless, be prohibited from further proceeding therein, when in so doing it exceeds its legitimate powers.").

Furthermore, while "prohibition does not lie to correct errors committed by a court which is acting within its jurisdiction, or where the existence of jurisdiction depends on controverted facts which such court is competent to determine ... 'the writ properly issues where an erroneous decision on a question of law operates as an unlawful assumption of jurisdiction.' " *State ex rel. Zirk v. Muntzing,* 146 W.Va. 878, 894, 122 S.E.2d 851, 860 (1961) (quoting 73 C.J.S. *Prohibition* § 12). *See also State ex rel. Charleston Mail Ass'n v. Ranson,* 200 W.Va. 5, 9, 488 S.E.2d 5, 9 (1997) (" 'The rationale behind a writ of prohibition is that by issuing certain orders the trial court has exceeded its jurisdiction, thus making prohibition appropriate.' " (quoting *State ex rel. Allen v. Bedell,* 193 W.Va. 32, 36, 454 S.E.2d 77, 81 (1994) (Cleckley, J., concurring))).

Traditionally, we have viewed the writ of prohibition as an extraordinary remedy to be granted in only the most extraordinary cases. *See, e.g., State ex rel. West Virginia Div. of Natural Resources v. Cline,* 200 W.Va. 101, 105, 488 S.E.2d 376, 380 (1997); *State ex rel. Suriano v. Gaughan,* 198 W.Va. 339, 345, 480 S.E.2d 548, 554 (1996); *State ex rel. United States Fidelity & Guar. Co. v. Canady,* 194 W.Va. 431, 436, 460 S.E.2d 677, 682 (1995); *State ex rel. Doe v. Troisi,* 194 W.Va. 28, 31, 459 S.E.2d 139, 142 (1995). In this regard, "[i]t is well established that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari.... [Where] the lower court had jurisdiction of the ... proceedings, ... unless it so exceeded its legitimate powers as to vitiate that jurisdiction, prohibition is not the proper remedy."

Handley v. Cook, 162 W.Va. 629, 631, 252 S.E.2d 147, 148 (1979) (citations omitted). *See also State ex rel. Williams v. Narick,* 164 W.Va. 632, 635, 264 S.E.2d 851, 854 (1980) ("[T]his Court has specifically stated that the writ [of prohibition] does not lie to correct 'mere errors' and that it cannot serve as a substitute for appeal, writ of error or certiorari." (citations omitted)). Therefore, "[t]o justify this extraordinary remedy, the petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Allen v. Bedell,* 193 W.Va. at 37, 454 S.E.2d at 82. Having set forth the applicable standard of review, we proceed now to a determination on the merits as to whether the petitioners satisfy these criteria for the issuance of a writ of prohibition.

B. Determination of Issues

In the proceedings presently before this Court, the petitioners contend that the circuit court did not have jurisdiction to entertain the abuse and neglect petition filed by the *S* family. The *Bs* argue that the *Ss* did not have standing to file the abuse and neglect or custody petitions in the circuit court, and, therefore, the circuit court did not have jurisdiction over those proceedings. W.Va.Code § 49-6- 1(a) (1992) (Repl.Vol.1996) permits a "reputable person" to file a petition alleging abuse and neglect, but this section also requires the petitioner to set forth specific facts evidencing such allegations. Mere conclusory statements that abuse or neglect has occurred will not suffice. *State v. Scritchfield,* 167 W.Va. 683, 280 S.E.2d 315 (1981). The *Bs* contend that the abuse and neglect petition filed by the *S* family in this case did not manifest sufficient facts to support their allegations of abandonment rising to the level of abuse and neglect. Rather, the *B* family suggests that, under the facts of this case, it is impossible for the conduct alleged by the *Ss* (the *Bs'* intent to relinquish the children and to re-place them for adoption) to constitute abuse and neglect by abandonment in West Virginia. See footnote 20

The *Bs* also dispute the circuit court's finding that their intent to relinquish their parental rights to their four children and to re-place them for adoption through the Gladney Center constitutes abandonment rising to the level of abuse and neglect. Rather, they contend that the statutory definition of abuse and neglect contained in W.Va.Code § 49-1- 3(c) (1994) (Repl.Vol.1996) neither specifically defines abandonment nor indicates that an intent to relinquish parental rights incident to an adoption proceeding constitutes abuse and neglect. If this provision were construed to apply to adoption proceedings, the *Bs* argue that adoption would practically cease to exist in this State because every parent contemplating a relinquishment of his/her parental rights could be charged with abuse and neglect.

The *S* family replies that they clearly had standing to bring the instant abuse and neglect petition pursuant to W.Va.Code § 49-6-1(a). This provision grants a "reputable person"

standing to file such a petition. The *Ss* submit that, as respite care providers, they have had much experience in caring for children and are in a good position to recognize signs of abuse or neglect. In this regard, they also assert that respite and foster care providers having knowledge of abuse or neglect have a duty to report such mistreatment to the appropriate authorities. The *S* family states further that, given their knowledge of these particular children and their treatment while they resided in the *B* household, the *Ss* were proper parties to bring this petition. Moreover, the *Ss* reply that the circuit court has jurisdiction to entertain allegations of abandonment rising to the level of abuse and neglect because the court has jurisdiction to protect and promote the best interests of children. *See In re Jeffrey R.L.,* 190 W.Va. 24, 435 S.E.2d 162 (1993). Accordingly, the *Ss* assert that the circuit court properly exercised jurisdiction over the underlying abuse and neglect proceedings.

The *Ss* contend finally that abandonment has previously been held to constitute abuse and neglect. *See* W.Va.Code § 49-1-3(e) (defining "imminent danger" as including abandonment); *In re Adoption of Mullins by Farley,* 187 W.Va. 772, 421 S.E.2d 680 (1992) (per curiam). They further assert that the *Bs'* intention to relinquish their parental rights and to re- place the children for adoption constitutes abandonment as a parent without actual custody of his/her child has been found capable of abandoning such child. *In re Katie S.,* 198 W.Va. 79, 479 S.E.2d 589 (1996); *In re Christine Tiara W.,* 198 W.Va. 266, 479 S.E.2d 927 (1996) (per curiam). Under the circumstances of this case, the *Ss* maintain their allegations that the *Bs'* intent to relinquish their parental rights and to send their children to Texas for adoptive placement would place the children in "imminent danger" of severe psychological damage, and submit that these allegations constitute abandonment for abuse and neglect purposes.

Our resolution of the standing and jurisdiction issues necessitates an inquiry into the current law of this State as it relates to abuse and neglect proceedings. W.Va.Code § 49-6-1(a) (1992) (Repl.Vol.1996) permits the filing of a petition alleging the abuse and/or neglect of a child:

> If the state departm ent [of health and hum an resources] *or a reputable person* believes that a child is negl ected or abused, the departm ent *or the person* may present a petition setting forth th e facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be veri fied by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including tim e and place, how such conduct co mes within the statutory definition of neglect or a buse with references thereto, any supportive services provided by the stat e department to rem edy the alleged circumstances and the relief sought[.]

(Emphasis added). Clearly, then, this statute permits not only the DHHR but also an individual who believes that a child is being abused or neglected to institute proceedings to investigate these allegations.

Under the facts of this case, we find that the *Ss* were proper parties to file an abuse and neglect petition and, therefore, had standing to do so. Generally speaking, "[s]tanding is an element of jurisdiction over the subject matter." 21A Michie's Jurisprudence *Words & Phrases* 380 (1987) (citing *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.,* 611 F.Supp. 1542 (E.D.Va.1985)). More specifically, standing refers to one's ability to bring a lawsuit because he/she has "such a personal stake in the outcome of the controversy as to insure the concrete adverseness upon which the court depends for illumination of the questions in the case." 14A Michie's Jurisprudence *Parties* § 18 (1989) (citing *Christman v. American Cyanamid Co.,* 578 F.Supp. 63 (N.D.W.Va.1983)). *See also Coleman v. Sopher,* 194 W.Va. 90, 95-96 n. 6, 459 S.E.2d 367, 372-73 n. 6 (1995) (explaining elements comprising standing). While the *Bs* contend that the petition filed by the *Ss* lacked the factual sufficiency required by the above-quoted statute, we hold that the inadequacy of allegations contained in an abuse and neglect petition does not, in and of itself, abrogate one's standing to file such a petition pursuant to W.Va.Code § 49-6-1(a) (1992) (Repl.Vol.1996). See footnote 21

Among the enumerated goals of the child welfare laws of this State are the "[p]rovi[sion] for [the] early identification of the problems of children and their families, and ... appropriate[responses thereto] with measures and services to prevent abuse and neglect" and the "[p]rotect[ion of] the welfare of the general public." W.Va.Code § 49-1-1(a)(8), (10) (1997) (Supp.1997). By permitting an individual who believes that abuse and/or neglect is occurring, or has occurred, to file a petition alleging such circumstances, and by requiring this person to also have sufficient knowledge of the facts underlying this belief to verify the petition, the statutory framework attempts to protect parents, custodians, guardians, and care givers from unsubstantiated charges while permitting the filing of petitions seeking to protect the health, safety, and well-being of children.

The *Ss* contend that, at the time they first received the four *B* children into their home, they had misgivings about whether the *Bs* had appropriately provided for the children's needs in terms of food and clothing. While caring for these children, the *Ss* noticed that the children seemed to be afraid of soap and learned that their "discipline" at the *Bs'* home may have included "washing the children's mouths out with soap" when they spoke their native Russian instead of English. The *Ss* also had discovered that the *Bs* were attempting to relinquish their parental rights and to re-place these children for adoption through the Gladney Center. Furthermore, the parties indicate that, during the initial period of respite care, they were uncertain as to whether the Gladney Center had located a permanent adoptive placement for the children in Texas. As a result, the *Ss* maintain that they were concerned that the sibship may be separated and that the children would be

placed in different foster homes pending permanent placement. Separation of these siblings would not only have been emotionally devastating for them but also would have been contrary to this State's public policy of attempting to unite siblings in foster care placements. *See* W.Va.Code § 49-2-14 (1995) (Repl.Vol.1996). Therefore, given the *Ss'* beliefs about the children's care and treatment during their residence with the *B* family, and the *Ss'* personal familiarity with and observations of the children during their provision of respite care, we find that the *Ss* were proper parties and had standing to file an abuse and neglect petition in this case.

Although not as definitely ascertainable as the issue of standing, we also find that the Circuit Court of Wood County had jurisdiction over the basic abuse and neglect petition filed in this case. While not explicitly stated in the abuse and neglect statutes, we previously have recognized that circuit courts have "original jurisdiction of all cases coming within the terms of the [child welfare] act," which serves to protect "delinquent, dependent *and neglected children.*" *Locke v. County Court of Raleigh County,* 111 W.Va. 156, 158, 160, 161 S.E. 6, 7 (1931) (emphasis added). Therefore, it appears that the circuit court properly exercised jurisdiction over the abuse and neglect proceeding in this case as such proceeding comes within the child welfare laws of this State. *See* W.Va.Code § 49-1-1, *et seq.*

In addition, our Constitution provides both specific grants of power to circuit courts and a general, more inclusive jurisdictional provision encompassing grants of power which are intended by the Legislature, but which have not been specifically enumerated. Article VIII, Section 6, of the West Virginia Constitution states, in part, that "[c]ircuit courts shall also have such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law." *See also* W.Va.Code § 51-2-2 (1978) (Repl.Vol.1994) (same). In this manner, it may be inferred that if one may file a petition with the circuit court alleging abuse or neglect of a child and if hearings are to be had in the circuit court with respect to that petition, then the circuit court logically should possess the inherent jurisdiction to entertain the petition and to conduct such proceedings. *See* W.Va.Code § 49-6-1. Thus, under this interpretation of the circuit court's jurisdiction in abuse and neglect proceedings, the circuit court's exercise of jurisdiction was proper in this case.

Finally, the circuit court had jurisdiction to entertain the abuse and neglect proceeding under the doctrine of *parens patriae.* We have acknowledged that the State, in its role of *parens patriae,* has a duty to safeguard children:

> While parents enjoy an inherent right to the care and custody of their own children, the State in its recognized role of *parens patriae* is the ultimate protector of the rights of minors. The State has a substantial interest in providing for their health, safety, and welfare, and may properly step in to

> do so when necessary.... This *parens patriae* interest in promoting the welfare of the child favors preservation, not severance, of natural family bonds.... The countervailing State interest in curtailing child abuse is also great. In cases of suspected abuse or neglect, the State has a clear interest in protecting the child and may, if necessary, separate abusive or neglectful parents from their children.
>
> *In the Interest of Betty J.W.*, 179 W.Va. 605, 608, 371 S.E.2d 326, 329 (1988) (citations omitted).

Tempered with the State's *parens patriae* interest is the court's obligation to consider the "best interests of the child [as] paramount." *In re Jeffrey R.L.*, 190 W.Va. 24, 32, 435 S.E.2d 162, 170 (1993). *See also Carter v. Carter*, 196 W.Va. 239, 246, 470 S.E.2d 193, 200 (1996) (recognizing paramount importance of best interests of child). This judicial duty has also been characterized as a *parens patriae* role: "[t]his Court cannot ... ignore its *parens patriae* duty to protect the best interests of [the child]." *State of Florida, Dep't of Health & Rehabilitative Servs. ex rel. State of West Virginia, Dep't of Human Servs., Div. of Social Servs. v. Thornton*, 183 W.Va. 513, 519, 396 S.E.2d 475, 481 (1990) (per curiam) (citation omitted). During the proceedings below, the court specifically recognized, in ruling upon the allegations of abuse and neglect, that "the interest of the child is just unsurpassed by anything" and that "[t]he primary issue is always the welfare of the child." Thus, the circuit court, in its conduct of proceedings to ensure the safety and well-being of the *Bs'* four children, properly exercised its jurisdiction by entertaining the *Ss'* abuse and neglect petition. Having found various rationales for vesting jurisdiction in the circuit court to entertain abuse and neglect proceedings, we hold that a circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W.Va.Code § 49-6-1, *et seq.*

Finally, the *Bs* contend that the circuit court exceeded its jurisdiction in the underlying proceedings because a parent's intent to relinquish his/her parental rights in anticipation of placing a child for adoption does not constitute abandonment for abuse and neglect purposes. In this regard, we agree with the *Bs*. During the hearing below, the circuit court determined that "[r]elinquishing children constitutes neglect or abandonment." Although the circuit court did have jurisdiction of the basic abuse and neglect petition filed by the *Ss* and of the proceedings held in accordance therewith, the court exceeded such jurisdiction when it created a new basis for finding abuse and neglect: voluntary relinquishment of parental rights incident to adoption proceedings.

In W.Va.Code § 49-1-3 (1994) (Repl.Vol.1996), the Legislature very explicitly set forth definitions for abuse and neglect. An " '[a]bused child' " is defined in W.Va.Code § 49-1-3(a) as:

> a child whose health or welfare is harmed or threatened by:
> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or a nother child in the home; or
> (2) Sexual abuse or sexual exploitation; or
> (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section si xteen [§ 48-4-16], article four, chapter forty-eight of this code.
> In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

Similarly, subsection (g) defines a " '[n]eglected child' " as a child:

> (1) ... (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
> (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]

W.Va.Code § 49-1-3(g)(1). More generally, " '[c]hild abuse and neglect' " or " 'child abuse or neglect' " refers to "physical injury, mental or emotional injury, sexual abuse, sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child." W.Va.Code § 49-1-3(c).

None of these definitions encompasses the conduct of the *Bs* in this case, that is the voluntary relinquishment of parental rights incident to placement for adoption. Thus, we hold that a parent's relinquishment of his/her parental rights either in anticipation of future adoption proceedings or as a part of previously initiated adoption proceedings does not constitute abandonment for abuse and neglect purposes. See footnote 22 Accordingly, the circuit court erred in concluding that the *Bs'* intention to relinquish their parental rights to their children constituted abandonment or abuse and neglect. See footnote 23

Neither does the *Bs'* contemplated relinquishment constitute abandonment under the pertinent statutory provisions governing adoption. In fact, such a characterization would negate the entire intent and effect of the recent legislative amendments to the adoption statutes. First and foremost, the adoption procedures of this State require, as a necessary prerequisite to placing a child for adoption, the child's parent to execute either a relinquishment of parental rights or a consent to adoption. W.Va.Code § 48- 4-3 (1997) (Supp.1997) provides exceptions to the relinquishment/consent requirement only where a parent's parental rights have previously been terminated; where the parent has abandoned his/her child as that term is defined in the adoption statutes; where the spouse of one parent is seeking to adopt that parent's child; or where the parent is found to be under a disability and is incapable of granting such relinquishment or consent. In every other instance, a relinquishment or consent is required before the adoption may proceed. See footnote 24 Therefore, because none of these exceptions exempts the *Bs* from the relinquishment requirement, they must execute a relinquishment of their parental rights as a prerequisite to re-placing their Russian children for adoption. Nevertheless, under the circuit court's characterization of relinquishment, the *Bs* could be charged with abuse and neglect simply by adhering to the statutory requirements for adoption. We simply cannot approve such an ironic result.

Furthermore, the adoption laws specifically define abandonment as that term is used in the context of adoption proceedings. As this definition pertains to the facts presently before us:

> (a) Abandonment of a child over the age of six m onths shall be presum ed when the birth parent:
> (1) Fails to financially support the ch ild within the m eans of the birth parent; and
> (2) Fails to visit or otherwise com municate with the child when he or she knows where the child resides, is physi cally and financially able to do so and is not prevented from doing so by the person or authorized agency having the care or custody of the child; Provided, That such failure to act continues uninterrupted for a period of six months immediately preceding the filing of the adoption petition.

W.Va.Code § 48-4-3c(a) (1997) (Supp.1997). Again, these criteria for abandonment do not comport with the fact pattern of the case presently before us. None of the elements of abandonment as recited above is present in the instant case. The *Bs* have not failed to financially support the children and, in fact, had arranged to pay the *Ss* for caring for the children during the initial period of respite care. Neither have the *Bs* failed to visit or otherwise communicate with their children for a period lasting six months. At the time the *Ss* filed the abuse and neglect petition, the *Bs* had attempted to retrieve their children from the *S* household, but their efforts were thwarted by the *Ss'* procurement of an *ex*

parte order of temporary custody. Therefore, the circuit court's finding that the *Bs'* intention to relinquish their parental rights constituted abandonment is erroneous under the adoption statutes' definition of that term.

Finally, and perhaps most telling of the legislative intent underlying the statutory adoption laws of this State, is the fact that the Legislature amended virtually all of this State's pre-existing adoption law during its last legislative session. Despite these extensive amendments, though, the Legislature declined to characterize either a relinquishment or a consent, or the contemplation thereof, as either abandonment or abuse and neglect. Given the sweeping changes, it seems that had the Legislature intended such a result, it could have, and would have, effectuated such a change in conjunction with the other adoption amendments. However, it did not. Therefore, we can glean a legislative intent to permit a parent to relinquish his/her parental rights without being subject to abuse and neglect charges on the basis of abandonment.

The peculiar facts and circumstances of the instant case suggest that the only remedy available to the *Bs* is the writ of prohibition which they today seek. They have no other adequate remedy. If we deny the writ and permit the underlying abuse and neglect proceedings to continue to a final resolution, the children would be in judicial limbo for months, possibly even years. Further aggravating this scenario is the fact that the *Bs* are not seeking reunification with these children. Although the vast majority of abuse and neglect proceedings contemplate a parental improvement period in the hopes that the conditions of abuse and neglect can be eradicated, such proceedings in the instant case would be futile as the *Bs* ultimately desire to regain custody of the children for the sole purpose of relinquishing their parental rights and re-placing them for adoption. Therefore, given the unique circumstances of this case, we find no other remedy to be adequate, and we deem prohibition to be necessary to provide the petitioners with the requested relief.

III.
CONCLUSION

In conclusion, we cannot emphasize enough the calamitous impact that the characterization of relinquishment of parental rights for adoption purposes as abandonment or as abuse and neglect would have upon the adoption law of this State. Were we to construe such a relinquishment, or, as in this case, an intent to effectuate a future relinquishment, as abandonment, we would inevitably be opening the floodgates for abuse and neglect petitions. No more would birth mothers and other parents unable to care for their children be permitted to consider adoption as an option for fear that even the mere thought of relinquishment would permit them to be charged with abuse and neglect. And, as noted above, the recent legislative amendments to this State's adoption law would be rendered virtually meaningless with the likely curtailment of adoptions altogether. Therefore, while we can applaud the *Bs'* initial decision to accept these

children into their home and can accept their decision that they can no longer care for these children, we simply cannot, in good conscience, find that their respect for the best interests of these children, which, of necessity, includes the relinquishment of their parental rights, constitutes either abandonment or abuse and neglect.

Thus, for the foregoing reasons, we find that the circuit court erred in concluding that the petitioners' intent to relinquish their parental rights constituted abandonment. Accordingly, we grant as moulded the petition for writ of prohibition and direct the circuit court to re-vest custody of the children in the petitioners. See footnote 25 We further instruct the petitioners and the DHHR to immediately complete preparations and to implement such final arrangements as are necessary for the prompt relinquishment and adoptive re-placement of the children through the Gladney Center in order that these children may finally have a permanent adoptive home in the United States. See footnote 26

Writ granted as moulded.

Footnote: 1 We adhere to our usual practice in family law cases involving sensitive matters and do not use the last names of the parties. See State ex rel. Diva P. v. Kaufman, 200 W.Va. 555, 559 n. 2, 490 S.E.2d 642, 646 n. 2 (1997); Elmer Jimmy S. v. Kenneth B., 199 W.Va. 263, 264 n. 1, 483 S.E.2d 846, 847 n. 1 (1997); In the Interest of Tiffany Marie S., 196 W.Va. 223, 226 n. 1, 470 S.E.2d 177, 180 n. 1 (1996).

Footnote: 2 Hereinafter, for ease of reference, the parties will be referred to by their last initials (e.g., the Bs and the Ss).

Footnote: 3 Mrs. B does not speak Russian; Mr. B speaks limited Russian.

Footnote: 4 The possibility that these children may have emotional difficulties was of particular concern to the B family given the various emotional problems suffered by children who have lived in orphanages prior to their adoption.

Footntoe: 5 The children's ages are as follows: Anatoli Josef is nine years old; Natasha Colette is eight years old; Alevhnia Marie is seven years old; and Olya Tess is six years old.

Footnote: 6 The record indicates that the Bs have three other children who joined their family by adoption.

Footnote: 7 The Bs deny allegations that they are pursuing litigation against the Gladney Center as a result of this alleged misrepresentation, and state that they have not filed, and do not intend to pursue, a "wrongful adoption" suit against Gladney.

Footnote: 8 Among the bizarre behavior exhibited by the four Russian siblings, the Bs cite "pack behavior"; fighting with and biting of each other and the Bs' other children; self-abuse; soiling their clothes; and various instances of violence and rage.

Footnote: 9Typically, "respite care" envisions the short-term placement of a child outside of the child's home environment in order to permit the child's parent(s) or guardian(s) and the child a temporary reprieve from a stressful familial situation. Respite care is often sought by families who have children with severe physical, emotional, or mental difficulties as a type of "cooling off" period before the family relationship becomes irreparably damaged. Although foster care also involves the placement of a child outside of his/her home environment, "foster care" generally contemplates a more lengthy period of separation between a child and his/her family. Foster care is often employed as a temporary placement for children whose parent(s) or guardian(s) have been charged with child abuse and/or neglect or who are awaiting final adoptive placement.

Footnote: 10 It appears from the record that, at the time they accepted the four B children into their home for respite care, the Ss already had seven children in their home who had joined their family by adoption.

Footnote: 11 The S family speaks minimal Russian because they previously had housed a child of Russian descent. In addition, a Russian exchange student, who speaks both English and Russian, is currently residing with the Ss.

Footnote: 12The Ss represent that only Mrs. S met the Bs when they brought their four children to the S home for respite care as Mr. S was not at home at that time.

Footnote: 13 The Bs had, in fact, sought treatment for their four Russian children from a mental health professional in the Parkersburg area. They were denied services, however, when the professional ascertained the nature of the children's problems and determined that he could not treat them.

Footnote: 14 By contrast, the Ss claim that, although they had agreed to continue providing respite care for the Bs' four children, the parties had not agreed upon an ending date for such care.

Footnote: 15 *Mrs. S claims that she originally had planned to take the four B children to the library in addition to her other children, but, at the last minute, was concerned that she could not handle all of the children by herself. Mr. S then agreed to take the four B children for ice cream. He claims that he did not stop when the Bs attempted to "flag him down" because he had never met them and did not know who they were.*

Footnote: 16 *An affidavit by Mrs. S attached to the emergency custody order indicates that the S family wished to "safeguard the well-being" of the four B children and intended to "file a Petition seeking [their] adoption."*

Footnote: 17 *The record indicates that the DHHR could not approve the S home as an appropriate foster care placement for the four B children, in part, because the number of children living in the S household exceeded the permissible number of children contemplated by the DHHR's foster care standards. As a result of the DHHR's concerns over potential liability problems under these circumstances, Judge Hill vested both legal and physical custody of the B children in the Ss.*

Footnote: 18 *Since our acceptance of this original jurisdiction proceeding, we have received a report by the DHHR summarizing that agency's inquiry into the parties' allegations. The report indicates that the S family has an acquaintance who is originally from Moscow and who served as an interpreter during the case worker's interview with the four B children. The children reported various instances of emotional cruelty and physical mistreatment while residing in the B household. Believing the interpreter to be biased in favor of the S family, the case worker requested a second, neutral interpreter to assist with a second interview of the children. The second interview provided some indication that the children had been coached to relate various stories of abusive treatment and inappropriate discipline to the case worker if they wanted to remain in the S household. The case worker further determined that the B family and the Gladney Center had been cooperating to ensure appropriate treatment for the children's attachment displacement disorder upon their re-placement in Texas. Gladney also appears to have found a new adoptive family for the children that would permit the four siblings to remain together. The new adoptive family seems to be very eager to accept these children into their home and appears to understand and appreciate the difficulties that may arise in caring for these emotionally challenged children. In addition, the new adoptive family has demonstrated a great appreciation for the children's ethnic heritage as they have been familiarizing themselves with Russian culture and learning to speak Russian. Further evidence indicates that the B family has received approval from the West Virginia Deputy Compact Administrator of the Interstate Compact on the Placement of Children to proceed with the proposed relinquishment and re-placement. Finally, inquiry into the appropriateness of the S family as a potential adoptive family for the four children led the case worker to believe that if the S family had requested, through the DHHR, to provide foster care for these children, the DHHR would not have permitted such an arrangement. Inquiry into the S family's history indicated several*

previous allegations of abuse and neglect against that family and against children residing in that home, although the record does not indicate that any of these charges is currently under investigation.

Footnote: 19 At this juncture, we note that the West Virginia Department of Health and Human Resources [DHHR] participated in the presentation of this original jurisdiction proceeding before this Court. In addition, Childplace, Inc., and Burlington United Methodist Family Services, Inc., appeared as Amici Curiae herein. As both the DHHR and Amici Curiae present arguments concurring with those asserted by the petitioners, we will hereinafter refer collectively to all of these parties' arguments as those advanced by the Bs.

Footnote: 20 The Bs further challenge the Ss' standing in this case claiming that the Ss had a contractual agreement whereby they agreed not to interfere with the parental rights of those parents whose children had been placed with them for respite care. Because the existence of such a contract is not clear from the record presently before this Court and because we can resolve this matter on other grounds, we decline the Bs' invitation to address further this particular argument.

Footnote: 21 We do not, at this juncture, pass upon the adequacy of the allegations of abuse and neglect contained in the Ss' petition. Instead, we note generally that while such factual allegations may not sufficiently allege abuse and neglect at the time a particular petition is filed, the petitioner may later amend his/her petition to include more specific grounds. See W. Va. R. Proc. for Child Abuse & Neglect Rule 19.

Footnote: 22 We note, though, that our holding today is in no way intended to abrogate our prior holding that a parent may not relinquish his/her parental rights while he/she is the respondent or defendant in a child abuse and neglect proceeding. See Syl. pt. 2, Alonzo v. Jacqueline F., 191 W.Va. 248, 445 S.E.2d 189 (1994) ("Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.").

Footnote: 23 While the Ss bolster their argument that the B s' intended conduct constitutes abandonment rising to the level of abuse and neglect by referring to the "imminent danger" phraseology contained in W.Va.Code § 49-1-3(e), we cannot base our decision upon this rationale. The situations in which this phrase is utilized throughout the abuse and neglect statutes do not contemplate the fact pattern presently before this Court. See, e.g., W.Va.Code § 49-2D-3 (1989) (Repl.Vol.1996) (dispensing with pre-removal hearing requirement when child is in "imminent danger"); W.Va.Code § 49-5-8 (1997) (Supp.1997) (permitting a law enforcement official to take a child into custody under emergency circumstances where the child is in "imminent danger"); W.Va.Code § 49-6-3 (1996) (Repl.Vol.1996) (permitting award of temporary custody

where child is in "imminent danger," and there exist no reasonable alternatives to removing child from his/her home). For the same reasons, we cannot adopt the Ss' argument that the Bs' intention to relinquish their parental rights amounts to mental and emotional injury of the children because such relinquishment would, necessarily, result in the uprooting of the four children from the S household and their relocation to some unknown and unfamiliar new residence. Although the Ss cite numerous case authorities for this contention, we simply cannot agree that the abuse and neglect law of this State contemplates, either as abandonment or as abuse and neglect, a parent's voluntary relinquishment of his/her child for adoption.

Footnote: 24 Although the statutory waiting period, which requires a birth parent to wait seventy-two hours after the birth of his/her child before executing a relinquishment or consent, is not directly applicable to the instant facts, the holding of the circuit court in the proceedings below potentially affects this statutory requirement, as well. See W.Va.Code § 48-4-3a (1997) (Supp.1997). Were we to permit the circuit court's characterization of an intent to relinquish parental rights as grounds for abuse and neglect to persist, this construction could conceivably permit an abuse and neglect petition to be filed against a birth parent, contemplating adoption, before the statutory waiting period has expired.

Footnote: 25 We commend the guardian ad litem for her appearance in this action and appreciate her efforts on behalf of the children involved in this case. Nonetheless, we are unable to abide by her suggestion that the best interests of the children demand their continued placement with the Ss. Not only are we troubled by the numerous allegations of abuse and neglect against the Ss, and the guardian's failure to address these charges in her recommendation, but we also are wary of the legal precedent that may result from such a holding in this case.

Footnote: 26 The speedy resolution of this matter in terms of the petitioners' relinquishment of their parental rights and the children's prompt re-placement is imperative as we typically attempt to resolve quickly those matters involving abuse and neglect and child custody. See, e.g., W.Va.Code § 49-6-2(d) (1996) (Repl.Vol.1996) (encouraging prompt resolution of child abuse and neglect proceedings); Carter v. Carter, 196 W.Va. at 245 n. 7, 246, 470 S.E.2d at 199 n. 7, 200 (admonishing that child custody matters should be resolved "in a timely fashion in order to minimize the trauma to innocent children"); West Virginia Dep't of Health & Human Resources ex rel. Wright v. David L., 192 W.Va. 663, 671, 453 S.E.2d 646, 654 (1994) (ordering expedited resolution of child custody issue); Syl. pts. 1 and 5, In the Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991) (emphasizing priority of child abuse and neglect cases to safeguard the interested child's well-being).

184 W. Va. 60, 399 S.E.2d 460

Supreme Court of Appeals of West Virginia

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES

v.

PEGGY F. and James F., Parents; Jammie F., Waikiki F., Cassaundra S., Gemini F., Cherish F., and Reginald F., Infants; and Donald S., Parent.

No. 19719

Nov. 13, 1990

SYLLABUS BY THE COURT

1. "*W.Va.Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

2. "Under W.Va.Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984)." Syllabus Point 3, *State ex rel. W.Va. Dep't of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

John G. Ours, Petersburg, for Peggy F., and James F., Parents; Jammie F., Waikiki F., Cassaundra S., Gemini F., Cherish F., and Reginald F., Infants; and Donald S., Parent.

Roger W. Tompkins, Atty. Gen., Robert Schulenberg, Asst. Atty. Gen., Attorney General's Office, Charleston, for West Virginia Dept. of Human Services.

PER CURIAM:

Peggy F. See footnote 1 appeals from an order of the Circuit Court of Hardy County which terminated her parental rights to five of her minor children and placed a sixth child in the temporary custody of the Department of Human Services (DHS). See footnote 2 The circuit court found that Peggy F. was guilty of neglect and abuse of her children and that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected in the near future. We agree and affirm the order of the circuit court.

Peggy F. is the mother of eleven children, six of whom are the focus of the current litigation. She has a history of involvement with DHS dating back to at least 1982. She has previously had her parental rights to two other children terminated.

DHS has received repeated referrals regarding the living conditions at Peggy F.'s home and the behavior of her children. Various criminal acts by the children have been reported, including assault, attacking neighbors with rocks and belts, shoplifting, and fighting. DHS workers visiting the home have found it to be filthy, without heat, and not adequately safeguarded for young children. Neighbors have reported that the children beg for food and dig through garbage. Two of the youngest children were found wandering outside in the cold in their nightclothes and wet diapers, wearing no shoes. The small children have been seen playing in the street and have been found several blocks from home without supervision. Neighbors report that the children are often left at home alone.

In April of 1988, Peggy F. voluntarily placed the six children who are the subject of this litigation in the custody of DHS in order to enter St. Joseph's Hospital for psychiatric treatment. She remained at St. Joseph's until May 11, 1988.

The children, ranging in age from one-and-one-half to fifteen years of age, were assigned to foster care and group homes, as their individual needs dictated. At the time of their placement, the children all demonstrated emotional problems. These problems variously manifested themselves in nightmares, bedwetting, overeating, thumb sucking, crying, fear of adults, fear of males, fear of hot items, and extreme resistance to authority. During their time in the custody of DHS, most of the children have shown some improvement.

On May 18, 1988, DHS filed a petition for temporary custody in the Circuit Court of Hardy County, alleging abuse and neglect of the children. See footnote 3 A hearing on the petition was held on July 7, 1988, at which time Peggy F. was granted a six-month improvement period in accordance with W.Va.Code, 49-6-2(b) (1984). See footnote 4 DHS was ordered to prepare and submit a family case plan as required by W.Va.Code, 49-6D-3 (1984). See footnote 5

The family case plan was filed on August 3, 1988. The plan required: (1) psychological evaluation of Peggy F., with possible amendments to the plan to be made based upon the findings, (2) visitation with the children by Peggy F., (3) maintenance of specified housekeeping standards by Peggy F., (4) participation by Steve D. (Peggy F.'s new husband) in specified aspects of the plan, (5) resolution of Peggy F.'s shoplifting charge followed by continued compliance with the law, (6) eradication of any drugs or alcohol in Peggy F.'s home, and nonattendance by the subject children at any functions where alcohol or drugs were used, (7) submission by Peggy F. of a child-care plan for all the children during her working hours, (8) maintenance of stable employment by Peggy F. and Steve D. and submission of a monthly budget, (9) procurement of a home with adequate living space to accommodate the children, and (10) completion of a parenting skills program by Peggy F. and Steve D.

Hearings on the success of the improvement period were held on May 16 and 22, 1989. At the hearings, DHS contended that, although Peggy F. may have minimally met the requirements of the case plan, she had made no substantive changes and would not provide a suitable home for the children. DHS presented testimony of the evaluating psychologist who opined that Peggy F. had an antisocial personality and that symptoms of a similar disorder were apparent in several of the children. In addition, several social workers testified as to Peggy F.'s inability or unwillingness to properly act as a parent for her children. Peggy F. argued that she had substantially complied with the requirements of the case plan. She testified on her own behalf and offered the testimony of Steve D.

On June 6, 1989, the circuit court entered an order terminating Peggy F.'s parental rights to five of the six children. The exception was Cassaundra S., who was over the age of fourteen and did not want Peggy F.'s rights terminated. In compliance with W.Va.Code, 49-6-5(a)(6) (1988), See footnote 6 the court did not terminate her mother's rights over her objection. She was to remain in the temporary custody of DHS until her eighteenth birthday.

The court found that Peggy F. was guilty of neglect and abuse of her children and that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future. The court believed that, although Peggy F. had made some changes to comply with the case plan, there was no change in her underlying attitude to indicate that it would be in the best interest of the children not to terminate her parental rights.

Peggy F. appeals from that order of the circuit court, asserting that the weight of the evidence does not support its findings and conclusions. We disagree. There was ample evidence offered to support the court's conclusion that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected in the near future.

Stephen Townsend, the evaluating psychologist, noted in his report that Peggy F. accepts treatment or help when required to do so, but reverts to her earlier behaviors shortly after the termination of any such program. He diagnosed her as having a personality disorder resulting in antisocial behavior and an inability to conform to social norms. After conducting psychological tests on the children, he found them to have extensive emotional problems. However, the younger the child, the less severe the problems. This led him to conclude that the children were taking on Peggy F.'s personality disorder. Maxine Kessell, a social worker who had worked with Peggy F. for many years, testified that Peggy F. would do well for a period, then slip back into poor parenting. She stated that she had not noted much improvement in Peggy F.'s parenting abilities over the years. The guardian ad litem who represented the children recommended against continuation of

the improvement period and agreed that termination of the parental rights was in the best interest of the children.

DHS is not obligated, as Peggy F. would have us believe, to prove its case by showing that she failed to comply with the family case plan. In Syllabus Point 1 of *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981), we held:

> "*W.Va.Code,* 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden."

DHS was, therefore, entitled to prove its case by showing that, despite Peggy F.'s compliance with specific aspects of the case plan, she had failed to improve her overall attitude and approach to parenting. The circuit court did not err in finding Peggy F. to be an unfit parent.

The circuit court complied with the requirements of the statute in terminating Peggy F.'s parental rights. She requested, and was granted, a six-month improvement period, in accordance with W.Va.Code, 49-6- 2(b) (1984). See footnote 7 As we noted in Syllabus Point 3 of *State ex rel. West Virginia Department of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987):

> "Under W.Va.Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W.Va.Code, 49-6D-3 (1984)."

Such a plan was prepared for Peggy F. and filed with the circuit court. The purpose of the family case plan, as set forth in W.Va.Code, 49-6D-3(a), as we emphasized in *Cheryl M.*, 177 W.Va. at ----, 356 S.E.2d at 186, " 'is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.' " (Footnote omitted). The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute, and as DHS argued, the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan.

For the foregoing reasons, we affirm the decision of the Circuit Court of Hardy County.

Affirmed.

Footnote: 1 *We follow our traditional practice in domestic relations and other cases which involve sensitive facts and do not use the last names of the parties so as not to stigmatize them or their children. See, e.g., Nancy Viola R. v. Randolph W., 177 W.Va. 710, 356 S.E.2d 464 (1987); West Virginia Dep't of Human Serv. v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985).*

Footnote: 2 *The fathers of the children, James F. and Donald S., were also named in this action at the circuit court level. James F. initially attempted to gain custody of the children, but ultimately abandoned that cause and took no part in any further proceedings in this matter. Donald S. never made any appearance. The circuit court took no action regarding the parental rights of these men, and they are, therefore, not parties to this appeal.*

Footnote: 3 *During her stay in the hospital, Peggy F. had been evicted from her home. Although she sought the return of her children who were then in the custody of DHS, she had no home to offer them. This apparently caused DHS to institute the neglect petition.*

Footnote: 4 *W.Va.Code, 49-6-2(b) (1984), provides:*
"In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter."

Footnote: 5 *W.Va.Code, 49-6D-3 (1984), provides, in pertinent part:*
"(a) Within the limits of funds available, the department of human services shall develop a family case plan for every family wherein a person has been referred to the department after being allowed an improvement period under the provisions of subsection (b), section two, or subsection (c), section five [§ 49-6-2(b) or § 49-6-5(c)], article six of this chapter, and for each family referred to the department for supervision and treatment following a determination by a court that a parent, guardian or custodian in such family has abused or neglected a child.... The family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems. Every family case plan prepared by the

department shall contain the following: "(1) A listing of specific, measurable, realistic goals to be achieved;
"(2) An arrangement of goals into an order of priority;
"(3) A listing of the problems that will be addressed by each goal;
"(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;
"(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;
"(6) A list of the services which will be provided;
"(7) Time targets for the achievement of goals or portions of goals;
"(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and
"(9) A designation of when and how often tasks will be performed.
"(b) In cases where the family has been referred to the department by a court under the provisions of this chapter, and further action before the court is pending, the family case plan described in subsection (a) of this section shall be furnished to the court within thirty days after the entry of the order referring the case to the department, and shall be available to counsel for the parent, guardian or custodian and counsel for the child or children."

Footnote: 6 W.Va.Code, 49-6-5(a)(6) (1988), provides, in pertinent part:
"Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination."

Footnote: 7 The pertinent part of W.Va.Code, 49-6-2(b), is set out in note 4, supra.

164 W. Va. 496, 266 S.E.2d 114

Supreme Court of Appeals of West Virginia

In re R. J. M.

No. 14612

March 25, 1980 and May 9, 1980.

SYLLABUS BY THE COURT

1. As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va.Code, 49-6-5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

2. Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 (1977) may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) (1977) that conditions of neglect or abuse can be substantially corrected.

C. Blaine Myers, Parkersburg, for R. J. M.

Chauncey H. Browning, Jr., Atty. Gen., Billie Gray, Asst. Atty. Gen., Charleston, for Circuit Court, Wood County.

NEELY, Chief Justice:

This is an appeal from an order of the Circuit Court of Wood County terminating parental rights. The appellant parents make general assignments about the insufficiency of the evidence and argue that the circuit court should have granted them an improvement period pursuant to W.Va.Code, 49-6- 5(a)(4) (1977) and 49-6-5(c) (1977). Since their court appointed attorney did not move for an improvement period pursuant to W.Va.Code, 49-6- 2(b) (1977) the appellants alleged ineffective assistance of counsel. We disagree and affirm.

R.J.M., the child involved in this proceeding, was born on 8 January 1978. Her mother was 16 years old at the time of R.J.M.'s birth and had left the tenth grade about a year earlier when she was pregnant with her first child Shawn. Shawn was also the subject of a neglect petition at the time of the proceedings under consideration here regarding R.J.M.,

and while the record does not develop the facts surrounding Shawn's removal from the home, it is apparent that he had been placed under the supervision of the Department of Welfare. R.J.M.'s father is an unskilled laborer suffering from a nervous condition.

In early March 1978, Gladys Foster, a mother of three and a grandmother, acquainted with the parents in this case because one of her daughters was living with them, noticed that R.J.M. looked ill and hungry. On her next visit, Mrs. Foster brought a jar of baby food and a jar of milk, which she fed to R.J.M. Mrs. Foster noticed no feeding problems or vomiting and in response to Mrs. Foster's suggestion that R.J.M. looked ill the mother promised to take her daughter to a doctor.

At about the same time, Isodene Alkire, a Department of Welfare homemaker who was working in the subject home, became concerned about R.J.M.'s health. She noticed that the child looked pale and unhealthy and observed that the mother had stopped giving her baby the prescribed formula and was substituting a mixture of Karo syrup, water and milk. When Mrs. Alkire asked the mother if she had discussed this change with her pediatrician she replied that she had not, but had made the change because the baby was spitting up the formula. Mrs. Alkire reported her concern to Larry Lowe of the Department of Welfare Child Protective Services Office who had been working with the parents since December 1977 concerning problems with their older child Shawn. On 3 March 1978, both Mrs. Alkire and Mr. Lowe visited the subject home and discussed with the mother the necessity for proper feeding of her child.

On 15 March 1978, Mrs. Alkire came to the subject home and took the mother and R.J.M. to Camden Clark Hospital in Parkersburg where R.J.M. was seen by Dr. Robert Crooks, a pediatrician, who found the baby to be suffering from gastroenteritis, dehydration and "failure to thrive" (malnutrition). R.J.M.' s skin showed the wrinkling and dryness common to undernourished children, a remarkable condition since R.J.M. had been a healthy normal seven pound eleven ounce baby at birth. R.J.M. had gained only one ounce in the two months since birth. The history given by the mother to Dr. Crooks was that her baby had been healthy until three days earlier when she developed diarrhea, began vomiting, and refused to eat. This was the first time the infant had been seen by a doctor since her birth.

R.J.M. was discharged from the hospital two weeks later, by which time her weight had increased by almost half to ten pounds ten ounces. Mr. Lowe, alerted by hospital staff members to the mother's apparent unwillingness to participate in a feeding program planned by Dr. Crooks, tried to discuss the matter with the mother before she took R.J.M. home, but found her uncooperative. He explained that the mother appeared not to understand the need for consistent feeding.

Mr. Lowe sought to maintain contact with the family following R.J.M.'s discharge from the hospital and during the next several weeks he made numerous attempts to visit the mother and R.J.M. which were to no avail. Remembering that the mother was to bring R.J.M. for an appointment with Dr. Crooks on 4 April, he went to the doctor's office to await her arrival. The appointment was never kept and when asked about it the mother explained that she had forgotten. Mr. Lowe waited for the mother again at Dr. Crook's office on 7 April but again she did not come. On 10 April Mr. Lowe discovered that the parents had moved from their previous address. Three days later he located the mother at the home of a relative, in Belpre, Ohio.

Despite his many attempts to remain in touch with the family, Mr. Lowe was unable to locate them again until 24 April 1978 when he received a telephone call from Mr. and Mrs. Harry Love of Parkersburg, West Virginia. They informed Mr. Lowe that R.J.M. had been left in their care and was ill and in need of medical attention. R.J.M.'s parents could not be located and Mr. Lowe responded by arranging for the Department of Welfare to be given emergency temporary custody.

Later that same day, Mr. Lowe received a telephone call from the mother. She declined to divulge her whereabouts, but explained that the purpose of her call was to inform Mr. Lowe and the Department of Welfare that R.J.M. was in Ohio. She expressed dismay when Mr. Lowe informed her that her daughter was in the custody of the Department of Welfare and in a foster home. That same day R.J.M. was seen by Dr. Crooks who discovered that she was not ill but weighed only ten pounds five ounces, a loss of five ounces since her discharge from the hospital less than one month earlier.

Mr. Lowe tried eleven times during the following weeks to contact the parents in order to discuss R.J.M. with them, all to no avail. On 12 May 1978 he filed a neglect petition on behalf of R.J.M. and at the preliminary hearing the circuit court found probable cause to believe that the allegations in the petition were correct and ordered custody to continue in the Department of Welfare. At the close of the preliminary hearing counsel for the parents expressed his intention to move for an improvement period. The court scheduled a hearing on the motion, but at the hearing the motion was withdrawn without explanation and psychiatric examinations of both parents requested instead.

The adjudicatory hearing, held on 9 June 1978, resulted in a termination of the parental rights of the appellants. The court found by clear and convincing proof that R.J.M.'s illness, malnutrition and abandonment were the result of her parents' refusal to care and provide for the child and that there was

> . . . no reasonable likelihood (sic) that the conditions of neglect or abuse can be substantially corrected in the near future as ar e necessary for the welfare of the child in that the parents have refused and not responded to or

> followed through with a reasonable reha bilitative effort of social, medical and other rehabilitative agencies designed to reduce and prevent the neglect of the child evidenced by the continua tion of substantial and repeated acts of neglect after efforts were made by the West Virginia Departm ent of Welfare, by the nurses at the hospital a nd by various other such agencies to supply the needed assistance to the family to avoid the neglect.
> . . . that the mother is of average to above average intelligence, the father is of average intelligence, both of whom are able to grasp the nature and character of their failure to properly care for the child and the consequences thereof, and are able to understand a nd respond to the assistance, support, and help offered to them by the various child welfare agencies, and that the parents have, as disclosed by the evid ence, willfully failed and refused to accept such services to th e substantial detriment of the health, welfare and wellbeing of the child, and the substa ntial endangerment of the child' s physical condition.

We conclude that the Court's findings of fact are amply supported by the evidence and further conclude from the records that every possible opportunity was given to these parents to behave in a responsible way toward their child. While the record does not reveal trial counsel's continued insistence upon an improvement period, the record does reveal that such an insistence, under the facts and circumstances of this case, would have been a vain act.

Starvation is a particularly insidious type of child abuse; if the parents in the case before us had routinely flogged their child to within an inch of her life the legitimacy of the trial court's action would never been questioned. An infant less than a year old is at the utter mercy of the adults around her and unless her needs are anticipated by the parents they will be unmet, since the child is incapable of articulating her demands. W.Va.Code, 49-6-2(b) (1977) provides:

> In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The c ourt shall allow such an improvement period unless it finds com pelling circumstances to justify a denial thereof, but m ay require tem porary custody in the state departm ent or another agency during the improvement period. (Emphasis supplied by Court.)

Certainly it must have been obvious to all concerned that when these parents: (1) had permitted the child to come very close to starvation which was only averted by the intervention of outside authorities; (2) had contumaciously declined to follow the advice of qualified physicians and the Department of Welfare after the child's life had been

jeopardized; and (3) had negligently or deliberately missed doctor appointments and concealed themselves from representatives of the Department of Welfare, a reasonable person would conclude that permitting this child to return to their custody would threaten the child's life. In a case such as this where return of the child to the parents might result in their absconding the jurisdiction and removing the child from effective supervision, there are certainly compelling reasons to justify the denial of an improvement period.

In addition, where a child is under the age of three immediate termination without an intervening period employing a less drastic alternative is more reasonable than in other cases. A child of that age has a far greater susceptibility to illness; the child is not as irrevocably attached to his parents; and, numerous placements may severely retard the child's ability to form lasting attachments. At the early stage of development a child needs close interaction with an adult fully committed to helping the child's emotional as well as physical development See footnote 1 and, it is difficult for foster parents to fulfill this role because they often fear forming a deep emotional attachment to the child. See footnote 2

Furthermore, this Court finds that the trial court did not abuse its discretion or deny the appellants due process when it selected the most drastic remedy provided by W.Va.Code, 49-6-5 (1977), namely termination of parental rights, because all of the requirements for finding that "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" as set forth in Code, 49-6-5(b) (1977) were met. That section provides that no reasonable likelihood that conditions of neglect or abuse can be substantially corrected shall mean that:

> . . . (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan designed to lead to the child's return to the parent or parents; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the neglect or abuse of the child, as evidenced by the continuation of substantial or repeated acts of neglect or abuse after the provision of such services; . . .

For the reasons set forth above the judgment of the Circuit Court of Wood County is affirmed.

Affirmed.

Footnote: 1 A. Clark-Stewart, Family Variables Related to Children's Development: Review and Recommendations, (Report for Carnegie Commission on Children 1974).

Footnote: 2 Standards Relating to Abuse and Neglect 8.3, Juvenile Justice Standards Project (1977); and Wald, State Intervention on Behalf of "Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 21 Stan.L.Rev. 623, 695-96 (1976).

MILLER, Justice, dissenting:

I dissent, since I believe the majority has ignored testimony in the record which casts substantial doubt upon the claim that this infant girl has been neglected. Furthermore, the majority has also ignored the order of precedence mandated by W.Va.Code, 49-6-5, by upholding the imposition of the most severe statutory disposition, that of total, permanent severance of the parental rights, when less restrictive alternatives could adequately protect the child.

The majority's statement of the facts of this case is not supported by the record. Foremost, it is important to note that as a whole, the medical testimony contradicts, rather than supports, a finding of neglect.

The infant's physician was Robert D. Crooks, a Parkersburg pediatrician. Dr. Crooks provided the only medical testimony in the record. He examined the infant on two occasions, first on March 15, 1978, when the mother, accompanied by Isodene Alkire, a welfare worker, brought the baby to the hospital for treatment. Dr. Crooks found the two-month-old infant to be suffering from "gastroenteritis, dehydration, and failure to thrive." He explained that gastroenteritis is a virus, "a condition of the intestinal tract characterized by either vomiting or diarrhea and usually by weight loss due to loss of fluid." Rather than attributing the infant's illness to starvation resulting from a pattern of parental neglect, as the majority characterized his testimony, Dr. Crooks found the condition to be wholly attributable to the onset of gastroenteritis a few days prior to his examination of the child. See footnote 1

Dr. Crooks' second examination of the infant was on April 24, 1978, the day the Welfare Department seized custody of the child and brought her to Dr. Crooks for examination. Dr. Crooks examined the infant on that date and found her to be in good health. See footnote 2

Despite the favorable medical report, the Department of Welfare kept the baby and initiated proceedings to terminate parental rights. As of the time of final disposition on June 9, 1978, the infant had not been taken to a physician again. Dr. Crooks' testimony remains unrebutted by any other medical evidence. Thus, the State has terminated the

parental rights of an infant found to be in good health, on the ground that the infant was starving.

In light of the fact that the medical testimony is favorable to the parents, the remaining lay testimony faces a heavy burden in order to nullify the medical testimony and meet the statutory requirement of abuse or neglect "proven by clear and convincing proof." W.Va.Code, 49-6-2(c).

Three persons in addition to Dr. Crooks and the infant's parents testified at the termination hearing: Gladys Foster, an acquaintance of the family who had observed the infant on several occasions, and Isodene Alkire and Larry Lowe, both employees of the Department of Welfare.

The majority accurately describes Mrs. Foster's testimony insofar as it includes her impression that the infant appeared ill and hungry. The majority, however, ignores her testimony relating to her observations that the infant always appeared clean and freshly clothed. See footnote 3 Thus, the only negative aspect of Mrs. Foster's testimony, that the infant appeared to be ill and hungry, was contradicted by Dr. Crooks, an acknowledged expert.

The majority states that Mrs. Alkire "became concerned about R. J. M.'s health," and "noticed that the child looked pale and unhealthy." Mrs. Alkire's testimony, however, contains no remarks to this effect. Her only testimony is a brief narration of a conversation she had with the infant's mother concerning its diet. The testimony gives no indication of apparent illness or lack of health, or other evidence of the presence or absence of proper care.

The remaining testimony in the record is that of Mr. Lowe, who described his difficulty over a period of time in locating the family. It is important to note, however, that nothing in the record indicates that the family was under any legal obligation to maintain contact with the Department of Welfare regarding the infant. There is no testimony that the family was enrolled in a Department of Welfare program beyond the fact that the Department had initiated proceedings to gain custody of the infant's older brother. See footnote 4

The record is clear that the Department of Welfare had nothing to do with the infant's admission to the hospital on March 15. This admission was voluntarily undertaken by the mother, and the infant was released from the hospital to the mother on March 28. Most of the contact that Mr. Lowe had with the case was after the baby was released from the hospital.

It is apparent that the mother and Mr. Lowe had not maintained a good relationship regarding the infant. The presence of ill will might well be understood in light of the fact that Lowe was concurrently directing proceedings initiated by him for custody of the family's older child. The mother testified that she had attempted to elude Lowe because of her fear that the Department was also trying to take custody of R. J. M. a fear that cannot be considered groundless in light of the proceedings against the older child and the fact that the Department, upon locating the infant, did indeed seize custody and begin adoption proceedings, despite the medical findings of the infant's good health.

Because the medical testimony is favorable to the parents and the lay testimony is meager and equivocal, the finding of neglect by clear and convincing proof, as required by W.Va.Code, 49-6-2, is clearly erroneous.

Even if the finding had been correct, however, the dispositional requirements of W.Va.Code, 49-6-5, were violated. W.Va.Code, 49-6-5(a), sets forth six possible dispositions following a petition for abuse or neglect of a child. See footnote 5 The dispositions are listed in order of least to most severe, and this statute requires the court to adhere to that order, giving precedence to the least restrictive alternative that is appropriate to the circumstances. The last alternative, termination of all parental rights, is proper only where the preceding five alternatives are inadequate to redress the situation and only "(u)pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W.Va.Code, 49-6-5(a)(6). Even then, under W.Va.Code, 49-6- 5(b), in order to find "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected," the court must find one of five specific grounds to exist in order to sever all parental rights. See footnote 6

The record demonstrates that no such ground existed. First, there was no evidence that the parents were addicted to intoxicating liquor or drugs. W.Va.Code, 49-6-5(b)(1). Second, it cannot be found that the parents "willfully refused" to cooperate in the "development of a reasonable foster care plan," since no such plan was ever offered them by the court. W.Va.Code, 49-6-5(b)(2). Third, it cannot be charged that the parents refused to follow through "with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative agencies," since no such alternative was ever developed and offered to the parents. W.Va.Code, 49-6- 5(b)(3). Fourth, there is no showing that the parents abandoned the child. W.Va.Code, 49-6-5(b)(4). Nor does the fifth ground exist, that the parents repeatedly or seriously physically abused the child. W.Va.Code, 49-6- 5(b)(5).

It is obvious from the foregoing statutory standards that with the exception of a finding of alcohol or drug abuse, abandonment or serious physical abuse, none of which were present in this case, the court is not empowered to sever the parental rights without some

prior attempt at a rehabilitative program. In the present case, there is a complete lack of any such showing of a rehabilitative plan. Absent this, the majority is in clear error when it affirms the trial result.

The proper disposition, if we assume clear and convincing proof of neglect, would have been that the court fashion some type of rehabilitative program involving the parents and, if necessary, place the infant in the temporary custody of the Department of Welfare. Should the parents have refused to cooperate in the rehabilitative program, the court, at a later hearing, could have then made the determination to totally sever the parents' right.

The statutory expression of the parents' right to the least restrictive alternative before custody of their children can be permanently terminated is buttressed by constitutional grounds. In Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551, 558-59 (1972), the United States Supreme Court, in a related context, stated that:

> "It is plain that the interest of a pa rent in the com panionship, care, custody and m anagement of his or her childre n ' come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive m erely from shifting econom ic arrangem ents.' Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513, 527 (10 A.L.R.2d 608) (1949) (Frankfurter, J., concurring).
> "The Court has frequently em phasized the importance of the family. The rights to conceive and to raise one' s children have been deem ed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, (626), 67 L.Ed. 1042, (1045), (29 A.L.R. 1446) (1923), ' basic civil rights of m an,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, (1113), 86 L.Ed. 1655, 1660, (1942), and ' (r)ights far more precious . . . than property rights, ' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct . 840, (843), 97 L.Ed. 1221, (1226) (1953). 'It is cardinal with us that th e custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, (442), 88 L.Ed. 645, (652) (1944). The integrity of the fam ily unit has found protection in the Due Process Clause of the Fourteenth Am endment, Meyer v. Nebraska, supra, (262 U.S.) at 399, (43 S.Ct. at 626), (67 L.Ed. at 1045), the Equal Protection Clause of the Fourteenth Am endment, Skinner v. Oklahom a, supra, 316 U.S. at 541, 62 S.Ct. (1111) at 1113, (86 L.Ed. at 1660), and the Ninth Am endment, Griswold v. C onnecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510, (522) (1965) (Goldberg, J., concurring)."

The principles set forth in Stanley were acknowledged by this Court in a previous child neglect decision, In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). In Willis, the

Court added that "We hasten to affirm that Article III, Section 10 of the West Virginia Constitution in equal measure protects this fundamental right of parenthood. See In re: Simmons Children, 154 W.Va. 491, 177 S.E.2d 19 (1970)." (157 W.Va. at 237, 207 S.E.2d at 137).

Where the constitutionally protected interests of parenthood are at stake, overriding considerations permit impingement only to the minimum extent necessary to achieve the particular goal. See Note, Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine, 12 Tulsa L.J. 528 (1977). The right to the least restrictive alternative in a child neglect proceeding relegates permanent termination of parental rights to the far end of a long list of alternative dispositions. See Derdeyn, Rogoff and Williams, Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care, 31 Vand.L.Rev. 1165 (1978); Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stanford L.Rev. 623 (1976). These are the precise standards set out in W.Va.Code, 49-6-5, but the majority has chosen to ignore them.

A careful reading of the majority opinion in comparison with the case record and our law demonstrates that the majority's analysis is both cursory and mistaken on this vital issue. A great injustice has been visited upon both the parents and the child, and we have allowed it to become irrevocable.

I have been authorized to state that Justice McGraw joins me in this dissent.

Footnote: 1 *"Q (By the prosecuting attorney) Now, from your examination and the history you took, Doctor, you were not able to reach an opinion as to the cause of this condition of the child on that date, were you? "A No. We assumed that it was a viral type of gastroenteritis, as most are.*
"Q But that was you made that opinion based on other cases which you have observed?
"A Yes, and on the medical examination.
"Q (By the court) So I do understand you would the viral infection also be responsible for the dehydration and failure to survive (sic) and the weight of the child as you found it at that particular time?
"A Yes. Gastroenteritis is a cause of weight loss, and failure to thrive would be explained at that time from that immediate episode of gastroenteritis."

Footnote: 2 *At the preliminary hearing on May 22, 1978, Dr. Crooks testified as follows:*
"Q (By the prosecuting attorney) Since the child was released from the hospital on March 28th of this year, have you seen the child since?
"A Yes.
"Q And when was that?
"A I saw this child again on April the 24th, 1978.

"Q And what was the condition of the child on that day?
"A The child appeared to be active, in good health. I found at that time no disease.
"Q (By the attorney for the child) Between the time you saw her on the 15th and the time that you saw her again on April 24th, what in your opinion caused the change from all these feeding problems and so forth to active good health, in your opinion?
"A I think well, the absence of any viral disease plus the fact that the baby was on a different formula."

Footnote: 3 Mrs. Foster gave the following testimony at the preliminary hearing:
"Q Was the child clothed?
"A Yes. "Q When you saw it at all times?
"A Yes.
"Q What condition were his (sic) clothes in?
"A Clean.
"Q Clean?
"A They were.
"Q Did the child smell bad or look very
"A She just looked bad that is all.
"Q Was she dirty, the child?
"A She didn't look dirty to me."

Footnote: 4 The record contains scant information regarding the basis for the proceeding involving custody of the older child, other than the fact that it had been initiated.

Footnote: 5 W.Va.Code, 49-6-5(a), provides:
"(a) Following a determination pursuant to section two (s 49-6-2) of this article, the court may request from the state department information about the history, physical condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:
"(1) Dismiss the petition;
"(2) Refer the child and the child's parent or custodian to a community agency for needed assistance and dismiss the petition;
"(3) Return the child to his own home under supervision of the state department;
"(4) Order terms of supervision calculated to assist the child and the child's parent or custodian which prescribe the manner of supervision and care of the child and which are within the ability of the parent or custodian to perform;
"(5) Upon a finding that the parents or custodians are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court; "(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the

near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

Footnote: 6 W.Va.Code, 49-6-5(b), states:
"As used in this section, 'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' shall mean that: (1) The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parenting ability has been seriously impaired and the parent has not responded to or followed through with recommended and appropriate treatment which could have improved the capacity for adequate parental functioning; (2) the parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable foster care plan designed to lead to the child's return to the parent or parents; (3) the parent or parents have not responded to or followed through with reasonable rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the neglect or abuse of the child, as evidence by the continuation of substantial or repeated acts of neglect or abuse after the provision of such services; (4) the parent or parents have abandoned the child; or (5) the parent or parents have repeatedly or seriously physically abused the child."

180 W. Va. 190, 375 S.E.2d 823

Supreme Court of Appeals of West Virginia

In the Matter of the ABUSE AND NEGLECT OF R.O. and R.O.

No. 17931

Decided Dec. 21, 1988

SYLLABUS BY THE COURT

1. " 'As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W.Va.Code,* 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.' Syl. pt. 1, *In re R.J.M.,* [164] W.Va. [496,] 266 S.E.2d 114 (1980)." Syllabus point 1, *In the Interest of Darla B.,* 175 W.Va. 137, 331 S.E.2d 868 (1985).

2. " 'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va.Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va.Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.,* [164] W.Va. [496], 266 S.E.2d 114 (1980)." Syllabus point 4, *State v. C.N.S.,* 173 W.Va. 651, 319 S.E.2d 775 (1984).

Barbara L. Baxter, Wheeling, for appellant.

Charles G. Brown, III, Atty. Gen., for the Dept. of Human Services.

PER CURIAM:

This is an appeal from a final order of the Circuit Court of Ohio County, entered September 10, 1986, which terminated the parental rights of the appellant, G.O. The appellant contends that the evidence was not sufficient to support the termination of her parental rights. We remand for a further hearing.

On November 16, 1984, Debra Hannan, a protective services worker for the West Virginia Department of Human Services (hereinafter, "the Department"), filed a petition with the Circuit Court of Ohio County, seeking to have two children, age 3 and age 1, declared neglected or abused children and removed from the custody of their natural mother, the appellant herein, until the conditions giving rise to the petition had been

corrected. By order dated the same day, the court ordered the children placed in the temporary care, custody and control of the Department and appointed separate counsel to represent the children and the appellant.

A preliminary hearing was conducted on November 19, 1984, at which time the appellant requested an improvement period. In response, the Department prepared a family case plan See footnote 1 designed to correct the conditions existing at the time the petition was filed. Among other things, the family case plan required the appellant to submit to a psychological evaluation and to any counseling or treatment recommended as a result of such evaluation and to participate in parenting classes and cooperate with suggestions for improving her parenting skills. The appellant subsequently waived her right to a preliminary hearing and agreed to accept the Department's recommendation of a three-month improvement period in which to implement the provisions of the family case plan. By order dated January 28, 1985, the circuit court adopted the Department's recommendations and family case plan, but ordered the children to remain in the Department's temporary custody during the improvement period.

An adjudicatory hearing was conducted on March 21, 1985. The evidence showed that at the time the petition was filed, the appellant had failed to provide the children with suitable housing, furnishings or clothing, had failed to supervise or discipline the children and had refused numerous offers of assistance, including offers of needed food and milk for the children. In addition, the evidence strongly suggested that the appellant was suffering from a serious mental illness which required hospitalization and which, without treatment, rendered her incapable of caring for and potentially harmful to the children.

The evidence adduced at the adjudicatory hearing also showed that although the appellant had obtained appropriate housing and home furnishings during the improvement period and was financially able to maintain the home and care for the children, her overall progress on the family case plan was poor. The appellant appeared not to understand why the children were taken from her and had repeatedly refused to accept inpatient evaluation and treatment recommended by the Department, mental health professionals and her own attorney, usually accusing those making such suggestions of mental illness. On this evidence, the Department moved for termination of the appellant's parental rights.

At the conclusion of the hearing, the court found that the children had been neglected at the time the petition was filed, but that such neglect was not willful in that the appellant was suffering from a mental illness or deficiency. The circuit court also found that the appellant had failed to cooperate in the development of a family case plan or to follow through with the rehabilitative efforts of the Department and other social and mental health agencies and that her mental illness rendered her incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills. Although any of these findings would have supported termination of the appellant's parental rights, under

W.Va.Code § 49-6-5(b) [1984], the statute then in effect, the circuit court, as an alternative, granted the appellant a three-month post-dispositional improvement period and strongly urged her to seek psychological evaluation and treatment. In July 1985, the improvement period was extended for an additional three months. The children remained in the temporary custody of the Department during this time.

A further hearing was conducted on September 26, 1985, at which time the evidence showed that the appellant had continued to reject any suggestion or offer of psychological evaluation or treatment and was given to hostile and intemperate outbursts in front of the children. The case was submitted for final disposition on October 17, 1985.

It does not appear, however, that any further action was taken until July 17, 1986. At a hearing conducted on that date, counsel for the Department advised the court that a mental hygiene petition had been filed against the appellant and that she had been committed to a mental health facility approximately one month before. Counsel for the appellant joined in the Department's motion that a final decision be rendered upon the record as it existed at that time. At the conclusion of the hearing, the court indicated its intention to terminate the appellant's parental rights.

Two further hearings were conducted for the purpose of advising the appellant, following her release from the hospital, of the court's decision and of her rights regarding appeal. No evidence was adduced at either of these hearings. By order dated September 10, 1986, the court found that the appellant had failed to cooperate in the development of the family case plan, had not responded to reasonable rehabilitative efforts and was mentally or emotionally unable to provide properly for the children. The court found no reasonable likelihood that the conditions of neglect could be substantially corrected in the near future and that termination of the appellant's parental rights was necessary for the welfare of the children. See footnote 2 It is from this order that the appellant brings this appeal.

The appellant does not seriously contend that the trial court erred in finding that the children were neglected at the time the petition was filed. Instead, her principal contention is that the evidence did not warrant termination of her parental rights. In this regard, the appellant asserts that the evidence did not show any reasonable likelihood that the conditions of neglect could be substantially corrected in the near future.

The dispositional phase of child abuse or neglect proceedings is governed by W.Va.Code § 49-6-5 (1988 Cum.Supp.), which provides a number of dispositional alternatives the circuit court may consider, giving precedence to the least restrictive alternative appropriate in the circumstances.

> "As a general rule the least restrictiv e alternative regarding parental rights to custody of a child under *W.Va.Code,* 49-6-5 [1977] will be employed; however, courts are not required to e xhaust every speculative possibility of parental im provement before term inating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illne ss, need consistent clos e interaction with fully committed adults, and are likely to have their emotional and physical development retarded by num erous placements." Syl. pt. 1, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syllabus point 1, *In the Interest of Darla B.,* 175 W.Va. 137, 331 S.E.2d 868 (1985).

> Termination of parental rights, the most restrictive alternative, is authorized only "[u] pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially correct ed in the near future, and when necessary for the we lfare of the child." W.Va.Code § 49-6- 5(a)(6). The State m ust produc e clear and convincing evidence to support this finding before the court m ay sever the custodial rights of the natural parents. *State v. Carl B.,* [171] W.Va. [774] , 301 S.E.2d 864 (1983); *In re Willis,* [157 W.Va. 225, 207 S.E.2d 129 (1978)].

State v. C.N.S., 173 W.Va. 651, 656, 319 S.E.2d 775, 780 (1984).

Here, it appears that the principal reason for the termination of the appellant's parental rights was her serious mental illness and her repeated refusal to seek professional evaluation and treatment. The existence of a mental illness which renders a parent incapable of exercising proper parenting skills or of improving the adequacy of such skills and the failure of a parent to respond to rehabilitative efforts of the Department are circumstances warranting a finding of "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" under the statute. See footnote 3 We have also expressly recognized that the inability or unwillingness of a parent to obtain medical treatment to correct a mental deficiency that endangers the welfare of his or her children will support a termination of parental rights. *See State v. Scritchfield,* 167 W.Va. 683, 280 S.E.2d 315 (1981).

There is evidence in the record which indicates that the appellant was suffering from a serious mental illness which affected her ability to care for the children. Despite the urging of the Department, the court, mental health professionals and her own attorney, the appellant repeatedly refused to acknowledge this fact or to seek treatment to correct her condition. We tend to believe that these facts support the ruling of the circuit court.

We are troubled, however, by the lack of a record concerning the appellant's condition following her hospitalization. Although it appears that hospitalization was forced upon the appellant, it seems clear that she had been released from treatment prior to entry of the final order. If the appellant's parental rights are to be terminated for her inability or unwillingness to seek treatment for her mental illness, the requirements of due process would appear to require the Department to put into evidence the results of such treatment when it was ultimately forced upon her.

Accordingly, we believe the appropriate remedy in this case is to remand for further evidentiary development. The hearing on remand is solely for the purpose of adducing evidence as to the appellant's mental state following her hospitalization in July of 1986. If the evidence shows that the appellant has not, in the past two years, sought out and responded to professional treatment, the order of the circuit court terminating her parental rights should stand.

REMANDED.

NEELY, J., dissents.

Footnote: 1 Under W.Va.Code § 49-6-2(b) (1986 Replacement Vol.), the Department is required to prepare a family case plan in accordance with the provisions of W.Va.Code § 49-6D-3 (1986 Replacement Vol.) any time an improvement period is authorized. See State ex rel. W.Va. Department of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987).

Footnote: 2 The Department had also petitioned for termination of the parental rights of the children's natural father on grounds of abandonment. Counsel was appointed to represent the father in the proceedings below, but was unable to locate him. The court subsequently terminated the father's parental rights, and no appeal has been taken from this ruling.

Footnote: 3 W.Va.Code § 49-6-5(b) provides, in pertinent part:
As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:

* * *

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect

of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

* * *

(6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

_____

No. 33086

_____

FILED
November 30, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: RANDY H., APRIL G., BRITTANY T., and MEGAN H.

Appeal from the Circuit Court of Hardy County
Hon. Andrew N. Frye, Jr., Judge
Case Nos. 05-JA-11, 05-JA-12, 05-JA-13, 05-JA-14

REVERSED AND REMANDED

Submitted: October 3, 2006
Filed: November 30, 2006

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JUSTICE STARCHER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode

of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

4. "Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions." Syllabus Point 4, *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997).

5. To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

6. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and

the case remanded for compliance with that process and entry of an appropriate dispositional order." Syllabus Point 5, *In Re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

Starcher, J.:

In this appeal from the Circuit Court of Hardy County, we are asked to examine a brief order dismissing a petition alleging abuse and neglect of four children. As set forth below, we reverse the circuit court's dismissal order, and remand the case for additional proceedings.

I.
Facts & Background

On July 28, 2005, the Department of Health and Human Resources ("the DHHR") filed an abuse and neglect petition that initiated this case. The petition alleged that the respondent, Lucinda H.,[1] had through her actions placed four children in her custody – Megan H., Brittany T., April G., and Randy H.[2] – in imminent danger. Lucinda H. was well

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the last names of the parties. *See In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

[2]Respondent Lucinda H. was the custodian and mother of the oldest of the four children, Megan H., who was sixteen years old. The next oldest child in the respondent's custody, Brittany T. (age eight), was the daughter of Rhonda G. and Charles T. (a man apparently unrelated to the respondent, but who was also raised by the respondent). The third child, April G. (age four), is the child of Rhonda G. and James G. The fourth child in the respondent's custody is Randy H. (age two), who is the child of the respondent's twenty-six-year-old daughter Mary Ann C. and the respondent's now-ex-husband Simon H.

The DHHR's petition in this case also appropriately names as respondents, in addition to Lucinda H., the various natural parents of the children: Calvin H., Rhonda G., Charles T., James G., Mary Ann. C., and Simon H.

known to the DHHR, as she had been the subject of at least twenty-seven referrals since 1997, and her parental rights to six other children had previously been terminated (four voluntarily, two involuntarily).

In its petition, the DHHR alleged that on July 25, 2005, eight-year-old Brittany took four-year-old April and two-year-old Randy into the bathroom, locked the door and gave them a prescription drug. The person watching the children at the time, a thirty-five-year-old registered sex offender named Kevin P., called 911 and the children were taken to a hospital for treatment. Hospital personnel found that the children had a lice infestation, and found that April had a yeast infection, had bruising on her inner thigh, and acted in a manner suggestive of sexual abuse. Hospital personnel also saw Kevin P. holding hands and acting affectionate toward the oldest child, sixteen-year-old Megan, in the hospital waiting area. The DHHR applied for and received an emergency order from the circuit court, and immediately took custody of all four children.

The DHHR appears to have visited Lucinda H.'s residence, and Lucinda H. complied with the DHHR's suggestions. A counselor from Family Preservation Services described Lucinda H. as cooperative, the home as neat and hygienic, provided with utility service, appropriately furnished with food in a clean kitchen, and appropriate for young children. More importantly, the counselor found that Lucinda H. had child-proofed the home, and had placed medications in a lockbox which was locked, with the keys put away so the children in the household could not get to them.

On August 2, 2005, the DHHR stated that it could not present testimony or other evidence in support of its petition, and moved to dismiss the petition. The circuit court denied the motion, but returned the children to Lucinda H.'s custody.

On September 8, 2005, the respondent moved to dismiss the petition "for lack of presentation of testimony." The DHHR agreed with the motion and "indicated that the Respondent [Lucinda H.] had complied with services, and stated that they were prepared to dismiss the petition."

The guardians *ad litem* for the children, however, objected and demanded a deeper investigation of the case by the DHHR because of the numerous prior referrals and terminations involving Lucinda H. Further, it appears that the guardians *ad litem* were concerned that Lucinda H. was endangering the children by exposing them to known sex offenders. The guardians *ad litem* assert that, in addition to Kevin P., the respondent associated with Calvin H. – Megan's natural father – who was also a registered sex offender. Further, they assert that the respondent's ex-husband, Simon H., is a convicted sex offender who might return to live in the respondent's household after a term in prison; while the record is unclear, it appears that Simon H. pleaded guilty to the offense of "lewd and lascivious behavior" apparently arising from his affair with a person to whom he was not married: Lucinda H.'s twenty-six-year-old daughter Mary Ann. C. *See W.Va. Code*, 61-8-4 [1923].

The DHHR subsequently amended the petition to allege aggravated circumstances. However, the DHHR presented no additional evidence in support of the petition.

On November 3, 2005, over the objections of the guardians *ad litem*, the circuit court dismissed the amended petition in a brief order. The order states:

> Whereupon, the Court heard statements from all parties in regards to the status of this matter.
>
> Whereupon, the Counsel for Respondent Lucinda [H.] made a Motion to Dismiss the Amended Petition. Thereafter, counsel for the children objected to this Motion; said objection appears more fully in the official tape recordings of these proceedings.
>
> After due consideration, the Court GRANTED the Motion to Dismiss; counsel for the children's objection thereto was noted and saved.

The guardians *ad litem* now appeal that order, and ask this Court to compel the circuit court to conduct a more thorough review of the case. The DHHR did not file a petition for appeal, but has submitted a letter indicating that the DHHR does not oppose the relief sought by the guardians *ad litem*.

II.
Discussion

Two principles guide our deliberations in this case. First, the findings of a circuit court in an abuse and neglect case will not be set aside by a reviewing court unless they are clearly erroneous – that is, although there is evidence to support the findings, the

reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Second, "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

The respondent, Lucinda H., argues that, in five hearings over two months, the DHHR produced no testimony in support of its petition. Counsel for the respondent asserts that she remedied the situation complained of in the petition, mainly by placing locks on the prescription medication in the house. The respondent therefore contends that the circuit court did not abuse its discretion in dismissing the DHHR's petition.

The guardians *ad litem* for the children, however, do not dispute the respondent's position. Instead, the guardians *ad litem* assert that the DHHR failed to fully investigate the possibility that Lucinda H. may be exposing the children in her care to future harm from the various sex offenders with whom she associates. The guardians *ad litem* argue that the respondent failed to prove, by clear and convincing evidence, that she was committed to providing a safe environment for the children.

The burden of proof is statutorily placed upon the proponent of the allegations contained in the petition alleging abuse and neglect, namely the DHHR. *See W.Va. Code*, 49-6-2(c) [2006] (the circuit court must make findings of fact and conclusions of law "based upon conditions existing at the time of the filing of the petition and proven by clear and

convincing proof."). *See also*, Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981); ("*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources] in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.'"). *In accord*, Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990) (*per curiam*); Syllabus Point 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995); Syllabus Point 3, *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997).

We are moved, however, by the argument of the guardians *ad litem* that the DHHR failed to act upon the allegations that further harm might come to the children because of respondent Lucinda H.'s alleged association with several sex offenders. We believe, from our review of the abuse and neglect statutes and procedural rules, that the circuit court had the authority to compel the DHHR to further investigate these allegations and had a duty to make findings of fact and conclusions of law regarding those allegations.

Abuse and neglect cases are troublesome to this Court because of "the very nature of the painful issues involved." *In re Jeffrey R.L.*, 190 W.Va. 24, 35-36, 435 S.E.2d 162, 173-74 (1993). Although courts are expected to give the highest priority and degree of attention to child abuse and neglect cases, we are still compelled to "explore stronger approaches to facilitate the fair and expeditious handling of child abuse and neglect cases." *Id.*

Recent amendments to the *Rules of Procedure for Child Abuse and Neglect Proceedings* – in conjunction with similar amendments to the *Rules of Practice and Procedure for Domestic Violence Civil Proceedings* and the *Rules of Practice and Procedure for Family Court* – have emphasized that judges are to take a pro-active role in facilitating the prompt, fair, but thorough resolution of cases which involve the abuse or neglect of a minor child.[3] For example, Rule 3a of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [2006], states that when a circuit court receives a written report of potential abuse or neglect from a family court judge, the circuit court is required to enter an administrative order "directing the Department [of Health and Human Resources] to submit to the court an investigation report or appear before the court in not more than 45 days . . . to show cause why the Department's investigation report has not been submitted[.]" The DHHR can then submit a report of its investigation, or – if the circumstances warrant – file

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[3]For example, Rule 48 of the *Rules of Practice and Procedure for Family Court* [2006] states that, if a family court judge has reasonable cause to believe a minor child involved in a proceeding before the court has been abused or neglected, then the judge must do two things. First, the judge must send a written report of the suspected abuse or neglect to the DHHR. Second, the judge must send a copy of the written report to the appropriate circuit judge and the prosecuting attorney. The family court judge retains jurisdiction over the minor child until the DHHR and/or the circuit court acts upon the reported abuse or neglect. *See also*, Rule 16a of the *Rules of Practice and Procedure for Domestic Violence Civil Proceedings* [2006] (stating that if, during the course of a domestic violence proceeding a family court judge "has reasonable cause to suspect any minor child involved in the proceedings has been abused or neglected," then the judge must make a report as set forth in Rule 48).

Rule 48 goes on to require the DHHR to investigate the family court judge's report, and promptly report back to the family court, the circuit court, and the prosecutor what action, if any, should be taken.

an abuse and neglect petition. If the DHHR chooses not to file a petition, but the circuit court believes that the information presented "suggest[s] circumstances upon which the Department would have a duty to file a civil petition," the circuit court may then issue a show-cause order to determine whether the DHHR has erred in its choice.

Furthermore, we believe that the protection-oriented concerns that undergird our cases and rules in this area clearly dictate that if a circuit court discerns that the evidence developed during an abuse or neglect proceeding is suggestive of additional abuse or neglect not encompassed by the allegations contained in the DHHR's petition, then the circuit court has the discretion to compel the DHHR to amend its petition to encompass that evidence. As we stated in Syllabus Point 4 of *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997):

> Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

See also, Rules of Procedure for Child Abuse and Neglect Proceedings Rule 19 [1997] ("The court may allow the petition to be amended at any time until the final adjudicatory hearing begins[.]")

To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, we therefore hold that if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause

exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

Furthermore, the statutes and rules pertaining to abuse and neglect actions mandate that a circuit court make findings of fact and conclusions of law, in writing or on the record, as to whether or not a child is abused and/or neglected. *See*, *e.g.*, *W.Va. Code*, 49-6-2(c) [2006] ("At the conclusion of the hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected[.]"); Rule 27, *Rules of Procedure for Child Abuse and Neglect Proceedings* [2000] ("[T]he court shall make findings of fact and conclusions of law, in writing or on the record, as to whether the child is abused and/or neglected[.]").

When a circuit court has not fully complied with the statutes and rules of procedure pertaining to cases under Chapter 49, this Court will not hesitate to reverse the circuit court. As we stated in Syllabus Point 5 of *In Re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001):

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for

> compliance with that process and entry of an appropriate dispositional order.

The record in the instant case indicates that the DHHR did not thoroughly pursue the allegations of potential danger asserted by the guardians *ad litem*, and the circuit court was imbued with the authority to compel a thorough review of such allegations. Further, while these allegations were presented to the circuit court, the court failed to make specific findings of fact or conclusions of law regarding their validity.

Based upon our review of the parties' arguments, upon the record, and upon the brevity of the circuit court's final order, we find that the result which will best protect the interests of the children is to reverse the circuit court's decision and remand the case. On remand, the court should compel the guardians *ad litem* and the DHHR to give full investigation to the allegations of potential harm raised by the guardians, and should thoroughly discuss those allegations in the court's future order[s].

III.

The circuit court's November 3, 2005 order is reversed, and the case is remanded for further proceedings.

Reversed and Remanded.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED
March 24, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30599

IN RE: REBECCA K. C.

Appeal from the Circuit Court of Ritchie County
Hon. Robert L. Holland, Jr., Judge
Case No. 01-JA-01

AFFIRMED

Submitted: January 15, 2003
Filed: March 24, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS

"'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 1, *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 476 S.E.2d 548 (1996).

Per Curiam:

In the instant case, we uphold a decision by the Circuit Court of Ritchie County terminating a mother's parental rights.

I.

The pertinent facts of the instant case can be presented fairly simply.

On June 30, 2001, the appellant, Susie Pearl K. C., gave birth to a female child, Rebecca K. C.[1] On July 18, 2001, the appellee, the West Virginia Department of Health & Human Resources ("DHHR") filed a petition seeking the termination of the appellant's parental rights.[2]

W.Va. Code, 49-6-5b(a)(3)(1998) requires the DHHR to file such a petition (subject to certain exceptions) if there has been a prior involuntary termination of rights to another of a parent's children. In the appellant's case, as we detail further *infra*, her parental rights to three other children were terminated by court order in 2000.

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[1]As is our custom in certain sensitive cases, we use initials instead of last names.

[2]*W.Va. Code*, 49-6-5 [2002] sets forth a hierarchy of dispositional options that are available to a circuit court upon a finding that a child is neglected or abused. The final option is to ". . . terminate the parental, custodial or guardianship *rights and/or responsibilities* of the abusing parent . . .." *W.Va. Code*, 49-6-5(a)(6) [2002] (emphasis added). This statutory language recognizes the constellation of legal obligations, duties, responsibilities, authorities, and powers that make up the parent-child relationship.

After several hearings, the circuit court determined that Rebecca K. C. was neglected and/or abused; that there was no reasonable likelihood that the appellant, even with assistance, could correct the conditions that led to the finding of neglect and/or abuse; and specifically that granting an improvement period to see if those conditions could be corrected would be pointless. Consequently, on December 27, 2001, the court entered an order terminating the appellant's parental rights with respect to Rebecca K. C.

The appellant appeals this order, arguing first that the circuit court erred in determining that the child was neglected or abused; and second, assuming *arguendo* that this determination was correct, that the court erred in determining not to grant the appellant an improvement period to attempt to correct the conditions that led to the finding of neglect and/or abuse.

Inasmuch as the evidence regarding both of these determinations was basically the same, we shall combine them for purposes of our discussion.

II.

We begin by briefly discussing the applicable standards of review for civil abuse and neglect proceedings. In Syllabus Point 1 of *State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W.Va. 456, 475 S.E.2d 548 (1996), this Court stated:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether

> such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

We further stated in *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 562, 490 S.E.2d 642, 649 (1997) that:

> The above standard of review requires deference by this Court to the findings of a circuit court in a civil abuse and neglect proceeding. The critical nature of unreviewable intangibles justify the deferential approach we accord findings by a circuit court.

In *In re Emily & Amos B.*, 208 W.Va. 325, 540 S.E.2d 542 (2000), we recognized that "the circuit court is the better-equipped tribunal" to make the substantive determination regarding termination of parental rights. 208 W.Va. at 340, 540 S.E.2d at 557 (rejecting the contention that incarceration should automatically result in termination; holding that incarceration was a factor for the court to consider in exercising its discretion).

III.

As previously stated, the appellant's (and her former husband's) parental rights with respect to their three older children were involuntarily terminated by the Circuit Court of Ritchie County on September 14, 2000 – following the filing of a neglect and abuse petition

in 1999. In this earlier case, severe adverse conditions for the children were found to exist; the appellant and her then-husband were granted an improvement period, and an extension of that period. However, they did not comply with a family plan that included assistance from social service agencies, and the court ultimately concluded that – even with available assistance – they could not adequately parent their children. The merits of this earlier finding are not challenged in the instant case.

The appellant was born in 1977; she is illiterate and mildly retarded. She has a history of alcohol abuse, unstable and abusive relationships, and sexual victimization. When the child at issue in the instant case was born, the appellant had ended her marriage to the father of her three other children, and she was living at her parents' house.[3] She did not obtain pre-natal medical care until the third trimester of her pregnancy.

The record from the previous neglect and abuse case demonstrated that the appellant has serious limitations in her judgment and her ability to parent, even with assistance.

The appellant testified in the instant case that she and her child intended to live with her parents. At first blush, this testimony might seem to argue that the circuit court should have viewed her ability to parent her fourth child, with their assistance, in a different light; and that the court should have afforded her an improvement period.

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[3]The father of the child at issue in the instant case (not the appellant's former husband) was determined, after the termination order in the instant case, to be an individual who is apparently not asserting any claim to parental rights; presumably his rights have been or are to be terminated voluntarily.

However, her living with her parents was in fact not a positive factor for the appellant, in terms of their supporting or enhancing her ability to adequately parent her child. The contrary is true. The children's maternal grandparents were originally named as respondents in the earlier neglect and abuse proceedings. Many of the adverse conditions in the previous case occurred while the appellant was living with her parents and away from her then-husband. Those conditions included unsanitary and dangerous surroundings and neglect of illnesses.

An in-depth psychological evaluation of the appellant and her parents that was prepared in the earlier case concluded that the appellant's parents did not appreciate the deficiencies in the appellant's parenting of her (previously terminated) children, and that her parents contributed to and enabled those deficiencies. The appellant's mother, in her testimony before the circuit court in the instant case, disputed any need to make any changes or improvements in her or the appellant's parenting. The psychological report in the earlier case stated that "[t]here appears to be a significant basis for concern about ongoing neglect and abuse should the appellant return to that setting (the appellant's parents' home)."[4]

It is axiomatic that the fact that conditions of neglect or abuse have been found for one child, or that a parent has had their rights terminated with respect to one child, does

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[4]Additionally, when the circuit court set the DHHR's petition for a preliminary hearing, on July 30, 2001, the appellant appeared in court and said she did not know the whereabouts of the child (this was apparently untrue). The appellant's mother testified that she did know the child's location, but that she would not tell the court; whereupon she was briefly held for contempt. The authorities soon located the child, who had been concealed at a relative's home.

not, standing alone, mean that such conditions necessarily exist for another child, or that a parent's rights to another child are to be automatically terminated. But such facts may be considered, and have considerable weight, in determining the issue of termination of a second child.

In *In Re Christina L. and Kenneth J. L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), this Court reiterated that the fact of neglect or abuse of another child by a parent does not relieve the DHHR of its burden to show by clear and convincing evidence that a child who is the subject of a petition is neglected or abused – although the abuse or neglect of another child may be relevant evidence with respect to the condition of a child that is the subject of a petition. *Id.* 194 W.Va. at 452, 460 S.E.2d at 698.

Syllabus Points 3-5 of *In re George Glen B., Jr.*, 207 W.Va. 346 (2000), 532 S.E.2d 64, state:

> 3. "Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently-born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12 (1998). Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syllabus Point 2, *In re George Glen B.*, Jr., 205 W.Va. 435, 518 S.E.2d 863 (1999).
>
> 4. "When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a

> sibling pursuant to West Virginia Code § 49-6-5b(a)(3) (1998), prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syllabus Point 4, *In re George Glen B., Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999).
>
> 5. The presence of one of the factors outlined in W.Va.Code, 49-6-5b(a)(3) [1998] merely lowers the threshold of evidence necessary for the termination of parental rights. W.Va.Code, 49-6-5b(a)(3) [1998] does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to *W.Va.Code*, 49-6-2 [1996].

In abuse and neglect cases, circuit courts have limited procedural discretion. For example, they *must* move cases quickly to decision, so that the rights and interests of children, parents, government officials, and other interested parties do not languish. This Court has not hesitated in overruling circuit courts when we perceived procedural errors – such as a court's refusal to consider the merits of a petition, or to hear certain evidence, or to move a case to a decision in a timely fashion, or to create a reasonably specific improvement period. *See, e.g.*, *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997) (reversing a trial court's finding that there was no neglect and abuse because the court did not consider relevant evidence developed during an improvement period; *see also In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001) (reversing a trial court's termination of parental relationship because the court did not make findings and follow proper procedures).

On the other hand, as set forth in Part II. *supra*, of this opinion, a circuit court's substantive determinations in abuse and neglect cases on adjudicative and dispositional matters – such as whether neglect or abuse is proven, or whether termination is necessary – is entitled to substantial deference in the appellate context. *See, e.g., In re Johnathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996) (upholding a decision by a circuit court to dismiss an abuse and neglect petition and reunify a child with a parent who acknowledged abuse, where the natural parents had cooperated with therapeutic intervention that was ultimately deemed beneficial); *see also State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 490 S.E.2d 642 (1997) (trial court was not clearly erroneous in going against the wishes of the DHHR and the guardian *ad litem* by ordering an improvement period).

Applying the foregoing principles to the instant case, the record shows that the circuit court had ample evidence from which to conclude, using a clear and convincing standard, that the appellant – even with help from social service agencies and her parents – could not be reasonably expected to properly parent her child.[5]

We emphatically reiterate that a prior termination does *not* mean that a parent does not have the right to "another chance" – in the form of an improvement period or otherwise. To the contrary, regardless of past events, unless the evidence is clear and convincing to the effect that an improvement period would be pointless, our law requires that one must be ordered. But if a court, and it would be expected that this would be the rare case,

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[5]The appellant showed marginal interest in her child during visitations during the pendency of the proceedings.

determines based upon all of the evidence, including evidence from any prior abuse and neglect cases, and clearly enunciates in reasoned findings, that there is clear and convincing proof that conditions constituting abuse and neglect are present, and if the court clearly explains why it has concluded that an improvement period would be pointless, then the court *may*, in its discretion, decide not to grant such a period. That is what occurred in the instant case, and we conclude that the court acted within its discretion.

IV.

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

Affirmed.

192 W. Va. 421, 452 S.E.2d 737

Supreme Court Of Appeals Of West Virginia

IN THE INTEREST OF: RENAE EBONY W., a Child
Under the Age of 18 Years

No. 22556

Submitted: November 29, 1994
Filed: December 21, 1994

SYLLABUS BY THE COURT

Where a child is initially removed from the custody of his or her parents pursuant to West Virginia Code § 49-6-3 (Supp. 1994), and where such emergency taking is subsequently ratified on the basis of a finding of imminent danger, the child shall remain in the temporary legal and physical custody of the State or some responsible relative within the meaning of West Virginia Code § 49-6-3 and out of the alleged abusive home during the improvement period until the circumstances which constitute the imminent danger have ceased to exist, or the alleged abusing person has been precluded from residing in or visiting the home.

Guardian Ad Litem:
E. Kent Hellems
Gorman, Sheatsley & Co., L.C.
Beckley, West Virginia

For Paula W.:
Joe Noggy
Public Defender
Beckley, West Virginia

For Alonzo F.:
James M. Henderson
Abrams, Byron, Henderson & Richmond
Beckley, West Virginia

For Department of Health and Human Resources:
Christen Keller
Chief Deputy Prosecuting Attorney
for Raleigh County
Beckley, West Virginia

Workman, Justice:

This matter is before the Court on appeal from an order of the Circuit Court of Raleigh County entered June 2, 1994, ratifying the emergency removal of the

Appellant, Renae Ebony W., See footnote 1 an infant child, from her parents' custody, but returning the child to her parents' physical custody for a three-month improvement period. The issue raised by Appellant E. Kent Hellems, the infant's guardian ad litem, is the propriety of the court's granting of an in-home improvement period once the child had been taken under emergency circumstances constituting imminent danger to the physical well-being of the child. We hold that the lower court erred in returning Renae Ebony to the immediate physical custody of her parents during the improvement period. For the reasons stated, we reverse the lower court's order insofar as it continued custody of Renae Ebony in her parents. We further order that temporary custody of Renae Ebony continue in the Department of Health and Human Resources ("DHHR") and that Renae Ebony's parents both submit to psychological evaluations and both be granted liberal visitation with her during the course of the court-supervised three-month improvement period, the terms of which should be developed by the lower court on remand.

I.

Renae Ebony was born on December 22, 1993, to Paula W. and Alonzo F. The guardian ad litem contends that both of the child's parents are low-functioning and mentally-impaired individuals who met while attending vocational rehabilitation in Charleston, West Virginia.

On February 16, 1994, the DHHR received a child abuse complaint regarding Renae Ebony which was made by Helen F., the child's paternal grandmother. Ms. Nancy Forsberg of DHHR traveled to the child's home in Beckley, West Virginia, to conduct an initial investigation into the allegations of child abuse. Upon arriving at the child's home, Ms. Forsberg found the child, who was then less than two months old, living in a two-bedroom apartment occupied by as many as seven other people. During Ms. Forsberg's visit, Helen F. advised her that Paula W., the child's natural mother, had been mistreating the child. Specifically, Ms. F. advised Ms. Forsberg that the child's mother had been heard spanking the baby, cussing the baby and calling the baby "a bitch." The child's father told Ms. Forsberg that he had seen Paula W. shaking the baby.

The DHHR, recognizing that a problem did exist, entered into an arrangement with Paula W. whereby she would enter the Florence Crittendon Home ("Home") in Wheeling, West Virginia, with Renae Ebony to learn better parenting skills. Ms. W. entered the Home at the end of February and stayed for approximately two weeks, at which time she left with the child, allegedly to visit her ailing father. Ms. W. was scheduled to return to the Home on March 14, 1994, but she refused to do so and on March 16, 1994, the DHHR filed its Petition in the circuit court, thereby initiating the underlying child abuse and neglect proceeding. An order was entered

that same day, granting the DHHR temporary custody of Renae Ebony pending a hearing scheduled for March 17, 1994.

The March 17, 1994, hearing was held before Judge John C. Ashworth of the Circuit Court of Raleigh County for the purpose of hearing testimony to ratify the emergency taking of Renae Ebony by the DHHR. Michael Horton rendered testimony on behalf of the DHHR during the hearing. There were no other witnesses. At the close of the hearing, the Appellant recommended to the court that the child remain in the temporary legal and physical custody of the DHHR and that both of the child's parents undergo psychological evaluations. The court denied the Appellant's request, refused to ratify the emergency taking, and dismissed the case.

On March 24, 1994, a hearing was held on the motion of Appellant and the DHHR for reconsideration of the lower court's prior ruling. Several witnesses testified at this hearing. Helen F. testified that she initially contacted the DHHR regarding the allegations of abuse of Renae Ebony by her mother because she herself did not want to get into trouble if the child was injured. She also testified that she heard Paula W. yelling at the baby that she would "flush you down the toilet" or "throw you out the window" when the baby was less than one-month-old.

Stephanie F., the child's paternal aunt, also testified at the March 24, 1994, hearing. She testified that she was awakened one morning at approximately 2:30 a.m. by her boyfriend, who told her that he had actually seen Paula W. spanking the baby. Ms. Stephanie F., once awakened, witnessed this incident herself. She further testified that, during this same incident, she heard Ms. W. tell the child "shut up" or she would "stick" you. Ms. Stephanie F. characterized the blows as "hard-like" and stated that she could actually hear the baby being spanked.

At the close of the March 24, 1994, hearing, the guardian ad litem again requested that the lower court continue temporary custody of Renae Ebony with the DHHR and that the child's parents be ordered to undergo psychological evaluations. Although the lower court did reconsider its prior ruling and ratified the emergency removal of Renae Ebony from her parents' custody, See footnote 2 the court again refused to continue temporary custody of Renae Ebony with the DHHR, stating in-home placement was "the least intrusive alternative," See footnote 3 and placed the child's parents on a three-month improvement period. See footnote 4

Upon being advised of the court's ruling regarding temporary custody of Renae Ebony, the Appellant immediately moved the court for a stay of its order pending an appeal to this Court. The lower court denied the motion for stay. Thereafter, the Appellant filed a motion to stay the circuit court orders of May 27, 1994, and June

2, 1994, See footnote 5 which was granted by this Court. Consequently, temporary custody of Renae Ebony has remained with the DHHR pending this appeal.

II.

West Virginia Code § 49-6-3 (Supp. 1994), provides in part:

> Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the custody of the state department or a responsible relative, which may include any parent, guardian or other custodian pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child . . . .

In syllabus point one of In re Jonathan P., 182 W.Va. 302, 387 S.E.2d 537 (1989) we held:

> W. Va. Code, 49-6-3 (1984), authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by the Department of Human Services when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child.
>
> Id. at 302-03, 387 S.E.2d at 538.

Imminent danger to the physical well-being of the child is statutorily defined as:

> an emergency situation in which the welfare or the life of the child is threatened. Such emergency situation exists when there is reasonable cause to believe that any child in the home is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health or life of any child in the home:
>
> (1) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a babysitter or other caretaker; or
>
> (2) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome; or
>
> (3) Nutritional deprivation; or

> (4) Abandonment by the parent, guardian or custodian; or
>
> (5) Inadequate treatment of serious illness or disease; or
>
> (6) Substantial emotional injury inflicted by a parent, guardian or custodian; or
>
> (7) Sale or attempted sale of the child by the parent, guardian or custodian.
>
> W. Va. Code § 49-1-3(e) (Supp. 1994).

Both the paternal grandmother and the paternal aunt testified at the March 24, 1994, hearing that they witnessed more than one incident when Renae Ebony, a very young infant, was spanked by her mother. Nancy Forsberg, the DHHR investigator, testified that she was told by Alonzo F. that he had seen the mother shake the baby. Michael Horton, also of DHHR, testified at the March 17, 1994, hearing that Paula W. admitted to him that she had shaken the baby on more than one occasion. None of these adults, including the baby's father, seemed able to afford the child protection.

Counsel for the mother relies heavily on the fact that Renae Ebony bore no visible physical marks or injury discernible to the naked eye from the alleged abuse. What constitutes the imminent danger, however, is the grave potential for serious harm or even death to an infant who is subjected to the type of physical shaking described in this case. See footnote 6

The lower court's conclusion, therefore, that a reasonably available alternative to continuing temporary custody of Renae Ebony in the DHHR existed in the form of a DHHR supervised improvement period in the home is contrary to the evidence in the record. The mother's admitted practice of shaking the infant at issue, together with the inability or unwillingness of the other adults in the home to intervene, created too great a potential for great harm to this child.

* * *

Although we have previously discussed improvement periods in abuse and neglect cases, See footnote 7 we have not had occasion to discuss when such improvement periods should include physical custody of the child in-home versus out-of-home. West Virginia Code § 49-6-2(b) (Supp. 1994) provides that:

> In any proceeding under this article, any parent or custodians may, prior to final hearing, move to be allowed an improvement period of

> three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody with a responsible relative, which may include any parent, guardian, or other custodian, or the state department or other agency during the improvement period. . . .
>
> W. Va. Code § 49-6-2(b) (emphasis added).

In the ordinary abuse and neglect case filed under West Virginia Code § 49-6-1, the court must, upon appropriate motion, allow at least one improvement period unless it finds compelling circumstances to refuse such request. West Virginia Code § 49-6-2(b) leaves within the sound discretion of the trial court the question of whether the child or children who are the subject of the proceeding will remain in the custody of their parents or be placed in the temporary custody of a responsible relative, which may include any parent, guardian, or other custodian, or the state during the term of the court-imposed improvement period. Thus, even in the typical abuse and neglect case where there is no emergency taking, the court has the discretion to impose an out-of-the-home improvement period where custody is granted to a responsible relative or to the state during the temporary removal.

In a case involving an emergency taking, however, the statute requires placement of the child in a safe environment away from the abusing person:

> Provided, That where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in said home unless the alleged abusing person is or has been precluded from visiting or residing in said home by judicial order.
>
> W. Va. Code § 49-6-3(a) (Supp. 1994).

We therefore conclude that where a child is initially removed from the custody of his or her parents pursuant to West Virginia Code § 49-6-3, and where such emergency taking is subsequently ratified on the basis of a finding of imminent danger, the child shall remain in the temporary legal and physical custody of the state or some responsible relative within the meaning of West Virginia Code § 49-6-3, and out of the alleged abusive home during the improvement period until the circumstances which constitute the imminent danger have ceased to exist, or the alleged abusing person has been precluded from residing in or visiting the home.

For the foregoing reasons, we reverse the lower court's order to the extent that order returns physical custody of Renae Ebony to her parents. We further order that temporary custody of Renae Ebony continue with the DHHR, that both of the child's parents undergo psychological evaluation, and that the parents be granted the three-month improvement period, as previously directed by the circuit court.

We have spoken before about the importance of circuit courts crafting improvement periods in a manner designed to remedy the problem that led to the abuse and neglect action. See Carlita B., 185 W.Va. 613 at 625, 408 S.E.2d 365 at 377. There we stated:

> The goal [of improvement periods and family case plans] should be the development of a program designed to assist the parent(s) in dealing with any problems which interfere with his ability to be an effective parent and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the D.H.S. and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.
>
> Id. at 625, 408 S.E.2d at 377.

Consistent with our decision in Carlita B., we emphasize in this case that the status of the child and the progress of the parents be monitored on a monthly basis to ensure compliance with the specific goals set forth in the conditions of the improvement period. Id. at 625, 408 S.E.2d at 377. We note in this regard that West Virginia Code § 49-6-2(b) allows for a three to twelve month improvement period to remedy the alleged circumstances upon which the abuse and neglect proceeding is based. It would be wise of the circuit judge in drafting the court order imposing the terms and conditions of the improvement period to give himself the flexibility to extend the improvement period past the three month period if progress is being made, but the parents are not fully ready for restoration of custody. We also emphasize the importance of the court offering the parents wide opportunity for continued contact with this infant in crafting the conditions of the improvement period. As was noted in Carlita B., the level of interest a parent demonstrates in visiting his or her child says much about his or her potential to be a good parent. Id. at 628, 408 S.E.2d at 380. See footnote 8

Based on the foregoing, this case is reversed and remanded consistent with this opinion.

Reversed and remanded.

Footnote: 1 Consistent with our practice in cases involving sensitive matters, we identify the parties through the use of initials. See Benjamin R. v. Orkin Exterminating Company, Inc., 182 W. Va. 615, 390 S.E.2d 814, n.1 (1990) (citing In re Jonathan P., [182] W. Va. [302],[303] n.1, 387 S.E.2d 537 n.1 (1989)); State v. Murray, 180 W. Va. 41, 375 S.E.2d 405, n.1 (1988).

Footnote: 2 On March 24, 1994, the court reconsidered its refusal to ratify the emergency taking and did ratify the emergency taking by order entered June 2, 1994. Even though the trial court ratified the emergency taking, the court, in comments from the bench, indicated that he believed there was insufficient evidence of imminent danger to the child. Although the ratification of the emergency taking is not at issue here, we are compelled to note that the record supports a finding of imminent danger to this child.
In addition, as more fully set forth herein, the DHHR attempted to develop a reasonably available alternative to removal by arranging the residential parenting training at the Florence Crittendon Home, but the mother's refusal to complete the program left no other reasonably available alternative.

Footnote: 3 Generally, the least restrictive alternative available regarding parental rights to custody of a child is appropriately considered at the dispositional stage in child abuse and neglect cases. See W. Va. Code § 49-6-5 (Supp. 1994). The concept of least restrictive alternative may even be useful by way of analogy when dealing with improvement periods granted pursuant to a standard abuse and neglect petition filed under West Virginia Code § 49-6-1 (Supp. 1994). The concept, however, has little value in an emergency taking proceeding under West Virginia Code § 49-6-3 (Supp. 1994) where a child has been removed from the custody of its parents based on a finding of imminent danger. In such cases, the placing of the child in a safe environment away from the alleged abusing adult until the problems giving rise to imminent danger are remedied should be of the utmost concern to the court.

Footnote: 4 The terms of the improvement period were as follows:

1. Both Respondents shall submit to parenting skills[,] education and other counseling services under West Virginia Department of Health and Human Resources direction; both promptly shall receive psychological, psychiatric and parental evaluations at FMRS Mental

Health Council, Inc., with results promptly to be provided this Court and all parties.

2. Both Respondents, and the grandmother and all other persons residing with the infant or acting in a custodial capacity are herein restrained from using corporal punishment of any kind or nature upon the infant, or using any degree of force against her, including but not limited to spanking, striking, shaking, throwing; further, the Respondents and the other described parties are hereby restrained from cursing at or otherwise verbally abusing the infant; and the Respondents and other described persons are hereby notified, in open court in their presence, that each Respondent and every other household member has a duty to report to the Department of Health and Human Resources, or to police or to the State or Guardian ad Litem, any knowledge of any other person's prohibited conduct against the infant, and that failure to do so may subject the non-reporting party to prosecution.

3. Respondents shall cooperate with regular home monitoring by the Department of Health and Human Resources and with any home services deemed necessary by the Department of Health and Human Resources.

Footnote: 5The June 2, 1994, order entered by the trial court reinstating and ratifying the removal of the child is a cursory order which does not include findings of fact and conclusions of law consistent with the statutory requirements. We once again urge the trial courts to be more thorough in making findings of fact and conclusions of law in child abuse and neglect cases, and that theycomply with statutory requirements before entering orders.
This Court has repeatedly recognized that it is incumbent on all courts to be especially vigilant in protecting the welfare of children of the tender age of three years or less. See State v. Jessica M., 191 W. Va. 302, ___, 445 S.E.2d 243, 248 n.24 (1994) (specifically noting the child's age of two years, eleven months as being "of particular concern to this Court"); In re Jeffrey R.L., 190 W.Va. 24, 33, 435 S.E.2d 162, 171 (1993) (recognizing that "termination of parental rights is even more appropriate in cases where the welfare of a child less than three years of age is seriously threatened"); Carlita B., 185 W. Va. at 623, 408 S.E.2d at 375 (quoting various authorities on the critical importance of a child's first three years of life); Syl. Pt. 1, In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980) (holding that "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years. . . .").

Footnote: 6 The allegation of the shaking of Renae Ebony is of particular concern as every year thousands of babies suffer blindness, brain damage, or even death

from being shaken. A diagnosis of "shaken baby syndrome" may be difficult to make where there is a lack of any external signs. As Jack Showers, Ed. D., notes,

The term 'Shaken Baby Syndrome' (SBS) describes the consequences which occur when a young child's head is whiplashed back and forth during shaking. Babies can be easily injured when shaken. Their neck muscles aren't strong enough to control head movements, and rapid movement of the head can result in the brain being bruised from banging against the skull wall. Bleeding behind the eyes and in and around the brain occurs and can cause serious injury. Depending upon the vulnerability of the child and the severity of the shaking, consequences may include seizures, partial or total blindness, paralysis, mental retardation, or death. In cases of less violent and sometimes chronic shaking of a young child, long-term outcomes can include attention deficits and learning disabilities.

Jack Showers, Children Today, p.34 (vol. 21, no.2 1992) (footnotes omitted). We further note that the publication, Children Today, is regarded as a "well-rounded interdisciplinary journal for the professions serving children" and that it is recognized as being "[v]ery useful for public and academic libraries supporting child-oriented programs and professionals." Bill Katz & Linda Sternberg Katz, Magazines For Libraries, p. 224 (5th ed. 1986).
Furthermore, records submitted by the Appellant, but not in the record of this case and not considered on the underlying issues of this opinion, reinforce our conclusion as to the danger of shaken baby syndrome. The notation of particular concern is included in a letter to Appellant from Terri L. Farley, a child protective services worker, in which it is stated:

Ebony was taken to FMRS for an Early Intervention evaluation on May 13, 1994 to ascertain if there were any developmental delays. She was very stiff this date in her muscle movements. The more she tried to crawl forward the farther she went backwards. She seemed to be favoring her left side and did little with her right. She was very alert and responded well when assisted with movement by the therapist. She did grasp with her right hand and hold. There was stiffness in her legs, thighs and shoulders. Later evaluation revealed a concern for her jerky motions. The therapist advised the foster parent these motions seemed to be consistent with a 'crack' baby or 'baby shaking' syndrome . . . ..

Footnote: 7 See In re Lacey P., 189 W.Va. 580, 433 S.E.2d 518 (1993); James M. v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991); In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991); State v. Krystal T., 185 W.Va. 391, 407 S.E.2d 395 (1991).

Footnote: 8 Although it is not part of the record before us on the issue involved in this case, the guardian ad litem contends in his brief that the mother, and to some

extent, the father of Renae Ebony have a poor record with regard to visiting the child once removal was mandated. The circuit court should monitor their level of interest in this child closely in the coming months.

226 W. Va. 520, 703 S.E.2d 292

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2010 Term

FILED
July 9, 2010
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34751

IN RE: RICHARD P. AND DEVON P.

Appeal from the Circuit Court of Fayette County
The Honorable Paul M. Blake, Jr., Judge
Civil Action No. 08-CIGR-06

AFFIRMED

Submitted: January 26, 2010
Modified Opinion Filed: July 9, 2010

Vickie L. Hylton, Esq.
Fayetteville, West Virginia
Attorney for Appellants

JUSTICE WORKMAN delivered the Opinion of the Court.
CHIEF JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard." Syl. Pt. 4, in part, *Burgess v. Porterfield*, 196 W. Va. 178, 179, 469 S.E.2d 114, 115 (1996).

3. "Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, '[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence.' West Virginia Rules of Practice and Procedure for Family Court 48a(a)." Syl. Pt. 7, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008).

4. "In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971).

5. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

6. At common law, a parent or legal guardian may transfer medical, educational, and other legal decision-making authority for his or her child or ward to another adult through the execution of a power of attorney. Such instruments are revocable and automatically terminate upon death or incapacity of the principal.

7. Pursuant to the Caregiver's Consent Act, West Virginia Code § 49-11-1 to 10 (2010), an adult over the age of eighteen who is not legally related to a minor, but who has resided continuously with the minor for the immediately preceding six month period, may consent to health care and treatment on behalf of the minor, so long as that adult possesses an adequate affidavit, as set forth in that Act.

Workman, Justice:

The Appellants, Cary P. and Jennifer P. (jointly "the Appellants"), reside together in Fayette County, West Virginia, with Jennifer's biological children, Richard P. and Devon P.[1] On July 11, 2008, the Appellants filed a "Petition for Appointment of a Legal Guardian," in the Family Court of Fayette County, West Virginia, seeking to appoint Cary as the legal guardian of Richard and Devon. The Appellants do not wish to interfere with Jennifer's parental rights but instead seek to allow Cary, as a legal guardian, to make medical, educational and other legal decisions for the children when Jennifer is unavailable.

The family court, believing that the petition included an abuse and neglect allegation, transferred the case to the Circuit Court of Fayette County. After conducting a hearing and receiving further briefing from the Appellants, the circuit court denied the petition, finding that the appointment of a guardian for the children was not warranted under the circumstances presented in this case. On appeal, the Appellants waived oral argument, and the case was submitted on the Appellants' brief.[2] Having considered that brief, the record in the case, and all relevant legal material, this Court affirms the circuit court's Order.

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[1]The Court follows its customary practice in cases involving minors of using only the first initial of the parties' last names, in order to protect the privacy of the minors. *See, e.g., In re Emily B.*, 208 W. Va. 325, 329 n. 1, 540 S.E.2d 542, 546 n. 1 (2000).

[2]Although the West Virginia Department of Health and Human Resources ("DHHR") is designated as the Appellee in this case, it did not oppose the Appellants' petition below and has not filed a brief in this appeal.

I.

FACTS AND PROCEDURAL HISTORY

Richard P. and Devon P. are both minors under the age of eighteen; Richard is approximately thirteen years old and Devon is approximately eleven years old. The boys' biological father, Richard A., resides in Indiana. He and Jennifer separated when the boys were very young, and he is no longer in their lives.[3] Jennifer, Cary and the children have resided together since July 1999, at which time the boys were approximately three and one, respectively. Both Jennifer and Cary have acted as parents to the boys. Jennifer has consistently worked outside of the home, while Cary is a homemaker.

On July 11, 2008, the Appellants filed a "Petition for Appointment of a Legal Guardian," in the Family Court of Fayette County, seeking to have Cary appointed as the

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[3]After Jennifer divorced Richard A., the boys initially maintained contact with their father, visiting him occasionally. In 2005, Richard A. was charged with sexually molesting his sons. He eventually pled guilty to "dissemination of matter harmful to minors," and the molestation charges were dropped. He was convicted, however, of molesting the thirteen-year-old daughter of his then girlfriend. Following the 2005 charges, the boys ceased all contact with their father. Richard A. does not pay child support and the Appellants allege, without documentation, that pursuant to Indiana statute, his parental rights have been terminated.

As a consequence of the events with his father, Richard P. began acting out in school, exhibiting violent behaviors, and he has now undergone extensive psychological treatment, including inpatient hospitalization. As a result of these problems, the DHHR investigated the family. All of the DHHR's reports, however, indicate that Jennifer and Cary are "nurturing parents" who are "very supportive" of their children. The DHHR has consistently found no risk of abuse or neglect in the home. Devon P., the younger of the brothers, appears to be well adjusted and is not suffering the same consequences of their father's actions as Richard P.

boys' legal guardian.[4] Jennifer did not seek to relinquish any of her parental rights; rather, the Appellants sought to add Cary as a legal guardian, thus giving her the ability to make medical and educational decisions for the boys when Jennifer is unavailable. In the petition, the Appellants assert that Cary is a psychological parent to the boys and that legalizing their relationship would create stability for the children in the event that something happened to Jennifer and would protect the children if Richard A. ever attempted to reassert his parental rights.[5] They further contended that appointing Cary as a legal guardian would clarify, before an emergency occurred, Jennifer's wishes for the care of her children.[6]

The family court, concluding that the petition included an abuse and neglect allegation, transferred the petition, pursuant to Rule 48a of the West Virginia Rules of Practice and Procedure for Family Court, to the Circuit Court of Fayette County, West Virginia, on July 11, 2008. On July 18, 2008, the Circuit Court of Fayette County conducted a hearing on the petition. In addition to the Appellants, Tom Steele, counsel for the DHHR,

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[4]The petition also sought a legal name change for Richard P., who was named after his father, Richard A. While undergoing psychological treatment, Richard P. became upset over having the same name as his father and decided, with Jennifer and Cary's support, to change his first name. The circuit court granted this name change in October 2008, and that Order is not at issue in this appeal.

[5]Because the record contains no documentation or explanation of the alleged termination under Indiana law of Richard A.'s parental rights, the Court is unable to discern whether the Appellants' concerns in this area are legitimate.

[6]The petition indicates that the Appellants ultimately want Cary to legally adopt Richard and Devon and that they are seeking the guardianship as an interim measure.

and Robin Holland, a Child Protective Services worker for the DHHR, were also present at that hearing. Mr. Steele informed the court that the DHHR supported the Appellants' petition and urged the Court to appoint Cary as the children's guardian. The circuit court, however, questioned the need for a guardian given that Jennifer, the biological mother, was alive, healthy and capable of caring for the children. The circuit court declined to rule on the petition at that hearing, instead taking the matter under advisement.

Following the hearing, the Appellants submitted an additional brief, entitled "Response to Court's Query," further outlining their reasons for seeking the guardianship despite Jennifer's current good health and well-being. In that brief, the Appellants pointed out that Jennifer's employment with an ambulance service frequently renders her unreachable for significant periods of time. Thus, they asserted, the children's best interests would be served by giving Cary legal guardianship, so that she could make legal, medical and other decisions for the children when Jennifer is unavailable. The Appellants provided three examples of incidences that have occurred as a consequence of Cary not having the legal ability to make medical decisions for the children, but which could have been avoided had Cary been the children's legal guardian.

In the first incidence, Devon had fallen and injured his arm. Cary took him to the emergency room at the Plateau Medical Center, but the hospital refused to treat him because Cary could not legally consent to medical treatment. Jennifer was at work at the

time, transporting a patient to Morgantown, West Virginia. Consequently, Devon did not receive treatment until a day later when Jennifer was back in Fayette County and could take him to the emergency room herself.

In another instance, which occurred while Richard was hospitalized for psychological treatment, Richard had been prescribed a medication that was causing him to shake. The hospital called the family home seeking consent to remove him from the medication. Jennifer was not home and Cary gave consent; the hospital, however, would not accept the consent from Cary, and continued to administer the medication until Jennifer, who had been at work at the time, was able to contact the hospital and give consent herself.

Finally, on a third occasion, Richard had been admitted to another hospital for psychiatric examination and treatment. The hospital would not allow Cary to visit Richard during his stay, and would not provide her with information about his treatment, care or progress because she was not his legal guardian. This occurred even though Jennifer was present at the hospital and requested that Cary be allowed to have such information and to visit with Richard.

The Appellants assert that all of these situations occurred despite the fact that Jennifer had executed a power of attorney permitting Cary to make medical decisions for the children in Jennifer's absence. The record contains a document entitled "Medical Power of

Attorney," granting Cary the power to consent to health care decisions for Jennifer, when Jennifer is unable to do so for herself. In addition, the record includes a document entitled "Durable Power of Attorney," which names Cary as Jennifer's attorney-in-fact, and grants Cary full power over the (1) disposition of property, (2) collection of debts, (3) acquisition of property, (4) litigation, representation, and employment of assistance, (5) endorsing checks and depositing funds, (6) safe deposit boxes, (7) savings bonds, (8) borrowing money, (9) executing government vouchers, (10) tax returns, and (11) automobiles, trucks, and other personal property. It is unclear from the briefs and the record whether these two documents were presented by the Appellants to the medical institutions, or whether the Appellants had an additional power of attorney specifically authorizing Cary to make medical decisions for Richard and Devon in Jennifer's absence.

On August 14, 2008, the circuit court issued an Order denying the Appellants' petition. In that Order, the circuit court found that the Appellants could "accomplish their goals" through West Virginia Code § 44-10-1 (2000), which permits a biological parent to name, in their will, the person who is to be the guardian of their minor children in the event of their death. The circuit court further found that appointing Cary as a legal guardian "is not necessary at this time," stating that "the appointment of a non-relative as guardian while the custodial biological parent is alive, able and willing to care for the children has great potential to cause unnecessary difficulties in the future for both the biological mother and the

minor children named herein." The circuit court then concluded that such appointment was not in the best interests of the children.

II.

STANDARD OF REVIEW

On appeal, the Appellants argue that (1) the family court improperly transferred their petition for guardianship to the circuit court, and (2) the circuit court improperly interpreted the guardianship statute to require that certain factual circumstances exist as a prerequisite to appointing a legal guardian, specifically that the minor's biological parent or other legal guardian be unable or unwilling to properly care for the minor.

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). However, "[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard." Syl. Pt. 4, in part, *Burgess v. Porterfield*, 196 W. Va. 178, 179, 469 S.E.2d 114, 115 (1996). The Court, therefore, reviews the family court's transfer of the guardianship petition and the circuit court's interpretation of the guardianship statute de novo, but reviews the circuit court's ultimate conclusion in this case for an abuse of discretion.

III.

DISCUSSION

A. Transfer of the Guardianship Petition

As an initial matter, the Appellants challenge the family court's transfer of their guardianship petition to the circuit court. In its "Order of Removal of Infant Guardianship Case to Circuit Court," the family court found, following a preliminary review, that the petition was based, in whole or in part, on allegations of abuse and neglect. Thus, pursuant to Rule 48a of the Rules of Practice and Procedure for Family Court,[7] it transferred the petition to the Circuit Court of Fayette County.

The statute under which the Appellants filed their guardianship petition, West Virginia Code § 44-10-3 (Supp. 2009) (effective June 14, 2006), indicates that a legal guardian may be appointed by *either* the family court or the circuit court in the county in which the minor resides. Rule 48a(a) of the Rules of Practice and Procedure for Family Court, however, limits the family court's authority by providing that:

> [i]f a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect, as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship case is pending, shall remove the case

[7]The family court Order removing the guardianship petition to circuit court incorrectly cites "Rule 47a" of the Rules of Practice and Procedure for Family Court as its basis for removal, rather than Rule 48a(a). In fact, Rule 47(a) provides for the appointment of guardian ad litems in family court cases, while Rule 48a(a) establishes the basis for removing a guardianship petition to circuit court.

> to the circuit court for hearing. . . . At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence.

In syllabus point seven of *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300, this Court explained that Rule 48a(a)

> requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon.

The Court in *Abbigail Faye B.* further held that when addressing such petitions, a circuit court must conduct a hearing on the allegations of abuse and neglect and may only grant the guardianship petition if such allegations are supported by clear and convincing evidence. 222 W. Va. at 469, 665 S.E2d at 303.

In the instant case, the Appellants' petition raises the issue of the prior abuse by Richard and Devon's father as one of several grounds for the guardianship. Specifically, in the petition, the Appellants set forth information about Richard A., including his abuse of Richard and Devon and his subsequent convictions, and they explain that Richard A. no longer pays child support and that a protective order prevents him from contacting the children. The Appellants argue that because Richard A. is an unfit parent, the court is not required to notify him of the guardianship proceeding. Moreover, the Appellants use the prior abuse by Richard A. as a basis to support the petition, arguing that appointing Cary as

the children's guardian would help prevent Richard A. from ever successfully re-asserting parental rights.

On appeal, the Appellants contend that these references to the prior abuse by Richard A. are not new allegations of abuse or neglect which must be proven by clear and convincing evidence as required by Rule 48a(a) and *Abbigail Faye B.* Thus, the Appellants argue that the family court was not required to transfer the petition to circuit court and erred in doing so.

At the hearing following the removal of the petition, the circuit court noted that the allegations of abuse and neglect contained within the petition were not alleged to be presently existing, nor were the children in any present danger of abuse or neglect. Thus, the circuit court was not required to make a finding of abuse or neglect by clear and convincing evidence. Despite this acknowledgment, the circuit court did not address whether the family court's transfer of the petition to the circuit court constituted error, nor did it consider whether the case should be returned to the family court for further consideration. Importantly, the Appellants did not raise this issue with the circuit court either.

"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334

(1971). Here, the issue is not jurisdictional in nature because West Virginia Code § 44-10-3 provides that *either* the family court or the circuit court in the county in which the minor resides may appoint a suitable person as a minor's guardian. Consequently, family and circuit courts have concurrent jurisdiction over appointing guardians under § 44-10-3 and, thus, the circuit court possessed jurisdiction to rule on the petition in this case. This Court, therefore, will not consider this issue which was not properly raised below.

B. The Guardianship Petition

The principle issue in the instant appeal is whether the circuit court erred in denying the Appellants' guardianship petition. Specifically, the Appellants contend that the circuit court improperly interpreted the infant guardianship statute to require, as a prerequisite to appointing Cary as the boys' legal guardian, that Jennifer be unable or unwilling to care for her children.

The statute on which the Appellants base their petition for guardianship, West Virginia Code § 44-10-3, entitled "Appointment and revocation of guardian by county commission,"[8] vests family and circuit courts with the authority to appoint guardians for minors. The statute does not describe the types of situations in which such appointments are

[8]Prior to 2004, West Virginia Code § 44-10-3 (Supp. 1999) authorized county commissions to appoint guardians for minors. Although the Legislature, in 2004, amended the statute to transfer that authority to family and circuit courts, it did not change the title of the statute.

appropriate; rather, it simply states that a family or circuit court *may* appoint a suitable person as a minor's guardian. Specifically, the statute provides that

> [t]he circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the state, the county in which the minor has an estate, *may* appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.

W. Va. Code § 44-10-3(a) (emphasis added). Thus, the plain language of the statute neither requires nor prohibits the appointment of a legal guardian for a minor as an addition to, rather than a replacement for, the minor's biological parent or parents.

It is well-settled that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Although the statute at issue in this case is silent as to whether a family or circuit court may appoint a guardian in situations such as the one presented in this case, the statute clearly evinces a legislative intent to provide family and circuit courts with discretion in making such determinations. By stating that family and circuit courts *may*, rather than must, appoint a suitable person as a guardian for a minor, the Legislature granted family and circuit courts discretion in determining when the appointment of a guardian is appropriate.

Here, after reviewing the Appellants' petition for guardianship, the circuit court determined that appointing Cary as a guardian was not necessary, because Jennifer is "alive, able and willing to care for the children." It then denied the petition, noting that appointing a guardian under these circumstances could potentially create unnecessary difficulties in the future. Contrary to the Appellants' assertions, the circuit court did not wrongly interpret the guardianship statute to require that certain prerequisites be met for the appointment of a guardian, but rather the circuit court exercised the discretion afforded it by the Legislature to determine that the appointment of a guardian was not necessary in this case.

As more fully explained hereafter, alternative remedies exist, including the recently enacted "Caregiver's Consent Act," which provide alternate avenues by which the Appellants can address their legitimate concerns. Accordingly, under the circumstances presented in this case, and in light these alternative remedies, the circuit court did not abuse

its discretion in denying the Appellants' petition.[9] The Court, therefore, affirms the decision of the circuit court.

C. Alternative Use of a Power of Attorney

As noted, the Appellants have expressed legitimate concerns regarding Cary's ability to make decisions for the boys in emergency situations. The facts in this case clearly demonstrate that, because Jennifer often travels for work while Cary stays at home, Cary is frequently the parent who first responds to medical, educational and other emergencies in the

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[9]Because circuit and family courts may be utilizing West Virginia Code § 44-10-3 to grant temporary guardianships to non-parents where a parent is absent, in order to stabilize the child's custodial situation or assure his receipt of benefits, the Court is hesitant to embark on any interpretation of existing law that would limit a family or circuit court's authority in this area. Such interpretation is unnecessary for resolution of the instant issue. Further, any analysis of the breadth of a family or circuit court's authority to grant guardianships to non-parents should only be made after such issues are fully briefed and argued, which has not occurred in this case. There is concern, however, that current interpretations of statutory and case law may permit family and circuit courts to appoint a legal guardian for a minor over the objection of a natural, unoffending parent whose parental rights have not been terminated. The appointment of a legal guardian for a child in such a situation could arguably divest the natural parent of his or her parental rights without meeting the legal standards required in termination proceedings. To be clear, however, the Court recognizes that situations do exist where a guardianship may be appropriate and in the child's best interests, even when there is a natural parent whose rights have not been terminated. *See, e.g., In Re Nelson B.*, ___ W. Va. ___, ___ S.E.2d ___, 2010 WL 2346736 (W. Va. June 10, 2010).

Because these significant issues are not raised or briefed in the instant case, and because addressing them is unnecessary for resolution of the issues here, the Court declines to do so at this time. However, these are significant questions that the Legislature should perhaps review and address. Of course, in enacting any changes, the Legislature should be mindful of the large body of case law holding that the best interests of the child are always of predominate concern. *See, e.g.*, Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

family. Cary, therefore, needs to be able to make decisions for the children in these situations.

Under existing West Virginia law, the Appellants can achieve these goals through alternative means. First, as the circuit court noted, under West Virginia Code § 44-10-1, entitled "Testamentary Guardians," Jennifer may name Cary in her will as the individual to become the children's guardian in the event of Jennifer's death. In addition, as further explained herein, by executing a proper power of attorney and by utilizing a recently enacted West Virginia law known as the "Caregivers Consent Act," the Appellants can ensure that Cary has the authority necessary to properly care for the boys in Jennifer's absence.

On appeal, the Appellants argue that they had, in fact, executed a power of attorney authorizing Cary to make healthcare decisions for the boys in Jennifer's absence, but that several medical providers have refused to honor the power of attorney, thus preventing Cary from making such decisions or obtaining medical information about the children. As noted previously, the record on appeal includes two power of attorney documents. Neither of these documents, however, specifically permit Cary to make decisions for the children. Rather, the Appellants have executed a medical power of attorney which designates Cary to make medical decisions for Jennifer, in the event of Jennifer's incapacity, and a Durable Power of Attorney, which specifically grants Cary authority to

make a variety of economic and property decisions. The record does not contain a power of attorney specifically granting Cary authority to make decisions for the children.

A "power of attorney" is "an instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon death or incapacity of the principal." *Blacks Law Dictionary* 1290 (9th ed. 2009). Although no West Virginia statute specifically provides for an "ordinary" power of attorney by which a parent may grant authority over the care of their children to another adult, the authority to grant such powers exists at common law. While this Court has never directly addressed the legal basis for such powers of attorney, it has recognized on several occasions that such authority may be granted. *See, e.g.*, *In re Destiny Asia H.*, 211 W. Va. 481, 566 S.E.2d 618 (2002) (acknowledging a power of attorney executed by a parent who left her child temporarily with a friend, which authorized the friend "to act *in loco parentis*"); *Baugh v. Merritt*, 200 W. Va. 393, 395, 489 S.E.2d 775, 777 (1997) (remanding the case to the lower court for a determination of the parties' intent in executing a document entitled "Special Power of Attorney and Voluntary Appointment of Guardian"); *Efaw v. Efaw*, 184 W. Va. 355, 357, 400 S.E.2d 599, 601 (1990) (considering, as part of a determination of who had been the children's primary caretaker, a power of attorney authorizing the children's grandparents to make medical and other decisions for the children).

Although the record is unclear as to whether the Appellants had executed this type of power of attorney, to prevent any future confusion, the Court now clarifies that, at common law, a parent or legal guardian may transfer medical, educational, and other legal decision-making authority for his or her child or ward, to another adult through the execution of a power of attorney. Such instruments are revocable and automatically terminate upon disability or incapacity of the principal.

Moreover, a recently enacted law provides an additional avenue by which Jennifer may authorize Cary to make medical decisions for the boys. In the 2010 Legislative Session, the West Virginia Legislature passed the "Caregivers Consent Act," West Virginia Code § 49-11-1 to 10 (2010) (effective ninety days from March 8, 2010). This Act permits a "caregiver," who is an adult over the age of eighteen and is a relative by blood, adoption or marriage to a minor, or who has resided with a minor continuously during the immediately preceding six month period, to consent to health care and treatment on behalf of the minor, if the caregiver possesses an adequate affidavit. *Id.* §§ 49-11-2, -3. Such affidavit must provide the caregiver's name, address, birth date, and relationship with the minor, as well as the minor's name, birth date, and length of time residing with the caregiver. *Id.* § 49-11-5. In addition, the affidavit must be signed by the caregiver under oath, and by the minor's parent or guardian, consenting to the caregiver's authority. *Id.* The parent or guardian's signature is not necessary, however, if they are unavailable despite the caregiver's attempts to locate them and seek their permission. *Id.* The affidavit is valid for one year, or until the

minor no longer resides with the caregiver, which ever is less. *Id.* § 49-11-6(b). In addition, a parent or guardian may rescind the affidavit by writing at any time. *Id.* § 49-11-6(a).

Accordingly, pursuant to the Caregiver's Consent Act, an adult over the age of eighteen who is not legally related to a minor, but who has resided continuously with the minor for the immediately preceding six month period, may consent to health care and treatment on behalf of the minor, so long as that adult possesses an adequate affidavit, as set forth in that Act. Because Cary has resided continuously with the boys for more than the most recent six-month period, it appears that, under the Caregivers Consent Act, the Appellants may execute an affidavit permitting Cary to consent to health care and treatment for the boys. *See id.* §§ 49-11-2, -3. The execution of such affidavit, combined with a power of attorney and the testamentary designation of Cary as the children's guardian in the event of Jennifer's death, should allow the Appellants to substantially achieve the practical objectives that they had hoped to achieve through a guardianship appointment.

IV.

CONCLUSION

For the reasons stated herein, the Court affirms the final Order of the Circuit Court of Fayette County, West Virginia, entered on August 14, 2008, denying the Appellants' petition for guardianship.

Affirmed.

No. 34751 - *In Re: Richard P. and Devon P.*

FILED
September 3, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, concurring:

I agree with the result obtained by the majority of the Court, and I concur that, pursuant to W. Va. Code § 44-10-3 (2006) (Repl. Vol. 2010), the decision of whether a guardian should be appointed for a minor child in a particular case rests within the sound discretion of the presiding court. Nevertheless, I feel compelled to write separately to reiterate my concerns regarding the inadequacy of the guardianship statutes currently in place that fail to consider the unique circumstances of modern-day families and leave such parents with little assurance that their children will be sufficiently provided for in an emergency situation.

Throughout its jurisprudence, the Court frequently has acknowledged that a parent has the right to the custody of his/her child. *See, e.g.*, Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973) ("In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and

United States Constitutions."); Syl., *Whiteman v. Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960) ("A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.").

Attending such custodial rights is the parent's corresponding responsibility to make decisions to promote and ensure his/her child's well-being, including making provisions for the child's care in the event of an emergency. Although such arrangements necessarily must comport with a child's best interests and are presumed to be made by a parent in accordance therewith,[1] providing for a child's best interests and well-being in anticipation of an emergency situation is not always easily achieved as is evidenced by the presence of the case *sub judice* before this Court. While the instant proceeding arose in the context of a less traditional family structure, the concerns expressed by Jennifer and Cary might easily have occurred in any number of typical American households. Oftentimes, a child's parent is requested to sign a form authorizing another person to obtain medical care for a child as a prerequisite to the child's participation in school, sports, extracurricular, or

[1]*See, e.g.*, Syl. pt. 3, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("Although parents have substantial rights that must be protected, the primary goal . . . in all family law matters . . . must be the health and welfare of the children.").

religious activities. However, a seeming double-standard exists when, as here, a parent's attempt to give another person the authority to seek medical care for his/her child is not heeded, arguably because such authorization was not provided on an "official" childcare authorization form such as would be used by schools and sports, extracurricular, and religious organizations.

In still other families, as with the family involved in this case, one of the child's parents might work very far from home, or even out of the country, as with the case of a tractor trailer driver or deployed military personnel. The parent remaining at home in both such families understandably would want to make provisions for his/her child should something happen to the home-based parent given the delay in contacting the off-site parent. Appointment of an alternate formal guardian pursuant to W. Va. Code § 44-10-3 is not always viable because it is rather invasive of the parents' parental rights, yet the necessity of executing decision-making documents that will be honored by medical, educational, and other facilities is of real concern to these families. Similar problems arise in households in which the children have only one residential parent–either because the other parent is deceased or because the other parent's parental rights have not been exercised or have been terminated. In these families, what happens if the remaining parent becomes incapacitated and cannot care for the children or if that parent is out of town and cannot be reached? Does the law of this State enable this parent to adequately plan for such

a contingency?

While the Legislature has made significant inroads in recent months to accommodate a parent's need to provide for his/her children's medical care in the event of an emergency through its enactment of the Caregivers Consent Act, W. Va. Code § 49-11-1, *et seq.*, more certainty and direction is needed to ensure that a parent's authorization of another to act on his/her behalf for his/her child's well-being will be respected by medical, educational, and legal authorities. This Court, too, through its recognition of a power of attorney as a method by which a parent may delegate medical, educational, and legal decision-making authority regarding his/her child to another adult gives parents substantial power to plan for their children's safety and well-being in the event of an emergency. With the promulgation of this new statutory law and the Court's decision of this opinion, I fervently hope that other families will not have to endure the turmoil that Jennifer and Cary have undergone, all in an effort to provide for the best interests of their children. However, whether either an affidavit prepared in accordance with the Caregivers Consent Act or a power of attorney executed pursuant to this Court's holding will satisfy the demands of cautiously wary educational, medical, and legal institutions to actually permit a non-parent to exercise such delegated decision-making authority remains to be seen. While the law of this State is evolving to recognize the changing dynamics of modern families and the arrangements they wish to make to provide for unforeseen contingencies, many institutions

have not yet embraced the accommodations that are required to carry out these parents' legally enforceable decisions for the care of their children.

As a final matter, I would be remiss if I did not also comment on the Court's seeming reluctance, in footnote nine of the majority's opinion, to embrace the discretion afforded to courts to appoint guardians for minor children. As clearly delineated in the guardianship statute, *see* W. Va. Code § 44-10-3, and as I pointedly held in Syllabus point 6 of *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008), courts have the discretion to determine when a child's best interests require the appointment of a guardian. *See* W. Va. Code § 44-10-3(a) (2006) (Repl. Vol. 2010) ("The circuit court or family court of the county in which the minor resides, or if the minor is a nonresident of the State, the county in which the minor has an estate, *may* appoint as the minor's guardian a suitable person." (emphasis added)). *See also* Syl. pt. 6, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008) ("Pursuant to the plain language of W. Va. Code § 44-10-3(a) (2006) (Supp. 2007), the circuit court or family court of the county in which a minor resides *may* appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. 'However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W. Va. Code § 44-10-3(a)." (emphasis added)). This discretion is clearly provided for in the governing

statutory law and should be accepted without question.

It goes without saying that the law dictating precisely when a guardian should be appointed for a minor child is murky and does not contemplate all of the nuances of today's modern family. Although custodial placements are not directly at issue in this case, the majority's reticence to permit courts to appoint guardians in necessary circumstances may thwart a court's ability to honor a child's best interests by prematurely thrusting him/her into a custodial placement with a parent or another adult with whom the child does not have an established relationship. For example, a child may be living with one parent and have little or no contact with his/her other parent who moves out of state following the parents' divorce. If the child's residential parent dies, becomes incapacitated, or otherwise becomes unfit to care for the child, and if the non-residential parent is fit to have the child's custody, the law governing child custody directs that child's best interests are best served by a gradual transition to the non-residential parent's custody. *See* Syl. pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives."). The

appointment of a guardian under such circumstances would serve to accomplish this transition by bridging the gap between the former residential parent's custody and the subsequent non-residential parent's custody. Such a guardian might simply be a grandparent with whom the child has an exceptionally close relationship and with whom the child previously has resided. In this scenario, the appointed guardian might not be afforded the full gamut of parental rights but the guardian would be vested with the ability to make decisions on the child's behalf to ensure his/her safety and well-being during the period of transition. If courts are not afforded the discretion–granted to them by statute– to appoint guardians, the gradual transition of custody most befitting the child's best interests could not be accomplished in such a case. Therefore, I urge that any decisions or changes in the law regarding the propriety of guardianship appointments be made with extreme caution to ensure that innocent children do not become hapless victims of the laws that are intended to provide them with safety and security.

Although progress has been made through the recent decisions of this Court to clarify the circumstances in which the appointment of a guardian is appropriate and by the Legislature with its promulgation of the Caregivers Consent Act, additional legislative action must be taken to further clarify the process by which laypersons may delegate medical, educational, and legal decision-making authority for their children in the event of an emergency. Until such further guidance is provided, and heeded by the medical,

educational, and legal institutions to whom parents direct such permission, I remain cautiously optimistic about families' abilities to adequately plan for the safety and well-being of their children should an emergency arise.

For the foregoing reasons, I respectfully concur in the majority's decision in this case.

192 W. Va. 461, 452 S.E.2d 919

Supreme Court Of Appeals Of West Virginia

ROBERT DARRELL O., Plaintiff Below, Appellee,

v.

THERESA ANN O., Defendant Below, Appellant

No. 22307

Submitted: September 28, 1994

Filed: December 20, 1994

SYLLABUS BY THE COURT

1. "W. Va. Code, 48A-4-10(c) (1990), limits a circuit judge's ability to overturn a family law master's findings and conclusions unless they fall within one of the six enumerated statutory criteria contained in this section. Moreover, Rule 52(a) of the West Virginia Rules of Civil Procedure requires a circuit court which changes a family law master's recommendation to make known its factual findings and conclusions of law." Syllabus point 1, Higginbotham v. Higginbotham, 189 W. Va. 519, 432 S.E.2d 789 (1993).

2. "To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child." Syllabus point 2, Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977).

3. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syllabus point 3, James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991).

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Per Curiam:

This is an appeal by Theresa Ann O. from an order of the Circuit Court of Kanawha County denying her petition for custody of her two infant children, the custody of whom was previously awarded to her former husband. On appeal, the appellant claims that the evidence adduced demonstrates that the circumstances of the parties have changed and that the change of custody which she seeks will materially promote the welfare of her children. Under the circumstances, she claims that the Circuit Court of Kanawha County erred in denying her petition for modification of the previous custody award and for custody of the children. After reviewing the documents filed and the issues presented, this Court agrees with the appellant. The judgment of the Circuit Court of Kanawha County is, therefore, reversed.

The parties to this proceeding, Theresa Ann O. and Robert Darrell O., were divorced by order of the Circuit Court of Kanawha County entered on August 14, 1989. The final order incorporated a settlement agreement dated January 10, 1989, in which the parties agreed that Robert Darrell O. would be granted custody of the parties' two infant children, A.L.O., who is now twelve years old, and E.C.O., who is now ten years old. The settlement agreement also provided that the appellant was to have extensive visitation with the children.

After entry of the final divorce order, the appellant married a captain in the United States Army, who was subsequently stationed in Germany and in Virginia. He and the appellant now reside in California.

Over the years, the appellant has had extensive visitation with the children, including lengthy stays by them with her in Germany and in Virginia.

During the children's last visit with the appellant in California, she found her youngest child in the bathroom crying. When asked why he was upset, he told the appellant that he could no longer take beatings from his father.

After questioning the children extensively, the appellant learned that, according to the children, they had been subjected to frequent and excessive corporal punishment, including once when the appellant's daughter was beaten by her father at the drive-in window in a bank in Charleston, West Virginia.

The appellant investigated the children's stories and found that a teller at the drive-in window at the bank had actually reported to the West Virginia Department of Health and Human Services that the appellant's daughter had been beaten in the car by her father while conducting a drive-through banking transaction and that an investigation of the incident had resulted.

After learning this information, the appellant filed a petition in the Circuit Court of Kanawha County for modification of the previous custody award and for custody of the parties' children.

Hearings were conducted following the filing of the petition for modification of custody. During the hearings, Ingrid Schwartz, a child protective service worker for the West Virginia Department of Health and Human Services, and Vanessa Lynn Connor, the bank teller who witnessed the beating at the Charleston bank, testified. The parties' two children also testified in camera. Ms. Schwartz testified that she was assigned to investigate the case after the Department received a phone call stating that a woman had witnessed Robert Darrell O. hitting his daughter. She interviewed both children and testified that:

> Basically they both stated that there was an argument in the car. They did not disclose that [Robert Darrell O.] had struck his daughter. And I remember [E.C.O.], the son -- I asked him if he had seen [Robert Darrell O.] hit his sister and he said they started arguing and he looked the other way.

On cross-examination, Ms. Schwartz testified that she asked the daughter if her father had hit her, and the daughter replied, "No."

The second witness, Vanessa Lynn Connor, the bank teller who witnessed the beating at the bank, testified that the appellant's former husband had driven to the teller window and that a little girl was in the passenger seat in the front of the vehicle. While conducting a banking transaction, Ms. Connor testified that she looked up and saw the man hitting the little girl. She indicated that the man, whom she could identify from the transaction process, repeatedly hit the little girl with his forearm. She testified:

> A. . . . And he was hitting her -- It was about in the chest area. And he was hitting her repeatedly very hard.
>
> Q. When you say repeatedly, did you see how many time he struck her?
>
> A. I didn't count. I was in so much shock. It was several times.
>
> Q. Did you notice the little girl's reaction?
>
> A. She was crying very hard. When he stopped she had her school books up around her chest like a shield. I have never seen a look of fear like I did on her face. She was terrified.

Ms. Conner then identified the appellant's husband from recognition as the party who did the striking.

In discussing the incident at the bank, the appellant's daughter, who was eleven at the time of the hearing, testified that on the day of the beating at the bank, she had failed to brush her teeth and the father noticed that fact. She stated that "[h]e excessively smacked me on the lower part of the body." When asked if he had done that before, she replied that he had and added that her brother was hit more than she was.

The appellant's daughter also stated that on one occasion, when she was in the second grade, her father hit her fifty to sixty times on the rear and that it had turned black and blue and stayed black and blue for two days. She also said that her father, on occasion, had struck her brother. She testified:

> He [her brother] had left his race car out in the rain and when he went to get it Dad got all mad and he smacked [E.C.O.] once, you know, just once or twice and he made him throw it away even though it still worked. He sometimes has a bad temper. He'll yell at us if we spill our milk.

During the hearing, the appellant's daughter further testified that she did not want to live with her father when she went into puberty. She indicated that she had discussed this with her mother, the appellant, but that this was her own idea, not her mother's idea.

The appellant's son, who was nine at the time of the hearing, testified that he had always wanted to live with his mother and did not know how he had come to live with his father.

Relating to his reason for wanting to live with his mother, the appellant's son testified:

> A. The reason why --- Some of the reason I want to live with Mom is I'm tired of being slapped.
>
> Q. Oh. Did he slap you?
>
> A. Yes. He slapped me several times.
>
> Q. When did he slap you?
>
> A. So many times I can't remember.

Q. Does he get mad?

A. Yes. He gets mad very easily and he drinks quite a bit.

Q. He does?

A. He drinks coke with wine in it, or he has two or three beers.

He further testified:

Q. You don't think you would get -- If you come back to stay with your father for a while, you don't think you would change your mind?

A. No.

Q. Why not?

A. Because I'm sure I want to live with Mom. I thought it over and I'm positive.

Q. What about your sister?

A. Same thing with her.

During the hearings, the appellant's former husband testified:

In the course of my children's life, they have had their hands slapped or their rears slapped for disciplinary reasons. Presently they get yelled at more than I would like to, but they get yelled at and sent to their room, which is really the only functional discipline that they receive now.

He testified that the incident at the bank was the only time either child had been touched during the year. He indicated that in the past when he had spanked the children, he had swatted them three or four times on the rear.

At the conclusion of the first hearing, the family law master entered a temporary order granting custody of the children to the appellant and directing that the parties and the children present themselves to a psychologist.

The parties and the children were interviewed by Jeffrey Harlow, a licensed psychologist, who reported that the appellant's former husband had unresolved feelings about the divorce, which included anger and remorse. He stated that the

appellant's husband attempted to deny his anger and frustrated feelings and they increased over time. He then expressed them suddenly. The psychologist concluded that this and his impatience were significant personality weaknesses. He concluded that while the appellant's husband had the personality characteristics to be a parent, his "discipline techniques are inappropriate, inconsistent and ineffective . . . His slapping of the children falls within the grey area in regard to physical abuse." On the other hand, Mr. Harlow concluded that the appellant had the cognitive and personality attributes sufficient for her to provide parenting for the two children.

The psychologist noted that the two children wanted to live with their mother, and he indicated that the little girl's verbal intellectual abilities were very superior and that her general intellectual functioning was superior. He also found that the parties' son felt emotionally closer to his mother.

The psychologist found that the appellant's husband's discipline techniques were inappropriate, inconsistent, and ineffective and stated that regardless of the outcome of the custody proceeding, he should be required to receive instruction and guidance in effective disciplinary procedures.

During the hearings, two witnesses for the appellant's former husband testified. One was a close neighbor, who generally described the appellant's husband as a good father who participated regularly in the schooling and extracurricular activities of his children. The other witness was the appellant's mother, who testified that the appellant's former husband had permitted her to spend a lot of time with the children and she testified generally that the appellant's former husband was a good father who allowed the children liberal visitation with their maternal grandparents.

At the conclusion of the hearings, the family law master, on October 5, 1993, issued a recommended order in which he recommended that custody of the children be changed from the appellant's husband to the appellant. The family law master found that:

> Dr. Harlow's report indicates that the bank teller's and children's version of the bank incident is closer to the truth than that of the plaintiff, who is apparently denying Dr. Harlow's interpretation that plaintiff seems to be over-emotional at times. Dr. Harlow did not make a recommendation as to custody, but did strongly recommend that plaintiff be required to receive instruction and guidance in effective disciplinary procedures.

The master also found that "these children have clearly expressed a preference for living with their mother . . . and have given good reasons for changing custody," and he noted that the daughter gave as one reason for wanting to reside with her mother that she was entering puberty and felt she would be more comfortable with her mother during this period in her life.

The appellant's former husband filed exceptions to the recommendation of the family law master, and a hearing on the exceptions was held before the Circuit Court of Kanawha County.

At the conclusion of the hearing, the circuit court rejected the recommendation of the family law master and refused to modify the previous custody arrangement entered into by the parties and adopted by the court. The court stated:

> This Court does not feel that good reasons have been presented to justify a change in custody nor does it feel that there has been a showing of significant change in circumstances to warrant such a change. The mere fact that 11 and 9 year old children express a desire to live with the non-custodial parent, particularly after a lengthy stay with that parent, is not and never has been sufficient grounds to warrant a change in custody.

The court accordingly denied the appellant's petition for a change of custody, but did order the appellant's former husband to attend parenting classes and counselling to assist him in maintaining control of his anger.

On appeal, the appellant claims that the circuit court erred in failing to follow the family law master's recommendation regarding change of custody.

In Higginbotham v. Higginbotham, 189 W. Va. 519, 432 S.E.2d 789 (1993), this Court indicated that there were limitations on a circuit court's authority to depart from a family law master's recommendation in a domestic relations case. In syllabus point 1 of Higginbotham, the Court stated:

> W. Va. Code, 48A-4-10(c) (1990), limits a circuit judge's ability to overturn a family law master's findings and conclusions unless they fall within one of the six enumerated statutory criteria contained in this section. Moreover, Rule 52(a) of the West Virginia Rules of Civil Procedure requires a circuit court which changes a family law master's recommendation to make known its factual findings and conclusions of law.

The six criteria which authorize a circuit court to depart from a family law master's recommendations are set forth in W. Va. Code, 48A-4-20, as follows:

> The circuit court shall not follow the recommendation, findings and conclusions of a master found to be: (1) Arbitrary, capricious, an abuse of discretion or otherwise not in conformance with the law; (2) Contrary to constitutional right, power, privilege or immunity; (3) In excess of statutory jurisdiction, authority or limitations or short of statutory right; (4) Without observance of procedure required by law; (5) Unsupported by substantial evidence; or (6) Unwarranted by the facts.

In the present case, the court did not find that the family law master's decision was arbitrary, capricious, or not in conformance with the law or contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, or entered without observance of procedure required by law. Essentially, it appears that the circuit court found that the family law master's conclusion was unsupported by substantial evidence or unwarranted by the facts.

The fundamental rule to be applied in determining whether the evidence or facts in a case justify a change in child custody is set forth in syllabus point 2 of Cloud v. Cloud, 161 W. Va. 45, 239 S.E.2d 669 (1977), as follows:

> To justify a change of child custody, in addition to a change in circumstances of the parties, it must be shown that such change would materially promote the welfare of the child.

In the present case, it appears that the trial court concluded that the family law master's recommendation of a change in custody was predicated solely upon the family law master's finding that the children had expressed a preference to live with the appellant rather than with their father.

A close examination of the family law master's findings shows that, while indicating that the master did consider the children's preferences, the master also considered the evidence relating to the striking of the parties' child in the presence of the bank teller. The master found that the psychologist indicated that the children's version of the bank incident was closer to the truth than that of their father. The family law master also found that the psychologist indicated that the children's father was over-emotional at times and that he required instruction and guidance in effective disciplinary procedures.

This Court has recognized that physical abuse of a child by a parent may properly serve as a ground for transfer of custody of a child. See Rozas v. Rozas, 176

W. Va. 235, 342 S.E.2d 201 (1986), and State ex rel. Kiger v. Hancock, 153 W. Va. 404, 168 S.E.2d 798 (1969). While the striking of the child involved in the present case did not rise to the level of abuse, it was characterized by the psychologist as being in the grey area of abuse.

Further, in the present case, the children did express a clear preference for living with their mother. It is apparent that the children are very intelligent, and it appears that they did, in a thoughtful manner, consider and weigh various factors in arriving at their decisions relating to custodial preference. Their decisions apparently were not based only on the appellant's husband's approach to discipline or on single incidents, but on various factors.

In a number of cases, this Court has discussed the impact of a child's preference on the question of which parent should have custody of the child. On the one hand, the Court has indicated that ". . . [A]n adolescent fourteen years of age or older . . . has an absolute right under W. Va. Code, 44-10-4 [1923] to nominate his own guardian." Syllabus point 7, Garska v. McCoy, 167 W. Va. 59, 278 S.E.2d 357 (1981). On the other hand, the Court has recognized that children under six years of age usually cannot articulate an intelligent opinion about their custody and, obviously, the preferences of such children should be given little weight. See, David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989); J.B. v. A.B., 161 W. Va. 332, 242 S.E.2d 248 (1978). In between the two extremes, the Court has suggested that if the children can articulate preferences and explain their preferences, their preferences should be accorded some weight. See, David M. v. Margaret M., supra.

In view of all this, the Court believes that the expressions of preference of the children in the present case should be entitled to some weight.

Overall, in this Court's view, a fair reading of the evidence suggests that the family law master's recommendation was supported by clear findings of fact and conclusions of law based on facts which, under the decisions of this Court, would justify a change of custody.

Given the conclusion that the family law master's decision was based on facts and findings that would support a change of custody, and given the fact that the circuit court failed to find that the family law master's decision was inappropriate under any of the other circumstances discussed in W. Va. Code, 48A-4-20, this Court believes that the circuit court erred in reversing the family law master's decision and in failing to transfer custody of the infant children in this case to the appellant.

From the human perspective, this is a very difficult case, and we do not reach this conclusion lightly. This father has done the lion's share of parenting over the last

five years of these children's lives. The record indicates that they are intelligent, active children and that their father has been extremely dedicated to them.

The Court notes that the appellee has been a caring father and that, except for his problems relating to the disciplining of the children, he apparently has taken excellent care of them. Also, it appears that he has sought, and seriously engaged in, counselling to modify his attitude and approach to discipline. Somewhat similarly, the children have indicated that they are emotionally attached to him.

This Court has recognized that a change of custody is a traumatic event for minor children, and it likewise recognizes that it can be a traumatic event for parents. For instance, in syllabus point 3 of James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991), the Court stated:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

See also, Honaker v. Burnside, 182 W. Va. 488, 338 S.E.2d 322 (1989).

While this Court adheres to the principle that the welfare of the child is the paramount consideration, the Court also believes that a change in custody should, where possible and where consistent with the welfare and best interests of the children, be undertaken in a manner to lessen parental trauma and to facilitate stability in the children's lives.

In the present case, where it is evident that both parents care deeply for the children, and the children care deeply for both parents, and where the children are currently receiving proper and good care and are in the middle of their school year, where they are doing quite well in school and in extracurricular activities, the Court believes that the actual transfer of custody should be postponed until the end of the present school year.

The judgment of the Circuit Court of Kanawha County is, therefore, reversed, and this case is remanded with directions that the circuit court modify the previous custody order and grant custody of the children to the appellant in the manner consistent with the principles stated in this opinion. See footnote 1

Reversed and remanded with directions.

Footnote: 1 It appears that the change of custody in this case will require that the circuit court address the question of child support. The circuit court is, therefore, authorized and directed to take such action on remand as is reasonably necessary to provide for adequate financial support for the children.

157 W. Va. 225, 207 S.E.2d 129
Supreme Court of Appeals of West Virginia

In the Matter of Ronald Lee WILLIS

No. 13379
Submitted Oct. 9, 1973
Decided Dec. 11, 1973
Dissenting Opinion July 29, 1974

SYLLABUS BY THE COURT

1. In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

2. West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing.

3. In an emergency which imminently threatens the welfare, health or life of any minor child, the State, as Parens patriae, exercises an interest which temporarily overrides the rights of natural parents to the custody of the child and warrants the assumption of the child's custody by the State for a reasonable time, without regard to the requirements of Due Process.

4. Any retention of a minor child by the State, accomplished in the first instance by emergency procedures, beyond a period necessary to serve the legitimate interest of government to protect the health and welfare of the child, is unwarranted and unjustified and though presumptively legal at its inception, is, by the passage of time coupled with the omissions of the State to accord due process to the natural parents, void *ab initio* and of no effect in law.

5. Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as Parens patriae, if the parent is proved unfit to be entrusted with child care.

6. The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof.

7. Each neglect proceeding in a juvenile court based upon the ground of unfitness of the natural parent must be decided on its own particular facts.

8. Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in

nature and wisdom, will be respected unless they have been transferred or abandoned.

Daniel F. Hedges, Charleston, for Willis.

Chauncey H. Browning, Jr., Atty. Gen., Phillip D. aujot, Asst. Atty. Gen., Charleston, for State.

HADEN, Justice:
This is an appeal by John and Rosetta Willis, husband and wife, from a judgment of the Juvenile Court of Fayette County of November 22, 1972 which, upon a finding of neglect terminated their parental rights in their infant child, Ronald Lee Willis, and awarded the legal custody of the child to the West Virginia Department of Welfare, with full power and authority in the department to consent to his adoption.

The State first commenced action in this case on December 23, 1968 upon the filing of an unsworn petition by Regina Hardin, a social worker with the welfare department, which alleged that all five minor children of the Willises were 'neglected' as defined by the laws of the State. The petition contained no factual allegations supporting 'neglect' but merely conclusional words that such children were neglected. According to the testimony of a co- worker of Regina Hardin given in subsequent proceedings almost four years after the filing of the initial petition, the apparent reasons for the action of the welfare department at that time were the extremely unsanitary and substandard living conditions to be found in the Willis home and the poor physical appearance and condition of the minor children living there.

On December 23, 1968, the Juvenile Court of Fayette County entered an order transferring the custody of the children to the welfare department on a temporary basis. The action of the court was taken without notice to the parents, and in that the order stated a hearing was 'pending,' it is indicated that further judicial action was contemplated. Pursuant to the direction of the court, the welfare department, accompanied by a deputy sheriff of Fayette County, assumed custody of the Willis Children on December 28, 1968.

Within several months after the temporary custody change was accomplished, the four older Willis children then ranging in age from four to fourteen years were, at their request, restored to their parents. Ronald Lee, however, was not returned; he had been placed with foster parents shortly after his custody was removed from his natural parents. He has since resided with the foster parents continuously from the date of placement by the welfare department to the present. Considering his age to have been approximately eight months at the time of the initial placement and now to be approximately five and one-half years, he has lived for almost the total of his short life with the foster parents.

From the date of the initial State action in December of 1968 until a court hearing some three years later, John

Willis, the natural father of the infant, made repeated informal requests and attempts to regain custody of Ronald Lee, and also to comply with the suggestions and directions of the welfare department to remedy the conditions existing at the home which had apparently precipitated the initial removal of the Willis children.

It was not until February 3, 1972 that further legal proceedings were instituted concerning Ronald Lee's custody. On that date a second petition was filed with the juvenile court by Bruce L. Webb, also a social worker with the department, alleging Ronald Lee Willis to be a neglected child, and alleging as factual grounds constituting neglect, that the child 'has resided with his foster parents for approximately three years; all efforts to improve the natural parents' condition for return have failed; the natural parents' slow mentality also prohibits the child's return to them.'

A hearing was held on that petition on February 15, 1972, at which time both parents were present and represented by counsel, and the petitioner Webb was present and represented by the county prosecutor. Although no transcript or record was taken of that proceeding, an order was entered on the day following the hearing by the juvenile court finding the child to be neglected and permanently awarding his custody, care and control to the welfare department with 'the right to said Department to consent to the said infant's adoption.' The findings and judgment of the court were excepted to by the parents.

Subsequent to the court's order of February 16, 1972, the appellants' counsel informed the social worker Webb, that his clients intended to seek a review of the court's order and requested that Webb, on behalf of the welfare department, notify appellants if further proceedings were contemplated with respect to the infant Ronald Lee. Webb acknowledged such a conversation did occur and that he had agreed to notify the appellants of any change of position by the department in respect to Ronald Lee's custody, but also, he had been assured he would be contacted later by the appellants or their counsel and he was not so contacted. In any event, on April 26, 1972, Webb participated in an adoption proceeding before the same juvenile court in which the child Ronald Lee was permitted to be adopted by the foster parents with whom he had been previously placed by the department. All such proceedings were had and concluded without notifying the Willises.

On May 2, 1972, John Willis the father, through counsel, requested a rehearing upon the validity of the final order of February 16, assailing the order as invalid because the Willises received inadequate notice of the hearing. The petition also was attacked as insufficient in law, challenged hearsay evidence was admitted and considered by the court and the evidence established by proof at the hearing was insufficient in law to constitute neglect. On May 12, 1972, the juvenile court entertained the appellants' motion for rehearing, and as reflected by an order entered August 21, 1972, the

court voided the decree of February 16, 1972. It is to be noted that the rather sketchy transcript recounting the proceedings of February 15, 1972 does not reflect that service of notice was had upon the appellants prior to that hearing, nor does any record reflect an affirmative waiver of notice on the part of the appellants.

On August 25, 1972, the court reconsidered its previous order of August 21, 1972 and vacated it for the reason that the petition of February 3, 1972 failed to set forth allegations sufficient to meet the minimum requirements of West Virginia Code, Chapter 49, Article 6, Section 1, as amended. The court also accorded the Willises a 'rehearing' on the matters adjudicated in the February 16 decree. Although this court action took place on August 25, an order reflecting this and other proceedings was not entered until October 6, 1972 after the conclusion of all testimony in a neglect proceeding reheld in September 1972.

It further appears from the corrective order of October 6 either a 'rehearing' or an entirely new proceeding commenced on August 25 at the instance of the welfare department, the final object of which was to seek a court decree declaring Ronald Lee Willis to be a neglected child, to terminate the parental rights of the appellants and to gain authority for the welfare department to consent to the child's adoption. All parties were present and were generally aware of the purport and intent of the proceedings. Counsel for the appellants waived formal notice of the proceeding on behalf of his clients as to matters contained in a handwritten petition apparently prepared coincident with the convening of the hearing. On that date the court was notified the department also intended to prove John Willis' unfitness as a parent by offering evidence of his intoxication at various times over the previous years. Appellants' counsel objected on the basis of surprise. The juvenile court informally ruled the department could amend its petition so as to enable it to adduce proof on the intoxication issue and other matters relating to the appellants' fitness and to conditions in the home. Appellants were also given opportunity for a continuance to meet the new matters asserted by the welfare department, and hearings in the case actually did not begin until September 7, and were not concluded until September 29, 1972.

On November 22, 1972, the transcript reflects the filing or entry of three documents. First, an order was entered permitting the State to present evidence on the issue of intoxication; second, filing the 'new' or 'amended' juvenile petition which recited Inter alia on the complaint of Bruce L. Webb, social service worker with the department of welfare, that:

> 'Ronald Lee Willis is an infant four years of age; that the said infant lives and resides with his foster parents (now adoptive parents) Buford and Roxie Blevins.

'Your petitioner would further show unto your Honor that the said infant aforementioned as of about the 3 day of February, 1972, had resided with said foster parents for about three years; that prior thereto had lived with his natural parents, Mr. and Mrs. John F. Willis in Fayette County, in a house not fit or suitable for human occupancy; said parents' hom e was frequently without proper heat in cold weather, also in a dirty and filthy condition; said child was kept dirty; said hom e was in disrepair; and said child was not given care and supervision adequate for his physical, em otional or social needs and with the result that the future welfare and well being of said child were seriously endangered. The father, John F. Willis, drank intoxicants frequently and excessively and became intoxicated in the presence of his children.'

This petition was signed and verified on the 30th day of October, 1972.

The concluding entry on November 22, 1972 was the final order of the juvenile court decreeing in accordance with the prayer of the petition that:

'. . . Ronald Lee Willis under the evidence introduced in the hearings in this matter is and the court finds him to be a neglected child.
'It is further ORDERED, ADJUDGED AND DECREED that the care, custody and control of Ronald Lee Willis is permanently removed from his natural father and mother, John Willis and Rosetta Mary Neal Willis.
'The court being of the opinion that it is necessary for the welfare of the child does terminate the parental rights and responsibilities of the child' s parents and the permanent care, custody and control of Ronald Lee Willis is granted and awarded to the State Departm ent of Welfare and the State Department of Welfare shall have the right to give consent to the adoption of Ronald Lee Willis.'

This order was entered without notice to appellants or their counsel.

The foregoing represents our best efforts to recount the legal proceedings which resulted in the final order appealed from. Inasmuch as orders were entered recounting and ratifying events which occurred considerably prior to their

reflection in the official record, it is hoped the preceding account accurately reflects the chronology of procedures employed in the Juvenile Court of Fayette County.

Parenthetically, it also should be noted that the adoption proceedings of the infant Ronald Lee Willis concluded on April 26, 1972, are the subject of a separate revocation proceeding by the appellants herein against the department of welfare and Buford and Roxie Blevins, the adoptive parents. The adoption proceeding remains on the docket of the Juvenile Court of Fayette County pending the outcome of this appeal.

All the evidence which is before this Court was taken at the two hearings of September 7 and September 29, 1972.

From the testimony given by Nellie MacMillion, a welfare department social worker, it affirmatively appears that from sometime in 1966 to a period in 1969, within a few months after the initial taking of the Willis children from their natural parents, the living conditions in the home were severely substandard. During her visits to the home she found that there was a strong odor in the house; the family used the area around the house for their bodily functions; there was human excreta in the house; and cooking utensils were filthy. As to the physical structure of the house, the only heating unit, a stove, was propped up with bricks and rocks; there were no bathroom facilities; the kitchen facilities were such that it was impossible to prepare complete meals; there were only two bedrooms in the house. There were twelve persons occupying the house in December of 1968. Found in that environment, Ronald Lee, the disputed infant, appeared anemic, underdeveloped and undernourished as well as being physically dirty. Additionally, the witness testified she had observed a number of partially-filled wine bottles in the home and, on one occasion during that time period, she had observed Mr. Willis in an intoxicated state in the county jail. Based upon those things it was her opinion the care of all the Willis children was inadequate.

In her later testimony on cross-examination, Mrs. MacMillion said that she had no personal knowledge of what had occurred in relation to the Willis family or the home living conditions since her last visit early in 1969. She also stated she had been unsuccessful in locating new living quarters for the Willis family although she attempted to assist them in upgrading their living conditions, and acknowledged that the visiting homemaking services extended by the department of welfare to dependent families were not utilized in this instance since no such service was available in Fayette County.

For the period from March 1970 until February of 1972, Bruce Webb, the social worker most recently assigned to this family, also gave corroborating testimony in regard to the living conditions in the home. He observed the Willis children who had returned to the

home as being unkempt and dirty and stated the home condition had remained generally unsatisfactory. He related one incident in November 1971 at a time when the outside weather was cold and wintry and said the inside of the home was so cold that he and Mrs. Willis, though warmly dressed, were shivering because the home was in such a state of disrepair that it was virtually open to inclement weather conditions. Webb also opined that the children at home did not have proper discipline but admitted that none were in any type of difficulties outside the home. It was his further opinion that both parents lacked the ability to accept their parental responsibilities. Webb also corroborated previous testimony to the effect that he had once seen John Willis in an intoxicated state in the presence of some of his children. He also offered his opinion that, because of Ronald Lee's age when he left the home and considering the long separation, he felt a return to his natural parents would have a detrimental effect upon his future welfare.

On the other hand, his testimony was also to the effect that the parents were happy to have the children back in their custody and had made repeated attempts to secure Ronald Lee's return. Mr. Willis, according to Webb, had made twenty to twenty-five contacts with him during the 1970--1972 period for the purposes of expressing his concern for the return of Ronald Lee and finding new housing, an apparent precondition the department placed on Ronald Lee's return. Further, the Willis family had never refused any of the services offered to them by Webb and the welfare department, and Webb did not consider the children in the home to be physically abused.

Two school attendance officers testified for the State that they had had serious truancy problems with some of the Willis children in earlier years, but that in 1971 the school attendance by these children had been better than usual and that the most any of the children had missed in that year was seventeen days. Additionally, none of the children in the custody of the appellants had missed any school during the 1972 school year.

T. E. Myles, an attorney from Fayetteville who represented the foster parents, stated he offered Mr. Willis two or three hundred dollars to compensate or reimburse him for Ronald Lee's birth expenses and, contemporaneously, had asked both parents to sign a relinquishment and consent to adopt. Mr. Willis refused the offer of money and refused to sign any documents, telling Myles he believed there was hope of securing the return of his child.

The appellants offered testimony from four witnesses. Mary McNab, a former caseworker with the department of welfare in Washington, D.C., visited the Willis home on two occasions immediately prior to the September 1972 hearings. In addition, she conducted interviews with some fifteen neighbors and school officials who had contact with the Willis family. She offered testimony concerning her personal

observations and gave opinion evidence in her capacity as a trained caseworker. On her visits to the home she found it to be in good repair, clean and neat, with linoleum on the livingroom floor and the rooms, though poorly furnished, appeared to be adequate to serve the family's needs. She also stated there was water in the house and the family then had an electric pump for the water, and other plumbing facilities.

She stated she found the children expressed affection for one another and cared a great deal for their parents and she saw no indication of child abuse. Health records at the school corroborated the children's general good physical health. It was her concluding opinion that the family could and would properly care for the infant Ronald Lee if he were returned to his parents.

James Sommerville, a Presbyterian minister, visited the Willis home at the request of the Welfare Rights Organization for the stated purpose of giving testimony in this case and, also, to volunteer to help Mr. Willis with some home repairs. From his personal observation he found the home to be neat and clean and found no repairs to be necessary. Both Mary McNab and James Sommerville acknowledged on cross-examination that their visits to the Willis home were expected by the Willis family, but both said that the Willises did not know when they were going to drop in on them.

Annie Kelly, a sister of John Willis who also lived in Fayette County, testified she had visited the Willises at least once a month over the previous years; the present home was typical of other substandard rural homes in the area, and that Mrs. Willis kept the home clean and cooked good simple meals for the family. She stated, in her opinion, the Willises loved their children, took care of them to the best of their ability and did not abuse them. It was her further opinion the children loved their parents and all the children were in good health. She stated the Willises were on good terms with their neighbors. Further, as to the living conditions in the home they now had a Warm Morning heater in the livingroom and an electric stove in the kitchen.

John Willis testified that he had no notice nor was he served with any type of papers when the children were initially taken from him some four years previous. He testified generally that, though he had attempted to do everything the welfare department requested of him, they had not helped him get better living quarters and had refused to return Ronald Lee to the family despite his repeated requests to have Ronald Lee returned.

As to the condition of the present home, Willis said he had repainted the inside of the house, put in a bathroom, and was in the process of adding an additional room. Mr. Willis offered no testimony to rebut charges concerning his drinking habits.

The principal and underlying issue in this case is whether the State offered sufficient proof of unfitness of the

natural parents of Ronald Lee Willis to warrant a permanent change of custody for the child, and whether such child is neglected within the meaning of the statutes and case law?

Before arriving at consideration of the foregoing issue, we must assess the validity and legal effect of the initial taking of the infant child from its natural parents and of all proceedings had prior to the final hearing which began in September of 1972.

A principal contention of the State, in support of the correctness of the final order, is that the welfare of the child commanded the Juvenile Court of Fayette County to have given utmost consideration to the fact that the child had resided with his foster parents for most of his life. The appellants, on the other hand, say that the initial taking of the child, resulting in his prolonged absence from his natural parents, was illegally and unconstitutionally accomplished. This Court cannot ignore this assertion in the disposition of this case.

In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person. State ex rel. Acton v. Flowers, comm'r, 154 W.Va. 209, 174 S.E.2d 742 (1970); State ex rel, Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d 798 (1969). The Supreme Court of the United States has recognized the right to raise one's children is a fundamental personal liberty guaranteed by the Due Process clause of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). In that decision, Mr. Justice White cited, with approval, the language of Mr. Justice Frankfurter in an earlier concurrence:

> 'It is plain that the interest of a parent in the companionship, care, custody, and m anagement of his or her children 'comes(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangem ents.' Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513, 527, 10 A.L.R.2d 608 (1949).'

We hasten to affirm that Article III, Section 10 of the West Virginia Constitution in equal measure protects this fundamental right of parenthood. See In re: Simmons Children, 154 W.Va. 491, 177 S.E.2d 19 (1970).

The preeminent right of the parent to the custody of his child has been recognized in the statutes of this State since its formation. Code 1931, 44--10--7, as amended, provides Inter alia:

> '. . . But the father or mother of any m inor child or children shall be entitled to the custody of the

> person of such child or children, and to the care of his or their education. . . .'

Nevertheless, this Court, early in the history of this State, recognized that the right of the natural parent to the custody of his child is not absolute; it is limited and qualified by the fitness of the parent to honor the trust of the guardianship and custody of the child. See State ex rel. Neider v. Reuff, 29 W.Va. 751, 761, 2 S.E. 801 (1887). Standing at the side of the natural parents with benign, but continuing, interest is the State. The doctrine of Parens patriae, subsisting since feudal times and well documented in the common law of England, Virginia, and this State, accords the State rights just below that of the natural parent in the health and welfare of minor children. For the protection of the child, the State has always moved expeditiously and decisively when a natural parent has been proved to be unfit to continue the trust of raising his child, when a child has been abandoned by his natural parent or when the parent, by agreement or otherwise, has permanently transferred, relinquished or surrendered the custody of such natural child. See State ex rel. Cash v. Lively, W.Va.,187 S.E.2d 601 (1972); State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d 798 (1970); Whiteman v. Robinson, 145 W.Va. 685, 116 S.E.2d 691 (1960); Hoy v. Dooley, 144 W.Va. 64, 105 S.E.2d 877 (1958).

Our statutes providing for the welfare of children establish a mechanism whereby the courts may adjudicate questions arising when the State or a citizen thereof believes there is necessity to change the custodial relationship of natural parent and child because of some dereliction on the part of the parent or the child. Chapter 49 of the Code of 1931, as amended, is the legislative declaration of the State's interest, responsibilities and rights as respects any minor child under the age of eighteen years, who for some reason specified by the statute is in need of services, protection or care. See Code 1931, 49--1--2, as amended. The statute also recognizes that children may be neglected, and defines a neglected child in Section 3 thereof.

The procedure to be followed when an arm of the State or one of its citizens believes neglect of a minor child to have occurred, is to be found in Article 6 of Chapter 49. Section 1 provides:

> 'If the State department, (of welfare) or a reputable person, believes that a child is neglected, the department or the person may present a petition setting forth the facts to the juvenile court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. Upon the filing of the petition, the court or judge shall set a tim e and place for a hearing.'

Recognizing the rights of a natural parent to the care, custody, and companionship of his natural child rise to a constitutional level and judicial proceedings affecting such rights must be conducted with regularlity and fairness, this Court in a case concerning the alleged neglect of children, recently held:

> 'Although the hearings in a juvenile court are not usually held to the same strict rules of procedure as ordinary cases, the basic requirement of the law as to due process m ust be followed for a proper hearing to be held.' Syllabus, Point 1, In re: Simmons Children, Supra.

One of the basic constitutional guarantees of due process is, of course, that no one shall be deprived of a substantial right by an arm of the State without notice and the opportunity to be heard in a meaningful manner. See State ex rel. Payne v. Walden, W.Va., 190 S.E.2d 770 (1972). Code 1931, 49--6--2, as amended, recognizes and accords the right of notice and the opportunity to be heard to the parents of a child whose custody is sought to be taken by the state department of welfare or another person because of neglect. The case of In re: Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1966), established the principle that fundamental due process requires the notice of an adjudicatory hearing to the parties affected in a juvenile proceeding. Well before Gault was decided, however, this Court held in the case of In re: Sutton, 132 W.Va. 875, 53 S.E.2d 839 (1949), a parent could not be divested of his parental rights without notice and opportunity for a hearing when such parent was subject to the jurisdiction of the court and available for service of process; and any such hearing held divesting the parent of his rights to his child resulting in a decree, was void and of no effect. This is the undoubted law in this jurisdiction and elsewhere, mandated by our own as well as the Federal Constitution, and it operates to prevent the permanent termination of parental rights without according the full range of due process guarantees to the affected persons.

Nevertheless, there are situations of an emergency nature which can and do arise demanding the State as Parens patriae and acting In loco parentis, to move immediately without regard to the rights and sensibilities of the parents in order to protect the health, welfare and sometimes the very life of a child who needs care and protection. Again, our statute so provides. Code 1931, 49--6--3, as amended, reads:

> 'Until a hearing can be held upon the petition, the court or judge may order that the child be delivered into the custody of a county department, or into such other custody as the court or judge may deem proper.'

Until now, this section of the statute has never been construed. It would appear

the welfare department availed itself of the provisions of this section to accomplish the taking of the Willis children in December of 1968. Recently, this Court was faced with an analogous situation, coincidentally involving the department of welfare, which involved the claimed entitlement or privilege of one to do business with the State. In the case of State ex rel. Bowen v. Flowers, Comm'r, W.Va., 184 S.E.2d 611 (1971), based upon an investigation, the welfare department suspended a pharmacist from participation in medical programs administered by the department, and did not permit him to continue selling drugs to the State while under civil and criminal investigation. The commissioner suspended the pharmacist without first granting him opportunity to be heard. The Court recognized the legitimate State interest in purchasing and supplying pharmaceuticals to persons eligible for the medical assistance programs administered by the department of welfare and held this principle to be of overriding and compelling State interest. As such it warranted the temporary abrogation of an individual's right to due process:

> 'The opportunity to be heard is a fundam ental requirement of the due process clause of the federal and state constitutions. However, where there is an overriding public interest involved the hearing m ay be postponed for a reasonable period of tim e in order to allow an investigation to be conducted.' Syllabus, Point 1, State ex rel. Bowen v. Flowers, Comm'r, Supra.

It then became necessary for the Court also to define a 'reasonable period of time' and it held:

> 'In a case where a temporary suspension prior to a hearing pending an investigation is justified, the length of the suspension in order to conduct the investigation depends on the needs and circumstances of the individual case.' Syllabus, Point 2, State ex rel. Bowen v. Flowers, Comm'r, Id.

Then, appraising the facts in that particular case, the Court held the suspension of the pharmacist's entitlement for a period of four months without opportunity for a hearing, and considering that an investigation had been continuing for a period of seven months, was an unreasonable length of time. Consequently, the commissioner was subject to the award of a rule in mandamus against him, in that his failure to accord the hearing for the period of time involved constituted an arbitrary and capricious action on his part.

Returning to the facts of the case at hand, we assume there was good and sufficient reason for the lodging of a petition by a

welfare department official in December of 1968 against John and Rosetta Willis in order to effect an immediate charge of the custody of their minor children. Arguendo, we further assume emergency circumstances warranted an immediate taking, without notice to the parents or opportunity for them to be heard. However, we must pass upon whether the department then had the right to retain the custody of Ronald Lee and to pass his custody on to strangers while withholding from his natural parents the opportunity for a meaningful hearing for a period of more than three years.

In a very similar child custody case involving a dispute between a natural parent and the department of welfare in the Commonwealth of Massachusetts, a three-judge federal district court in White v. Minter, 330 F.Supp. 1194 (D.C.Mass.1971), had occasion to pass upon this specific question. That court held the retention of an allegedly abandoned child away from its natural mother without extending the right of hearing to the mother for a six-months' period of time, was an unconstitutional application of a statute (similar in language to Code 1931, 49--6--3 as amended) which otherwise permitted a temporary custody change in an emergency. The court also approved language from the case of United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) wherein the Supreme Court held a statute setting forth no guidelines for a 'reasonable time' as meaning that time 'reasonably requiring administrative and judicial action within time limits that would meet constitutional demands.' Id, 330 F.Supp. at page 1198. In other words, a reasonable time would be an unspecific time, rather short in duration, necessarily required to effectuate the overriding state interest.

We believe the principles enunciated and implied in the cases of State ex rel. Bowen v. Flowers, Comm'r, Supra, and White v. Minter, Supra, are applicable to the case at hand. Under the principle of Parens patriae we acknowledge the State has an overriding interest in the health and welfare of any allegedly neglected child within its jurisdiction who is in apparent need of immediate care. On the other hand, we will not say the retention of custody of a child and the deprivation of companionship of the child from his natural parents for a period of three years, without notice and without a hearing to the persons affected, is sanctioned, by any stretch of the imagination, by the 'overriding State interest' principle. Any taking and holding of a child from the custody of its natural parents is an unwarranted and unjustified intrusion by the State into the very personal family relationship, if it continues beyond any period necessary to serve the legitimate interest of government to protect the health and welfare of the minor child. The holding of the child in legal limbo away from his family and in disregard of their rights, without adjudication of these rights, offends due process and subverts the associative benefits of the familial relationship which natural law has honored since ancient time and which the Constitution protects today. See

Stanley v. Illinois, Supra; In re: Gault, Supra; Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1965); In re: Simmons Children, Supra; Accord, Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243 (1906). Both this Court and the Constitution are offended by the timespan of the retention of the infant child Ronald Lee Willis in obvious disregard of his parents' rights, his rights, and his consequent future welfare. We hold, therefore, the initial custody change of Ronald Lee from his natural parents to the department of welfare, though presumptively legal at its inception, to have become, by the mere passage of time coupled with the omissions of the State to accord due process to the natural parents, void *ab initio* and of no effect.

As respects the abortive legal proceeding held in February of 1972 purporting to terminate the parental rights of the appellants and transferring permanent custody to the department of welfare, and reposing authority in it to consent to the adoption of Ronald Lee Willis, the Juvenile Court of Fayette County upon reconsideration saw fit to set aside its ruling of February 16, 1972, we see no reason to disturb that ruling. There is ample authority in the case of In re: Simmons Children, Supra, to support the legal conclusion of the court in the vacation of its former order. Syllabus, Point 2 of that case held:

> 'The petition to the juvenile court in cases involving neglected children should set forth the facts constituting the neglect and not merely state conclusions in connection therewith.'

This principle, as well as those involving adequate notice to the parties and the exclusion of hearsay evidence, is directly applicable to the proceedings had in February of 1972.

Accordingly, we come to the main issue with a view that valid legal proceedings occurred in this case, if at all, within a time frame between August 25, 1972 and November 22, 1972. On the former date, regular juvenile proceedings were convened by the court. All parties were present with counsel and waived any defects as to notice of the scope of the hearing.

In assessing the allegations of the petition and the evidence taken in the proceeding, this Court is guided by relatively settled principles. First, a petition in a proceeding involving custody of an infant is addressed to the sound discretion of the juvenile court. Green v. Campbell, 35 W.Va. 698, 14 S.E. 212 (1891); Armstrong v. Stone, 9 Gratt. (50 Va.) 102 (1852); Coffee v. Black, 82 Va. 567 (1866). See also, 14 M.J., Parent and Child s 8 (1951). The juvenile court is authorized to exercise a discretion conducive to the best interest of the child. Hammond v. Department of Public Assistance, 142 W.Va. 208, 95 S.E.2d 345 (1956). Second, even in a case where the State, acting by and through the authorization of the legislature in delegation to the

department of welfare, properly seeks to interpose and substitute itself to the rights of natural parents to an allegedly neglected child, the basic presumption applies: 'The right of a natural parent to the custody of his or her infant child is paramount to the right of any other person.' State ex rel. Acton v. Flowers, Comm'r, Supra. Third, the right of the natural parent is not absolute and may be limited or terminated by the State if the parent is proved to be unfit to retain the trust of child care. State ex rel. Neider v. Reuff, Supra. Fourth in order to separate a child from its parents on the ground of their unfitness, there must be clear, cogent and convincing proof. In re: Simmons Children Supra; Whiteman v. Robinson, Supra. Fifth, each case turning on the unfitness of the natural parent must be decided on its own particular facts. Pierce v. Jeffries, 103 W.Va. 410, 137 S.E. 651 (1927). Sixth, once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Even then, the legal rights of the parents, being founded in nature and wisdom, will be respected unless they have been transferred or abandoned. Cunningham v. Barnes, 37 W.Va. 746, 17 S.E. 308 (1893); State v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 (1948). The statutory scope of the juvenile court's discretion in making the award of custody, found in Code 1931, 49--6--5, as amended, is consistent with the common law of this State and the principle just exposited. Seventh, on this review, this Court is also guided by the principle that findings of fact of the juvenile court, in the exercise of its equity jurisdiction, will not be disturbed on appeal unless at variance with undisputed evidence or contrary to the plain preponderance of the whole evidence. See, Wade v. Wade, 115 W.Va. 132, 174 S.E. 787 (1934).

Applying the foregoing principles and assessing the evidence adduced by the parties, we are led inexorably to the conclusion that this case must be reversed and the child, Ronald Lee Willis, must be restored to the custody of his natural parents. Viewing the evidence of the State in the best light possible, it is strongly indicative of child neglect and less than proper parental care for a period from 1966 to December of 1968. From that point forward until late 1971, the evidence less strongly, though certainly affirmatively, indicates an unawareness on the part of the parents of their own personal needs as well as the State-recognized needs of the children. The rather dismal home conditions which prevailed during that period certainly cannot be ignored by this Court, nor were they ignored by the juvenile court.

On the other hand, there is strong evidence from the State's own witnesses as well as the witnesses for the appellants, that the natural parents were quite willing to accept all the help the department of welfare was willing to extend to them. That they and their

children living at home with them, loved and cared for one another and that the father, though with repeated unsuccessful efforts, never gave up on attempts to resecure the custody of his infant child, Ronald Lee Willis. The evidence adduced on behalf of the appellants is strongly indicative of rehabilitative efforts to enhance the living conditions in the home and to effect repairs and restoration of the physical aspects of the residence in such a manner as to make it a more fit place within which sanitary and comfortable cohabitation could occur.

In summary, the best evidence of the department of welfare is remote and, unfortunately for the State, irrelevant to the conditions existing in the critical period just prior to the autumn of 1972, when the court was called upon to reassess in a valid and meaningful manner, relevant and pertinent evidence on the issues of neglect and unfitness of the parents. In point of time the evidence of the State, otherwise unrefuted, establishing the transgressions of apathetic parenthood, is certainly insufficient when assessed in light of the recent and favorable evidence showing the parents' efforts and successes toward improvement of the family environment and the physical living conditions in the home.

The conduct of the older Willis children living at the home must also be given consideration. It must be recalled that the children returned of their own volition to their parents' home in early 1969 and that the only evidence given in relation to them demonstrated strong ties of affection within the family and revealed they were in no trouble with the law or the community; and that though their earlier school attendance had been irregular and haphazard, that recent attendance records in 1971 and in 1972 showed significant improvement. From the testimony of the school attendance officials it appeared that in the year 1972 none of the children had missed any attendance in school.

As regards the voluntary return to home by the older children, we must also give some probative value to the inconsistent conduct of the welfare department in demonstrating strong concern for the youngest child's welfare while showing no concern in the older children's return to an allegedly unsuitable environment.

We cannot today in candor and fairness commend the family's living conditions or exemplify it as a typical West Virginia rural home; we cannot gloss over the unrefuted evidence of the father's intemperate drinking habits, nor can we even suggest these children will be raised in the best possible family environment from an educational, economic, or cultural standpoint.

Nevertheless, the duty on this Court has been to determine whether neglect and parental unfitness have been established by clear, cogent and convincing proof. Simply put, such proof has not been introduced. The strongest proof offered on behalf of the State was not seasonable as remote in time and, therefore, was not relevant and material. It must, of

necessity, fail and the welfare department's case fails with it.

There is one further factual point which calls for a fair comment by this Court. Our decision is rendered all the more difficult because we cannot ignore the fact that Ronald Lee Willis is being restored to the custody of strangers in a strange and, for him, an unnatural environment. From the time he was eight months of age until now when he is five and one-half years old, he has been given the love, care, and companionship of the foster parents who are presumed on the evidence at hand to be fit, proper and fine people. It would be an understatement to say that it will be most difficult for them and for Ronald Lee to adjust to the change of custody. Through a tragic series of events, the State Department of Welfare is responsible for the consequences which must naturally flow from the implementation of this decision. And in that the State's custody of Ronald Lee Willis from December 1968 was never even presumptively valid until November 22, 1972, it naturally follows that the State could not consent legally to the adoption of the infant child in April of 1972.

As this Court has previously recognized in the case of Whiteman v. Robinson, Supra, the law does not recognize any relationship which may produce mutual affection between a child and his temporary custodian and which leads to the annulment of the natural parents' right to the care, custody and control of the child:

> 'It would be a dangerous and perversive doctrine to hold that the mutual affections of the child and its tem porary custodian should annul the parent' s natural right to his offspring.' Id., 145 W.Va. at page 696, 116 S.E.2d at page 697.

The welfare department sought to rely upon the passage of time and the ties of mutual affection which naturally arose between the foster parents and Ronald Lee Willis. Neither this Court nor the Juvenile Court of Fayette County is entitled to take legal cognizance of that custody change, and its effect upon the child. No court is warranted in applying the 'polar star principle' until the natural parents' rights have been lawfully severed and terminated.

For the foregoing reasons we hold the judgment of the Juvenile Court of Fayette County to have been plainly wrong: at variance with undisputed evidence, and contrary to the plain preponderance of the whole evidence. We, therefore, reverse the judgment and remand it to the juvenile court for the entry of orders consistent with this opinion and the principles of Res judicata as set forth in the case of State v. See, 145 W.Va. 322, 115 S.E.2d 144 (1960), and the holding reflected in Syllabus Point 1 thereof.

Reversed and remanded with directions.

SPROUSE, Justice (dissenting):

I respectfully dissent from the decision of my colleagues as expressed in the majority opinion. I agree in the main with that part of the discussion concerning the laws and constitutional principles as they relate to the temporary custody of an infant child in cases of this nature, but I believe that this discussion is irrelevant to the proper resolution of the issue in this case. The sole issue, in my opinion, is whether the trial court properly found after the 1972 hearings that the Willises were unfit parents.

Certainly, neither a court nor the Department of Welfare can, under the guise of temporary custody, permanently remove a child from its natural parents. The 'overriding state interest' principle cannot be thus abused. The discussion of the laws and constitutional principles concerning this is learned and well articulated in the majority opinion. Most certainly such temporary custody can only be for a reasonable time and the length of time 'depends on the needs and circumstances of the individual case.' Obviously, a retention of a child under a temporary custody order for a period of three years is too long and is violative of the due process rights of the parents. I disagree strongly, however, with the conclusion of the majority that the original action by the court awarding temporary custody is thus void *ab initio.* This conclusion has no bearing on the outcome of the majority decision and is an added increment not called for by the logic or rationale of the above rule. The prolonged illegal temporary custody, resulting in the unconstitutional application of an otherwise constitutional statute, is sufficient in itself to terminate the temporary retention. Code, 1931, 49-- 6--3, as amended, however, clearly gave the court authority to make the original award. Lifting ourselves by the boot-straps by creating the fiction that a once legal proceeding becomes void Ab initio is a dangerous precedent. Such judicial overkill is not necessary for the majority disposition of the case, and may well adversely affect some future relationship between innocent third parties.

I agree with most of the well-reasoned discussion in the majority opinion of the law relating to the right of parents to custody of their children. I disagree sharply, however, with the majority's application of these legal principles to the facts of the case. I agree that: A decision involving custody of an infant is in the sound discretion of the juvenile court and that the juvenile court is authorized to exercise a discretion conducive to the best interest of the child; the right of a natural parent to the custody of his or her infant child is paramount to the rights of any other person (except the child, of course); the right of the natural parent is not absolute and may be limited or terminated by the State if the parent is proved to be unfit; in order to separate a child from its parents on the ground of their unfitness, there must be clear, cogent and convincing proof; each case of alleged unfitness of the natural parent must be decided on its own particular facts; once a determination of unfitness is made, the

welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody; and finally and importantly, an appellate court reviewing a custody award made by a trial court is governed by the long established and still prevailing rule of law that the finding of fact by a juvenile court in the exercise of its equity jurisdiction will not be disturbed unless at variance with undisputed evidence or contrary to the plain preponderance of the whole evidence.

The majority opinion states: '* * * Viewing the evidence of the State in the best light possible, it is strongly indicative of child neglect and less than proper parental care for a period from 1966 to December of 1968. From that point forward until late 1971, the evidence less strongly, though certainly affirmatively, indicates an unawareness on the part of the parents of their own personal needs as well as the State-recognized needs of the children. The rather dismal home conditions which prevailed during that period certainly cannot be ignored by this Court, nor were they ignored by the juvenile court. * * *' The statement of facts is well presented in the majority opinion, but the above summary of them in applying the law is a considerable understatement.

The majority expresses the view that after 1971 and until the hearing in the Fall of 1972, the home conditions and the efforts of Mr. and Mrs. Willis to become better parents improved.

Importantly, the opinion goes on to say: 'In summary, the best evidence of the department of welfare is remote and, unfortunately for the State, irrelevant to the conditions existing in the critical period just prior to the autumn of 1972, when the court was called upon to reassess in a valid and meaningful manner, relevant and pertinent evidence on the issues of neglect and unfitness of the parents. * * *'

The principal witness in the case, the social worker, Nellie MacMillion, who observed the family frequently during the important period between 1966 and 1969, testified that during her visits to the home she found that there was continually a strong odor in the house; that the family used the area around the house for toilet functions; there was human excreta in the house; and that the cooking utensils were filthy. The rest of her testimony was well summarized in the majority opinion: '* * * As to the physical structure of the house, the only heating unit, a stove, was propped up with bricks and rocks; there were no bathroom facilities; the kitchen facilities were such that it was impossible to prepare complete meals; there were only two bedrooms in the house. There were twelve persons occupying the house in December of 1968. Found in that environment, Ronald Lee, the disputed infant, appeared anemic, underdeveloped and undernourished as well as being physically dirty. Additionally, the witness testified she had observed a number of partially- filled wine bottles in the home and, on one occasion during that time period, she had observed Mr.

Willis in an intoxicated state in the county jail. * * *'

Another social worker, Bruce Webb, testified that he was assigned to the family between 1970 and 1972, and his testimony indicated that these conditions remained substantially the same during that period of time. He testified that on one visit to the home in November, 1971, when the weather was extremely cold, the house was open to the cold weather and that the occupants were suffering from the cold, although they were dressed as warmly as possible. Webb also testified about seeing the father, John Willis, intoxicated in the presence of his children. Appropriate witnesses for the State indicated a serious discipline problem with the Willis children as well as frequent absences from school during the entire period through 1971.

None of the witnesses for the State could be considered to be biased in the ordinary sense. The two most important ones were MacMillion and Webb, social workers who, excepting the parents, knew far more about the family than any witnesses involved. The testimony of the principal witnesses for the defendants, on the other hand, could have been considered suspect. John Willis, the father, neither denied nor offered any rebuttal testimony concerning his alcoholic and slovenly habits. John Willis' sister could well have been motivated by the obvious familial interest. The mother, Mrs. Willis, although having the opportunity to testify, declined to avail herself of that opportunity. Mary McNab was obtained by the parents as a purported expert witness. Her qualification was one year in social work in the neighborhood of Washington, D.C. After the defendants were alerted to her arrival, she visited them on two occasions for a total of two and one-half hours. Based on this, she made the sweeping conclusion that the Willises were fit parents. Likewise sent to the Willis home after notification to them, was witness Sommerville. He testified concerning the same home that MacMillion and Webb had described as being so deplorable. Sommerville made the somewhat startling observation that the home was 'a very typical West Virginia home', and 'a good place for children to be living in.'

I agree with my colleagues that the proceedings of February 16 were invalid, and that the hearings of September 7, and September 29, 1972, were legal in all respects. I am at a loss to understand, however, how the evidence covering the period 1966 to 1972 by MacMillion and Webb loses its probative force when it was introduced during the latter hearings simply because it had been previously introduced in an irregular proceeding. The probative value of this evidence should likewise not be reduced because the infant, Ronald Lee Willis, was too long in the temporary custody of foster parents. The evidence was perfectly valid and, in fact, uncontroverted to prove that in each of the years from 1966 through 1971 the conditions of the willis home were intolerable for adequately rearing children and that the Willises either could not, or did not care to

remedy their problems. This evidence was offered only to establish the conditions during that period. The evidence concerning the part of the year 1972 that was involved should, of course, be weighed along with the evidence relating to the previous years. The Court in its opinion did that. We cannot say that a trial court in making a difficult determination of this type is limited to observing the conditions of the home and the conduct of the parents for any one period of time. It would seem to me always to be pertinent to consider the history of home conditions. The greater evidentiary detail by which such conditions are documented, the easier should be the court's decision. To deprive the trial judge of these important tools is perhaps to force the exercise of his discretion by artificial game rules contrived by parties or their counsel.

The trial court in this case gave every indication of fairness to the natural parents. A circuit court, such as is involved here, acts as a criminal court, a domestic relations court, a juvenile court, and a court of general civil jurisdiction. The juvenile dockets are always crowded. It was the Department of Welfare's dereliction in not securing an expeditious hearing on the matter of permanent custody. The trial court recognized this, and invalidated the February 16, 1972 hearing on statutory and constitutional grounds. The court offered to suspend later hearings to permit the defendants opportunity to gather additional rebuttal evidence. The court on September 7 and September 29 heard all of the testimony offered, and on October 6 entered an order continuing the case until it had opportunity to consider the evidence. It found in a carefully drawn opinion of October 27, that the Willises were unfit parents.

It is unfortunate that the case was in litigation for such a long period of time. On the other hand, the court obviously had more opportunity than normal to observe the parties and the witnesses, as well as having the advantage of being a trial judge involved in many similar proceedings in the same locality.

In view of all of this, it seems incongruous to me that we can recognize the trial court's discretion in making this finding, restating the rule that its finding will not be disturbed unless at variance with undisputed evidence or contrary to the plain preponderance of the whole evidence, and not uphold it. In my view, the findings of the trial court are supported by clear, cogent and convincing evidence. I cannot visualize a set of circumstances less conducive to the proper welfare of a child than those reported in this case. It is trite to say perhaps, that this has nothing to do with the fact that the Willises are on welfare or are economically poor. Poverty is not a basis of finding unfavorable family conditions. Families in dire economic circumstances frequently create for themselves the warmest, most sensitive and rewarding intrafamily relationships. Who knows but what that may be the best environment in which a child can be reared. Parents of any status who so neglect their children could be deprived of their custody. Neither poverty nor

opulence is an excuse for such gross neglect of children. Each case must be decided on its own facts regardless of the status of the parents.

I agree with the general statements concerning the doctrine of parens patriae and the doctrine relating to the rights of natural parents to custody of their children. I disagree, however, with what I consider to be an erroneous juxtaposition of these doctrines. It is clear that natural parents have rights superior to others in the absence of clear, cogent and convincing proof that the parents are unfit or have voluntarily relinquished their rights to a child. This does not mean, however, that the rights of a natural parent are superior to the rights of the child. No principle of law would suggest that. Once a determination is made that the parent is unfit, there is not involved a question of the rights of the State as opposed to the rights of the parents, but the rights of the child as opposed to the rights of the parents or perhaps more simply, the rights of the child disregarding any residuary feelings of the parents.

Once it was demonstrated by competent evidence that the parents were unfit, there could then be considered evidence of any matter affecting the welfare of the child. It was here that the trial court properly considered the fact that the child had been in the custody of foster parents from the time he was eight months old until he was five and one-half years old. This was not necessary to sustain the finding of unfitness, nor was it made solely in that respect. Once, however, unfitness had been determined, the trial court was faced with the task of ruling on the totality of the case, including the question of custody to the Department of Welfare.

My colleagues, of course, are sensitive to this aspect of the case, and realize as readily as I the tragic possibility of the scars inflicted upon this child because of his being taken from warmth and security to possible or probable insecurity. I cannot believe that justice is served by making this kind of human impact by syllogistic reasoning as to what point of time in a proceeding evidence will be received concerning the fitness of parents or that otherwide legitimate evidence should not be received because the Department of Welfare was negligent in not timely obtaining a hearing on the question of permanent custody. I also believe that the majority opinion would overly extend the great constitutional protection given to parents who have not, through their actions, lost their natural rights to those who are mere biological parents and have abandoned all claim to human dignity. Merely biological breeding without the sanctity of familial relationship of love, human dignity and respect is certainly not deserving of the blessings of constitutional protection. It is vitally important to distinguish in the application of this law between the fit and the unfit parents. Admittedly, it is seldom an easy chore. In drawing the difficult line, a court can only be guided by the question--how will the alleged unfit parent affect the child? The mere

animal instinct of some affection to an offspring is not enough. The parents in this case evinced little more than that.

I do not believe that Syllabus 1 of the opinion completely states the law. In addition, the last line of Syllabus 8 confuses an otherwise proper statement of law. I agree with the statement of Syllabus 4, except that part which indicates that the passage of time, coupled with the due process omissions of the State, make an otherwise initially legal act void *ab initio.*

Finally, I am not clear whether the majority opinion would dispose of the adoption proceedings pending at the time this case was decided by virtue of the last paragraph of the opinion relating to the principles of res judicata. If so, I disagree with that application of the doctrine of res judicata. The parties and issues were identical in both proceedings in State ex rel. West Virginia Department of Public Assistance v. See, 145 W.Va. 322, 115 S.E.2d 144. That holding, therefore, would not govern prospective adoption proceedings in this case. The prospective adoptive parents of Ronald Lee Willis were not parties to this proceeding and the issue of their previous prolonged custody of the child and similar issues were not considered.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2001 Term

FILED
February 22, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27910

RELEASED
February 23, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
ROSE L., MARY L., LAURA L. and RICHARD L., Jr.,
Petitioners,

v.

HONORABLE DAVID M. PANCAKE, Judge of
the Circuit Court of Cabell County,
and RICHARD L.,
Respondents.

Writ of Prohibition

WRIT DENIED

Submitted: January 9, 2001
Filed: February 22, 2001

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The Opinion of the Court was delivered by JUSTICE STARCHER.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syllabus Point 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984).

2. "A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W.Va. Code § 49-6-1, *et seq.*" Syllabus Point 3, *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997).

3. Under the provisions of *W.Va. Code*, 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud.

Starcher, J.:

The guardian *ad litem* ("guardian") appointed to protect the interests of the children of respondent, Richard L.,[1] has petitioned this Court for a writ of prohibition to prohibit the Circuit Court of Cabell County from a hearing a motion filed by Richard L. that requests the circuit court to set aside a document signed by Richard L. in which he agreed to relinquish his parental rights. Richard L. alleged in his motion that he had earlier agreed to relinquish his parental rights, but had done so under duress and fraud just prior to a final disposition hearing in an abuse and neglect case. The circuit court set a hearing date for the motion; however, before the hearing could be conducted, the guardian filed the present petition for a writ of prohibition.

Following our review of the briefs and arguments in this matter, we deny the writ.

I.
Facts & Background

On March 14, 1996, the West Virginia Department of Health and Human Resources ("DHHR") filed an abuse and neglect petition in the Circuit Court of Cabell County. The petition alleged that Richard L. and his wife Roberta L. had physically and sexually abused one of their minor children,

[1]We follow our past practice in domestic and juvenile cases that involve sensitive facts, and do not use the last names of the parties. *See State v. George W.H.*, 190 W.Va. 558, 562 n. 1, 439 S.E.2d 423, 427 n. 1 (1993).

Rose L.[2] The petition alleged that Rose L., who was then 8 years old, had tested positive for the sexually transmitted disease chlamydia on March 8, 1996.

The circuit judge entered an Emergency Order on the same day the petition was filed removing all four children from the family home and granting temporary legal and physical custody to the DHHR. By separate order on the same day the court also required Richard L. to submit to a medical evaluation to determine if he had chlamydia. According to the respondent's brief, the test of Richard L. for chlamydia was negative.[3]

The child abuse and neglect proceedings against Richard L. were set for final disposition on November 24, 1997. Counsel for Richard L. attempted to have Rose L. subpoenaed to testify at the final disposition, but for reasons that are not clear the subpoena was quashed. Sometime during the course of the hearing, Richard L. entered into an agreement with the State agreeing to relinquish his parental rights to all of his children in exchange for the right to have supervised visitation with the children if they desired to see him. On November 25, 1997, Richard L. signed a document titled "Relinquishment of Parental Rights." The agreement between the State and Richard L. was memorialized by the circuit court by order entered March 4, 1998.[4]

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[2]In addition to Rose L. there were three other children residing with Richard and Roberta L. at the time the abuse and neglect petition was filed. Although the March 14, 1996 petition generally alleged abuse and neglect of all four children, specific factual allegations were made only with respect to Rose.

[3]Without providing this Court with the criminal record, the parties in their briefs assert that Richard L. was subsequently charged with criminal sexual abuse. According to the parties, on January 16, 1997, these charges were dismissed without prejudice.

[4]The March 4, 1998 order, in addition to memorializing the agreement between Richard L. and the State, also memorialized the events of the November 24-25, 1997 hearing, and "TERMINATED

(continued...)

Sometime later, Richard L. learned that Rose L. desired to see him. Consequently, on June 12, 1999 Richard L. filed a motion with the circuit court requesting that the court order DHHR to arrange for a visitation with his daughter, Rose. Upon reviewing Richard L.'s motion, the circuit judge ordered that Rose L. be brought to the court for an *in camera* hearing to determine if Rose L. did, in fact, desire to visit with her father, and to determine if visitation would be appropriate. During the April 6, 1999 *in camera* hearing Rose L. disclosed to the judge that it was not her father, Richard L., who had sexually abused her, rather, it had been her grandfather.

Following the *in camera* hearing on May 14, 1999, Richard L. filed a motion to "Set Aside Relinquishment of Parental Rights And To Again Set This Matter For Final Hearing." In his motion, Richard L. argued that the relinquishment agreement had been obtained by fraud and duress.

After a review of the case[5] the circuit judge, by order entered June 11, 1999, set Richard L.'s motion for hearing on September 8, 1999.[6] In this order the judge recognized that "[t]here is no legal

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[4](...continued)
FOREVER" the parental rights of both Richard L. and Roberta L. to all four of their children, Mary, Laura, Richard, Jr., and Rose, subject to conditional visitation.

[5]The record indicates that the transcript of the hearing that was conducted on the day Richard L. signed his relinquishment has been lost.

[6]The circuit court judge, in his June 11, 1999 order, stated that:

> 4. The motion of Richard [L.] to set aside his relinquishment of parental rights should be set for hearing for the following reasons:
>
> a. A close reading of W.Va. Code § 49-6-7, which controls, provides that the agreement of a natural parent in the termination of parental rights shall be valid if made in writing and entered into under circumstances free from duress and free from fraud.
>
> b. This court has more than a suspicion that Richard [L.] may have relinquished his parental rights under duress and fraud[.]

precedent for such a motion in West Virginia" and "[t]here are substantial equitable principles involved." It is this hearing that the guardian seeks to prohibit.

II.
Standard of Review

Traditionally, we have held that a writ of prohibition is an extraordinary remedy and should be granted in only the most extraordinary cases. *See, e.g., State ex rel. West Virginia Div. Of Natural Resources v. Cline*, 200 W.Va. 101, 105, 488 S.E.2d 376, 380 (1997). We have stated that "'[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syllabus Point 2, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984). We have further held that:

> [i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

To justify the execution of a writ of prohibition, a petitioner "has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994).

III.
Discussion

The guardian contends that the circuit court is without jurisdiction to conduct a hearing on Richard L.'s motion arguing that, after the relinquishment of parental rights was signed by Richard L., the circuit court retained only the authority to conduct disposition reviews.

We note initially that "[a] circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W.Va. Code § 49-6-1, *et seq.*" Syllabus Point 3, *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997). We have also stated that circuit courts have "original jurisdiction of all cases coming within the terms of the [child welfare] act[.]" *Locke v. County Court of Raleigh County*, 111 W.Va. 156, 158, 160, 161 S.E. 6, 7 (1931). Consequently, we find that the circuit court in this case has jurisdiction to conduct proceedings that are in accordance with *W.Va. Code*, 49-6-1, *et seq.* [1998].

The guardian has requested that this Court prohibit the circuit court from examining the evidence of the events leading up to Richard L. signing the relinquishment of his parental rights. The issue, therefore, is whether the circuit court has the authority to conduct a hearing to determine whether or not

to set aside a relinquishment of parental rights that was signed by the petitioner. The statutes that govern abuse and neglect proceedings provide that "[a]n agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances *free from duress and fraud*." *W.Va. Code*, 49-6-7 [1977] (emphasis added). This provision would be meaningless if a circuit court could not conduct a hearing to look behind the face of the document to determine whether or not a parent signed the agreement to relinquish their parental rights under circumstances free from duress and fraud.

While *W.Va. Code*, 49-6-7 specifically permits a relinquishment of parental rights, it clearly suggests that such an agreement may be invalid if it is not entered into under circumstances that are free of duress and fraud. Whether there has been fraud or duress is a question of fact that must be determined by the circuit court judge. Accordingly, we hold that under the provisions of *W.Va. Code*, 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud.

IV.
Conclusion

Based on the forgoing, we deny the writ of prohibition.

Writ Denied.

No. 27910 - State of West Virginia ex rel. Rose L., Mary L., Laura L. And Richard L., Jr., v. Honorable David M. Pancake, Judge of the Circuit Court of Cabell County, and Richard L.

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OF WEST VIRGINIA

Davis, J. concurring:

The majority opinion addressed a straightforward issue. The Court was asked to determine whether trial courts have jurisdiction to hold a hearing where a parent has relinquished parental rights resulting from an abuse and neglect case and is claiming that the relinquishment was procured as a result of fraud and duress. The majority has correctly held in Syllabus point 3 of the opinion that "[u]nder the provisions of W. Va. Code, 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud." I concur in this holding. However, I am compelled to write separately to stress the point that in any proceeding relating to the relinquishment of parental rights the prevailing principle of law is *the best interests of the child*.

The Best Interests of the Child

There can be little argument that no parent should part with his or her child when the consent to the relinquishment of parental rights is induced by fraud or duress perpetrated by another. The life-long bond between a parent and his or her child is an emotional attachment that stands as a cornerstone of civilization. The realization and existence of this fact, however, is tempered by a longstanding principle of law that in "custody matters, we have traditionally held paramount the best interests of the child." Syl. pt 5, in part, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996).

Because I am committed to making certain that the "best interests of the child" remains the polar star for child custody decisions in West Virginia, I write separately to caution the lower courts that when conducting a hearing subsequent to any relinquishment proceeding, they must give high regard to the interests of the child(ren) involved. *See William D.A., Sr. v. Shawna Renee A.*, 206 W. Va. 679, 683, 527 S.E.2d 790, 794 (1999) (Davis, J. concurring) ("When addressing issues involving children, especially custody issues, consideration of the best interests of the child must be paramount."); *Kessel v. Leavitt*, 204 W. Va. 95, 174, 511 S.E.2d 720, 799 (1998) ("Superior to any rights of parents to the custody of their own children, however, is the overriding consideration of the child's best interests. Thus, the natural right of parents to the custody of their children is always tempered with the courts' overriding concern for the well-being of the children involved."); Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."); *In re Jeffrey R.L.*, 190 W. Va. 24, 32, 435 S.E.2d 162, 170 (1993) ("Although the rights of the natural parents to the custody of their child and the interests of the State as parens patriae merit significant consideration by this Court, the best interests of the child are paramount."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children.").[1]

Consistent with this consideration for the best interests of the child and the importance of

[1]*See also* W. Va. Code § 48-4-9(a)(4) (1999)("[T]he court shall decree the adoption if . . . it is in the best interests of the child to order such adoption.").

timely and finally resolving custody issues so that a child may attain the stability and security that is so crucial to a young life, it should be pointed out that, obviously, a relinquishment agreement that is made in writing and entered into under circumstances free from duress and fraud *is valid*. A parent attempting to show otherwise is faced with a challenging task. Indeed, the threshold for establishing duress and fraud in the context of the relinquishment of parental rights is extremely high. As to duress, this Court has held that, in the context of an adoption, duress "means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress[.]" Syl. pt 2, in part, *Wooten v. Wallace*, 177 W. Va. 159, 351 S.E.2d 72 (1986). *See also Baby Boy R. v. Velas*, 182 W. Va. 182, 185, 386 S.E.2d 839, 842 (1989) ("[Duress] means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child."). With respect to fraud, we have held:

> The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.

Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981). *Accord* Syl. pt. 3, *Cordial v. Ernst & Young*, 199 W. Va. 119, 483 S.E.2d 248 (1996); Syl. pt. 2, *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W. Va. 468, 425 S.E.2d 144 (1992); Syl. pt. 2, *Muzelak v. King Chevrolet, Inc.*, 179 W. Va. 340, 368 S.E.2d 710 (1988).

Finally, I wish to emphasize that a parent challenging a relinquishment of his or her parental rights on the grounds of duress and fraud has the difficult responsibility of establishing the elements outlined above by *clear and convincing* evidence. *See, e.g.*, 48-4-5(a)(2) (1997) (Repl. Vol. 1999) (allowing revocation of adoption due to fraud or duress only where "[t]he person who executed the consent or relinquishment proves *by clear and convincing evidence* . . . that the consent or relinquishment was obtained by *fraud or duress*" (emphasis added)); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992) ("[The] elements [of *fraud*] must be proved by *clear and convincing evidence*." (emphasis added)); Syl. pt. 2, *Cardinal State Bank, Nat'l Ass'n v. Crook*, 184 W. Va. 152, 399 S.E.2d 863 (1990) (per curiam) ("'Allegations of *fraud*, when denied by proper pleading, must be established by *clear and convincing proof*.' Syllabus Point 5, *Calhoun County Bank v. Ellison*, 133 W. Va. 9, 54 S.E.2d 182 (1949)." (emphasis added)); Syl. pt. 2, *Warner v. Warner*, 183 W. Va. 90, 394 S.E.2d 74 (1990) ("Since property settlement agreements, when properly executed, are legal and binding, this Court will not set aside such agreements on allegations of *duress* and undue influence absent *clear and convincing proof* of such claims." (emphasis added)); Syl. pt. 3, *Allegheny Dev. Corp., Inc. v. Barati*, 166 W. Va. 218, 273 S.E.2d 384 (1980) (per curiam) ("'The *onus probandi* is on him who alleges fraud, and, if the *fraud* is not *strictly and clearly proved* as it is alleged, relief cannot be granted.' Pt. 1, Syl., *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S.E. 203 (1899)." (second and third emphases added)); Syl. pt. 3, *Carroll v. Fetty*, 121 W. Va. 215, 2 S.E.2d 521 (1939) ("In an action for wrongful death, a written release, signed by the beneficiaries entitled to recovery, may be set aside where it was obtained by *duress* exercised by a third party with the participation or knowledge of the releasee. However, such duress must

be proved by *clear and convincing evidence* and generally presents a question of fact for the jury." (emphasis added)).

Based upon the foregoing authority, it is clear that a parent has a heavy burden to establish duress or fraud once he or she has relinquished parental rights. Importantly, the inquiry does not end even if a parent satisfies that burden. Ultimately, lower courts must always return to the polar star principle: the best interests of the child. Consequently, even when a parent has successfully proven that fraud or duress played a role in the relinquishment of parental rights, trial courts must *still* consider the best interests of the child before finally resolving custody issues. This critical point must be clearly understood. As we have consistently stated: "the natural right of parents to the custody of their children is always tempered with the courts' overriding concern for the well-being of the children involved." *Kessel*, 204 W. Va. 95, 174, 511 S.E.2d 720, 799.

For the reasons so stated, I concur in the majority opinion.

176 W. Va. 235, 342 S.E.2d 201
Supreme Court of Appeals of West Virginia

George Stephen ROZAS
v.
Cheryl L. ROZAS

No. 16644
March 25, 1986

SYLLABUS BY THE COURT

1. "A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." Syl., *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d 798 (1969).

2. "While courts always look to the best interests of the child in controversies concerning his or her custody, such custody should not be denied to a parent merely because some other person might possibly furnish the child a better home or better care." Syl. Pt. 3, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975).

3. If an expert's report is not introduced into evidence, there is no right to cross-examine the report's preparer in open court.

4. Under *W.Va.R.Evid.* 702, a trial judge has broad discretion to decide whether expert testimony should be admitted, and where the evidence is unnecessary, cumulative, confusing or misleading the trial judge may properly refuse to admit it.

5. Even though a trial judge may exclude a court-appointed expert's testimony or opinion from the record, he may not abrogate each party's right to inspect the expert's findings. The parties to an action where the court has appointed an expert retain all their discovery rights in the expert's report.

William C. Garrett, Garrett, Garrett & Nostrand, Webster Springs, for appellant.

William W. Talbott, Talbott & Alsop, Webster Springs, for appellee.

NEELY, Justice:
This is an appeal from the Circuit Court of Webster County's 5 August 1983 order returning Elizabeth May Rozas to the custody of her mother Cheryl Rozas. Today, we address two issues: (1) whether the circuit court's custody order is supported by the weight of the evidence; and, (2) whether the circuit court erred by refusing to make the report of a 7 July 1983 psychological examination of Cheryl Rozas available for the litigants' inspection. Because the trial court erred in both of these respects, we reverse.

I

On 16 November 1982 twelve-month-old Elizabeth May Rozas underwent a mastoidectomy at the West Virginia University Hospital. Following the operation, Elizabeth had a one-inch incision behind her left ear to allow for proper drainage. To protect her ears from infection, they were dressed and bandaged. During the days following the surgery, the dressing around Elizabeth's ears repeatedly fell off and the incision bled recurrently. Furthermore, the incision widened from one to two inches and "[t]wo vertical scratches, one in front and one behind" her left ear appeared on 2 December 1982. These events had no explanation, but a review of the hospital's nursing notes and staff progress notes revealed that at each bleeding incident Mrs. Rozas was alone with, or in the vicinity of, the child.

Concerned for his child's safety, on 9 December 1982 George Stephen Rozas, Cheryl L. Rozas' ex-husband, petitioned the circuit court to remove custody of the child from Cheryl Rozas. On 10 December 1982, Mr. Rozas obtained a temporary custody order that barred Cheryl Rozas from visiting Elizabeth. Subsequently, the wound healed quickly and there were no more bleeding episodes.

Pending the hearing on Mr. Rozas' petition, the circuit court transferred temporary custody of the child to the Department of Welfare. After an evidentiary hearing, on 5 August 1983 the circuit court held that George Rozas had, by a preponderance of the evidence, established that Cheryl Rozas physically abused Elizabeth while the child was a patient in the West Virginia University Hospital from 15 November 1982 through 12 December 1982. However, the court made no finding as to Cheryl Rozas' fitness as a mother. Furthermore, the circuit court concluded that it would be in the best interests of Elizabeth May Rozas for the court to return her to the custody of Cheryl Rozas provided that they both lived in the home of Cheryl Rozas' parents, Jessie and Fannie Woods.

From the events that took place at the hospital, the trial court concluded that Mrs. Rozas physically abused her child in a manner that posed a significant risk to the child's health and welfare. Our reversal of this case is required because we find it difficult not to conclude that the court was in error when it failed to find Mrs. Rozas an unfit parent. The physical abuse that Mrs. Rozas visited upon her child is a *prima facie,* although not conclusive, case of parental misconduct. Such misconduct would serve as grounds for a transfer of custody. Syl., *State ex rel. Kiger v. Hancock,* 153 W.Va. 404, 168 S.E.2d 798 (1969). Accordingly, the first question that the trial court must answer on remand is whether Cheryl Rozas is a fit parent. The circuit court may have believed that although there were isolated instances of child abuse arising from the stressful circumstances under which Mrs. Rozas was living as a result of the deterioration of her marriage, she is now a fit parent because her abusive behavior is unlikely to recur. Our

problem in this case, however, is that the circuit court's findings of fact and conclusions of law come to us as final pronouncements rather than as explanations. And the circuit court has not forwarded a transcript of the proceedings below. On the basis of the record we have received, we cannot make a determination of Mrs. Rozas' fitness.

The trial court held that there was no evidence that Mr. Rozas is an unfit parent. Absent a showing that a natural parent is unfit, a natural parent's right to custody outstrips that of a grandparent. *Hatfield v. Hatfield,* 171 W.Va. 463, 300 S.E.2d 104 (1983); *Leach v. Bright,* 165 W.Va. 636, 270 S.E.2d 793 (1980). If Mrs. Rozas is unfit, the hybrid arrangement the trial court devised where Mrs. Rozas has custody so long as both she and the child reside with Mrs. Rozas' parents cannot stand. The courts cannot use the best interest of the child doctrine to strip a *fit* natural parent of his child. Syl. Pt. 3, *Hammack v. Wise,* 158 W.Va. 343, 211 S.E.2d 118 (1975); *Leach v. Bright,* 165 W.Va. 636, 270 S.E.2d 793 (1980) (award of nominal custody to fit parent improper if it has the practical effect of placing care and control in the grandparents while denying it to the other fit parent).

Because there is nothing in the record to suggest that Mr. Rozas' fitness as a parent was extensively examined below, on remand the trial court must make an evaluation of his fitness. If at the end of the proceedings, the evidence shows that one parent is fit, and the other parent unfit, the trial court must award the child to the fit parent. However, if the trial court finds that both parents are fit, the trial court may apply the "primary caretaker parent" rule, *Garska v. McCoy,* 167 W.Va. 59, 278 S.E.2d 357 (1981), or if there is no primary caretaker, examine the best interests of the child. In such an examination, the trial court may consider the affect that the child's respective sets of grandparents will have on the child's welfare should custody be awarded to one parent or the other.

II

The trial court made an additional finding of fact that Webster County Mental Health's 7 July 1983 examination of Cheryl Rozas should not be made part of the record. George Rozas contends that the trial court erred by refusing to admit the report into evidence, by refusing to allow him to cross-examine the report's preparer, and by refusing to make the report available for his inspection.

A

The court ordered the examination of Mrs. Rozas pursuant to *W.Va. Code,* 49-6-4(a) [1984], which states in pertinent part:

> At any tim e during proceedings under this article the court m ay, upon its own m otion or upon motion of the child or other parties, *order the child or other parties to be examined by a physician, psychologist or*

> *psychiatrist, and may require testimony from such expert, subject to cross-examination and the rules of evidence: ...*

W.Va. Code, 49-6-4(a) [1984] leaves no doubt that despite the less formal evidentiary rules and practices in child custody cases, all psychiatric or psychological evidence shall be heard in open court and comport with all the requirements of due process.

It has long been established that if the trial court wishes to use the report of an independent investigator in making a decision in a child custody case, all parties to the proceeding will be afforded the opportunity to cross-examine of the report's preparer. *Rohrbaugh v. Rohrbaugh,* 136 W.Va. 708, 715, 68 S.E.2d 361, 366 (1951), *overruled on other grounds, J.B. v. A.B.,* 161 W.Va. 332, 242 S.E.2d 248 (1978). See footnote 1 The present case differs, however, because the trial court ruled that the report not be made part of the record.

If an expert's report is not introduced into evidence, there is no right to cross-examine the report's preparer in open court. *In Interest of S.C.,* 168 W.Va. 366, 284 S.E.2d 867, 870 (1981) (State Department of Welfare's decision not to call social workers to testify at hearing on neglect petition, or to offer their reports into evidence, did not violate mother's statutory right to cross-examine witnesses where mother was afforded, and exercised her opportunity to cross-examine each witness presented by the State). This rule does not change when the party who proffers the report is a court appointed, independent agency rather than a litigant.

A trial court may exclude a report prepared pursuant to *W.Va. Code* 49-6-4(a) [1984] from the record because the court believes that the report is not competent, relevant, or probative. Even though a court appointed independent agency proffers the report, the report must meet the standards of the *West Virginia Rules of Evidence.* See footnote 2 In the present case, it was within the trial court's discretion to exclude the report. After administering a battery of psychological tests to Mrs. Rozas, Phyllis M. Maher of Webster County Mental Health, the report's preparer, concluded that: "... the psychological tests indicate results of questionable validity." She added: "... I do not feel I can make an accurate assessment of her capabilities as a mother." Phyllis Maher had great doubts about the usefulness of the report.

W.Va.R.Evid. 702 provides for the admission of expert testimony, such as Ms. Maher's, when the expert's "knowledge will assist the trier of fact ... to determine a fact in issue." It does not require the admission of all proffered expert testimony. Under *Fed.R.Evid.* 702, (which is identical to *W.Va.R.Evid.* 702), a the trial judge has broad discretion to decide whether expert testimony should be admitted, and where the evidence is unnecessary, cumulative, confusing or misleading the trial judge

may properly refuse to admit it. *U.S. v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir.1982) (in a Sherman Act prosecution of a paving company, expert testimony that did little more than correlate higher contracting costs with longer hauling distances was excludable at the trial judge's discretion), *citing, Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962). Furthermore, the U.S. Supreme Court has recognized that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous", *Salem v. United States Lines Co.*, 370 U.S. at 35, 82 S.Ct. at 1122, *cited in*, 3 *Weinstein's Evidence* ¶ 702[02] (1985). We follow our federal brethren and conclude that the circuit court judge did not abuse his discretion.

By its own admission, the report on Mrs. Rozas was of questionable validity. It was well within the trial court's discretion to decide that an extended cross examination of the report in open court would be unnecessary. Given the report's low probative value, and the substantial danger that it would serve only to confuse the issues, the report was properly excluded. *W.Va.R.Evid.* 403; See footnote 3 *United States v. Wright*, 489 F.2d 1181, 1186 (D.C.Cir.1973). In the present case, the probative value of the report is so low, we can find no reason to disturb the trial court's ruling.

B

But even though a trial judge may exclude a court appointed expert's testimony or opinion from the record, he may not abrogate each party's right to inspect the court appointed expert's findings. *West Va.R. of Evid.* 706 states:

> (a) *Appointment*--The court may on its own m otion or on the m otion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court m ay appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. *A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party.* He shall be subject to cross-examination by each party, including a party calling him as a witness.

[Emphasis supplied by the Court].

The parties to an action where the court has appointed an expert retain all their discovery rights in the expert's report. See footnote 4 Mr. Rozas had a right to inspect Ms. Maher's findings. Although Mr. Rozas may not be able to introduce Ms. Maher's findings into the record, he retains this limited right of review.

Accordingly, the judgment of the circuit court is reversed and the case is remanded for further proceedings consistent with this opinion. On remand the trial court will make Ms. Maher's report available to both parties.

Reversed and remanded.

Footnote:1 See also, Annot. 59 A.L.R.3d 1337, § 3 (1973).

Footnote: 2 This Court adopted the West Virginia Rules of Evidence on 1 February 1985. Accordingly, the rules were not in effect at the time of the proceedings below. But because the rules will govern this case on remand, we have stated our holding in this case in the phraseology of the rules rather than the common law. We note, however, that the rules we interpret in this opinion are generally consistent with the common law, and to the extent that the common law differs, it is so modified.

Footnote: 3 Fed.R.Evid. 403 advisory committee note which states:
The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of the need for the evidence against the harm likely to result from its admission. [Emphasis supplied by the Court].

Footnote: 4 See W.Va.R.Civ.P. 26(b)(1).

227 W. Va. 184, 706 S.E.2d 381

\ IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33912

STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Petitioner Below, Appellant

v.

THE HONORABLE TIMOTHY RUCKMAN,
FAMILY COURT JUDGE OF CLAY COUNTY, WEST VIRGINIA,
Respondent Below, Appellee

Appeal from the Circuit Court of Clay County
The Honorable Richard A. Facemire, Judge
Civil Action No. 07-P-19

AFFIRMED

Submitted: January 14, 2009
Filed: February 6, 2009

Angela Alexander Ash
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Counsel for the Appellee

SENIOR STATUS JUSTICE McHUGH delivered the Opinion of the Court.

JUSTICE ALBRIGHT not participating.

SENIOR STATUS JUSTICE McHUGH sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

2. "Statutes in pari materia must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect." Syl. Pt. 3, *State ex rel. Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958).

3. In a circumstance where mandatory reporting of abuse or neglect pursuant to West Virginia Code § 49-6A-2 (2006) (2008 Supp.) and Rule 48 of the Rules of Practice and Procedure for Family Court is not implicated, a family court judge has discretion pursuant to West Virginia Code § 48-9-301 (a) (2001) (Repl. Vol. 2004) to order an investigation to assess the potential of exposing a child to harm should a custodial decision such as ordering unsupervised visitation be made.

4. The West Virginia Department of Health and Human Resources falls within the classification in West Virginia Code § 48-9-301 (a) (2001) (2004 Repl. Vol.) of "professional social service organization experienced in counseling children and families"

which in the course of a child custody proceeding a family or circuit court may order to conduct an investigation and report to the court.

5. Family court judges ordering an investigation pursuant to West Virginia Code § 48-9-301(a) (2001) (2004 Repl. Vol.) should make every effort to determine the best available options for obtaining the information needed in a timely manner in each case and should only resort to ordering DHHR to perform an investigation and report to the family court when extraordinary circumstances exist.

6. "In visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

7. "Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children." Syl. Pt. 3, in part, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

8. "Where supervised visitation is ordered pursuant to . . . [statutory law], the best interest of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to

supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family [court judge] . . . or circuit court." Syl. Pt. 3, in part, *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992).

9. A family court finding potential safety risks to minor children that warrant a court-ordered investigation pursuant to West Virginia Code § 48-9-301 (2001) (2004 Repl. Vol.) may not order visitation between a child and the party posing the potential risks while the investigation proceeds. Supervised visitation may be ordered following the investigation if the court finds the investigation or other information supplies the requisite credible evidentiary basis to believe a child's safety will be jeopardized if visitation is not supervised. Where supervised visitation is contemplated, the family court should schedule a hearing, with notice to all parties and any proposed supervisors, regarding the most suitable source for supervision under the circumstances. The purpose of the hearing is to determine the most appropriate source for supervision by considering (1) whether the child is comfortable and familiar with a potential supervisor through prior contact or otherwise, and (2) whether the potential supervisor is willing and has ability to fulfill the obligation. In order to provide an adequate basis for review, this determination should be incorporated as a finding of the family court judge in the order granting supervised visitation.

McHugh, Senior Status Justice:[1]

This is an appeal by the West Virginia Department of Health and Human Resources (hereinafter "DHHR") of the October 25, 2007, order of the Circuit Court of Clay County in which DHHR was granted a portion of the relief it sought in prohibition. In its petition to the circuit court for issuance of a writ of prohibition, DHHR maintained that a family court judge exceeded his authority by ordering DHHR to perform two particular tasks. First, DHHR claimed that the family court judge exceeded his authority by ordering DHHR to have a child protective services (hereinafter "CPS") worker conduct an investigation in a case where no current allegations of abuse and neglect were made. The purpose of the ordered investigation was to assess the risk of potential harm removal of the condition of supervision of visitation would pose to two minor children. Second, DHHR asserted the family court had no authority to order DHHR to provide supervised visitation services during the course of the investigation. The lower court upheld the family court judge's authority to order the investigation, but found that it was improper for supervised visitation to be ordered during the pendency of the investigation. After careful study of the

[1]Pursuant to an administrative orders entered September 11, 2008, and January 1, 2009, the Honorable Thomas E. McHugh, Senior Status Justice, was assigned to sit as a member of the Supreme Court of Appeals of West Virginia commencing September 12, 2008, and continuing until the Chief Justice determines that assistance is no longer necessary, in light of the illness of Justice Joseph P. Albright.

points asserted and the relevant law governing the circumstances, we affirm the circuit court's decision.

I. Factual and Procedural Background

The issues raised in this appeal stem from a child custody case in the Family Court of Clay County in which the father filed a contempt petition against the mother for failing to comply with court-ordered visitation. Following a hearing, the family court judge issued an order on August 17, 2007, which bears the heading of "Second Temporary Order."

The order reflects that the family court judge found no current allegations of abuse or neglect in the case which would justify reporting the matter to the circuit court and CPS pursuant to Rule 48 of the Rules of Practice and Procedure for Family Court (hereinafter "Family Court Rules") as a case of suspected abuse or neglect. Instead, the order of the family court provided:

> The court specifically finds . . . that the history of this case demonstrates the potential for a risk of harm to the children in the event the court were to lift the requirement of supervised visitation without first considering whether such an action would be appropriate. The potential effects of the court lifting that requirement are grave enough that the court is not prepared to gamble with the safety of these children. The court, therefore, ORDERS this matter be referred to CPS in much the same way an overlap referral to circuit court would operate for purposes of investigating the potential for harm to the children that may be present in the event the court were to remove the supervision condition on Petitioner's visitation.

Thereafter the order directed CPS to investigate the family to determine if the father's visitation should continue to be supervised, with a report of findings of the investigation to be supplied to the family court and the parties. The order also stated that the worker completing the investigation appear at the next hearing in the case. Furthermore, the Second Temporary Order contained the requirement that supervised visitation services be furnished by CPS pending the report to the family court on whether it would be appropriate to remove the condition of supervision from further visitation orders.

On September 6, 2007, both an emergency motion to stay the order of the family court and a writ of prohibition were filed in the circuit court by DHHR. DHHR maintained that a writ of prohibition was warranted in this case because the family court lacked authority to order CPS to conduct investigations and supervise visitation in situations where abuse or neglect is not present. A rule to show cause and a stay were issued by the circuit court on September 10, 2007, and a hearing was held in the circuit court on October 1, 2007. In an order dated October 25, 2007,[2] the circuit court denied DHHR's petition for writ of prohibition and lifted the stay with regards to the investigation, but granted relief to

[2]The circuit court first found in its order that it was appropriate for DHHR to seek a writ of prohibition even though it was not a party in the underlying case. The circuit court expressly found an extraordinary writ was DHHR's sole recourse under the circumstances because even if the temporary family court order were appealable, DHHR as a non-party would have no standing to pursue an appeal. *See* W.Va. Code § 53-1-1(1923) (2008 Repl. Vol.) and *State ex rel Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

DHHR from the requirement that CPS workers supervise the visitation in the domestic suit.[3]

DHHR thereafter petitioned this Court for appeal of the October 25, 2007, circuit court order, for which review was granted by order dated April 3, 2008.

II. Standard of Review

This appeal involves a challenge to both the relief denied and the relief granted by the circuit court through a writ of prohibition. In either instance, our established standard of review is de novo. Syl. Pt. 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W.Va. 613, 486 S.E.2d 782 (1997) ("The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is *de novo*."); Syl. Pt. 1, *State ex rel. Callahan v. Santucci*, 210 W.Va. 483, 557 S.E.2d 890 (2001) ("The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*.").

This appeal also involves matters of statutory construction. Our review of a circuit court's interpretation of a statute is also plenary. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit

[3]To avoid redundancy, the reasoning underlying the circuit court's decision on both counts is set forth in Section III, *infra*, as part of our discussion of the issues raised in this appeal.

court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

III. Discussion

DHHR maintains that the circuit court committed error in two distinct ways: (1) by finding that the family court has authority to order DHHR to investigate situations in which abuse and neglect of minor children is not currently alleged; and (2) in finding that the family court has authority to order DHHR to supervise visitation outside of abuse and neglect cases. We will examine each issue in turn.

A. Investigation

The circuit court found that the Legislature afforded family courts discretion under West Virginia Code § 48-9-301 (a) (2001) (2004 Repl. Vol.) to order investigations regarding custodial issues. This statutory provision reads as follows:

> In its discretion, the court[4] may order a written investigation and report to assist it in determining any issue relevant to proceedings under this article [governing custody of children]. The investigation and report may be made by the guardian ad litem, the staff of the court or *other professional social service organization experienced in counseling children and families*. The court shall specify the scope of the investigation or evaluation and the authority of the investigator.

[4]As later explained, the Legislature expressly conferred jurisdiction of custodial matters generally to family courts, so the reference to "court" in West Virginia Code § 48-9-301 (a) includes family courts. *See* W.Va. Code § 51-2A-2(a)(6).

(Emphasis added.) The circuit court also found that DHHR was the type of organization which may be ordered to perform such an investigation under the terms of the statute. The provision in the circuit court order addressing this latter finding states:

> 16. CPS can certainly be characterized as *a professional social service organization with experience in counseling children and families*, that could be ordered under the statute to investigate a family. Although CPS is not currently involved with the family, CPS has some prior experience with this particular family . . . making it a logical choice to investigate the family. . . .

(Emphasis added.)

DHHR does not dispute that family courts have authority to order investigations regarding custodial matters, but the agency does refute the circuit court's conclusion that DHHR may be ordered by a family court to complete them. DHHR suggests that the Legislature only intended the agency to be involved in investigations in cases where abuse and neglect are suspected, leaving the reporting procedure set forth in Family Court Rule 48, referred to in the briefs as the "Overlap Process," as the sole avenue available to

family court judges to cause an investigation by DHHR to occur in cases where a "threat of harm"[5] to children is a concern.[6]

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[5]DHHR's argument incorrectly suggests that any threat of harm would constitute suspected abuse and neglect which would invoke use of the procedure established in Family Court Rule 48. *See* W.Va. Code § 49-1-3 (2007) (2008 Supp.) (statutory definitions of abuse and neglect).

[6]Family Court Rule 48 reads in relevant part as follows:

> **RULE 48. CHILD ABUSE AND NEGLECT.**
>
> (a) *Reports by family court*. — If a family court has reasonable cause to suspect any minor child involved in family court proceedings has been abused or neglected, that family court shall immediately report the suspected abuse or neglect to the state child protective services agency, pursuant to W.Va. Code § 49-6A-2, and the circuit court.
>
> (b) *Written Referrals*. — In addition to any oral communication made by the family court to the state child protective services agency pursuant to subdivision (a), the family court shall forthwith prepare and submit a written referral to the agency office in the county where the family court proceeding is pending and, at the same time, transmit copies of the referral to the appropriate circuit court in that county, as determined by the chief judge, and to the prosecuting attorney. Such written referral shall set forth the specific allegations or information that led to the family court's determination of reasonable cause to suspect that a child or children involved in family court proceedings has been abused or neglected.
>
> (c) *Reports of investigations of child abuse and neglect*. — The state child protective services agency shall promptly provide the family court, and the circuit court, and the prosecuting attorney copies of any report of any investigation regarding the abuse and neglect of any minor child involved in

(continued...)

Our analysis of whether family courts have authority to order DHHR to perform investigations related to custodial determinations necessarily involves statutory interpretation and relevant rules of statutory construction. We undertake this task mindful that our "primary object[ive] in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Determination of legislative intent may involve in pari materia consideration of statutes that "relate to the same persons or things, or to the same class of persons or things, or . . . have a common purpose." Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975). We have long held, "[s]tatutes in pari materia must be construed together and the legislative intention, as

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[6](...continued)
family court proceedings, including those investigations conducted pursuant to subsection (b) above and Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings.

(d) *Jurisdiction of proceedings.* — The family court shall retain full jurisdiction of proceedings until an abuse or neglect petition is filed. If an abuse or neglect petition is filed and the family court has entered an order regarding the allocation of custodial and decision-making responsibility between the parents, orders of the circuit court shall supercede and take precedence over any order of the family court regarding the allocation of custodial and decision-making responsibility between the parents. If the family court has not entered an order for the allocation of custodial and decision-making responsibility between the parents, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making responsibility between the parents and defer to the orders of the circuit court. . . .

gathered from the whole of the enactments, must be given effect." Syl. Pt. 3, *State ex rel. Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958). In the matter now before us, the intent of the Legislature in enacting the provisions of West Virginia Code § 48-9-301 (a) cannot be determined without resort to relevant constitutional and statutory provisions regarding the authority of the family court in custodial matters and the duties of DHHR with regard to child welfare.

According to Article VIII, Section 16 of the West Virginia Constitution, "[f]amily courts shall have original jurisdiction in areas of family law and related matters as may hereafter be established by law." The Legislature defined the jurisdiction of family courts through the enactment of West Virginia Code § 51-2A-2 in 2001. A provision of this jurisdictional statute expressly extends authority of family courts to "[a]ll actions for the establishment of a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child." W.Va. Code § 51-2A-2(a)(6). The only express exception the Legislature placed on this grant of jurisdiction is when an abuse and neglect petition is filed in the circuit court. Family courts lose jurisdiction of custodial matters once an abuse and neglect petition is filed. W.Va. Code § 51-2A-2(c); *see also* Fam. Ct. R. 48 (d).

Custodial issues in cases where the parents do not live together are addressed by the Legislature in Chapter 48, Article 9 of the West Virginia Code. W.Va. Code § 48-9-

101(a) (2001) (Repl. Vol. 2004). In this Article, the Legislature declares that the public policy underlying custodial issues is that "a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have *shown the ability* to act in the best interest of their children." W.Va. Code § 48-9-101(b) (emphasis added). In furthering this public policy, the Legislature identifies specific legislative concerns in West Virginia Code § 48-9-102 (2001) (Repl. Vol. 2004) that courts deciding custodial issues should examine, including a child's "[s]ecurity from exposure to physical or emotional harm." W.Va. Code § 48-9-102(1)(6). Family courts are granted the authority and discretion under West Virginia Code § 48-9-301(a) to "order a written investigation and report to assist. . . in determining any issue relevant to proceedings" involving custody matters. Reading these statutory provisions in pari materia, it is clear that the safety of a child during visitation is a relevant custody issue. Thus we hold, in a circumstance where mandatory reporting of abuse or neglect pursuant to West Virginia Code § 49-6A-2 (2006) (2008 Supp.) and Rule 48 of the Rules of Practice and Procedure for Family Court is not implicated, a family court judge has discretion pursuant to West Virginia Code § 48-9-301(a) to order an investigation to assess the potential of exposing a child to harm should a custodial decision such as ordering unsupervised visitation be made. This naturally leads us to the next question of who may be ordered to conduct these investigations.

West Virginia Code § 48-9-301(a) provides that a court may order that an investigation pursuant to the statute be made by a guardian ad litem, staff of the court or

"other professional social service organization experienced in counseling children and families." DHHR asserts two reasons why it believes the agency is not subject to orders of the family court under this statute. First, DHHR claims that if the Legislature intended DHHR to be included within the ambit of the statute it would have specifically named the agency in the listing of potential investigative entities. Second, DHHR maintains that it does not qualify as a social service agency that directly counsels children and families, but rather contracts for delivery of these services. We find neither argument persuasive as we find no authority to substantiate DHHR's bald assertions.

The unqualified reference in West Virginia Code § 48-9-301(a) to "professional social service organization experienced in counseling children and families" does not include or exclude any entity, nor does the language give any indication that only agencies actually providing counseling services may be utilized to conduct the investigation. Such lack of specificity standing alone does not create ambiguity necessitating court interpretation. *See Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) ("A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." (internal quotations and citation omitted)); Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968) ("Where the language of a statute

is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.").

We simply find no reason to believe that the Legislature intended to exclude DHHR from the provisions of this statute, especially considering that one of the prescribed legislative goals established for DHHR under the child welfare laws is to "[p]rovide for early identification of the problems of children and their families, and respond appropriately with measures and services *to prevent* abuse and neglect or delinquency." W.Va. Code § 49-1-1(a)(8) (1999) (Repl. Vol. 2004) (emphasis added). Accordingly, we hold that the West Virginia Department of Health and Human Resources falls within the classification in West Virginia Code § 48-9-301(a) (2001) (2004 Repl. Vol.) of "professional social service organization experienced in counseling children and families" which in the course of a child custody proceeding a family or circuit court may order to conduct an investigation and report to the court. However, family court judges ordering an investigation pursuant to West Virginia Code § 48-9-301(a) (2001) (2004 Repl. Vol.) should make every effort to determine the best available options for obtaining the information needed in a timely manner in each case and should only resort to ordering DHHR to perform an investigation and report to the family court when extraordinary circumstances exist.

A family court judge's discretion to order an investigation should be tempered with reason which reflects consideration of the surrounding circumstances. Not every case warrants an investigation, and ordering DHHR to conduct the investigation should hardly be a routine matter. The circuit court's order in the present case relates an example of an extraordinary circumstance that supports the family court's selection of DHHR to conduct the investigation into the family circumstances. The order indicates that DHHR had completed an earlier investigation and was familiar with the family as well as the safety issues in question. Ordering another person or entity to perform an investigation on this same matter would have only protracted the investigatory period since another investigator would have needed additional time to become familiar with the situation and the parties. Other factors which would support an order for DHHR to perform an investigation in like circumstances include the lack of other resources available in the geographic area to conduct the risk assessment and the financial resources of the family.

B. Supervision of Visitation

The circuit court granted DHHR relief in prohibition from the family court's order directing the agency to supervise visitation while the investigation regarding the safety of the children was being completed. Relying on the provisions of syllabus point three of *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992), the circuit court arrived at the following conclusion regarding supervised visitation in its October 25, 2007, order:

> 19. The Court does not believe that the Family Court can order supervised visitation without making a finding regarding the necessity for supervised visits, and without giving the parties an opportunity to be heard on proposed supervisors. Furthermore, when ordering supervised visits, and choosing a supervisor, the Family Court must consider and attempt to select a supervisor that is already familiar with the child, so as to minimize any stress to the child. By failing to give the parties an opportunity to be heard on this issue, and not making a finding as to why supervised visits are required, the Court believes the Family Court's order is erroneous as a matter of law. . . .

DHHR does not contest this particular portion of the circuit court's decision. Instead, DHHR claims that the circuit court erred by not specifically finding that the family court lacked any authority under the facts of this case to order supervised visitation solely because the family court did not make the requisite finding that abuse and neglect were present. Relying on this Court's per curiam decision in *In re: Jason S. and Jasmine B.*, 219 W.Va. 485, 637 S.E.2d 583 (2006), DHHR maintains that the family court must first make a finding based on credible evidence regarding the presence of neglect or abuse before it may order supervised visitation. We find DHHR's emphasis on findings of abuse and neglect in this regard misplaced.

Our case law recognizes that "[i]n visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*,

196 W.Va. 239, 470 S.E.2d 193 (1996). We have further held that "[b]ecause of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children." *Id.*, Syl. Pt. 3, in part. Moreover, we have said that in determining the propriety of supervised visitation, "the best interest of a child includes determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience" during the course of visitation. *Mary D.*, Syl. Pt. 3, in part. Although a family court is required to determine that claims of a child's safety being jeopardized are supported by credible or trustworthy evidence before supervised visitation may be ordered, threats to safety are not limited to acts of abuse and neglect. *See e.g., Alireza D. v. Kim Elaine W.*, 198 W.Va. 178, 479 S.E.2d 688 (1996); *Mary Ann P. v. William R. P., Jr.*, 197 W.Va. 1, 475 S.E.2d 1 (1996); *Belinda Kay C. v. John David C.*, 193 W.Va. 196, 455 S.E.2d 565 (1995). Supervision and/or further restrictions to visitation are required to be ordered under the provisions of West Virginia Code § 48-9-209 (2008) (2008 Supp.) when credible information establishes that abuse and neglect as well as other enumerated conditions exist. However, the court is not absolved of its responsibility to examine factors beyond those listed in the statute mandating limitations on visitation when the court has facts before it which raise concerns about exposure of a child to harm during visitation. The best interests of the child remains the overarching consideration of courts in making custody decisions, including visitation matters.

This Court has not had occasion to address the precise issue of whether supervised visitation may be ordered during the pendency of a court-ordered investigation into the risk of harm posed to children should a request for unsupervised visitation be granted. As the circuit court recognized, we addressed the general procedure that courts should follow prior to ordering supervised visitation in syllabus point three of *Mary D.*, in which we stated:

> Where supervised visitation is ordered pursuant to . . . [statutory law],[7] the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family [court judge] . . . or circuit court.

The circuit court judge applied the general precepts of this holding from *Mary D.* to the present case in order to determine that supervised visitation was inappropriate during the investigation period. The October 25, 2007, order reflects the circuit court's reasoning as follows:

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[7]Chapter 48 of the West Virginia Code was completely reorganized, in some respects amended and reenacted in 2001. 2001 Acts of the W.Va. Legislature c. 91; *see* W.Va. Code § 48-1-101(b). The statutory reference was omitted from the quoted material since it no longer has significance under the arrangement of the current domestic relations statutes. Under the recodification, visitation matters are primarily contained within Article 9 which bears the heading of "Allocation of Custodial Responsibility and Decision Making Responsibility of Children."

> 22. In the instant case, the Family Court did not make any specific finding that abuse has occurred that would support the extraordinary step of supervised visits, only that there was potential risk in not supervising visits. Also, the Family Court did not consider the wishes of the parties when choosing a supervisor, and it does not appear from the order that the Family Court made any attempt to select a supervisor that was close with the children, and has a relationship with the children. Furthermore, the Family Court did not consult with proposed supervisor (CPS), before ordering CPS to supervise visitation. The Court believes that before the Family Court requires any third party to supervise visitation, that third party should have an opportunity to be heard as to their willingness to supervise, and their relationship with the children.

Thereafter, the circuit court order suggests the following procedure:

> 23. Before Judge Ruckman can order CPS to supervise visitation, the Family Court must conduct a hearing and give all parties, including CPS, notice and an opportunity to be heard on the issue. The Family Court must make findings of fact and conclusions on the record regarding the need for supervision, and give all parties an opportunity to be heard on proposed supervisors. Recognizing that CPS does have an extensive caseload, the Family Court must exhaust other options for supervisors, for example other family members or organizations that provide for family visits, before ordering CPS to supervise the visits.

We find the circuit court's approach to be a sound extension of existing law. Consequently, we hold a family court finding potential safety risks to minor children that warrant a court-ordered investigation pursuant to West Virginia Code § 48-9-301 may not

order visitation between a child and the party posing the potential risks while the investigation proceeds. Supervised visitation may be ordered following the investigation if the court finds the investigation or other information supplies the requisite credible evidentiary basis to believe a child's safety will be jeopardized if visitation is not supervised. Where supervised visitation is contemplated, the family court should schedule a hearing, with notice to all parties and any proposed supervisors, regarding the most suitable source for supervision under the circumstances. The purpose of the hearing is to determine the most appropriate source for supervision by considering (1) whether the child is comfortable and familiar with a potential supervisor through prior contact or otherwise, and (2) whether the potential supervisor is willing and has ability to fulfill the obligation. In order to provide an adequate basis for review, this determination should be incorporated as a finding of the family court judge in the order granting supervised visitation.

The circuit court's order also cautions the family court not to unduly burden DHHR with responsibility for supervising visitation given the caseload of the CPS workers and the gravity of the work they are called upon to perform. We echo this concern and emphasize that family courts should exhaust other available and reasonable options such as family members or community organizations before looking to DHHR to provide supervision of visitation.

IV. Conclusion

Concluding our review de novo, this Court is of the opinion that the circuit court correctly reached the proper result for the reasons stated above. The October 25, 2007, order of the Circuit Court of Clay County, therefore, is affirmed.

Affirmed.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

FILED
October 29, 2009
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34598

IN RE: RYAN B.

Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Juvenile Petition No. 07-JA-39-2

REVERSED AND REMANDED

Submitted: September 9, 2009
Filed: October 29, 2009

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No. 34704

IN RE: CAITLYN M., CARSON M., AND STEVEN M.

Appeal from the Circuit Court of Harrison County
Honorable James A. Matish, Judge
Juvenile Petition No. 08-JA-12-3, 08-JA-13-3, 08-JA-14-3

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED

Submitted: September 9, 2009
Filed: October 29, 2009

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JUSTICE KETCHUM delivered the Opinion of the Court.

CHIEF JUSTICE BENJAMIN concurs and reserves the right to file a separate opinion.

Syllabus By the Court

1. The Legislature's 2006 amendment of *W.Va. Code*, § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support.

2. A circuit court terminating a parent's parental rights pursuant to *W.Va. Code*, § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W.Va. Code*, § 48-13-101, et. seq. [2001]. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the *Guidelines* pursuant to *W.Va. Code*, § 48-13-702, [2001].

3. "When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child." Syllabus Point 3, *West Virginia Dept. of Health and Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W.Va. 480, 624 S.E.2d 917 (2005).

Ketchum, J.:

These two appeals have been consolidated because they present the same question - whether a court in an abuse and neglect proceeding may accept a voluntary relinquishment and terminate a parent's parental rights while continuing his/her obligation to pay child support for the child(ren). The two circuit court rulings below came to different conclusions, one finding that a voluntary relinquishment cuts off all parental rights and responsibilities, including the obligation to pay child support; the other finding that child support is a right unto the child which cannot be voluntarily relinquished by a parent.

After carefully reviewing the briefs, the legal authority cited and the record presented for consideration, we hold the Legislature's 2006 amendment of *W.Va. Code*, § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support. A circuit court terminating a parent's parental rights pursuant to *W.Va. Code*, § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W.Va. Code*, § 48-13-101, et. seq. [2001]. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the

Guidelines pursuant to *W.Va. Code*, § 48-13-702, [2001].

I.
Facts & Background

The instant appeals involve two fathers who voluntarily relinquished their parental rights, which relinquishments were accepted by the circuit courts, after abuse and neglect petitions were filed against them.

A.
In re: Ryan B.[1]

Ryan B. was born to Appellant Joanna F. on June 23, 2007. On the day he was born, a drug screen was performed that showed both mother and child tested positive for cocaine. Joanna F. admitted to using cocaine throughout her pregnancy. On August 13, 2007, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") filed a petition against Joanna F., Appellee William Matthew B., who Joanna F. identified as Ryan's biological father, and an unknown father, as paternity had not yet been conclusively established. This petition alleged that Ryan B. was a neglected and abused child and that the parties named were neglectful and abusing parents.

On September 5, 2007, Joanna F. entered into a stipulated adjudication wherein she admitted to her past drug use. Accordingly, the circuit court found her to be a neglectful parent. She subsequently participated in a treatment program, successfully completed the

[1] As is our practice in cases involving sensitive matters, we use the child's initials rather than his full name to identify him. *See Marilyn H. v. Roger Lee H.*, 193 W.Va. 201, 202 n.1, 455 S.E.2d 570, 571 n.1 (1995).

terms and conditions of her family case plan and the petition against her was dismissed.

On September 26, 2007, the court ordered William Matthew B. to undergo DNA testing to determine whether he was Ryan B.'s biological father. On December 14, 2007, the court ruled that the DNA test results proved that William Matthew B. was the biological father and granted him a three month pre-adjudicatory improvement period.

On January 11, 2008, William Matthew B. entered a voluntary relinquishment of his parental rights with the circuit court. Joanna F. objected to the relinquishment and requested that the court order William Matthew B. to pay child support until Ryan B. reaches the age of majority. On January 22, 2008, the circuit court granted William Matthew B.'s request and ordered that his parental rights be severed and terminated. On June 16, 2008, following a hearing and the submission of briefs by each of the parties and the *guardian ad litem*, the court denied Joanna F.'s motion requesting that William Matthew B. pay child support. Joanna F. now appeals the circuit court's June 16, 2008, order.

B.

In re: Caitlyn M., Carson M., and Steven M.

An abuse and neglect petition was filed against Stanley Ray M. on March 3, 2008, alleging that he sexually abused his daughter, Caitlyn M. Based on these allegations, the petition also included Stanley Ray M.'s other children, Carson M. and Steven M. The mother of these three children, Donna M., was named in the petition but no allegations of

abuse were made against her.[2]

On April 2, 2008, Stanley Ray M. executed a "Voluntary Relinquishment of Parental Rights" form with regard to all three children. The circuit court below accepted Stanley Ray M.'s voluntary relinquishment and entered an order on August 5, 2008, terminating his parental rights to Caitlyn M., Carson M., and Steven M. The court also ordered that the child support obligation, previously established by the Family Court of Harrison County, continue to be in effect. It is from this order that Stanley Ray M. now appeals.

II.
Standard of Review

This Court explained in *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000), that: "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." We also held in Syllabus Point 1 of *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set

[2] On April 2, 2008, the circuit court below converted Donna M. from a respondent parent to a party in interest.

> aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With this standard in mind, we proceed to consider the parties' arguments.

III.
Analysis

This issue, whether a court in an abuse and neglect proceeding may accept a voluntary relinquishment and terminate a parent's parental rights while continuing his/her obligation to pay child support for the child(ren), was addressed by this Court in *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003).[3] In that case, the Court concluded that a circuit court in an abuse and neglect proceeding had the authority to continue a father's obligation to pay child support, even though his parental rights had been terminated. The Court's conclusion was guided mainly by *W.Va. Code*, § 49-6-5(a)(6) [1998], which read, in relevant part:

> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child,

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[3] *In re Stephen Tyler R.* dealt with an involuntary termination of a father's parental rights, whereas the two cases presently before us involve two fathers who voluntarily relinquished their parental rights. The issue presently before us is applicable to both voluntary and involuntary relinquishments.

> terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

The Court focused on the phrase "and/or responsibilities" and found that the "plain language of this statute affords the circuit court the options of either terminating the abusing parent's parental rights, terminating his/her responsibilities, or terminating both the parent's parental rights and responsibilities." *In re Stephen Tyler R.*, 213 W.Va. at 740, 584 S.E.2d at 596. The Court found that paying child support was a parental responsibility, and therefore concluded that a circuit court could simultaneously terminate parental rights and continue to impose child support obligations on parents whose parental rights were terminated. Three years after this case was decided, the Legislature amended *W.Va. Code,* § 49-6-5(a)(6), and changed the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities." *W.Va. Code,* § 49-6-5(a)(6) [2006], currently reads, in relevant part:

> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

Both of the fathers who voluntarily relinquished their parental rights in the present appeals argue that this statutory change overrules this Court's holding in *In Re*

Stephen Tyler R., and mandates that when a circuit court terminates a parent's parental rights it must also terminate his/her parental responsibilities, including the responsibility to pay child support. Joanna F. (Ryan B.'s mother), the DHHR and the *guardian ad litem* for Caitlyn M., Carson M., and Steven M., contend that the overall goal of the child welfare statutory scheme is to do what is in the best interest of the child(ren). They also argue that allowing these fathers to avoid their child support obligations would clearly be detrimental to the child(ren) and that the Legislature could not have intended this result. In order to resolve this issue, we must examine *W.Va. Code*, § 49-6-5(a)(6) [2006], specifically, our child welfare statute generally, and our extensive case law on this issue.

When interpreting statutes promulgated by the Legislature, we first discern the objective of the enactment. "'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syllabus Point 1, *Smith v. Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syllabus Point 6 *State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). In gleaning legislative intent, we endeavor to construe the scrutinized provision consistently with the purpose of the general body of law of which it forms a part.

> "'Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syllabus Point 3, *Smith v. State Workman's Compensation Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syllabus Point 3, *Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992).

Syllabus Point 3, *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999). *See also*

Syllabus Point 4, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." (Internal quotations and citations omitted)); Syllabus Point 2, in part, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994) ("To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select 'any single part, provision, section, sentence, phrase or word.' Syllabus Point 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990).").

This effort to maintain consistency among related statutes is particularly important as legislators normally are charged with knowledge of the law in effect at the time of a statute's enactment or amendment. In this regard, "we assume that elected representatives know the law at the time of any amendment to a statute . . ." *State v. Hosea*, 199 W.Va. 62, 68 n. 15, 483 S.E.2d 62, 68 n. 15 (1996).

Applying these rules of statutory construction to the statute at issue herein, we observe that the express purpose of the child welfare statute, *W.Va. Code* § 49-1-1, *et. seq.*, is to "[a]ssure each child care, safety and guidance . . .[s]erve the mental and physical welfare of the child . . .(and) [r]ecognize the fundamental rights of children and parents." *W.Va. Code* § 49-1-1(a)(1)-(4). The plain language of the child welfare statute makes it clear that the Legislature's main goal is to assure the best interest of the child and recognize the child's fundamental rights. The statute at issue herein, *W.Va. Code*, § 49-6-5(a)(6) [2006], states that a court may terminate parental rights and responsibilities "when necessary for the

welfare of the child." This phrase makes it clear that this statute is intended to serve the overall goal of the child welfare statute. Reading *W.Va. Code* § 49-1-1, *et. seq*., in *para materia* with *W.Va. Code*, § 49-6-5(a)(6), we hold that the Legislature's 2006 amendment of *W.Va. Code*, § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support.[4]

Had the Legislature intended to eliminate the long standing requirement that a parent, even one who voluntarily relinquishes his/her parental rights, provide financial support to his/her child, we believe it would have done so explicitly and clearly, rather than simply removing the word "or" from *W.Va. Code*, § 49-6-5(a)(6). *See Com. Dept. of Public Welfare ex. rel Hager v. Woolf*, 276 Pa.Super. 433, 437, 419 A.2d 535, 537 (1980) ("It is apparent that if the Legislature wished to eliminate the legal obligation of a parent to support a child, in the event of termination . . . it would have done so clearly and explicitly, in view of the long standing recognition in our Commonwealth of a parent's liability for the support of his or her child.").

Further, case law from this Court as well as courts around the country[5] have

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[4] This holding is applicable to both voluntary and involuntary terminations. *See* footnote 3, *supra*.

[5] *See Evink v. Evink*, 542 N.W.2d 328, 333 (Mich. Ct. App. 1196) (stating that "[t]his Court has held that, absent adoption, the obligation to support a child remains with the natural parents").

held that an obligation of support is owed to a child by both of his parents until such time as the child is placed in the permanent legal custody of another guardian/parent/obligor, such as in adoption. As this Court has frequently emphasized, the best interest of the child is the polar star by which all matters affecting children must be guided. *See* Syllabus Point 7, *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995) ("Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)."). This Court has previously stated that child support obligations are not only responsibilities parents owe to their children, they are also rights which belong to children. "Child support is a right which belongs to the child." *Kimble v. Kimble*, 176 W.Va. 45, 49, 341 S.E.2d 420, 424 (1986), *quoting Armour v. Allen*, 377 So.2d 798, 799-800 (Fla.Dist.Ct.App.1979).[6] Allowing a parent who voluntarily relinquishes his/her parental rights to avoid this right that belongs to the child goes against the overall goal of the child welfare statutory scheme and is in opposition to our well established case law.

One final issue that needs to be addressed, in light of our ruling herein, is whether a circuit court that terminates a parent's parental rights under *W.Va. Code*, § 49-6-5(a)(6), *must* impose a child support obligation on a parent whose parental rights have been terminated. A circuit court's duty to impose a child support obligation upon hearing an abuse

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[6] *See* also *In re Jamie Nicole H.*, 205 W.Va. 176, 183, 517 S.E.2d 41, 48 (1999) ("Provisions of shelter and financial support for children is one of the most basic components of parental responsibility."); *Supcoe v. Shearer*, 204 W.Va. 326, 330, 512 S.E.2d 583, 587 (1998) (per curiam) ("The obligation of child support is grounded in the moral and legal duty of support of one's children from the time of birth.").

or neglect petition is found in *W.Va. Code,* § 49-7-5 [1936]. That statute states, in part:

> If it appears upon the hearing of a petition under this chapter that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge shall order the person to pay the state department, institution, organization, or private person to whom the child was committed, a reasonable sum from time to time for the support maintenance, and education of the child.

This statute indicates that a circuit court "shall" require a parent to pay support for a child if the parent "is able to contribute to the support of such child." The determination of whether and how much a parent can contribute[7] to the support of the child is a determination the circuit court must make, using the *Guidelines for Child Support Awards* found in *W.Va. Code,* § 48-13-101, *et. seq.* [2001]. Specifically, *W.Va. Code,* § 48-13-701, states that "[t]he guidelines in child support awards apply as a rebuttable presumption to all child support orders established or modified in West Virginia."[8] The Guidelines may,

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[7] A parent who is unemployed or under-employed can have income attributed to him/her under appropriate circumstances. *See W.Va. Code,* § 48-1-205 [2008].

[8] *W.Va. Code,* § 48-13-701 [2001] states:

> The guidelines in child support awards apply as a rebuttable presumption to all child support orders established or modified in West Virginia. The guidelines must be applied to all actions in which child support is being determined including temporary orders, interstate (URESA and UIFSA), domestic violence, foster care, divorce, nondissolution, public assistance, nonpublic assistance and support decrees arising despite nonmarriage of the parties. The guidelines must be used by the court as the basis for reviewing adequacy of child support levels in uncontested as well as contested hearings.

however, be disregarded or adjusted to "accommodate the needs of the child or children or the circumstances of the parent or parents" if the court makes specific findings that the use of the Guidelines is inappropriate. *W.Va. Code*, § 48-13-702, [2001].[9] It is possible that in a rare instance an award of child support in the face of relinquishment, voluntary or involuntary, may be found by the circuit court to stand as an immediate obstacle to the imminent permanent placement[10] of a child. In such a case, the court, upon specific findings thereof, may conclude that an award of child support is not in the child's best interests.

In light of our strong precedent that the best interest of the child is the polar star that guides all matters affecting children, we hold that a circuit court terminating a parent's parental rights pursuant to *W.Va. Code*, § 49-6-5(a)(6), must ordinarily require that the

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[9] *W.Va. Code*, § 48-13-702(a) [2001] states:

> If the court finds that the guidelines are inappropriate in a specific case, the court may either disregard the guidelines or adjust the guidelines-based award to accommodate the needs of the child or children or the circumstances of the parent or parents. In either case, the reason for the deviation and the amount of the calculated guidelines award must be stated on the record (preferably in writing on the worksheet or in the order). Such findings clarify the basis of the order if appealed or modified in the future.

[10] This Court has repeatedly held that children deserve permanency in their lives. *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185 (1998). We observed in *State ex. Rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996), that a child deserves "resolution and permanency" in his or her life and deserves the right to rely on his or her caretakers "to be there to provide the basic nurturance of life." 196 W.Va. at 260, 470 S.E.2d at 214. We have consistently held that abuse and neglect cases must be given the utmost attention to ensure their prompt resolution in order to provide permanency for the children involved therein. *See* Syllabus Point 1, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W.Va. Code*, § 48-13-101, et. seq. [2001]. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the *Guidelines* pursuant to *W.Va. Code*, § 48-13-702, [2001].

Applying this holding to the two appeals presently before us, we turn first to *In re Ryan B.* The circuit court in *Ryan B.* refused to impose a child support obligation on William Matthew B. after he voluntarily relinquished his parental rights, finding that the amendment to *W.Va. Code*, § 49-6-5(a)(6), compelled such a result. We hereby reverse this ruling and remand the case back to the circuit court below for further proceedings consistent with this opinion.

With regard to *In re: Caitlyn M., Carson M., and Steven M.*, we affirm the circuit court's August 5, 2008, order in part and reverse and remand in part. We affirm the portion of the order in which the court accepted Stanley Ray M.'s voluntary relinquishment and required him to continue paying child support after relinquishing his parental rights. We reverse the circuit court's rulings in paragraphs 32 and 33 of its order, which state:

> 32. The obligation to pay child support as ordered by the Family County of Harrison County shall not be altered by this Court, and shall continue as ordered.

> 33. Any modifications of the amount of child support to be paid lies in the jurisdiction of the Family Court of Harrison County.

As this Court previously stated in Syllabus Point 3 of *West Virginia Dept. of Health and Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W.Va. 480, 624 S.E.2d 917 (2005), "When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child." As discussed above, in establishing a child support obligation, the circuit court must use the *Guidelines for Child Support Awards* found in *W.Va. Code*, 48-13-101, *et seq*. *See* Syllabus Point 5, *WVDHHR v. Smith, supra*[11]. On remand, the circuit court is directed to use the *Guidelines for Child Support Awards* to establish Stanley Ray M.'s child support obligation or make a detailed finding on the record why it is not in the children's best interest to use the *Guidelines* in this case. Furthermore, any modification of the amount of child support to be paid shall be heard by the circuit court, not the family court.

IV.
Conclusion

A.

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[11] Syllabus Point 5 of *West Virginia Dept. of Health and Human Resources, Bureau for Child Support Enforcement v. Smith*, 218 W.Va. 480, 624 S.E.2d 917 (2005), states:

> Any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the *West Virginia Code* must use the *Guidelines for Child Support Awards* found in *W.Va. Code*, 48-13-101, *et seq*.

In re: Ryan B.

For the reasons set forth in this opinion, the judgment of the Circuit Court of Harrison County, rendered on the 16th day of June 2008 is reversed and remanded to the circuit court below for further proceedings consistent with this opinion.

Reversed and Remanded with directions.

B.

In re: Caitlyn M., Carson M., and Steven M.

For the reasons set forth in this opinion, the judgment of the Circuit Court of Harrison County, rendered on the 5th day of August 2008, is affirmed in part and reversed and in part, and remanded to the circuit court for further proceedings consistent with this opinion.

Affirmed in part, Reversed in part, and Remanded with directions.

No. 34598 – In re: Ryan B.

and

No. 34704 – In re: Caitlyn M., Carson M., and Steven M.

FILED
December 22, 2009
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Chief Justice, concurring:

I write separately to underscore the procedure set forth in Syllabus Point 2 herein, by which a circuit court retains the discretion in specific cases not to order a terminated parent to pay child support if that is what is in the child's best interests (based on factors such as permanency, etc.). Quite obviously, the overriding principle is to act in the child's best interests. While the majority opinion establishes a presumption that a terminated parent continue to pay child support pursuant to the *Guidelines for Child Support Awards* found in *W.Va. Code* § 48-13-101, *et seq.* (2001), that presumption is subject to the best interests of the child. Should the court determine that the presumption should not be followed in a specific case, the court should make such a finding on the record with its reasons clearly set forth in its order.

191 W. Va. 184, 444 S.E.2d 62

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA, EX REL. S.C., Petitioner

v.

GRETCHEN LEWIS CHAFIN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN RESOURCES; AND JAMES KIRBY, DIRECTOR, LAUREL PARK PRESSLEY RIDGE SCHOOL,

Respondents

No. 22090

Submitted: March 1, 1994

Filed: April 22, 1994

SYLLABUS BY THE COURT

1. W. Va. Code, 49-6-3(b) [1992] provides that, whether or not the court orders immediate transfer of custody as provided in W. Va. Code, 49-6-3(a) [1992], if the court finds that there exists imminent danger to the child, the court may schedule a preliminary hearing. If at the preliminary hearing the court finds there to be no alternative less drastic than removal of the child from his or her home, the court may order that the child be delivered into the temporary custody of the Department of Health and Human Resources or some other designated person for a period not exceeding sixty days. Furthermore, if, pursuant to W. Va. Code, 49-6-2 [1992], the court finds the child to be abused or neglected, then both the Department of Health and Human Resources and the court, no later than sixty days after the child is placed in the temporary custody of the Department of Health and Human Resources, are to proceed with the disposition of the child, in compliance with W. Va. Code, 49-6-5 [1992]. W. Va. Code, 49-6-5(a) [1992] requires the Department of Health and Human Resources to file with the court a copy of the child's case plan, including the permanency plan for the child. W. Va. Code, 49-6-5(a) [1992] defines a case plan as a written document which includes, where applicable, the requirements of a family case plan, as set forth in W. Va. Code, 49-6D-3 [1984], as well as the additional requirements set forth in W. Va. Code, 49-6-5(a) [1992]. Furthermore, W. Va. Code, 49-6-5(a) [1992] requires the court to proceed to disposition, one of those being, if the court finds the abusing parent(s) unwilling or unable to provide adequately for the child's needs, the court may commit the child temporarily to the custody of the Department of Health and Human Resources.

2. W. Va. Code, 49-6-8(a) [1992] provides that if, twelve months after receiving physical custody of a child, the Department of Health and Human Resources has not placed the child in permanent foster care, in an adoptive home or with a natural parent, the Department of Health and Human Resources shall file with the

circuit court a petition for review of the case as well as a report detailing the efforts which have been made to place the child in a permanent home and copies of the child's case plan including the permanency plan. W. Va. Code, 49-6-8(a) [1992] further requires the circuit court to schedule a hearing to review the child's case, to determine whether and under what conditions the child's commitment to the Department of Health and Human Resources shall continue, and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the circuit court shall enter an appropriate order of disposition, in accordance with the best interests of the child. Under W. Va. Code, 49-6-8(a) [1992], the court shall retain continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care.

3. "The purpose of the family case plan as set out in W. Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. pt. 5, State ex rel. Dept. of H.S. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).

4. The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in W. Va. Code, 49-6-5(a) [1992] and 49-6D- 3(a) [1984], as well as the additional requirements articulated in W. Va. Code, 49-6-5(a).

5. W. Va. Code, 49-6-8(d) [1992] requires the Department of Health and Human Resources to file a report with the circuit court in any case where any child in the temporary or permanent custody of the Department of Health and Human Resources receives more than three placements in one year no later than thirty days after the third placement.

6. "'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. pt. 2, State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951)." Syl. pt. 3, Echard v. Holland, 177 W. Va. 138, 351 S.E.2d 51 (1986).

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Juvenile Justice Committee
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Amicus Curiae on behalf of S.C.

McHugh, Justice:
In the case before this Court, the petitioner, S.C., See footnote 1 a juvenile, seeks a writ of habeas corpus and a writ of mandamus against the respondents, Gretchen Lewis Chafin, Secretary, Department of Health and Human Resources ("DHHR") and James Kirby, Director, Laurel Park Pressley Ridge School, See footnote 2 to compel her release from Pressley Ridge and to require the DHHR to comply with W. Va. Code, 49-6-3(b) [1992], which allows the DHHR to maintain temporary custody of a child for no more than sixty days; W. Va. Code, 49-6- 5(a) [1992], which requires the DHHR to file with the court the child's case plan, including the permanency plan for the child; W. Va. Code, 49-6-8(a) [1992], which requires the DHHR to file with the court a petition for review of the case if it has not permanently placed a child after twelve months; and, W. Va. Code, 49-6-8(d) [1992], which requires the DHHR to file a report with the court when a child in its custody receives more than three placements in one year. Upon consideration of the petition, all matters of record and the briefs and arguments of counsel, See footnote 3 we conclude that the writ of habeas corpus should be denied and the writ of mandamus should be granted.

I.

S.C., now sixteen years old, has been in the temporary custody of the DHHR since August 27, 1991,See footnote 4 when it was determined that she was being sexually abused by her mother's boyfriend and by the boyfriend's son, as well as being physically and emotionally abused by her mother. See footnote 5 Subsequent medical and psychological evaluations of S.C. revealed that she had been "raped" and frequently abused drugs and alcohol. See footnote 6 Though the DHHR's mission is to serve the emotional and physical welfare of children such as S.C., it has not adequately done so in this case. See W. Va. Code, 49-1-1 [1981]. As this case demonstrates, the DHHR has not fulfilled its responsibility to secure for S.C. "custody, care and discipline" consistent with her best interests. Id.; see also W. Va. Code, 49-2-1 [1941].

On August 28, 1991, S.C. was moved from the Upshur County Emergency Shelter, where she was initially placed, to the Lewis County Emergency Shelter. See footnote 7 On November 8, 1991, S.C. was placed with her grandmother on a trial basis. This arrangement was terminated, however, when it was learned that S.C. was not attending school. See footnote 8 S.C. was then placed at the Genesis

Youth Crisis Shelter, on December 10, 1991. On December 13, 1991, S.C. was returned to the Lewis County Emergency Shelter. See footnote 9
On January 2, 1992, S.C. was admitted to Stonewall Memorial Hospital in Weston, West Virginia, following a suicide attempt by drug overdose. She was then transferred to St. Joseph's Hospital in Parkersburg, West Virginia, for follow-up evaluation and treatment. Upon being released from St. Joseph's Hospital, S.C. was placed at Monongalia County Youth Services in Morgantown, West Virginia on January 31, 1992.See footnote 10
Following completion of treatment at Olympic Center, S.C. was returned to Monongalia County Youth Services, on March 18, 1992, and then moved again to the Wesley Youth Center in Beckley, West Virginia on May 5, 1992. When the Wesley facility was closed on March 18, 1993, S.C. was moved to a private foster home in Weston, West Virginia. On March 30, 1993, at S.C.'s request, she was placed at the Odyssey Group Home for Girls in Morgantown. On May 6, 1993, an Unusual Incident Report was filed by Sophia Bienek, Site Supervisor of the Odyssey Group Home, stating that, during S.C.'s meeting with staff, child protective services ("C.P.S.") worker Michal Harris argued with S.C. regarding her behavior. Ms. Bienek, who was present during the meeting, wrote in the report that Ms. Harris told S.C. that she dressed, "like a whore," that her actions were going to result in pregnancy and that she was going to end up like her mother.

On July 29, 1993, the Circuit Court of Upshur County entered an agreed order adjudging S.C. to be a "status offender," as that term is defined in W. Va. Code, 49-1-4 [1978].See footnote 11 The agreed order indicates that "the parties hereto are in agreement" as to this determination, that no hearing was held on the matter and that S.C. was not represented by counsel. See footnote 12 The agreed order further directs S.C. to remain in the temporary care, custody and control of the DHHR and to be moved to Pressley Ridge, where she was eventually placed, on July 30, 1993.

In a letter to guardian ad litem Roger Thompson, dated August 16, 1993, the executive director of Odyssey, Lisa Shepherd, questioned the agreed order of July 29, 1993 and the fact that S.C. received neither a delinquency hearing nor representation by an attorney. Ms. Shepherd further indicated that a treatment plan had been developed for S.C. by the staff at Odyssey, that S.C.'s behavior had improved significantly and that her behavior was indicative of sexual abuse survivors. It was Ms. Shepherd's belief that Mr. Thompson was given incorrect and fictitious information concerning S.C. and that S.C.'s case "should be reviewed for accuracy and due process."

Though the Juvenile Justice Committee subsequently telephoned Mr. Thompson regarding S.C.'s situation, Mr. Thompson did not respond to that phone call.

After the filing of the petition with this Court, S.C. was released from Pressley Ridge and, at her request, was returned to the Odyssey Group Home in Morgantown, where she presently resides.

II.

Chapter 49 of the West Virginia Code provides the "legislative declaration of the State's interest, responsibilities and rights as respects any minor child under the age of eighteen years, who for some reason specified by the statute is in need of services, protection or care." In re Willis, 157 W. Va. 225, 238, 207 S.E.2d 129, 137 (1973); see also In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993); In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988). Indeed, the State, in its role of parens patriae, "[s]tand[s] at the side of the natural parents with benign, but continuing, interest" in the care and custody of children. Id. Therefore, when it is determined that a child must be removed from his or her family, the State is required, by statute, to "secure for the child custody, care and discipline consistent with the child's best interests[.]" W. Va. Code, 49-1-1 [1981].

Chapter 49, article 6 of the West Virginia Code specifically sets forth the affirmative duties of both the DHHR and the circuit courts concerning children who have been abused or neglected. However, in S.C.'s case, neither the DHHR nor the Circuit Court of Upshur County fulfilled its statutory responsibilities.

A.

W. Va. Code, 49-6-3(a) [1992] allows the circuit court to order a child into the custody of the DHHR if the court finds there to be imminent danger to the child's physical well-being and there are no reasonable available alternatives to removal of the child. W. Va. Code, 49-6-3(b) [1992]See footnote 13 provides that, whether or not the court orders immediate transfer of custody as provided in W. Va. Code, 49-6-3(a) [1992], if the court finds that there exists imminent danger to the child, the court may schedule a preliminary hearing. If at the preliminary hearing the court finds there to be no alternative less drastic than removal of the child from his or her home, the court may order that the child be delivered into the temporary custody of the Department of Health and Human Resources or some other designated person for a period not exceeding sixty days.

Furthermore, if, pursuant to W. Va. Code, 49-6-2 [1992], the court finds the child to be abused or neglected, then both the Department of Health and Human Resources and the court, no later than sixty days after the child is placed in the temporary custody of the Department of Health and Human Resources, are to proceed with the disposition of the child, in compliance with W. Va. Code, 49-6-5 [1992]. W. Va. Code, 49-6-5(a) [1992] See footnote 14 requires the Department of Health and Human Resources to file with the court a copy of the child's case plan, including the permanency plan for the child. W. Va. Code, 49-6-5(a) [1992]

defines a case plan as a written document which includes, where applicable, the requirements of a family case plan, as set forth in W. Va. Code, 49-6D-3 [1984], as well as the additional requirements set forth in W. Va. Code, 49-6-5(a) [1992]. Furthermore, W. Va. Code, 49-6-5(a) [1992] requires the court to proceed to disposition, one of the dispositions being, if the court finds the abusing parent(s) unwilling to provide adequately for the child's needs, the court may commit the child temporarily to the custody of the Department of Health and Human Resources.

A preliminary hearing was held in the Circuit Court of Upshur County, on September 5, 1991, pursuant to a petition dated August 27, 1991, which asked that the care, custody and control of S.C. be awarded to the DHHR, based on the allegations of sexual, emotional and physical abuse. At the preliminary hearing, it was determined that there existed imminent danger to the physical well- being of S.C. and the other four children in the household. There was further found to be no reasonable, available alternatives to removal of the children, on a temporary basis, pending a full hearing on the matter.

A final hearing was originally scheduled for October 31, 1991. However, the case was continued until January 14, 1992, at the request of counsel for S.C.'s mother and the mother's boyfriend, because the boyfriend was awaiting extradition from Illinois to West Virginia. On January 14, 1992, the DHHR requested a continuance until February 13, 1992, so that psychiatric and psychological evaluations could be completed. See footnote 15 On February 13, 1992, the Circuit Court of Upshur County, sua sponte, continued further proceedings until June 26, 1992, and entered an additional order granting the DHHR continued custody of S.C. until appropriate foster care could be found. The circuit court further found that a reasonable effort had been made to prevent placement of S.C. and the other children out of the home, but that it was in their best interests to place them out of their home.

The proceedings were again continued, at the request of guardian ad litem Roger Thompson, until July 17, 1992, and by order entered August 6, 1992, the parental rights of S.C.'s mother were terminated. However, to date, there has been no hearing concerning permanent custody of S.C.

Though the DHHR concedes that it has had temporary custody of S.C. for a period exceeding sixty days, it argues that it has, nevertheless, complied with W. Va. Code, 49-6-3(b) [1992]. The DHHR asserts that, though this case has been continued numerous times, only one of those continuances was granted at its request. Citing overly burdened courts and prosecutors and a focus on the criminal aspects of this case, the DHHR defends the excessive delay as being caused by factors beyond its control. The DHHR further contends that it has attempted to act

in the best interest of S.C., tendering, as proof, the order of February 13, 1992, in which it was found that the DHHR had made reasonable efforts to prevent the removal of S.C. from her home and in which the DHHR was given continued custody of S.C.

As we noted in In re Carlita B., 185 W. Va. 613, 622, 408 S.E.2d 365, 374 (1991), lengthy procedural histories are a common occurrence in abuse and neglect cases. This Court recognized this problem when we stated: "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Id. at syl. pt. 1. We recognize that minor procedural delays are, at times, inevitable. However, S.C. has lingered in the temporary custody of the DHHR for over two years. In cases such as S.C.'s, where months turn into years, "[r]egardless of who is responsible for the delay . . . the child is the unfortunate victim." W. Va. Dept. of Human Serv. v. La Rea Ann C.L., 175 W. Va. 330, 337 n. 8, 332 S.E.2d 632, 638 n. 8 (1985). Such lengthy delays will not be tolerated by this Court, if for no other reason, but to ensure the well-being of the child. As we stated in Carlita B.:

> [S]ome means of systematic review of child neglect and abuse cases must be established. Otherwise, the statutory time frames that govern their processing and the mandatory, periodic status reports that must be filed with the court are too easily overlooked. If such safeguards are rendered meaningless by a failure or inability to monitor cases, neglected and abused children may become lost in the very system designed to rescue them.

185 W. Va. at 624, 408 S.E.2d at 376.

The DHHR also contends that the mandatory duties delineated in W. Va. Code, 49-6-3(b) [1992] are duties required of the circuit court, and not of the DHHR and that, consequently, if a writ of mandamus is to be granted, it should be directed to the Circuit Court of Upshur County and not the DHHR.

If the circuit court finds a child to be abused or neglected pursuant to W. Va. Code, 49-6-2 [1992], then both the DHHR and the circuit court, no later than sixty days after the child is placed in the temporary custody of the DHHR, are to proceed with the disposition of the child, in compliance with W. Va. Code, 49-6-5 [1992]. Specifically, the DHHR shall file with the circuit court a copy of the child's case plan, including the permanency plan for the child. See W. Va. Code, 49-6-5(a) [1992]. W. Va. Code, 49-6-5(a) [1992] further provides that the circuit court "shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard."

In this case, neither the DHHR nor the circuit court fulfilled its statutory responsibility to S.C. Though the DHHR has presented to this Court numerous documents concerning problem- solving and goal-setting for S.C., this Court has learned, upon further examination of this case, that those documents were never filed with the circuit court. Requiring the DHHR to file case plans with the circuit court was designed to check the often chaotic administration of the foster care system and to ensure that the system does not lose track of children in care. This procedural requirement further assures that the DHHR has properly prepared a case plan in individual cases. Clearly, it was the DHHR's statutory duty to file with the circuit court a case plan for S.C. Furthermore, the circuit court had the statutory duty of ensuring that a case plan had, in fact, been filed.

Though the documents to which the DHHR refers in its brief were not filed with the circuit court as required by W. Va. Code, 49-6-5(a) [1992], we recognize there was some attempt by the DHHR to, at least, formulate a case plan for S.C. During S.C.'s stay at Wesley Youth Center, the Wesley staff and S.C.'s C.P.S. worker, Michal Harris, prepared a Plan of Care, three Plan of Care Reviews and a Discharge Summary. These documents identify problems and define goals in the areas of physical and mental health, socialization, self-help, work and education, leisure skills, family, adult and peer relationships, faith development, discharge needs and case management. For the problems and goals stated, there is also a stated method and frequency of treatment, a desired outcome and target date, a responsible person and a summary of progress. Although the DHHR failed to file the Plan of Care Reviews with the circuit court, the documents do contain some of the statutory requirements of a case plan, which are enumerated in W. Va. Code, 49-6-5(a) [1992].

Furthermore, the other documents to which the DHHR refers in its brief and which were presented to this Court as exhibits do not comport with W. Va. Code, 49-6-5(a) [1992] and, therefore, do not constitute a case plan. For instance, the DHHR refers specifically to a Service Plan, dated September 3, 1991.See footnote 16 The DHHR asserts that, although this document is entitled a "Service Plan," it is, in reality, a case plan, the difference being the terminology and not content. See footnote 17 We disagree. The Service Plan, prepared only days after S.C. was removed from her mother's home, describes S.C.'s situation in the most general and superficial terms. According to the briefs of both parties, S.C. was not even evaluated by a physician until September 4, 1991, thus explaining the cursory report on S.C.'s case. See footnote 18 We must conclude, therefore, that the September 3, 1991 Service Plan is not a case plan, pursuant to W. Va. Code, 49-6-5(a) [1992].

The DHHR further claims that the weekly progress reports, prepared at Olympic

Center, during S.C.'s forty-five-day stay for drug and alcohol treatment, also meet the statutory requirements of a case plan. Again, we disagree. S.C.'s history of substance abuse certainly necessitated an intensive treatment program. Accordingly, the progress reports prepared at Olympic tracked S.C.'s participation in individual and group therapy and Alcoholic's Anonymous Twelve-Step Program for Young Adults. However, S.C.'s chemical dependency accounts for only one of the many issues which should have been addressed in her case plan.

In syllabus point 5 of State ex rel. Dept. of H.S. v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987), we stated that, "[t]he purpose of the family case plan as set out in W.Va. Code, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. See footnote 19 The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in W. Va. Code, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in W. Va. Code, 49-6-5(a) [1992].

The DHHR has gathered an assortment of documents and has labelled them a "case plan." While the Plan of Care Reviews from Wesley Youth Center contain some of the requirements of a case plan, the initial Service Plan of September 3, 1991 and the weekly progress reports from Olympic Center do not.

B.

W. Va. Code, 49-6-8(a) [1992]See footnote 20 provides that if, twelve months after receipt by the Department of Health and Human Resources of physical custody of a child, the Department of Health and Human Resources has not placed the child in permanent foster care, in an adoptive home or with a natural parent, the Department of Health and Human Resources shall file with the court a petition for review of the case as well as a report detailing the efforts which have been made to place the child in a permanent home and copies of the child's case plan including the permanency plan. W. Va. Code, 49-6-8(a) [1992] further requires the circuit court to schedule a hearing See footnote 21 to review the child's case, to determine whether and under what conditions the child's commitment to the Department of Health and Human Resources shall continue, and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the circuit court shall enter an appropriate order of disposition, in accordance with the best interests of the child. Under W. Va. Code, 49-6-8(a) [1992], the court shall retain continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care.

The DHHR was given custody of S.C. on August 27, 1991. A Petition for Review

of Custody of S.C., pursuant to W. Va. Code, 49-6-8 [1992], was not entered until July 29, 1993, approximately twenty-four months later. The DHHR has consistently maintained that the permanency plan for S.C. was placement with a relative, if possible, her maternal grandmother. However, the DHHR also argues that S.C.'s placement at Wesley Youth Center, in May of 1992, was an attempt at permanent placement and that, therefore, the DHHR did not fail to comply with W. Va. Code, 49-6-8(a) [1992] because it had permanently placed S.C. within twelve months of obtaining custody of her. We find this explanation to be without merit. During the course of S.C.'s stay at Wesley, the various reports referred to above indicate that its goal was to permanently place S.C. with a relative. Furthermore, the Plan of Care Reviews prepared by Wesley staff estimate S.C.'s length of stay to be "over twelve months," and not "permanent." See footnote 22 It is, thus, reasonable to conclude that S.C.'s placement at Wesley was intended to be temporary. Therefore, both the DHHR and the circuit court failed to comply with W. Va. Code, 49-6-8(a) [1992].

C.

W. Va. Code, 49-6-8(d) [1992] requires the DHHR to file a report with the circuit court in any case where any child in the temporary or permanent custody of the DHHR receives more than three placements in one year no later than thirty days after the third placement. See footnote 23 As the record indicates, S.C. has been shuffled through numerous facilities while in the DHHR's custody. Though the DHHR admits that it has failed to comply with the strict interpretation of W. Va. Code, 49-6-8(d) [1992], it asserts that its violation of the statute is not as egregious as S.C. would have this Court to believe.

According to the DHHR, it interpreted the language in that code section to require that a report be filed within thirty days after the third permanent placement. In its Petition for Review of Custody, the DHHR indicates that it attempted to permanently place S.C. three times during the twenty-four months it has had custody of S.C. See footnote 24 The DHHR describes the other placements as temporary and necessary to retain S.C. only until suitable long- term placements could be found. The DHHR argues that to include all of S.C.'s placements as being within the meaning of W. Va. Code, 49-6-8(d) [1992] would be detrimental to the efficient administration of the child welfare system.

We find the language of W. Va. Code, 49-6-8(d) [1992] to be clear and unambiguous. That code section requires the DHHR to file with the circuit court a report regarding any child in its temporary or permanent custody who "receives more than three placements in one year no later than thirty days after the third placement." Id. Had the legislature intended the report to be filed only after three permanent placements, we believe it would have included that language in the statute. Unfortunately, in these types of cases, the word "permanent" has lost its

significance. As we have previously held, "'[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. pt. 2, State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951)." Syl. pt. 3, Echard v. Holland, 177 W. Va. 138, 351 S.E.2d 51 (1986). According to the record in this case, S.C. was moved approximately ten times in one year. By failing to file a report with the circuit court within thirty days after the third placement, the DHHR violated W. Va. Code, 49-6-8(d) [1992].

D.

On July 29, 1993, S.C. was adjudicated a "status offender" in the Circuit Court of Upshur County, based upon an agreed order between S.C.'s C.P.S. worker, Michal Harris, and the Prosecuting Attorney for Upshur County, William Thurman. However, W. Va. Code, 49-5-1(c) [1982] states, in relevant part, that a "child shall have the right to be effectively represented by counsel at all stages of proceedings under the provisions of this article[,]" and W. Va. Code, 49-5-1(d) [1982] states, in relevant part, that "the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W. Va. Code, 49-5-1(c) and (d) [1982] are written in very clear terms. S.C. was not afforded an opportunity to be heard at the July 29, 1993 proceeding nor was she represented by counsel. See footnote 25 The case should not have proceeded in the absence of S.C. and her counsel. The agreed order should never have been entered. See footnote 26

In that S.C. has been removed from Pressley Ridge, her petition for a writ of habeas corpus is moot and is, therefore, denied. S.C. is to remain at the Odyssey Group Home, in the temporary custody of the DHHR, pending the DHHR's proper disposition of her case.

We believe the case presently before this Court to be indicative of the many problems currently plaguing the foster care system. Previously, this Court, in the case of Jennifer A., individually and o[n] behalf of B.A. and S.A., her infant children, v. Harry A. Burgess, Director of Social Services, West Virginia Department of Health and Human Resources, et al., No. 21009 (orders filed May 15, 1992 and July 16, 1993) addressed the need for comprehensive and workable child sexual abuse guidelines. To that end, we appointed a statewide advisory committee to develop such guidelines for the State of West Virginia. The stated mission of the committee is, in addition to developing comprehensive and workable child sexual abuse guidelines discussed in Jennifer A., to investigate the possibility of creating regional teams from within the individual counties, to develop and recommend rules of procedure for handling investigation, treatment and resolution of child abuse and neglect cases and to develop and recommend workable and comprehensive guidelines for handling investigation, treatment and resolution of child sexual abuse cases.

Among the committee's goals and objectives is to minimize case-processing time and maximize effective delivery of services and to facilitate permanency planning. The committee further established its methods as identifying problems in the field; evaluating what other states and counties are doing; reviewing West Virginia law and limitations under federal rules and regulations (especially as perceived by the DHHR); identifying what other agencies and committees are doing; drafting rules, outlines and guidelines and submitting them to this Court; and recommending statutory changes.

As a result of the circumstances of S.C.'s case, we shall expand the role of the committee to include the following: to conduct a statewide inventory of all children who have been in the foster care system of this state for more than one year so as to identify barriers to obtaining permanent homes for these children and to make recommendations to this Court for eliminating or reducing those barriers. The committee is to further develop a uniform reporting format to be used by C.P.S. workers in preparing family case plans as well as children's case plans, so as to promote uniformity and clarity and to make the plans amenable to outside review; to develop procedures for both the DHHR and the circuit courts which ensure that a case plan has been properly prepared by the DHHR and filed with the circuit court in individual cases; to insure that time frames for all aspects of the case plan are complied with; and to require the case plan to be a discrete part of the record in each case.

In addition, the committee is to develop procedures by which the progress and timetables of case plans are to be monitored by both the DHHR and the circuit courts, so as to ensure the case plans are adhered to and remain appropriate in individual cases. Finally, we ask the committee to develop any additional plans and procedures which will ensure more effective and efficient permanency planning for children in the DHHR's care.

The order in Jennifer A., filed on July 16, 1993, is to be returned within one year for a progress report. That date should be met. We recognize that the additional tasks required as a result of the S.C. case may necessitate more time. When this case was argued, Secretary Chafin commendably agreed to work with the Juvenile Justice Committee to correct the deficiencies which obviously existed in S.C.'s case. The involvement of the DHHR and the Juvenile Justice Committee alone may not accomplish the desired results in the absence of other necessary participants, including representatives of the judiciary. We believe that the utilization of the committee which is already in place and which includes representatives from the various entities involved in the process of handling of abuse and neglect cases, would be the most expeditious way to achieve the desired results. Insofar as these additional duties will require more time, we request a

progress report by October 1, 1994.

As stated above, S.C. sought to compel her release from Laurel Park Pressley Ridge School. Because S.C. was released from Pressley Ridge to the Odyssey Group Home after this proceeding began, the writ of habeas corpus is denied. However, the relief relating to a writ of mandamus requiring compliance with W. Va. Code, 49-6-3(b) [1992] (allowing the DHHR to maintain temporary custody for a period not exceeding sixty days), W. Va. Code, 49-6- 5(a) [1992] (requiring the DHHR to file with the circuit court a case plan including a permanency plan), W. Va. Code, 49-6-8(a) [1992] (requiring the DHHR to file with the circuit court a petition for review if it has not permanently placed the child after twelve months), and W. Va. Code, 49-6-8(d) [1992] (requiring the DHHR to file a report with the circuit court when a child receives more than three placements in one year) will be granted.

Writ of Habeas Corpus denied;
Writ of Mandamus granted.

Footnote: 1 As is our practice in cases involving sensitive matters, we use initials to identify the parties rather than full names. See In re Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991).

Footnote: 2 Pressley Ridge is a staff secure residential facility for status offenders located in Harrison County, West Virginia.

Footnote: 3 In addition to the briefs and argument of counsel, this Court considered an amicus curiae brief filed by attorney Jane Moran, who has diligently represented children on prior occasions before this Court.

Footnote: 4 Four other children, then aged 16, 10, 5 and 2, were also removed from the household by the DHHR.

Footnote: 5 Attorney Roger Thompson was appointed guardian ad litem to represent the interests of the infant children.

Footnote: 6 Various psychiatric and psychological evaluations of S.C. revealed that S.C. came from a family environment which was conducive to sexual molestation. S.C. reportedly suffers from frequent crying spells and feelings of being unloved, unwanted and hopeless. S.C.'s sexually promiscuous behavior and school failure indicates an environment of abuse and neglect. Examinations of S.C. also determined that she was at high risk for sexually transmitted diseases, pregnancy, alcohol and drug abuse, running away and delinquency.

Footnote: 7 While S.C. asserts that there was no reason for her removal from the Upshur County Shelter, the DHHR explains that S.C. was removed out of fear that she was going to engage in sexual relations with another juvenile at the facility.

Footnote: 8 It should be noted that S.C. has continued to maintain a close relationship with her grandmother. All parties agree that permanent placement with the grandmother would not be possible at this time, as the grandmother has been unable to control S.C.'s behavior.

Footnote: 9 Again, S.C. alleges that no reason was given for her removal from Genesis. Conversely, the DHHR asserts that S.C. was removed due to her disruptive behavior and frequent attempts to run away. The DHHR further states that placement in the Lewis County facility was to be temporary, until a suitable long-term placement could be found.

Footnote: 10 The DHHR explains that it temporarily placed S.C. at the Monongalia County facility until a bed became available at Olympic Center, where S.C. was to be admitted for a 45-day treatment program for drug and alcohol addiction.

Footnote: 11 Actually, W. Va. Code, 49-1-4 [1978] defines "delinquent child" and not "status offender." A "delinquent child" is defined, in relevant part, as a child:

(1) Who commits an act which would be a crime . . . if committed by an adult, punishable by confinement in a jail or imprisonment;

. . . .

(3) Who, without just cause, habitually and continually refuses to respond to the lawful supervision by such child's parents, guardian or custodian;

(4) Who is habitually absent from school without good cause[.]

W. Va. Code, 49-5B-3(3) [1979] defines "status offender" as "a juvenile who has been charged with delinquency or adjudicated a delinquent for conduct which would not be a crime if committed by an adult."

Footnote: 12 The record reflects that S.C.'s C.P.S. worker, Michal Harris, approached the Upshur County Prosecuting Attorney's office concerning the order to have S.C. placed at Pressley Ridge. According to the DHHR's Service Documentation Log, dated August 6, 1993, the DHHR contacted guardian ad

litem Roger Thompson concerning the agreed order. The log indicates that Mr. Thompson said that he usually likes to see what he is agreeing to and that he had not received a copy of the order. He was assured that his name only appeared at the end of the order, as a party to whom a copy should be mailed.

Footnote: 13 W. Va. Code, 49-6-3(b) [1992] states, in relevant part:

(b) Whether or not the court orders immediate transfer of custody as provided in
subsection (a) of this section, if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child, the court may schedule a preliminary hearing giving the respondents at least five days' actual notice. If the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary custody of the state department or a responsible relative, which may include any parent, guardian, or other custodian, or another appropriate person or agency for a period not exceeding sixty days: Provided, That the court order shall state (1) that continuation in the home is contrary to the best interests of the child and state the reasons therefor; (2) whether or not the department made reasonable efforts to prevent the child's removal from his or her home; (3) whether or not the state department made a reasonable effort to prevent the placement or that the emergency situation made such efforts unreasonable or impossible; and (4) what efforts should be made by the department to facilitate the child's return home[.]

Footnote: 14 W. Va. Code, 49-6-5(a) [1992] states, in part:

Following a determination pursuant to section two [§ 49-6-2] of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term case plan means a written document that includes, where applicable, the requirements of the family case plan as provided for in . . . [§ 49-6D-3] . . . and that also includes at least the following: A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent(s) home, facilitate return of the child to his or her own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child. The term permanency plan refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available . . . . If reunification is not the

permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative placement for the child to include approximate time lines for when such placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children.

W. Va. Code, 49-6D-3(a) [1984] provides, in relevant part:

Within the limits of funds available, the department of human services shall develop a family case plan for . . . each family referred to the department for supervision and treatment following a determination by a court that a parent, guardian or custodian in such family has abused or neglected a child . . . . The family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems. Every family case plan prepared by the department shall contain the following:

(1) A listing of specific, measurable, realistic goals to be achieved;

(2) An arrangement of goals into an order of priority;

(3) A listing of the problems that will be addressed by each goal;

(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;

(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;

(6) A list of the services which will be provided;

(7) Time targets for the achievement of goals or portions of goals;

(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and

(9) A designation of when and how often tasks will be performed.

Footnote: 15 This was the only continuance requested by the DHHR.

Footnote: 16 The substance of the one-page Service Plan consisted of identifying the problems of S.C. and the other children removed from the home in the following manner: " That [the children] are neglected and abuse d infant children and that they have not been and do not have proper parental care, control and guardianship" and "[l]a ck of parental care cause d educational and medic al problems and severe emotional problems." The goals included: "To find appropriate placement for the infant children" and "[t]o asses s each child 's needs re: Health and Educa tion. " Final ly, the tasks were deter mined to be: "Temporary Foster Care Placement until appropriate placement can be found ," "[t]o make inquiries into [several relatives'] background [s] to see if they are fit and proper perso ns to care for the above children," "[m]edical check-ups for [the children], " "[e]arly child hood Inter venti on Screening for [two of the children], " "investigative counseling for [S.C. and one of the other children], " and "[s]c hool registration and attendance ."

Footnote: 17 In its brief, the DHHR states that S.C.'s C.P.S worker, Michal Harris, filed this Service Plan with the Circuit Court of Upshur County. However, the circuit clerk's office has no record of this document ever being filed there.

Footnote: 18 According to the briefs of both parties, S.C. was first examined for possible sexual abuse by Christopher A. Borchert, M.D., on September 4, 1991.

Footnote: 19 In this case, the DHHR was to prepare and file with the court a child's case plan in that the maternal rights of S.C.'s mother have been terminated and S.C. has no contact with her biological father.

Footnote: 20 The text of W. Va. Code, 49-6-8(a) [1992] states, in relevant part:

If, twelve months after receipt (by the state department or its authorized agent) of physical custody of a child . . . the state department has not placed a child in permanent foster care or an adoptive home or placed the child with a natural parent, the state department shall file with the court a petition for review of the case. The department shall also file with the court a report detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan including the permanency plan as defined in . . . [§ 49- 6-5][.]

Footnote: 21 The word hearing envisions the presence of all parties and their counsel in court and the actual opportunity to be heard on the issues before the court. The statutory requirement is not fulfilled by the entry of an order without such a hearing.

Footnote: 22 The DHHR further contradicts the documentation at Wesley when it states in its brief that, had Wesley not shut down altogether, it would be reasonable to believe that S.C. would be there today.

Footnote: 23 W. Va. Code, 49-6-8(d) [1992] provides:

The state department shall file a report with the court in any case where any child in the temporary or permanent custody of the state receives more than three placements in one year no later than thirty days after the third placement. This report shall be provided to all parties and their counsel. Upon motion by any party, the court shall review these placements and determine what efforts are necessary to provide the child with a stable foster or temporary home: Provided, That no report shall be provided to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

Footnote: 24 In its brief to this Court, the DHHR indicates that it attempted to place S.C. in a permanent home four times. However, the Petition for Review of Custody, the document to which the DHHR refers, recounts only three attempts at permanent placement. The DHHR also states in its brief that S.C.'s placement in a private foster home in Weston, West Virginia, in March of 1993, was temporary. However, in the Petition for Review of Custody, the DHHR described that same foster home as an attempt at permanent placement.

Footnote: 25 Though the circuit court had previously appointed a guardian ad litem to represent S.C.'s interests in the abuse and neglect proceedings, there is no evidence that S.C. had counsel to represent her interests in this juvenile matter.

Footnote: 26 As we noted earlier, Ms. Harris did not even contact S.C.'s guardian ad litem about the agreed order until August 6, 1993, days after the proceeding.

168 W. Va. 366, 284 S.E.2d 867

Supreme Court of Appeals of West Virginia

In the Interest of S. C., M. C., D. C., B. C., B. C., R. C., G. C., J. A. C., A. R. C., D. E. C.

No. 15200.

Dec. 3, 1981.

Syllabus by the Court

1. *W.Va.Code*, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

2. Even when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings.

3. "An order to which no objection was made and which was actually approved by counsel, will not be reviewed on appeal." Syl. pt. 1, *Loar v. Massey*, W.Va., 261 S.E.2d 83 (1979).

Smith & Rumora and Robert D. Calfee, Williamson, for appellant.

Jane Moran, Williamson, for father.

Paul E. Pinson, Williamson, for children.

Chauncey H. Browning, Atty. Gen. and Billie Gray, Asst. Atty. Gen., for State.

McHUGH, Justice:

This is an appeal by Rebecca C. from an order of the Circuit Court of Mingo County, entered on July 11, 1980, which granted permanent custody and guardianship of eight of the appellant's ten children to the West Virginia State Department of Welfare and terminated the appellant's parental rights. See footnote 1 On this appeal Rebecca C. assigns three errors: (1) that she was denied her right under *W.Va.Code*, 49-6-2 [1980], to cross-examination of the witnesses who appeared in opposition to her; (2) that the trial judge improperly shifted the burden of proof from the State Department of Welfare to the appellant, and that the State failed to meet its burden; and (3) that the trial judge erred by

failing to make findings of fact and conclusions of law in his final order as required by *W.Va.Code*, 49-6-2(c) [1980]. The assignments of error will be considered in order.

I

On September 5, 1979, the West Virginia State Department of Welfare filed a petition with the Circuit Court of Mingo County alleging that the children of the appellant were neglected children within the meaning of *W.Va.Code*, 49-1-3 [1978]. See footnote 2 Included as part of the petition were reports made by social workers Lewis Childers and Marcia Corbett. At a hearing on July 2, 1980, the State Department of Welfare did not call either Lewis Childers or Marcia Corbett to testify, nor did the State Department of Welfare offer their reports as evidence. The appellant assigns this as error.

The appellant's argument is based on *W.Va.Code*, 49-6-2(c) [1980], which provides:

> In any proceeding under this article, th e party or parties having custody of the child shall be afforded a m eaningful opportunity to be heard, including the opportunity to testify and to presen t and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Where relevant, the court shall consider the efforts of the state departm ent to remedy the alleged circumstances. At the conclusion of the hearing the cour t shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or ne glected, which shall be incorporated into the order of the court. Th e findings must be based upon conditions existing at the time of the filing of the petition and pr oven by clear and convincing proof.

The appellant argues that the language of this section requires the State Department of Welfare to call the social workers who prepared the reports which were incorporated into the petition and to offer those reports into evidence. She further argues that the State's failure to call the social workers and to offer their reports into evidence denied her the right to cross- examination provided for in the statute. We find no merit in this argument.

W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden. Specifically, there is no statutory requirement that the State Department of Welfare call any or all of the social workers who may have been involved in the case or to offer their reports into evidence. In this case the State

Department of Welfare elected to attempt to meet its burden without relying on social workers Childers and Corbett or their reports. The State Department of Welfare, instead, chose to rely on the testimony of three of the children and social worker Kerry Burmeister.

Similarly, the State Department of Welfare's decision not to call social workers Childers and Corbett, or to offer their reports into evidence, did not violate the appellant's statutory right to cross-examine witnesses. The statute merely provides that there be an "opportunity ... to cross-examine witnesses." In this case the appellant was afforded, and exercised, her opportunity to cross-examine each witness presented by the State.

II

An adjudicatory hearing was held on the neglect petition in this case on July 2, 1980. At that hearing the State Department of Welfare offered testimony by social worker Kerry Burmeister, and three of the appellant's children. At the close of the State's case, counsel for Rebecca C., relying principally on the fact that social workers Childers and Corbett had not been called to testify, moved to dismiss the petition. In overruling the motion, the trial judge said:

> The gist of this action is neglect, a nd I think there is su fficient evidence as to what the living conditions were and it has been established by the evidence that the living conditions were such that it could be concluded that the children or that the parents had neglected to give the children proper surroundings, proper environm ent, in whic h to grow up. I think the State has sustain [*sic*] the burden of proof in that connection, and that when the stipulation was entered into on a form er occasion that Mrs. C. be given an improvement period, I construe that to be an adm ission by all--not an admission--a concurrence by all partie s that the living conditions of the children were not satisfactory and th at stipulation am ounted to a tacit agreement that conditions were not what they should have been, but that the parties would permit an improvement period. There has been no evidence that the conditions have improved, and for that reason, I think the State has sustained its case.

The appellant argues that the trial judge's comment, "that the stipulation amounted to a tacit agreement that conditions were not what they should have been," indicates that the trial judge had improperly shifted the burden of proof to the appellant.

The appellant, citing *Pierce v. Pierce*, W.Va., 274 S.E.2d 514 (1981), correctly points out that this Court will reverse a lower court judgment if it appears that such judgment was based on an incorrect conclusion of law. In a child abuse or neglect case the burden of proof under *W.Va.Code*, 49-6-2 [1980], is upon the State Department of Welfare to

show by clear and convincing proof that conditions existing at the time of the filing of the petition constituted neglect or abuse. That burden does not shift.

The question here, however, is whether the trial judge did misinterpret the law and improperly shift the burden of proof on the issue of neglect to the appellant. The statement of the trial judge cited by the appellant must be taken in context. Prior to the taking of the children's testimony at the July 2, 1980, hearing, for example, the following exchange occurred:

> Mr. Calfee [Counsel for Rebecca C.] : I don' t have any objection to the testimony that pertains to the cond itions prior to the removal of the children, because our concern here is what has happened in the improvement period more than what happened prior to the removal. If the State wants to take a life history of these children in their home, that is fine, but I don't see what real purpose that is going to serve.
> Mr. Pinson [Counsel for the children] : Our purpose is to check into what the conditions were at the time of th e filing of the petition and what the situation is now at the date of the hearing.
> The Court: I think the Court at the tim e it put this parent upon an improvement period decided, in effe ct, that the living conditions were unsatisfactory in the past and the que stion now is whether there has been any improvement, and I have not m ade a final disposition of the custody and I don' t really believe this court needs testimony in detail about living conditions, other than the m anner in which it m ight pertain to any improvement, since the parents were put on an improvement period.... Is it stipulated that the living conditions were unsatisfactory?
> Miss Moran [Counsel for James C.]: No, Your Honor.
> Mr. Calfee: No, Your Honor....
> The Court: Alright. We will have to go into this matter in abonitio [*sic*].... We will go into it thoroughly from the beginning and let there be testimony as to the unsatisfactory conditions in the home prior to any order as to an improvement period or custody in the hands of the welfare departm ent. So, we will proceed.

The trial judge, upon learning that the parties did not stipulate to the conditions existing at the time of filing of the petition, ordered that the State Department of Welfare go forward with its evidence of neglect existing at the time of the filing of the petition.

The trial judge's statement regarding the "tacit agreement" must also be viewed in the context of the whole statement in which it appears. Specifically, the trial judge said: "I think there is sufficient evidence.... I think the State has sustain [*sic*] the burden of proof in that connection...." The stipulation statement seems, when viewed in context, to be an

afterthought--a statement of further supportive evidence--not an indication that the trial judge placed the burden of proof upon the appellant.

In the context of the entire record here, including the trial judge's specific finding that the State had presented sufficient evidence to sustain its burden, we do not think that it can be said that the trial judge misconstrued or misapplied the law. The trial judge, in this case did not give undue weight to the evidence concerning the improvement period, nor did he improperly shift the burden of proof. We do, however, take this opportunity to emphasize that, even when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings.

The appellant next argues that, even if the burden of proof was not improperly shifted, there was not sufficient evidence to show neglect and the State Department of Welfare, therefore, failed to carry its burden. In making this assertion the appellant mainly argues that the State Department of Welfare's proof was insufficient because social workers Childers and Corbett were not called to testify and their reports were not introduced into evidence. As we discussed in Section I above, the State Department of Welfare was not under an obligation to present such evidence or testimony, and the failure to do so is not, standing alone, a basis for finding that the evidence was insufficient. The proper question is whether the evidence which the State Department of Welfare did present was clear and convincing proof of neglect existing at the time the petition was filed. We have reviewed the record in this case and we think that the evidence was sufficient to support such a finding.

III

W.Va.Code, 49-6-2(c) [1980], specifically provides that the court shall "make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court." The disposition order in this case merely states: "Following a full hearing, and after mature consideration of said evidence and argument of counsel, the Court found that each of said children were neglected children as defined by *West Virginia Code*, 49-1-3, as amended...." The trial judge, at the close of the July 2, 1980, hearing, did state:

> The court ... makes the following findi ngs: that there is no reasonable likelihood that the conditions of negl ect or abuse can be substantially corrected in the near fu ture, and it is necessary for the welfare of the children to terminate the parental or custodial rights and responsibilities, and the Court commits the children to the perm anent guardianship of the West Virginia Department of Welfare....

We agree with the appellant that this bare statement couched in the language of *W.Va.Code*, 49-6-5(a)(6) [1977], is not sufficient to comply with the requirement of *W.Va.Code*, 49-6-2(c) [1980], even though the evidence did support a finding of neglect. The State, however, argues that the error was waived and we find merit in that argument.

In *Loar v. Massey*, W.Va., 261 S.E.2d 83 (1979), we held, at Syl. pt. 1: "An order to which no objection was made and which was actually approved by counsel, will not be reviewed on appeal." The record in this case shows that no objection was ever made to the trial judge's failure to make specific findings of fact and conclusions of law. This issue is raised for the first time in the appellant's petition for appeal. In addition, the order which should have contained such findings of fact and conclusions of law was acquiesced in and signed by the appellant's counsel. In this case no objection was made to the order and it was approved for entry by counsel. In this situation we will consider the error to be waived. A litigant may not silently acquiesce to error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.

For the above stated reasons, the judgment of the Circuit Court of Mingo County is affirmed.

Affirmed.

Footnote: 1 James C., the father of the children, did not appeal from the judgment of the circuit court. Two of the children were not included in the order granting permanent custody and guardianship to the State Department of Welfare. D. E. C. and J. A. C. remain in the custody of their father. The appellant and James C. are now divorced.

Footnote: 2 W.Va.Code, 49-1-3 [1978], provides, in part:
"Neglected child" means a child:
(1) Whose physical or mental condition is impaired or endangered as a result of the present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education and the condition is not due primarily to the lack of financial means of the parent, guardian or custodian; or (2) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian.

233 W. Va. 91, 755 S.E.2d 8

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

FILED
February 12, 2014
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-0362

In Re: S.W.

Appeal from the Circuit Court of Berkeley County
The Honorable Michael D. Lorensen, Judge
Case No. 12-JA-6

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 15, 2014
Filed: February 12, 2014

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Respondent Mother

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

3. "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 2, *State ex rel. Lipscomb v. Joplin*, 131 W. Va. 302, 47 S.E.2d 221 (1948).

4. “‘“‘Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5b [1977] that conditions of neglect or abuse can be substantially corrected.’ Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).’ Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).” Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

Per Curiam:

This case is before the Court upon the appeal of the final order of the Circuit Court of Berkeley County, West Virginia, entered on March 12, 2013. This is a child abuse and neglect matter brought against Respondent Father John W.[1] concerning his infant daughter, S.W. In this appeal, the West Virginia Department of Health and Human Resources ("DHHR") and the guardian ad litem on behalf of S.W. contend that the circuit court erred by directing the DHHR to develop a plan for reunification between the child and father. The non-offending Respondent Mother Jamie W. filed a brief in support of the circuit court's ruling.

Upon careful review of the briefs, the appendix record, the arguments of the parties, and the applicable legal authority, we find that the circuit court erred in ordering reunification. We reach this conclusion in view of the fact that John W. and Jamie W.'s first child, L.W., died due to abusive head trauma in 2009. John W. confessed to causing L.W.'s death and pleaded guilty to felony manslaughter. In spite of the medical evidence to the contrary and his guilty plea, John W. now denies that any abuse or neglect of L.W. occurred. We find that his failure to acknowledge responsibility for the death of L.W. renders the conditions and circumstances in the home untreatable. Therefore, we reverse

[1] We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties. *See, e.g., W.Va. Dept. of Human Servs. v. La Rea Ann C.L.*, 175 W.Va. 330, 332 S.E.2d 632 (1985).

and remand this case to the circuit court for the entry of an order terminating the parental rights of John W.

I. FACTUAL AND PROCEDURAL HISTORY

A. Birth and Death of L.W.

John W. and Jamie W.'s first child, L.W., was born in December of 2008, at Harbor Hospital in Baltimore City, Maryland. The baby was premature and weighed three pounds eleven ounces at birth. L.W. was in the hospital several days after her birth. She was readmitted for low body temperature, and released six days later.

On the evening of January 9, 2009, John W. and Jamie W. transported L.W. to the Baltimore Washington Medical Center emergency room because her body temperature dropped. The parents reported to hospital personnel that they heard the baby make a "weird cry," and when they went into her room they found her cold and unresponsive. Upon examination, the baby "looked pale and droopy" and the medical providers initially thought that she was possibly suffering from an infection or meningitis. A spinal tap revealed blood which was a sign of a possible brain bleed. A physician then took both parents into a consultation room to tell them of her concerns and asked if the baby had any falls or if she had been thrown in the air or shaken. John W. admitted that he had thrown the baby in the air "playfully." When John W. stated that he had thrown the baby in the air, Jamie W. said, "I told you that you shouldn't do that."

John W. replied, "but she likes that." The physician noticed that after John W. conceded that he had thrown the baby in the air, he looked as if he was going to cry.

A CT scan confirmed that L.W. had internal bleeding and swelling of her brain. She also had bilateral retinal hemorrhaging. These injuries were consistent with the baby being shaken severely.[2] The medical center intubated L.W. to assist with her breathing and then transferred her to Johns Hopkins Hospital due to the severity of her injuries. L.W.'s condition deteriorated rapidly. The physicians at the pediatric intensive care unit at Johns Hopkins Hospital pronounced L.W. brain dead on January 13, 2009. She was kept alive until the evening of January 14, 2009, for organ donation purposes. The death certificate listed the cause of L.W.'s death as abusive head trauma.

Zabiullah Ali, M.D., Assistant Medical Examiner for the State of Maryland, performed an autopsy on the body of L.W. and concluded that

> [t]his 1 month, 7 day old, African American female, **[L.W.]**, died of **HEAD INJURIES.** Investigation indicates that L[.] was brought to the hospital with decreased mental status and

[2] The neurological damage caused by shaking is commonly referred to as shaken baby syndrome. The diagnostic triad of symptoms includes retinal bleeding, bleeding in the protective layer of the brain, and brain swelling. *See generally* Comm. on Child Abuse and Neglect, Am. Acad. of Pediatrics, Shaken Baby Syndrome: Rotational Cranial Injuries – Technical Report, 108 *Pediatrics* 206 (2001). "Playfully tossing a child in the air and catching him or her does not cause this type of brain injury, neither does normal 'wear and tear' activity." Roger W. Byard, *Sudden Death in Infancy, Childhood, and Adolescence* 77-163, at 94 (2d ed. 2004)(Cambridge, UK: Cambridge University Press).

> a change in her cry. Autopsy examination revealed subdural hemorrhages (bleeding around the brain) with microscopic evidence of early stages of organization, diffuse subarachnoid hemorrhage, widespread hemorrhagic infarcts of the brain and upper spinal cord, global hypoxic-ischemic changes, and left retinal hemorrhages with bilateral optic nerve sheath hemorrhage. Review of the medical record indicates L[.] had extensive subarachnoid and subdural hemorrhage, left retinal hemorrhages, and cerebral edema with midline shift. Thrombosis of the superior sagittal sinus seen at autopsy is a complication of global ischemic/hypoxic brain damage. The manner of death is **HOMICIDE.** (emphasis in original).

B. John W.'s Confession, Guilty Plea and Manslaughter Conviction

On January 11, 2009, Detective J.S. Gajda with the Anne Arundel County Maryland's Criminal Investigation Division, Homicide Unit, questioned John W. about the circumstances surrounding L.W.'s injuries. John W. stated that the baby starting "fussing" and she would not stop, so he "bounced her." When the baby would not stop crying, he "bounced her a little more." John W. then said that he "probably" bounced L.W. "too hard." He told the detective that he regretted his actions and explained that he was having "a bad day."

The detective asked John W. if he wanted to write a letter of apology to L.W., and John W. prepared the following handwritten note:

> [L.], I am so sorry for what I did to [you] when [you] were still a[n] infant[.] I had a bad day and I guess I don't know my own strength and I guess I shook [you] a little to[o] hard and [you] ended up in the hospital with brain injuries[.] I'm so sorry.

Thereafter, John W. was arrested and indicted by a grand jury, sitting for the State of Maryland in Anne Arundel County, on charges of: (1) second degree murder; (2) child abuse in the first degree causing death; (3) manslaughter;[3] (4) child abuse in the first degree causing physical injury; (5) child abuse in the second degree; and (6) reckless endangerment. On August 24, 2009, John W. pleaded guilty to manslaughter.[4]

We note that Maryland does not differentiate between voluntary and involuntary manslaughter in its statute. Maryland Criminal Law § 2-207 (2002) states, in part: "(a) A person who commits manslaughter is guilty of a felony and on conviction is subject to: (1) imprisonment not exceeding 10 years; or (2) imprisonment in a local correctional facility not exceeding 2 years or a fine not exceeding $500 or both." In *Cox v. State*, 518 A.2d 132 (Md. Ct. Spec. App. 1986), the Maryland Court of Appeals provided the following definitions of manslaughter: "Voluntary manslaughter has been defined as 'an intentional homicide done in sudden passion or heat of blood caused by reasonable provocation, and not with malice aforethought. . . .' Involuntary manslaughter, on the other hand, has been defined as 'the killing of another unintentionally and without malice[.]'" *Id.* at 135 (citations omitted).

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[3] In Count Three of the Indictment, the grand jury charged that John W. "feloniously, without malice aforethought, kill[ed] and slay[ed] [L.W.]."

[4] John W. did not go through a colloquy with the court when he made this plea.

Following the manslaughter conviction, the Maryland court sentenced John W. to serve six years in the penitentiary, and suspended all but eighteen months. John W. served nine months in the penitentiary following his guilty plea.[5]

C. Abuse and Neglect Proceedings Following the Birth of S.W.

The instant case involves the abuse and neglect proceedings for John W. and Jamie W.'s daughter, S.W., who was born in February of 2012, at Winchester Medical Center in Winchester, Virginia. The DHHR received a referral from the hospital following S.W.'s birth after Jamie W. told the hospital staff that the couple had another child in 2008 that died. Jamie W. reported to hospital staff that her husband, John W., served a jail sentence for the death of the child but that she did not believe he hurt their child.

The DHHR filed an abuse and neglect petition against John W. and Jamie W. on February 10, 2012, pursuant to West Virginia Code § 49-6-5b(a)(3) (2009), alleging that John W. was subject to an aggravated circumstances filing based upon his conviction of manslaughter following the death of S.W.'s sibling.[6] On that same day, the

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[5] Following John W.'s release from prison, the couple moved to Berkeley County, West Virginia.

[6] West Virginia Code § 49-6-5b states, in part:

(continued . . .)

circuit court granted emergency custody of S.W. to the DHHR. The DHHR completed a family functioning assessment, applicable to both parents. The case worker noted that John W.

> was convicted of the death of his daughter two years ago. He spent 9 months in jail and is now on unsupervised probation. John denies hurting his daughter and reports confessing because he does not handle conflict well and due to his ADHD he just wanted to be done with interrogation. . . .
>
> John's inability to control his anger when his child was crying is of great concern to the worker. He is unable to control his actions resulting in an inability to parent safely.

The case worker made the following observations about Jamie W.:

> After her first daughter was admitted to the hospital and was in a coma, she only visited for short periods of time. In the case records from MD it was reported that on one occasion Jamie visited for five minutes[.] [T]hey reported she was going to lunch and running errands and that she would return, which she did not until the next evening. The second visit she told the hospital staff she would not be returning to see her daughter at all. The worker from Maryland was the

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> (a) Except as provided in subsection (b) of this section, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:
>
> ….
>
> (3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children or to the other parent of his or her children; or the parental rights of the parent to a sibling have been terminated involuntarily.

> last visitor [L.W.] had before she was pronounced dead and the doctor was the only person with her when she was taken off of life support.
>
> Jamie chose to be with her husband instead of in the hospital with their daughter after she was admitted and was in a coma. Her inability to put her child before her own needs is a great concern for a vulnerable infant's safety as well as her refusal in believing her husband's role in her child's death is a major concern for any infant in their care.

The circuit court held a preliminary hearing on March 12, 2012, and an evidentiary hearing on March 26, 2012. The circuit court denied John W.'s motion for visitation and found that visitation would not be consistent with the child's well-being and best interests. The circuit court adopted an agreement between the parties that allowed Jamie W. to have a minimum of two supervised one-hour visitation sessions with S.W. per week, with the DHHR having the discretion to increase the frequency of those visits.

The circuit court conducted an adjudicatory hearing on July 11, 2012. The circuit court found that John W.'s guilty plea and manslaughter conviction for the death of L.W. constituted aggravated circumstances under West Virginia Code § 49-6-5(a)(7)(B) (2009). The circuit court ruled that based upon the conditions existing at the time of the filing of the petition that S.W. was "abused and neglected as defined by West Virginia Code § 49-1-3 [(2009)]." The circuit court ordered that John W. have no contact with S.W., and found that the DHHR was not required to make reasonable efforts to preserve the family with regard to John W.

At the adjudicatory hearing, the DHHR and the guardian ad litem for S.W. informed the circuit court that S.W. had been returned to the physical custody of Jamie W. in June of 2012, subject to the terms of a safety plan.[7] Counsel for the DHHR and Jamie W.'s counsel moved that the petition either be dismissed with respect to Jamie W. or that she be considered a non-offending respondent. The guardian ad litem had no objection. Thereafter, the circuit court ruled that Jamie W. was a non-offending respondent.[8] The matter was scheduled for disposition.

The circuit court conducted additional evidentiary hearings in October of 2012, on John W.'s motions for visitation, reunification, or in the alternative, an improvement period. The circuit court heard testimony from John W.'s expert witness, Bernard Lewis, Ph.D., a licensed psychologist. Dr. Lewis conducted a parental capacity evaluation of John W. and opined that John W. was a "very low or absolutely minimal level of risk for harming this child." Dr. Lewis recommended that John W. be reunified into the home with S.W., with supervised visitation at first.

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[7] During oral argument in this matter, this Court expressed its concerns about the decision to place S.W. with Jamie W. in light of the fact that Jamie W. continued to deny that John W. caused L.W.'s death. The DHHR and the guardian ad litem represented that the child was placed with her mother because Jamie W. showed improvement following her receipt of social services. All parties agree Jamie W. has a strong family support system and that S.W. is doing well in her care.

[8] After careful review of the appendix record submitted to this Court, it does not appear that the circuit court entered an order dismissing the petition against Jamie W.

In his report dated September 17, 2012, Dr. Lewis stated that he relied upon John W.'s history of the death of his first daughter. John W. reported to Dr. Lewis that after L.W. was taken to the emergency room, she was given a spinal tap which he believed caused her to go into a coma and subsequently led to her death. John W. acknowledged to Dr. Lewis that he gave a confession to law enforcement authorities but he adamantly stated he did nothing to harm or cause the death of his first child. John W. stated that his confession occurred after hours of questioning "and being worn down to the point where he was willing to do almost anything to get out of the police station[.]"[9]

In his testimony, Dr. Lewis stated that John W. was "the textbook example of individuals who make false confessions." On cross-examination, Dr. Lewis admitted that he relied upon the DHHR's summaries provided by John W.'s counsel and did not review L.W.'s medical records showing how she died to assess whether John W. was being truthful. Counsel for the DHHR questioned Dr. Lewis as follows:

> Q. [Mr. Rossi] I guess one of the problems I'm having is trying to understand – and maybe you just – maybe your opinion doesn't go there. Trying to understand how, if [John W.] doesn't admit that he did anything wrong with respect to the death of his first child, then how he can remedy himself. How he can prove himself from that time period.
>
> A. [Dr. Lewis] First of all, I'm willing to entertain the possibility that he's right. I understand legally he's not right.

[9] The record reflects that, during police questioning, Detective Gajda told John W. that he could leave at any time.

> Legally he bears responsibility for that child. I understand that. I accept that. *But I also think, given my understanding of the big picture of the circumstances, I think it's possible that he was right. That he did not bear responsibility for the death of that child. So let's start with that.*
>
> *But moving beyond that and minimizing that, throwing that out, we're four years down the road.* This man has changed in that four years, he has served his time in incarceration for that, he has paid his debt to society for that, he remains on now unsupervised probation for that. So in that sense, you know, he has done what the law required of him. There have been no problems with incarceration. No problems with probation. He's not violated anything. He has not shown himself to in any way be a violent, aggressive, angry, temperamental, substance abusing kind of person who would be at risk.
>
> So if we go back and say, okay, he's not being honest about that, there was something that he did, and there was never any clear evidence of what it was specifically that he did. But if we go back and say he did something, then I think we need to look at the four years since then and what he is like psychologically now. And that to me is the most important factor. (emphasis supplied).

The circuit court also heard testimony from Catherine Smith-Heine, who was qualified as an expert in counseling with an expertise in parenting. She testified that John W. successfully completed eight sessions of parenting class. She also stated that John W. denied harming L.W.

Jamie W. testified in support of John W.'s motion for visitation with L.W. She blamed L.W.'s death on medical professionals. Jamie W. stated that she had "papers" from another doctor indicating that L.W. suffered from a minor contusion "made worse

by a spinal tap." When asked to provide that document, Jamie W. stated that she had it "at home."

Several family members testified in support of John W.'s motion for visitation. Angela Agostini, Jamie W.'s mother and S.W.'s grandmother, testified that she believes it is important for S.W. to have contact with her father. Ms. Agostini stated that she has never known John W. to be a violent or aggressive person. On cross-examination, Ms. Agostini was asked if John W. ever admitted to killing L.W. She answered in the negative, indicating "It's not something we discussed."

John W. testified and requested that the circuit court grant him visitation with S.W. John W. stated that he would be willing to engage in parenting classes and work with the DHHR if he were granted an improvement period. He denied doing anything to intentionally harm L.W. On cross-examination, John W. was shown a copy of the apology letter he wrote to L.W., and he stated, "I really didn't remember writing that." He admitted that he pleaded guilty to manslaughter following the death of L.W. When asked if he was telling the truth, that he committed manslaughter, John W. replied, "Yes." He also agreed that during the police interrogation, the detective told him he was free to go at any time.

Following this testimony, the circuit court found that it was in S.W.'s best interest to deny John W.'s motions for visitation, reunification or an improvement period.

The circuit court set the case for disposition again.[10] At the disposition hearing held on February 27, 2013, Jamie W. and other family members testified in support of John W.'s previous motions for visitation, reunification or for an improvement period.

The circuit court entered a disposition order on March 13, 2013, and found that "because there has been no showing of present unfitness . . . less drastic alternative[s] may be available in this matter, and failure to implement such in a safe manner, will cause further harm to this child[.]" The circuit court directed the DHHR to "prepare a plan of reunification which contemplates supervised visitation with a plan to move toward unsupervised visitation and ultimately re-unification without government involvement."[11] This appeal followed. [12]

II. STANDARD OF REVIEW

This Court has explained that "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of

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[10] On December 21, 2012, the circuit court held a status conference and noted that the case was going to be transferred to another judge. The parties agreed that transcripts of prior hearings would be provided to the judge to review before the final dispositional hearing was conducted.

[11] The circuit court did not dismiss the petition against John W., order a dispositional improvement period, or articulate its disposition of this case in accordance with the provisions of West Virginia Code § 49-6-5 (2009) and Rule 36 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

[12] The circuit court entered a stay of execution of this order pending the outcome of this appeal.

review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). In addition, we have held:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With these principles in mind, we turn to the parties' arguments.

III. DISCUSSION

As a preliminary matter, this Court notes that the legal framework for deciding parental termination petitions is well established. The proceedings consist of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the circuit court must determine whether one or more of the statutory grounds for termination of parental rights exists by clear and convincing evidence. If the circuit court determines that a statutory ground for termination exists, then it proceeds to the

dispositional phase. During the dispositional phase, the circuit court must determine the appropriate outcome of the case considering the best interests of the child.[13]

In this case, the circuit court conducted an adjudicatory hearing on July 11, 2012. At this hearing, the circuit court ruled that John W.'s prior guilty plea and conviction for the death of his child, L.W., constituted aggravated circumstances, under West Virginia Code § 49-6-5(a)(7)(B). Therefore, the DHHR was not required to make reasonable efforts to preserve the family with regard to John W. The circuit court found that S.W. was an abused and neglected child as those terms are defined under West Virginia Code § 49-1-3.[14] John W.'s counsel objected to this finding. The circuit court overruled the objection and scheduled the matter for a disposition hearing. The circuit court stated that "the only remaining issue for the court's determination will be whether [John W.] can show a change of circumstances sufficient to be granted an improvement period."

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[13] *See* Syl. Pt. 2, *W.Va. Dept. of Health & Human Res. ex rel. Wright v. Brenda C.*, 197 W.Va. 468, 475 S.E.2d 560 (1996) ("'In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code, 49–6–5, it must hold a hearing under W. Va. Code, 49–6–2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.' Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983).").

[14] The circuit court did not enter its order following the adjudicatory hearing until October 20, 2012, well outside the time frame set forth in the rules. Rule 27 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides that at the conclusion of the adjudicatory hearing, "*[t]he court shall enter an order of adjudication . . . within ten (10) days of the conclusion of the hearing[.]*" *Id.* (emphasis supplied).

On appeal to this Court, the DHHR and the guardian ad litem do not dispute the circuit court's adjudicatory findings.[15] Therefore, the fundamental issue before this Court is whether the circuit court erred in the disposition of this case. The DHHR and the guardian ad litem contend that the circuit court abused its discretion following the disposition hearings when it overturned previous rulings denying an improvement period, denying reunification and denying visitation. The DHHR and the guardian ad litem argue that the only clear option under the law was termination of parental rights. Although John W. confessed to causing the death of L.W. and pleaded guilty to manslaughter, he now denies that any abuse or neglect of L.W. occurred. Therefore, the DHHR and the guardian ad litem maintain there is no reasonable likelihood that the conditions of abuse can be substantially corrected because John W. fails to acknowledge that abuse of L.W. occurred, in spite of the clear medical evidence to the contrary. In response, John W. argues that the circuit court did not err in ordering reunification with S.W. because there has been no present showing of unfitness. He contends that his previous manslaughter conviction in another state cannot shift the burden to him to prove present fitness.

[15] In his brief, John W. criticized the circuit court's finding following the adjudicatory phase of this case. He argued that the Maryland manslaughter conviction should not be equated to a voluntary manslaughter conviction under the West Virginia Code to reach the aggravated circumstances finding. However, John W. did not cross-assign as error the circuit court's adjudication of this case and that issue is not before this Court. We further note that the circuit court did not reverse its adjudication.

In determining the appropriate disposition of an abuse and neglect proceeding, we acknowledge that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syl. Pt. 1, *In re: Tonjia M.*, 212 W.Va. 443, 573 S.E.2d 354 (2002). In other words, "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syl. Pt. 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995).

As noted above, the DHHR was required to file a petition seeking termination of parental rights in this case pursuant to West Virginia Code § 49-6-5b. Pursuant to our statutes, the DHHR was *not* required to make reasonable efforts to preserve the family considering the fact that John W. pleaded guilty to manslaughter of a previous child. W.Va. Code § 49-6-5(a)(7)(B)(ii) .

"Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syl. Pt. 2, in part, *In re George Glen B. Jr.*, 205 W.Va. 435, 518 S.E.2d 863 (1999). Moreover, termination is proper when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially

corrected in the near future and, when necessary for the welfare of the child . . . .” W.Va. Code § 49-6-5(a)(6). In such cases, the lower court must allow the development of evidence surrounding the prior abuse and determine “what actions, if any, the parent(s) have taken to remedy [those] circumstances[.]” Syl. Pt. 4, in part, *In re George Glen B. Jr.*, 205 W.Va. 435, 518 S.E.2d 863.

Having carefully examined the extensive record and testimony in this case, this Court is of the opinion that the circuit court committed reversible error in ordering that S.W. be reunited with John W. when the overwhelming evidence supported the termination of his parental rights. We reach this conclusion in view of clear and convincing proof that the injuries to L.W. were, in fact, consistent with abusive head trauma. Her death was ruled a homicide by medical examiners. John W. admitted to throwing this infant in the air and bouncing her when she would not stop crying. John W.’s explanations to the contrary throughout these proceedings were completely contradictory to the medical evidence. This Court has consistently articulated and adhered to the statutorily-mandated standard for the termination of parental rights. West Virginia Code § 49-6-5(a)(6) authorizes the termination of parental rights “[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child.”

We emphasize that this case involves the death of a child. Contrary to Dr. Lewis' suggestion, this Court cannot minimize or disregard the death of L.W. The risk in this kind of case is evident and, consequently, any chance of subjecting the current living child to circumstances that could result in a similar fate is unacceptable. The evidence in this case unequivocally shows that John W. inflicted the fatal neurological injuries suffered by L.W. Despite his confession and guilty plea to manslaughter, he failed to take responsibility for his actions during these proceedings. He maintained that her injuries were caused by mistakes made by hospital personnel. This explanation wholly lacked support from the record evidence and is inconsistent with the medical records and autopsy of the child.[16] As this Court has noted, a parent's denial of abuse or neglect in the face of unrefuted medical evidence reflects an underlying resistance to the treatment needed to effect the behavior changes that will ensure a child's safety. *See In re Kaitlyn P.*, 225 W.Va. 123, 127, 690 S.E.2d 131, 135 (2010) (finding that where child was clearly

[16] This Court is cognizant of the fact that there is controversy in the legal and medical communities regarding criminal convictions of murder based solely on the presence of the diagnostic triad associated with shaken baby syndrome: retinal bleeding, bleeding in the protective layer of the brain, and brain swelling. *See* Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 Ala. L. Rev. 513, 515 (2011) (discussing lack of consensus that the diagnostic triad is necessarily and exclusively induced by shaking and recognizing that other medical disorders and accidental trauma can cause symptoms previously associated with shaken baby syndrome). This controversy does not affect the outcome of the case *sub judice*. The diagnosis in this case was abusive head trauma, not shaken baby syndrome. By definition, abusive head trauma is head trauma that is inflicted. The record also demonstrates that John W. gave a police confession and pleaded guilty to felony manslaughter. He did not challenge this plea in an appeal or file a post-conviction habeas corpus petition.

abused and his siblings were certainly at risk of being abused, parents were not entitled to post-adjudicatory improvement period when they failed to even acknowledge that abuse occurred, despite uncontroverted medical evidence to the contrary).

Accordingly, we find that termination of John W.'s parental rights in the present proceeding is warranted. We believe that the DHHR proved that S.W. remains at substantial risk of significant harm from John W. There was no showing of a reasonable likelihood that the conditions of abuse can be substantially corrected because John W. has failed to acknowledge that abuse caused the death of L.W. As we have previously explained:

> "'"Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).' Syllabus point 4, *In re Jonathan P.*, 1982 W.Va. 302, 387 S.E.2d 537 (1989)." Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

Without question, the precedent of this Court supports our holding. In *West Virginia Department of Health and Human Resources ex rel. v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), we affirmed termination of parental rights after a child in the

home suffered fatal injuries and the autopsy results showed a severe injury to the spinal column consistent with violent shaking. This Court stated that

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

197 W.Va. at 498, 475 S.E.2d at 874 (footnote omitted); *see also Matter of Taylor B.*, 201 W.Va. 60, 69, 491 S.E.2d 607, 616 (1997) (finding termination of parental rights appropriate disposition when neither parent ever acknowledged that any abuse or neglect occurred despite medical evidence that child's injuries were consistent with shaken baby syndrome, a life-threatening circumstance).

The facts surrounding the death of L.W. are very disturbing. This Court declines to rule in any way that might risk the life of another child whose parent has engaged in such horrific conduct. We again acknowledge that parental rights are fundamental in nature, but we conclude that the DHHR not only established a statutory basis for termination of John W.'s parental rights, but also proved that termination was the least restrictive means of protecting S.W. under the facts of this case.

Finally, this Court remains deeply concerned that the disposition in this case raises a critical issue not resolved below: Whether Jamie W. is committed to ensuring that John W. will have no contact with S.W. Simply stated, will Jamie W. place

the safety of her daughter above the desires of her husband? As noted by the initial case worker, Jamie W. refused to believe her husband had any role in L.W.'s death. In our review of the record, we find that Jamie W.'s opinion has not changed and she continues to support John W. This Court cannot abandon the question of this child's well-being without further inquiry into this situation. We therefore find that the DHHR must continue to monitor the status of this case to reasonably assure the safety of S.W.[17] *See In re Brianna Elizabeth M.*, 192 W.Va. 363, 367, 452 S.E.2d 454, 4589 (1994)("Although sound public policy and the whole tenor of law seek generally to perpetuate the marital bond, the rights of children to be free from abuse require that a parent's first loyalty be to the protection of his or her children."). This matter will be remanded to the circuit court for further proceedings with the assistance of the DHHR to determine whether such protection is being accorded. As part of these reviews, the circuit court should also examine whether any additional services are required.

IV. CONCLUSION

Based upon the foregoing, the final order of the Circuit Court of Berkeley County entered March 12, 2013, is reversed, and this case is remanded for the entry of an order (1) terminating the parental rights of John W. to S.W., and (2) directing the DHHR to develop a plan to monitor S.W.'s safety.

[17] *See supra* note 8.

Reversed and remanded with directions.

236 W. Va. 309, 779 S.E.2d 577

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2015 Term

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No. 15-0333

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FILED
November 5, 2015
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE S.W.

Appeal from the Circuit Court of Brooke County
The Honorable Martin Gaughan, Judge
Civil Action No. 10-JA-11

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: October 14, 2015
Filed: November 5, 2015

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CHIEF JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl., *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

2. "'"The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal." Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).' Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008)." Syl. Pt. 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011).

3. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Workman, Chief Justice:

This is a joint appeal by the paternal grandparents[1] and guardian ad litem of a child (hereinafter jointly referenced as "the petitioners" or separately referenced as "the grandparents" or "the GAL"). The petitioners appeal a circuit court order terminating the grandparents' legal guardianship of their grandchild, S.W. (hereinafter "the child"), and returning the child to his mother.[2] The Department of Health and Human Resources (hereinafter "the DHHR") also supports the petitioners' contentions in this appeal. Subsequent to thorough review of the pleadings and record designated for review, the briefs and oral arguments of the parties, and for the reasons stated herein, we reverse the order of the Circuit Court of Brooke County, West Virginia, terminating the grandparents' guardianship of S.W. and remand this matter for entry of an order consistent with this opinion.

I. Factual and Procedural History

S.W. was born in 2009. An abuse and neglect petition was filed on June 30, 2010, alleging that the child's mother, K.M., was under the influence of drugs while caring

[1]Because this case involves sensitive facts, we protect the identities of those involved by using only the parties' initials. *See State ex rel. W.Va. Dept. of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987); *see also* W.Va. R. App. P. 40.

[2]Based upon this Court's stay of the circuit court's order returning the child to his mother, the child currently resides with his paternal grandparents.

for him. The DHHR placed the child in the care of his paternal grandparents, and a pre-adjudicatory improvement period was granted to the mother on September 29, 2010. The mother and the maternal grandparents were also granted visitation with the child.

On March 16, 2011, the GAL filed a motion to terminate the mother's pre-adjudicatory improvement period because she had tested positive for oxycodone and morphine on two separate occasions. The improvement period was terminated on March 24, 2011, and the mother admitted that she was abusing drugs.[3]

On May 12, 2011, the mother admitted that she had been under the influence of drugs in the presence of the child and had neglected to take reasonable care of the child due to her drug addiction. The circuit court adjudicated her as a neglectful parent. During a June 23, 2011, status hearing, the circuit court was advised that the mother had completed a rehabilitation program and was participating in an outpatient program.

On September 8, 2011, the circuit court granted the mother a post-adjudicatory improvement period, requiring her to discontinue her abuse of controlled substances and refrain from contact with felons. On November 10, 2011, the child was returned to the

[3]On April 14, 2011, the GAL also informed the circuit court that the mother was living with a registered sex offender.

mother's care, but legal custody remained with the DHHR. Approximately four months later, on March 9, 2012, the GAL filed a motion to return physical custody of the child to the DHHR because the mother had violated the terms of the post-adjudicatory improvement period by refusing to answer the door to her home and submit to a drug test. The child was thereafter removed from the mother's care and placed back in the custody of the paternal grandparents.

On July 12, 2012, the circuit court granted supervised visitation to the mother, contingent upon her cooperation with drug testing. The mother was unable to appear for a September 2012 hearing due to her incarceration on a charge of possession of drugs with intent to deliver. Subsequent to a June 21, 2013, dispositional hearing, the circuit court entered an order on August 5, 2013, stating that the mother had been arrested in September 2012 for possession with intent to deliver, had refused to be drug tested, and had exhibited erratic behavior. The court held that under West Virginia Code § 49-6-5(a)(5) (2012),[4] the child would remain in the physical custody of the paternal grandparents, with visitation permitted with the mother and maternal grandparents.[5]

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[4]That section, now recodified as West Virginia Code § 49-4-604(b)(5) (2015), provided that the circuit court may commit the child temporarily to the State Department or a person who may be appointed guardian.

[5]The circuit court also stated that an abuse and neglect action was pending against the child's father, J.W. The father's parental rights to S.W. were ultimately terminated, and that aspect of this matter is not before this Court.

On September 3, 2013, the mother was released from incarceration and placed on probation for five years as a result of her guilty pleas to felony and misdemeanor drug charges. On December 12, 2013, the circuit court held a permanency hearing and granted legal guardianship to the paternal grandparents. The mother graduated from Drug Court on September 11, 2014,[6] and filed a "Petition to Overturn Legal Guardianship" on November 19, 2014. In that petition, she asserted that she had been in recovery for over one year, and she argued that her recovery and continued sobriety constituted a material change in circumstances justifying a modification of the custody of her son.

A hearing on the mother's petition was held on January 15, 2015. The mother testified concerning her strong bond with the child and her maintenance of sobriety. She indicated that the child calls her "Mommy," comes to her for safety and comfort, and sometimes throws tantrums in an effort to be permitted to stay with her. Ms. Gina Hicks, the mother's supervising officer and Mental Health Court Coordinator, testified that the mother had completed the rehabilitation program successfully and noted distinct improvements in the mother's performance during her participation in the program the second time. The mother's probation officer, Terry Stuck, testified that the mother was compliant with all

[6]The mother also married on June 6, 2014, and she now has another child, who is a half-sibling to S.W.

terms of her probation.

The paternal grandmother also testified concerning her bond with the child, and she explained that she has encouraged the mother's role in the child's life and had not tried to assume the role of mother. The GAL testified that the child wished to remain living at his grandparents' home, with visits to his mother's home.

On April 1, 2015, the circuit court terminated the grandparents' legal guardianship and ordered the transfer of the child to the mother within ten days. The grandparents and the GAL appeal that ruling, contending the lower court ruled in favor of the mother based upon her right to parent her child, rather than in accordance with the statutorily-required analysis of the child's best interests. Specifically, the petitioners contend that the circuit court (1) ignored the best interests of the child by modifying the dispositional order and removing the child from the grandparents and (2) erred in modifying the dispositional order two years after it was entered, depriving the child of permanency. The petitioners further contend that if a transfer of custody to the mother is mandated, the circuit court should provide a period of gradual transition, as well as continued association with the grandparents.

On April 16, 2015, this Court granted a stay of the transfer of custody. In

updates to this Court, the mother reports that she, her husband, and her newborn child are residing in the basement of her parents' home and are in the process of renovating separate living quarters for their own family at that location. Although the mother has been married since June 6, 2014, she and her current husband were briefly separated prior to the most recent October 2015 update on the status of the child. S.W., currently in the first grade, has remained in the custody of the paternal grandparents since 2010, with the exception of the four-month period in which custody was transferred back to the mother in 2012**.**

II. Standard of Review

This Court's standard of review in a child abuse and neglect case was addressed in *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998). This Court explained that we employ the two-pronged standard of review enunciated in the syllabus of *McCormick v. Allstate Insurance Company*, 197 W.Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

We have also held that the following standard of review is applicable in custody decisions:

> "'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused; however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the

> ruling will be reversed on appeal.' Syllabus point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975), *superseded by statute on other grounds as stated in David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989)." Syl. Pt. 1, *In re Abbigail Faye B.*, 222 W.Va. 466, 665 S.E.2d 300 (2008).

Syl. Pt. 2, *In re Antonio R.A.*, 228 W.Va. 380, 719 S.E.2d 850 (2011). With these standards as guidance, we address the issues raised in this case.

III. Discussion

The petitioners contend that the circuit court erred in ignoring the best interests of the child in modifying the dispositional order and terminating the legal guardianship of the grandparents. The mother's petition requesting modification of the guardianship order was premised upon West Virginia Code § 49-6-6 (2014). That statute clearly provides two prerequisites to modification of disposition. First, there must be a showing of material change in circumstances, and second, the alteration must serve the best interests of the child. As applicable to these proceedings,[7] West Virginia Code § 49-6-6(a) provides, in pertinent part:

> Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing . . . and may modify a dispositional order if the court finds by clear and convincing evidence a material change in circumstances and that

[7]West Virginia Code § 49-6-6 was recodified, effective May 17, 2015, as West Virginia Code § 49-4-606 (2015), with minor modifications that do not affect the issues currently before this Court.

such modification is in the child's best interests. . . .

In her memorandum to the circuit court in support of her petition, the mother also cited West Virginia Code § 44-10-3 (2014). That statute also distinctly provides that a request for a termination of legal guardianship must be supported by evidence of a material change in circumstances and must serve the best interests of the child. Further, West Virginia Code § 44-10-3(j) specifies that the burden of proof is upon the *movant,* in this case, the child's mother. The relevant portion of that statute provides as follows:

> (i) The court, the guardian or the minor may revoke or terminate the guardianship appointment when:
> . . . .
> (4) A petition is filed by the guardian, the minor, *a parent* or an interested person or upon the motion of the court stating that the minor is no longer in need of the assistance or protection of a guardian due to *changed circumstances and the termination of the guardianship would be in the minor's best interest*.
>
> (j) For a petition to revoke or terminate a guardianship filed by a parent, the *burden of proof is on the moving party* to show by a preponderance of the evidence that there has been a material change of circumstances and that a revocation or termination is in the child's best interest.

W.Va. Code § 44-10-3(i)(4) and 44-10-3(j) (emphasis added). Additionally, Rule 46 of the West Virginia Rules for Child Abuse and Neglect is consistent with the statutory requirements and states that modification of a court order is permissible upon a showing of a material change in circumstances and clear and convincing evidence that modification is

in the best interests of the child.

Based upon the rule and the statutory mandates outlined above, the December 12, 2013, disposition in this case, providing legal guardianship to the paternal grandparents, may be modified only if a circuit court finds *both* a change in circumstances and that modification is in the child's best interests. The petitioners argue that the record in this case reveals insufficient evidence to support a conclusion that returning the child to the mother is in his best interests. In presenting evidence on the best interests issue, the mother relied primarily on her status as the child's mother and the bond they had established. She did not identify any other significant evidence indicating that a modification of the custodial arrangements would be in the child's best interests. She argues on appeal that the GAL's recommendations should not be accorded significant weight because the GAL failed to view the interactions between the mother and the child. The mother also argues that the opinions of the child's school counselor, Mr. Paul Weigel, should be disregarded because Mr. Weigel was treating the child for unrelated issues at school and did not observe the mother/child relationship.[8]

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[8]The school issues prompting the therapy with Mr. Weigel involved an incident involving the child's behavior issues on the school bus and his inability to concentrate in his Kindergarten class. Mr. Weigel recommended that the child should remain with the grandparents due to the potential traumatic effects of separating him from his current caretakers. In her most recent October 2015 update to this Court, the GAL explained that the child is still engaged in therapy with Paul Weigel. Mr. Weigel informed the GAL that the child has responded well to the consistency of rules implemented by the grandparents in their

(continued...)

To the contrary, the grandparents, GAL, and DHHR adamantly contend that the circuit court erred in modifying the dispositional order based upon such extremely limited evidence that a modification would serve the best interests of the child. The DHHR asserts that while the mother unquestionably underwent a substantial and positive change in her own circumstances, there is a glaring absence of evidence that a modification of the disposition is in the child's best interests. The petitioners contend that the circuit court essentially ignored the key element of the best interests of the child and elevated the rights of the mother over those of the child.

Although this Court has observed that a circuit court has statutory authority to modify a guardianship, evidence regarding each of the two elements required by the statute must be presented. As explained above, both West Virginia Code § 49-6-6 and West Virginia Code § 44-10-3 clearly identify the two requirements for alteration of custody in this case. The significance of the best interests of the child cannot be overstated; it is a statutory requirement and has been repeatedly and strenuously emphasized by this Court. In syllabus point three of *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996), for instance, this Court explained: "Although parents have substantial rights that must be protected, the primary goal

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[8](...continued)
home. He also indicated that the child seem "bothered" about the most recent changes in the mother's living arrangements.

in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." *See also* Syl. Pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) ("In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.") (internal citation omitted); Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.").

This Court also addressed these requirements in the specific context of a termination of guardianship in *In re K.H.*, 235 W.Va. 254, 773 S.E.2d 20 (2015). In that case, this Court recognized that an analysis of the best interests of the child is imperative in matters involving modification of custody. This Court's evaluation of the guardianship issues in *K.H.* specified that the statutory scheme requires consideration of the change in circumstances, as well as the best interests of the child. *Id.* at 258, 773 S.E.2d at 24; *see also In re Haylea G.*, 231 W.Va. 494, 745 S.E.2d 532 (2013) (examining grounds for termination of legal guardianship). The statutes and rule prohibit modification of an existing guardianship in the absence of evidence that the child's best interests will be served by the modification and that there has been a change in circumstances.

Upon review of the present case, this Court finds the evidentiary record

insufficient to support a conclusion that S.W.'s best interests would be served by modifying the disposition and terminating the paternal grandparents' legal guardianship.[9] Were this simply a question of the safety and welfare of this child, this Court would be compelled to conclude that the evidence indicates that both the mother and the paternal grandparents would be stable and venerable caretakers for this child. But, that is not the question before this Court. The statutes and rule prohibit a modification of the disposition in this case in the absence of a showing that the child's best interests would be served by altering the status quo. We commend the mother on her extremely substantial success in conquering her addiction issues, and we encourage her meaningful and extensive involvement in the life of her son. At this juncture, however, there is insufficient evidence to indicate that an alteration in the custody arrangements would be in the best interests of the child. He is entitled to a sense of stability and permanency in his life. This Court has consistently emphasized the importance of achievement of permanency to the greatest degree possible. *See In re: Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010); *In re: Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996); *In re*

[9]This Court observes that the abuse and neglect statute at issue here, West Virginia Code § 49-6-6, requires clear and convincing evidence that the best interests of the child will be served by the modification. Rule 46 of the West Virginia Rules for Child Abuse and Neglect also requires clear and convincing evidence. The statute addressing a termination of legal guardianship, however, requires only a preponderance of the evidence on the issue of best interests. *See* W.Va. Code § 44-10-3. We find that the evidence on that issue in this case is insufficient to meet either of those evidentiary standards.

Brian D., 194 W.Va. 623, 461 S.E.2d 129 (1995).[10]

As revealed in the record, the home provided for this young boy by his paternal grandparents has been the only stable home he has known. The circuit court order did not identify any factors indicating that termination of the guardianship would be in the child's best interests, basing the conclusion primarily upon the mother's change in circumstances. The petitioners emphasize the fact that the mother was asked to address the issue of how removing the child from his grandparents would serve the child's best interests. She responded by saying that a child should be with his mother, but she did not offer evidence on issues which might impact the best interests analysis. For instance, she was unaware of issues such as whether the child would have to change schools if custody were to be transferred. The record is devoid of sufficient evidence indicating that alteration of custody would serve the child's best interests at this time.

Based upon the foregoing, we reverse the April 1, 2015, order of the circuit court.[11] On remand to the circuit court, the rights of the mother and maternal grandparents

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[10]*See also* Syl. Pt. 6, *Holstein v. Holstein*, 152 W.Va. 119, 160 S.E.2d 177 (1968) ("A change of custody should not be based only upon speculation that such change will be beneficial to the children.").

[11]The Petitioners presented two arguments regarding gradual transition and the right to continued association, applicable only if this Court had affirmed the holding of the circuit court. Based upon this Court's reversal of the circuit court, we do not address those (continued...)

to visitation with the child should be specifically established. As in other child custody matters, the visitation schedule will be subject to modification as circumstances warrant and as the child advances in age.[12]

The visitation schedule should provide extensive contact between the child and his mother and "should give due consideration to . . . work and home schedules and to the parameters of the child's daily school and home life, and should be developed in a manner intended to foster the emotional adjustment" of the child "while not unduly disrupting the lives of the parties or the [child]." *Honaker v. Burnside*, 182 W.Va. 448, 452, 388 S.E.2d 322, 325 (1989). This Court also explained in *Honaker*:

> [u]ndoubtedly, ... [the child's] best interests must be the primary standard by which we determine [the child's] rights to continued contact with other significant figures in [the child's] life. Clearly, "these interests are interests of the child and not of the parent. Visitation is, to be sure, a benefit to the adult who is granted visitation rights with a child. But it is not the adult's benefit about which the courts are concerned. It is the benefit of the child that is vital."

Id. (footnotes and internal citations omitted).

No matter how artfully or deliberately the trial court judge draws

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[11](...continued)
alternative arguments.

[12]The mother's continued recovery efforts will obviously have an impact on her rights to visitation and the potential expansion of those rights. If she suffers a relapse into drug abuse, the visitation schedule should be modified, within the discretion of the circuit court.

> the plan for these coming months, however, its success and indeed the chances for [the child's] future happiness and emotional security will rely heavily on the efforts of these . . . [caretakers]. The work that lies ahead for . . . them is not without inconvenience and sacrifice on both sides. Their energies should not be directed even partially at any continued rancor at one another, but must be fully directed at developing compassion and understanding for one another, as well as showing love and sensitivity to the [child's] feelings at a difficult time in all their lives.

Id. at 453, 388 S.E.2d at 326-27. Fortunately, this appears to be a situation in which all parties are cooperating remarkably well to provide emotional security for the child, and we encourage the continuation of this unity of effort for the benefit of the child.

IV. Conclusion

The April 1, 2015, order of the Circuit Court of Brooke County is reversed, and this matter is remanded with directions for the entry of an order establishing visitation rights for the mother and maternal grandparents.

Reversed and remanded with directions.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2008 Term

No. 33713

FILED
September 26, 2008
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: SAMANTHA S. AND HOPE S.

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Chief Judge
Juvenile Action Nos. 05-JN-8 and 05-JN-9

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED

Submitted: September 3, 2008
Filed: September 26, 2008

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Guardian Ad Litem for the Minor Children,
Samantha S. and Hope S.

The Opinion of the Court was delivered PER CURIAM.

JUSTICE ALBRIGHT not participating.

SENIOR STATUS JUSTICE MCHUGH, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syllabus point 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005).

3. "A trial court, in considering a petition of a grandparent for visitation

rights with a grandchild or grandchildren . . . shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syllabus point 1, in part, *In re the Petition of Nearhoof*, 178 W. Va. 359, 359 S.E.2d 587 (1987).

4. "'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W. Va. 801, 187 S.E.2d 601 (1972)." Syllabus point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W. Va. 86, 459 S.E.2d 363 (1995).

Per Curiam:[1]

This case presents for review the issue of grandparent visitation rights, which stems from an underlying abuse and neglect case involving the biological parents.[2] The intervenors below and appellants herein, the *paternal* grandparents, Larry S.[3] and Debra S. (hereinafter "Larry" and/or "Debra" or "paternal grandparents"), were granted physical custody of the subject children and have started the process to adopt them.[4] Larry and Debra appeal from an order entered June 28, 2007, by the Circuit Court of Mingo County. By that order, the circuit court granted unsupervised visitation to the *maternal* grandparents, John T. and Mabel T. (hereinafter "John" and/or "Mabel" or "maternal grandparents").[5] On appeal to this Court, Larry and Debra argue that all of the evidence, including that submitted by

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[1]Pursuant to an administrative order entered on September 11, 2008, the Honorable Thomas E. McHugh, Senior Status Justice, was assigned to sit as a member of the Supreme Court of Appeals of West Virginia commencing September 12, 2008, and continuing until the Chief Justice determines that assistance is no longer necessary, in light of the illness of Justice Joseph P. Albright.

[2]The biological parents' rights were terminated on July 18, 2005. The termination is not an issue in this appeal.

[3]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[4]The adoption proceedings have been stayed pending the outcome of this appeal.

[5]The maternal grandparents, John and Mabel, have not filed any responsive pleadings in this matter and did not participate in the oral argument in this case. See *infra* note 14.

mental health experts, illustrates that visitation with the maternal grandparents is harmful to the children and not in the children's best interests. Thus, the paternal grandparents seek the reversal of that portion of the circuit court's June 28, 2007, order that allows unsupervised visitation between the children and the maternal grandparents, and further ask that the visitation rights of John and Mabel be terminated. Based on the parties' arguments, the record designated for our consideration, and the pertinent authorities, we affirm that portion of the June 28, 2007, circuit court order that is unrelated to the visitation rights of the maternal grandparents, John and Mabel. Further, we reverse that portion of the June 28, 2007, circuit court order that allows unsupervised visitation by the maternal grandparents, John and Mabel. Finally, we remand this case to the Circuit Court of Mingo County for entry of an order terminating the visitation rights of the maternal grandparents, John and Mabel, consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

This case has a long legal history that began when the family moved from Kentucky to West Virginia. The Department of Health and Human Resources (hereinafter "DHHR") opened a case in December 2004 as a result of a request from Kentucky, which had an open case involving Joe S. and Faye S. (hereinafter "Joe" and/or "Faye" or "biological parents") and their two girls, Samantha S. (hereinafter "Samantha") and Hope S. (hereinafter "Hope"), to monitor the family when they relocated to Mingo County, West

Virginia. On March 10, 2005, the DHHR filed an emergency petition seeking immediate removal of Samantha and Hope[6] from the custody of their parents.[7] The Circuit Court of Mingo County reviewed the petition, removed the children from the custody of their biological parents, gave legal custody to the DHHR and awarded physical custody to the maternal grandparents, John and Mabel.

A preliminary hearing was held on March 15, 2005; wherein, the circuit court found probable cause to support the allegations of abuse and neglect. The trial court found continued physical custody with John and Mabel to be in the best interests of the children, and ordered a preadjudicatory improvement period for both parents. Thereafter, the improvement period was extended, with the directive that the biological parents undergo a substance abuse evaluation.

At an adjudicatory hearing on June 14, 2005, the circuit court found that the biological parents had failed to adhere to the terms of their improvement period and were once again incarcerated. Thus, the circuit court revoked the preadjudicatory improvement

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[6]Samantha and Hope are sisters. Their respective birth dates are January 6, 2000; and June 5, 2001.

[7]The petition alleged that the young children could not protect themselves from the negative behaviors of the parents. The alleged negative behaviors included repeated domestic violence incidents between the parents, drug use by the parents in front of the children, and the parents' failure to cooperate with recommended community services to remedy the problematic behaviors.

period. The circuit court additionally permitted the *maternal* grandparents, John and Mabel, to relinquish physical custody of the children to the DHHR[8] to facilitate the placement of the children in the physical custody of their *paternal* grandparents, Larry and Debra.

Subsequently, in a dispositional hearing of July 18, 2005, the circuit court terminated the parental rights of the mother and recognized the father's voluntary relinquishment of his parental rights. The circuit court awarded the mother post-termination visitation with the children. The circuit court also awarded Larry and Debra, the paternal grandparents, legal and physical custody of the children in consideration of how well the children were doing in their home and in recognition of the recommendations of the DHHR and the Guardian Ad Litem that the children remain there due to the stable structure Larry and Debra could provide. The circuit court granted John and Mabel grandparent visitation. In granting grandparent visitation to John and Mabel, the circuit court recognized that they had initially been uncooperative with the DHHR, failing to submit financial records when requested and failing to complete the ordered psychological evaluations. The court also noted that John and Mabel had violated a court order in allowing the children to have contact with their mother by phone while she was incarcerated.[9] However, the circuit court reasoned

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[8]From the record, the reason for the relinquishment of custody is unclear. However, it appears that John and Mabel considered it to be a temporary placement.

[9]The circuit court had found that a visitation schedule with the mother was not to be implemented until after she was released from jail.

that John and Mabel were now being more cooperative, and were building a new home to address the size and safety concerns raised by the DHHR's study. The visitation by John and Mabel was ordered to be supervised by Larry and Debra, the paternal grandparents, until such time as John and Mabel's new home was completed. Then, the visitation would occur at John and Mabel's new home, would include overnight visits, and would be unsupervised.

A judicial review was conducted by the circuit court on November 7, 2005. At this hearing, it was learned that John and Mabel had not exercised their granted supervised visitation. They stated that they preferred to wait until their new home was completed and they could begin unsupervised visitation. Another judicial review was held on February 6, 2006. It is clear that some level of visitation was being exercised by John and Mabel by this point because, during this hearing, the Guardian Ad Litem reported that John and Mabel were making inappropriate comments to the children and threatening that they would not be allowed to return to Larry and Debra if they did not behave during their visits with John and Mabel.[10]

On May 8, 2006, a review hearing was held. The DHHR moved to terminate

[10]Mental health experts opined that this type of comment created panic and anxiety in the children as they feared they would not be allowed to return to the home of Larry and Debra.

the unsupervised visitation of John and Mabel on the grounds that the children were experiencing significant difficulty and behavioral problems following visits with their maternal grandparents. At an evidentiary hearing held on the motion, Dr. Pam Ryan, the children's psychologist, testified that the unsupervised visitation with John and Mabel should cease. Dr. Ryan explained that the unsupervised visitation was the direct stressor leading to the children's problem behaviors. She testified that Hope disclosed that a boy in the neighborhood, who was later found to be John and Mabel's grandson, repeatedly exposed himself to her and that Mabel did nothing about it when Hope reported it to her. Dr. Ryan further noted that John and Mabel had permitted, against court order,[11] phone contact with the children by Faye while she was incarcerated. Regarding Samantha, Dr. Ryan reported that she had been hospitalized at Highland Hospital for seven days after she purposefully killed a kitten by throwing it against a wall. Dr. Ryan found this behavior consistent with the stabbing behavior that Samantha exhibited during play therapy. The circuit court further heard testimony from a worker with Child Protective Services (hereinafter "CPS"), who stated that she had prepared a protection plan in response to the allegations of the boy exposing himself to the girls, but that John had refused to sign the plan. The CPS worker recommended that unsupervised visitation be terminated. The court also heard testimony from John and Mabel. John and Mabel's testimony minimized any unsettling behavior by the girls, and denied any sexually inappropriate conduct by their grandson toward the girls.

[11]See *supra* note 9.

The testimony by John and Mabel was very emotional and stated their desire to have the girls in their lives.

Upon conclusion of the evidence, the circuit court ordered that unsupervised visitation be stopped pending further order of the court and further psychological testing of the grandparents. The circuit court also ordered a schedule of supervised visitation with John and Mabel to commence and ordered additional psychological evaluations of Samantha and Hope. The DHHR was granted legal custody of the girls to effectuate the adoption of the children by Larry and Debra, in whose physical custody they remained. Finally, the circuit court ordered the parties to return at a later date, after completion of the psychological testing, for further discussion of what type or amount of visitation would be in the best interests of the children.

The subsequent psychological evaluations agreed with the recommendations of Dr. Ryan, and concluded that the children exhibited maladaptive behaviors likely to escalate if they were not residing in a structured home with immediate consequences and consistent support. The psychologist noted serious and concerning behaviors in Samantha that might be reactive to the upheavals in her life. In evaluating the differing parenting approaches taken by the grandparents, the psychologist noted that John and Mabel seemed to minimize maladaptive behaviors of the children while Larry and Debra voiced concern and attempted to obtain mental health treatment for the children. The psychologist further

expressed concern regarding John's adamant dislike of Samantha being prescribed psychotropic medication and regarding Mabel's lack of concern surrounding the alleged inappropriate behavior by her grandson which might lead to a failure to protect her granddaughters from sexual abuse. The psychologist concluded that John would likely continue to engage in negative behaviors, including speaking of the paternal grandparents in very negative terms, without supervision during visits. This behavior would perpetuate continued confusion in his granddaughters. It was also noted that the children's worst behavior was always exhibited after visitation with John and Mabel, indicating the visits as the significant stressor in the lives of the children. The psychologist stated that "[t]heir [Samantha and Hope's] placement in an adoptive home where the severity of their potential behaviors can be appreciated will be critical to their overall well-being and long-term development."

Another judicial review was conducted on June 28, 2007, to examine the placement of the children and discuss the findings of the psychological report. The circuit court found that continued placement of the children in the home of Larry and Debra was in the best interests of the children and stated in its order that

> [a]fter reviewing the Psychological Evaluations the Court again **FINDS** that the children should be placed with [Larry and Debra], as set forth in the Court[']s Final Dispositional Order. The psychologist stated "the . . . children vacillating between two homes with different attitudes, expectations, routines and discipline can be very detrimental to their development. Placement in an adoptive home where the severity of their

> behavior is appreciated will be critical to their overall long-term development. Specifically, Samantha is anticipated to flourish most when her behavior is attended to, properly addressed and consistently punished/reinforced. Failure on any adult's part to recognize the potential threats this child has around others, as well as animals, may result in future injuries. Throughout the course of this evaluation and that of parental fitness assessments also completed in our office, the [paternal grandparents, Larry and Debra] have displayed a greater sense of awareness and sincere appreciation of their granddaughters' problematic issues. Their compliance with psychiatric treatment and counseling and the initiation of immediate professional intervention in times of crisis for Samantha have been evidenced."

Further, the circuit court's order went on to state that

> In regards to the [maternal grandparents, John and Mabel,] the psychologists stated that although [their] intentions with their granddaughters are well intended, [they] do not appreciate how disruptive, confusing, and emotionally painful it is for their granddaughters to be torn between grandparents all the while trying to resolve their feelings about their own parents. The psychologist stated that [they] refuse to accept the fact that the children have serious problems and blame any problems on [Larry and Debra]. The psychologist also stated that [the maternal grandparents] would have problems educating the children and providing for their emotional development.

However, despite these findings and against the advice of all of the mental health experts, the DHHR, and the Guardian Ad Litem, the circuit court found that it "would be in the best interests of the children to modify the previous dispositional order and to have unsupervised visitation with the [maternal grandparents][.]" John and Mabel, the maternal grandparents, were allowed *unsupervised* visitation with the children every other Friday from 6:00 p.m. until 1:00 p.m. Saturday. The court made this finding without further explanation of its reversal of supervised visitation, and in contravention of the unanimous recommendations

by all experts and by the DHHR that visitation with John and Mabel be terminated. The current appeal to this Court was filed by Larry and Debra, the paternal grandparents, seeking a reversal of the circuit court's order entered June 28, 2007, granting John and Mabel unsupervised visitation.

The children's Guardian Ad Litem, Diana Carter Wiedel, has recommended that the children remain with Larry and Debra and that they be adopted by them.[12] She further recommends that any visitation with John and Mabel be at the discretion of the children and Larry and Debra, and with the approval of the children's psychologist. Otherwise, she feels that it is unlikely that visitation with the maternal grandparents, John and Mabel, is in the best interests of the children.

Subsequent to the filing of the petition for appeal before this Court, at the latest judicial review conducted on September 24, 2007, the circuit court inquired into the status of the case and was informed that the children continued to do well with Larry and Debra but that John and Mabel had refused to exercise any visitation because they believed it was not sufficient and was confusing to the children. John and Mabel were reported to have not seen the children from the first part of June 2007 through the date of the review hearing. Upon motion of the DHHR, the circuit court, by order entered October 12, 2007, terminated all

[12]*See* note 4, *supra*.

visitation due to lack of participation by John and Mabel. The court also continued placement of the children in the home of Larry and Debra for finalization of the adoption. John and Mabel did not appeal from this ruling terminating their grandparent visitation.[13]

II.

STANDARD OF REVIEW

This case is before this Court on appeal from the circuit court's order granting the maternal grandparents, John and Mabel, unsupervised visitation with the children against the recommendations of all of the mental health experts, the children's Guardian Ad Litem, and the DHHR. While the case before this Court requires a determination of grandparent visitation rights, it began as a child abuse and neglect proceeding. We previously explained that, in the realm of an abuse and neglect case,

> [a]lthough conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed

[13]See footnotes 14 and 15, *infra*.

in its entirety.

Syl. pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Further, as a general guideline in light of the fact that this case requires us to review a decision made on grandparent visitation, we have held that "'[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syl. Pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syl. pt. 1, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005). Mindful of these applicable standards, we now consider the substantive issues raised herein.

III.

DISCUSSION

On appeal to this Court, Larry and Debra agree with the circuit court's decision to grant them physical custody of Samantha and Hope pending their adoption of them. However, Larry and Debra disagree with the lower court's order awarding the maternal grandparents unsupervised visitation, and seek a termination of visitation by the maternal grandparents in the interests of fostering a permanent placement for Samantha and Hope that is in their best interests.

The DHHR agrees with Larry and Debra and takes the position that it is not in the best interests of Samantha and Hope to have visitation with John and Mabel, and that

such visitation should be terminated.[14] In its brief, the DHHR further argues that the appeal has been rendered moot by the circuit court's subsequent order entered October 12, 2007, which terminated all visitation with John and Mabel. However, during oral argument before this Court, the DHHR recanted its position on the mootness issue and urged this Court to address the substantive issue of the grandparent visitation as an important issue to this case and to provide guidance for future cases. We do not find that this case has been rendered moot by the October 12, 2007, order;[15] therefore, we will now turn to the substantive issue

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[14]Even though the maternal grandparents' visitation is at issue, John and Mabel did not file any pleadings with this Court in response to Larry and Debra's petition for appeal from the June 28, 2007, circuit court order. Moreover, John and Mabel have not challenged the subsequent ruling by the circuit court that terminated their visitation rights. *See supra* note 5 and *infra* note 15.

[15]We recognize that this Court has stated that "'[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.' Syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E.2d 150 (1984)." Syl. pt. 1, *State ex rel. J.D.W. v. Harris*, 173 W. Va. 690, 319 S.E.2d 815 (1984). However, the issue of mootness is not relevant to our decision insofar as the circuit court was without authority to enter the October 12, 2007, order. We have previously explained that

> [i]n the absence of statutory or constitutional provision to the contrary, when a proceeding in its entirety is removed from a lower court to an appellate court, the jurisdiction of the lower court as to such proceeding is lost and ceases until the proceeding is decided by the appellate court and the lower court does not again acquire jurisdiction of such proceeding until the decision of the appellate court is certified to the lower court and regularly entered of record.

Syl. pt. 1, *State ex rel. Chambers v. County Court of Mingo County*, 146 W. Va. 846, 123

(continued...)

of the grandparent visitation and the permanency of the children's placement.

In assessing grandparents' visitation rights, this Court has always emphasized that the best interests of the children are paramount and must be afforded due deference. The emotional complexities of the instant case are enormous. While under the umbrella of a case where the children have been adjudged to be neglected and/or abused, the trial court judge terminated the parental rights of the biological parents and contended with the issue of grandparent visitation, all the while trying to maintain the children in the best environment

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[15](...continued)
S.E.2d 241 (1961). We note that Rule 50 of the Rules of Procedure for Child Abuse and Neglect Proceedings does allow a circuit court to exercise its discretion to consider ancillary matters that are not directly pending before this Court, and to enter an order thereon. Rule 50 states:

> The filing of a petition for appeal does not operate to automatically stay the proceedings or orders of the circuit court in abuse, neglect, and/or termination of parental right cases, but the circuit court or the Supreme Court of Appeals may grant a stay upon a showing of good cause. Any party seeking a stay from the Supreme Court of Appeals pending an appeal of neglect, abuse, and/or termination of parental rights cases shall submit a written motion for the stay and a brief statement explaining the need for the stay, discussing the effect of the stay on the ability of the circuit court to plan for the child and on the best interests of the child. This rule shall not preclude any motion to the circuit court for a stay which includes a brief statement of the issues previously set forth.

Therefore, the appeal to this Court to evaluate the grant of unsupervised visitation to John and Mabel is not moot because the circuit court did not have the authority to enter the October 12, 2007, order while the specific issue addressed in that order is pending before this Court.

for them. It is very clear in the hearing transcripts that the maternal grandparents, John and Mabel, truly love their granddaughters, Samantha and Hope. John and Mabel both described their former relationships with their granddaughters, pleaded to have their "babies" back and asserted that they would do anything needed to be able to maintain a relationship with the girls. While it is understandable that such a plea would not be viewed lightly by the circuit court, it is unfathomable to elevate the desires of the grandparents seeking visitation over the best interests of the children involved, especially in contravention of all of the evidence in the case as to the best interests of the children. In recognizing that Samantha and Hope had formed a bond with their maternal grandparents, John and Mabel, the circuit court's order failed to recognize that, according to all of the expert evidence presented, that attachment had a negative effect on the children.

W. Va. Code § 48-10-501 (2006) (Supp. 2008) provides that "[t]he circuit court or family court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship." We have previously explained, "while the [Grandparent Visitation Act] affords certain protections to the grandparent, it is in no measure a guarantee of the right to visitation. The best interests of the child must be given greatest priority, and the rights of the child are superior to those of the grandparent seeking visitation." *Mary Jean H. v. Pamela Kay R.*, 198 W. Va. 690, 693, 482 S.E.2d 675, 678 (1996) (per curiam). Further, "[a] trial court, in considering a petition of a grandparent for visitation rights with

a grandchild or grandchildren . . . shall give paramount consideration to the best interests of the grandchild or grandchildren involved." Syl. pt. 1, in part, *In re the Petition of Nearhoof*, 178 W. Va. 359, 359 S.E.2d 587 (1987). *See also* Syl. pt. 4, *State ex rel. David Allen B. v. Sommerville*, 194 W. Va. 86, 459 S.E.2d 363 (1995) ("'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W. Va. 801, 187 S.E.2d 601 (1972).").

All jurisprudence in this State dictates that the best interests of the children is the paramount concern guiding the circuit court's decisions. For evaluating whether grandparent visitation would be in the best interests of the child, the Legislature has compiled thirteen factors for the circuit judge to consider.[16] In the present case, the circuit court found

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[16]Pursuant to W. Va. Code § 48-10-502 (2001) (Repl. Vol 2004),

> In making a determination on a motion or petition [for grandparent visitation] the court shall consider the following factors:
>
> (1) The age of the child;
>
> (2) The relationship between the child and the grandparent;
>
> (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
>
> (4) The time which has elapsed since the child last had contact with the grandparent;

(continued...)

that the best interests of the children would be served by placing them with Larry and Debra

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[16](...continued)

> (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
>
> (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
>
> (8) The good faith of the grandparent in filing the motion or petition;
>
> (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;
>
> (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents;
>
> (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence;
>
> (12) The preference of the parents with regard to the requested visitation; and
>
> (13) Any other factor relevant to the best interests of the child.

with the goal of adoption. The June 28, 2007, order further found that it would be in the best interests of the children to modify the previous dispositional order and for the children to have unsupervised visitation with John and Mabel so long as all the previously ordered conditions are met. In making these findings, the circuit court order referenced the psychologists' findings that "[John and Mabel] do not appreciate how disruptive, confusing, and emotionally painful it is for their granddaughters to be torn between grandparents all the while trying to resolve their feelings about their own parents." The judge further acknowledged the psychologists' conclusion that John and Mabel "refuse to accept the fact that the children have serious problems . . . and that [John and Mabel] would have problems educating the children and providing for their emotional development." Additionally, the judge adopted the psychologists' statement that "[t]he problems exhibited by the children in [Larry and Debra's] home are unlikely to abate if placed in [John and Mabel's] household and may even escalate given another change in their environment and security. Given both [John and Mabel's] skepticism that actual problems exist, they will be unlikely to effectively deal with issues the children may have emotionally." The lower court ultimately concluded that these dispositions, i.e. physical custody to Larry and Debra and granting unsupervised visitation to John and Mabel, were the least restrictive alternatives and in the best interests of the children.

While the lower court appears to have considered all of the psychologists' reports and the arguments made by all parties in reaching its decision, there are several

deficits in the June 28, 2007, order that merit further consideration. First, there is a failure to analyze any of the thirteen factors delineated by the Legislature in W. Va. Code § 48-10-502 as a prerequisite for an award of grandparent visitation. Among these factors are significant issues that the circuit court failed to consider including the effect that the visitation would have on the relationship between the children and the paternal grandparents, with whom they are residing; any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted, or condoned by the maternal grandparents; the preference of the parents, or the paternal grandparents in this case, with regard to the requested visitation; and any other factors relevant to the best interests of the children.[17] Larry and Debra noted in their brief the numerous failures of John and Mabel to comply with the various case plan requirements and court orders, including failure to turn over financial information when asked, failure to sign an emergency plan devised by the CPS worker after the girls reported John and Mabel's grandson had exposed himself to them, and the failure to sever communication between the girls and their mother while she was incarcerated. These behaviors have not demonstrated the maternal grandparents' good faith in adhering to the procedures designed for the best interests of their grandchildren. Additionally, the children's psychologists have noted the negative impact that unsupervised visitation has had on the

[17]This Court, in light of the *Troxel v. Granville*, 530 U.S. 57, 70, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000), decision, has noted that the "'court must accord at least some special weight to the parent's own determination'" in assessing the amount of weight that should attach to the factor of parental preference. *In re Grandparent Visitation of Cathy L. (R.) M. v. Mark Brent R.*, 217 W. Va. 319, 617 S.E.2d 866 (2005) (per curiam) (quoting *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 763, 551 S.E.2d 674, 685 (2001).

children's behavior after their visits with John and Mabel and that this behavior has spilled over into their time with Larry and Debra. One of the concerns noted by the psychologists involved was the negative remarks and attitude of John towards Larry and Debra, and the confusion it causes for the children. Further, the judge failed to consider the adopting grandparents' desire that any visitation with John and Mabel be terminated. Finally, the order does not discuss the fact that everyone involved, with the exception of John and Mabel, recognized that unsupervised visitation was not in the best interests of the children.

The June 28, 2007, order allowed visitation with John and Mabel "so long as all previously ordered conditions are complied with." However, the judge did not specify the previous conditions to which he was referring. The only other conditions of record were the specifications that the children, along with John and Mabel, be evaluated by psychologists to determine if unsupervised visitation was proper. The psychologists concluded that unsupervised visitation would not be in the best interests of the children. As a result, there have been no conditions placed on the visitation with John and Mabel that would mitigate the negative behaviors which affect the children.

Rule 15 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides that "the court shall consider whether or not the granting of visitation would interfere with the child's case plan and the overall effect granting or denying visitation will have on the child's best interest." The evidence presented by the DHHR, Guardian Ad

Litem, two separate sets of psychological reviews, as well as the preferences of the pending adoptive parents clearly shows that visitation with John and Mabel is not in the best interests of the children.

Recognizing that visitation with the maternal grandparents is not in the best interests of the children, we wish to make clear that the maternal grandparents' visitation rights are permanently terminated. Statutory law recognizes the ability of the courts to terminate grandparent visitation in accordance with the best interests of the child standard. W. Va. Code § 48-10-1001 (2006) (Supp. 2008) states that "[a]ny circuit court or family court that grants visitation rights to a grandparent shall retain jurisdiction throughout the minority of the minor child with whom visitation is granted to modify or terminate such rights as dictated by the best interests of the minor child." In the present case, the visitation rights of the maternal grandparents are terminated as dictated by the best interests of the children, Samantha and Hope.

As a final matter, counsel for Larry and Debra argues that permanent placement for these children has not occurred within eighteen months of the final dispositional hearing as required by Rule 43 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, which states that "[p]ermanent placement of each child shall be achieved within eighteen (18) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay." Arguably, the grandparent

visitation issue and the petition for appeal to this Court might justify some measure of delay; however, we are mindful that "[c]hild abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). Moreover, the stay of the adoption proceedings pending the outcome of this appeal has delayed the fulfillment of the case plan and the permanency of the placements of the children. In order to resolve this portion of the litigation so that the paternal grandparents' adoption proceedings may proceed and the children's permanent placement be finally achieved, the Clerk of this Court is directed to issue the mandate in this case forthwith.

IV.

CONCLUSION

For the foregoing reasons, the June 28, 2007, order by the Circuit Court of Mingo County is hereby affirmed as to the portions unrelated to the visitation rights of the maternal grandparents, John T. and Mabel T. Moreover, the June 28, 2007, order by the circuit court is reversed insofar as it awarded unsupervised visitation to the maternal grandparents against the best interests of the children. Finally, we remand this case to the Circuit Court of Mingo County for entry of an order permanently terminating the visitation rights of the maternal grandparents, John and Mabel, consistent with this opinion. The Clerk of this Court is directed to issue the mandate in this case forthwith.

Affirmed, in part; Reversed, in part; and Remanded.

200 W. Va. 304, 489 S.E.2d 281

Supreme Court Of Appeals Of West Virginia

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES EX REL. BRENDA WRIGHT, SOCIAL SERVICE WORKER, Petitioner Below, Appellee

v.

SCOTT C. AND AMANDA J., Respondents Below, Appellants

LESLIE J., BRENDA J., TINA C., HOMER J., THE PUTATIVE FATHER OF SCOTT C., AND ANY UNKNOWN PUTATIVE FATHER OF SCOTT C., Respondents Below, Appellees.

No. 24007

Submitted: June 3, 1997

Filed: June 11, 1997

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syllabus Point 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 2, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

3. "Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her

recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.' Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syllabus Point 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

4. "Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994)." Syllabus Point 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

5. "'W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981). Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990). Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994)." Syllabus Point 3, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

6. "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syllabus Point 1, in part, *In Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

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Per Curiam:
In this abuse and neglect case, the Circuit Court of Cabell County denied a motion to reconsider the dismissal of the infant child, Amanda J., from an abuse and neglect proceeding concerning Scott C., an abused child residing in the same home as Amanda J. See footnote 1 On appeal, the guardian ad litem for the infant children maintains that the circuit court erred in refusing to conduct an evidentiary hearing concerning Amanda J. and in failing to conduct a disposition hearing concerning Scott C. Because the circuit court erred in both these matters, we reverse the decision of the circuit court and remand the case for action consistent with this opinion.

I.
Facts and Background

On April 1, 1996, both Scott C. (date of birth, July 22, 1984) and Amanda J. (date of birth, September 29, 1990) were living in the home of Brenda J. and Leslie J., the natural parents of Amanda J. Scott C., who is a cousin of Amanda J., had been living with Brenda J. and Leslie J., his aunt and uncle, since he was an infant. Tina C. is the natural mother of Scott C., and Homer J. is the putative father of Scott C.

On April 1, 1996, Brenda Wright, a Social Service Worker with the West Virginia Department of Health and Human Resources (the "Department") filed a petition in the circuit court alleging that Scott C. had been sexually abused by a male relative who lived about a block away. The petition also alleged the Amanda J., while being examined at the request of the Department, told a nurse that her father, Leslie J., had "done to her what he had done to Scott." Because of the allegations of abuse and neglect, the children were removed from their home and placed in the Department's custody. Lisa F. White, Esq., was appointed guardian ad litem for the children.

After an April 23, 1996 hearing (order entered May 10, 1996), physical custody of the children was returned to Brenda J. and Leslie J., but legal custody remained with the Department. An amended petition was filed by the Department on April 25, 1996 alleging the Brenda J. and Leslie J. failed to protect the children.

On July 1, 1996, after several delays, a probable cause hearing was held. Evidence was presented that Scott C. had been abused by a relative who lived in the neighborhood. A social worker for the Department testified that Brenda J. and Leslie J. were taking action to keep Scott C. away from the alleged abuser. The circuit court was informed that Leslie J. was no longer living with Brenda J. Based

on the evidence presented, the abuse case regarding Scott C. against Brenda J. and Leslie J. was dismissed. An adjudicatory hearing regarding the abandonment of Scott C. by his natural parents was set.

Amanda J. was not mentioned in the July 1, 1996 motion for probable cause. By order entered on July 17, 1996, the circuit court found no evidence that Amanda J. was abused or neglected and dismissed the petition concerning Amanda J.

On August 19, 1996, due to the abandonment of Scott C. by his natural parents, the circuit court terminated their parental rights. Brenda J. was given temporary custody of Scott C. "until such time as the West Virginia Department of Health and Human Resources conducts an investigation of this home." At the conclusion of the hearing, the circuit court declined to set a date for a disposition hearing, and the record does not indicate that such a hearing was held. See footnote 2

On October 21, 1996 after the guardian ad litem obtained some new evidence from Amanda J.'s teacher indicating that Amanda J. was having substantial problems at school, the guardian ad litem filed a motion requesting reconsideration of the July 1, 1996 order dismissing Amanda J. from the abuse and neglect petition. See footnote 3 On November 4, 1996, a hearing was held during which the guardian ad litem requested the circuit court hold an evidentiary hearing on the matter so that she could present evidence. Counsel for the Department supported the motion by saying "we think the motion seeks appropriate relief, the motion of the guardian." The motion was opposed by counsel for Brenda J. and Leslie J. When the guardian ad litem requested a transcript of the hearing, the circuit court indicated that the guardian ad litem had to pay for the transcript, which she agreed to do. See footnote 4 By order entered on November 18, 1996, the circuit court denied the guardian ad litem's motion to reconsider.

On appeal, the guardian ad litem maintains that the circuit court erred by: (1) failing to hold an evidentiary hearing to consider evidence supporting her motion to reconsider Amanda J.'s dismissal from the abuse and neglect petition; (2) failing to set a timely disposition hearing on Scott C.; and (3) requiring the guardian ad litem to pay for the hearing transcript.

II.
Discussion
A.
Standard of Review

On appeal, this Court applies a three-pronged standard of review. We review a circuit court's findings of fact under a clearly erroneous standard; questions of law and statutory interpretation are reviewed *de novo*; and a circuit court's final order and ultimate resolution is reviewed under an abuse of discretion standard. Syllabus

Point 2 of *In re Katie S.,supra*, note 2 states the standard of review in abuse and neglect cases:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

See Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996) (applying a three-pronged standard of review in civil cases).

Evidence of abuse and neglect must be clear and convincing. *W.Va. Code* 49-6-2(c) [1996] provides, in pertinent part, that "[t]he findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof." *See* Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993) ("Parental rights may be terminated where there is clear and convincing evidence" in appropriate circumstances).

In applying this blend of deferential-plenary standards of review, this Court's primary goal and focus must be on the health and welfare of the children. Syllabus Point 3 of *Katie S.* states:

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

We begin by considering the circuit court's denial of the guardian ad litem's motion to reconsider the dismissal of Amanda J. without affording the guardian the opportunity to present evidence.

B.

Motion to Reconsider - Amanda J.

The guardian ad litem maintains that the circuit court erred in denying her the opportunity to present evidence in support of her motion to reconsider the dismissal of the abuse and neglect petition concerning Amanda J. Amanda's parents, Brenda J. and Leslie J., maintain that because the findings must be based on conditions existing at the time of the petition, new evidence requires a new petition.

Guardians ad litem must be afforded a meaningful opportunity to represent fully the infant children involved in abuse and neglect cases. This Court has consistently recognized the duties and responsibilities of guardians ad litem and has rejected the imposition of "unreasonable limitations upon the function of guardians ad litem in representing their clients. . . ." *In re Christina L.*, 194 W.Va. 446, 453, 460 S.E.2d 692, 699 (1995). In Syllabus Point 4 of *Christina L.*, we stated:

> "Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client." Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)."

The right to the opportunity to be heard is also stated in *W.Va. Code*, 49-6-2(c) [1996], which provides, in pertinent part:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

In this case, we note that Amanda J. was living in the home with Scott C., a child determined to have been the victim of abuse. In Syllabus Point 2 of *Christina L.*, we indicated that children living in the home with abused children were at substantial risk of abuse. Syllabus Point 2 of *Christina L.* states:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Because of the relationship between the children, the circuit court should have been alerted to the possibility that Amanda J. might be abused and should have afforded the child every opportunity to insure her health and safety.

We agree that "findings [of abuse and neglect] must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof." *W.Va. Code*, 49-6-2(c), in part. But without any hearing of the evidence, any findings that the evidence either did or did not relate to conditions existing at the time of the filing or did or did not provide clear and convincing proof is without any basis. In Syllabus Point 3 of *Christina L.*, we declined to speculate on the kind or type of evidence needed to provide "clear and convincing proof" by stating:

> "'W.Va.Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981). Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990). Syllabus Point 1, *In re Beth*, 192 W.Va. 656, 453 S.E.2d 639 (1994)."

In accord Syllabus Point 1, *In re Joseph A.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 23780 Mar. 26, 1997).

In this case, the circuit court should have afforded Ms. White, the guardian ad litem representing the infant child, "a meaningful opportunity to be heard" as required by *W.Va. Code*, 49-6-2(c) [1996]. We find that the circuit court erred in denying Ms. White an evidentiary hearing in which she could present the additional evidence she had obtained concerning the infant child and we remand this case with directions to hold such a hearing as soon as possible. In any event, the evidentiary hearing must be held within twenty (20) calender days of the filing date of this opinion.

C.

Disposition Hearing - Scott C.

The guardian ad litem also alleges that the circuit court erred in failing to schedule and hold a disposition hearing concerning Scott C. The circuit court at the August 19, 1996 adjudicatory hearing ordered the Department to perform a home study of Brenda J., the aunt with whom he was living, with the hearing to be set when the home study was completed. At oral argument before this Court, the parties agreed that the home study had not been done and that no disposition hearing has been scheduled for Scott C. *See* note 2 for the current living arrangement of Scott C.

Counsel for Brenda J. and Leslie J. maintain that this Court should not apply the 60-day standard for setting a disposition hearing found in Rule 32 of the new *Rules of Procedure for Child Abuse and Neglect Proceedings,* adopted December 5, 1996, effective January 1, 1997. See footnote 5

Although the time limits of Rule 32 were not in effect until after the circuit court's August 19, 1996 decision, we are concerned about the almost ten-month delay in this case. In Syllabus Point 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991), we recognized that "[u]njustified procedural delays wreak havoc on a child's development, stability and security." In *Christina L.*, 194 W.Va. at 455, 460 S.E.2d at 701, we criticized the delay in considering abandonment because such delay "leaves the status of the children dangling. . . in 'No Man's Land'. . . ." *See Katie S.*, 198 W.Va. at __, 479 S.E.2d at 596.

The need for prompt resolution of abuse and neglect cases was recognized by the Legislature in *W. Va. Code*, 49-6-2(d) [1996], which provides, in pertinent part:

> Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under article two-a [48-2A-1 et seq.], chapter forty-eight of this code and actions in which trial is in progress.

Syllabus Point 1, in part, *Carlita B.* states:

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

In accord Syllabus Point 3, *In re Jonathan G.*, ___ W.Va. ___, 482 S.E.2d 893 (1996).

In this case, we find that the circuit court erred in failing to deal promptly with the disposition hearing of Scott C. Although *W.Va. Code*, 49-6-5 (a)[1996] requires the Department to file a permanency plan for the child, the circuit court needs to set a time frame for final disposition so that the child does not remain indefinitely in "No Man's Land." On remand, the circuit court should set a disposition hearing on Scott C., as soon as possible; in any event, the disposition hearing must be held within twenty (20) calender days of the filing date of this opinion.

D.

Transcripts

The guardian ad litem's final assignment of error concerns the circuit court requirement that she pay for a transcript of the proceedings. In their brief, Counsel for Brenda J. and Leslie J., who are the Chief Public Defender and a Public Defender for Huntington, indicated that "John R. Rogers, Director of the West Virginia Public Defender Services, has confirmed that he interprets West Virginia Code 29-21-13a as requiring him to pay for official transcript costs for abuse and neglect proceedings when they are approved as part of the voucher signed by the presiding judge." This policy is to remain in effect until Senate Bill 335 (*W.Va. Code*, 51-7-8 (1997)) is effective. Senate Bill 335 provides that such costs shall be paid out of the appropriation of this Court. See footnote 6

We note that *W.Va. Code*, 49-6-2 (e) [1996] provides for a transcript to be furnished for indigent persons without cost. See footnote 7 Rule 6 of the *Manual for Official Court Reporters of the West Virginia Judiciary* (Administrative Office of the West Virginia Supreme Court of Appeals), Promulgated October 30, 1984, Amended October 18, 1996 ("Official Court Reporter Manual"), states:

Transcripts of less than 100 pages in length requested by an indigent party for purposes of appealing a determination in a civil child abuse and neglect proceeding will be produced by the court reporter in accordance with the provisions of this Section governing production of transcripts in civil appeals.

The Official Court Reporter Manual also contains an "Transcript Pay Statement/Administrative Order" in Appendix C, which indicates the procedures to be followed for payment.

In this case, the infant children, represented by Ms. White as their guardian ad litem, are indigent persons and a transcript should have been furnished without requiring the guardian ad litem to pay from her own funds. We find that the circuit court erred in requiring the guardian ad litem for the infant indigent children to pay personally for the transcript necessary for this appeal.

For the above-stated reasons, we reverse the decision of the Circuit Court of Cabell County and remand this case for further prompt proceedings consistent with this opinion; said proceedings must be conducted within twenty (20) days of the filing date of this opinion.

Reversed and remanded, with directions.

Footnote: 1 We follow our traditional practice in cases involving sensitive facts by using initials to identify the parties rather than their full names. See Phillip Leon M. v. Greenbrier County Bd. of Educ., ___ W.Va. ___, 484 S.E.2d 909 (1996); In re Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996).

Footnote: 2 During oral argument, the guardian ad litem and counsel for the Department said that Scott C. is currently in the Cammack Children's Home and that no disposition hearing has been held. Amanda J. remains in the home with her mother Brenda J., but Leslie J. no longer lives in the home.
Although counsel for the Department did not file a brief in this matter, by letter dated May 8, 1997, the Department indicated that during the lower court proceedings, the Department "stated that the guardian's motion sought the appropriate relief."
We note that counsel for the Department appeared at oral argument and was able to respond to several of the concerns of this Court. A written brief by the Department outlining why the Department supported the guardian ad litem's motion would have assisted the Court in understanding the Department's position. We continue to encourage all parties, including the Department, to file briefs in such matters.

Footnote: 3 During oral argument, the guardian ad litem indicated that in addition to the evidence attached to her appeal petition, namely, Amanda J.'s medical report of March 29, 1996 and school materials, including a October 30, 1996 letter from Amanda J.'s teacher, she had additional evidence to present.

Footnote: 4 The following exchange occurred during the November 4, 1996 hearing concerning a transcript of the hearing:
MS. WHITE: Your Honor, at this time can I request that I have a copy of the transcript of this hearing?
THE COURT: Upon proper arrangements.
MS. WHITE: And I'll prepare an order to that effect.
THE COURT: With the reporter. The state supreme court in their wisdom, I believe, have indicated they wouldn't pay for -- is this one of the ones? And, therefore, you will need to find out how to get the good graces of my reporter or you may wish to pay.
MS. WHITE: Your Honor, I would wish to pay and --

THE COURT: And you could get repaid.
MS. WHITE: No, they won't repay me either. But I'll pay that.

Footnote: 5 Rule 32 [1997] of the Rules of Procedure for Child Abuse and Neglect provides, in pertinent part:
(a) Time Frame. -- The disposition hearing shall commence within forty-five (45) days of the entry of the final adjudicatory order unless an improvement period is granted pursuant to W.Va. Code 49-6-12(b) and then no later than sixty (60) days.

Footnote: 6 Senate Bill 335 provides, in pertinent part:
In any proceeding held pursuant to article five or six, chapter forty-nine of this code in which an indigent respondent or his or her counsel has filed a written request, in the manner prescribed by the supreme court of appeals, evidencing an intent to appeal a decision of a circuit court in the proceeding, the court, upon presentation of a written request, presented within thirty days after the entry of the order sought to be appealed, shall authorize and direct the court reporter to furnish a transcript of the testimony of the proceeding or the part or parts thereof that have specifically been requested.
The court, after being sufficiently satisfied by the reasonableness of the voucher or claim submitted for payment of the cost of preparing the transcript, shall certify the cost to the state auditor, who shall, in a timely manner, pay the court reporter's fee from appropriations to the supreme court of appeals.

Footnote: 7 W.Va. Code, 49-6-2(e) [1996] provides, in pertinent part:
The evidence shall be transcribed and made available to the parties or their counsel as soon as practicable, if the same is required for purposes of further proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating that he cannot pay therefor.

185 W. Va. 191, 406 S.E.2d 214

Supreme Court of Appeals of West Virginia

In the Matter of SCOTTIE D., Rebecca W., Patsy D., and Crystal D., Children Under the Age of Eighteen Years

No. 19676

Submitted Jan. 9, 1991
Decided June 14, 1991

SYLLABUS BY THE COURT

1. "W. Va. Code, 49-1-3(a) [, as amended], in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, *In re Betty J.W.,* 179 W.Va. 605, 371 S.E.2d 326 (1988).

2. Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code,* 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code,* 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

3. In a proceeding to terminate parental rights pursuant to *W.Va.Code,* 49- 6-1 to 49-6-10, as amended, a guardian *ad litem,* appointed pursuant to *W.Va.Code,* 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian *ad litem,* an appeal is necessary.

McHUGH, Justice:

This case is before the Court upon the appeal of Peter A. Hendricks, guardian *ad litem* for Scottie D., Rebecca W., Patsy D., and Crystal D. See footnote 1The appellee is Ronald D. In the action below, the West Virginia Department of Human Services (DHS) petitioned the Circuit Court of Boone County to terminate the parental rights of Ronald D. and his wife, Joyce D., pursuant to *W.Va.Code,* 49-6-1 [1977]. See footnote 2 In that action, the appellant was appointed guardian *ad litem* for the infant children. The appellant is aggrieved by the March 17, 1989 order of the circuit court. For reasons stated in this opinion, we reverse that order.

I

On February 11, 1985, the DHS filed an action in the Circuit Court of Boone County, alleging that the children of the appellee, Ronald D. and his wife, Joyce D., were neglected and abused pursuant to *W.Va.Code,* 49-1-3 [1990]. See footnote 3

The appellee and Joyce were married on November 24, 1983. Four children are now involved in this case: Scottie D., seven and one-half years old at the time of the petition in this case, the natural son of the appellee, Ronald D., but not of Joyce D.; Rebecca W., three years old, the natural daughter of Joyce D., but not of the appellee; Patsy D., one year old, born of both the appellee and Joyce D.; and Crystal D., born in 1986 of both the appellee and Joyce D. See footnote 4

The DHS petition sought to terminate the parental rights of the appellee and Joyce. Giving rise to this petition was an incident which occurred on February 8, 1985, wherein one of the children, namely, Rebecca, was treated in a hospital emergency room due to severe burns on her feet. See footnote 5

Following trial of the DHS action in the Circuit Court of Boone County, the circuit court entered an order on March 17, 1989, concluding that the appellee, Ronald D., did not neglect or abuse *his* children (Scottie, Patsy and Crystal) within the meaning of *W.Va.Code,* 49-1-3 [1984]. The order also concluded, however, that Ronald D. has no parental rights to Rebecca because she had not been adopted by him. See footnote 6

The primary issue raised by the appellant is that the circuit court committed error by returning the children to Ronald D. based upon its finding that there is no evidence of abuse on the part of Ronald D. Rather, the appellant contends that there was clear and convincing evidence that Ronald D. either: (1) took no action with respect to the abuse inflicted upon his children; or (2) actually aided or protected the abusing parent, Joyce, by supporting her version as to how the children were injured.

The medical evidence presented in this case indicated that Rebecca, when she was admitted to the emergency room on February 8, 1985, suffered from: severe submersion burns on both feet, resulting in the loss of several toes; a laceration on one foot; cigarette burns which were secondary to the submersion burns; a laceration on her lip; bruises on her back; and spots on her head where hair had evidently been pulled out. Rebecca was admitted to the hospital the following day.

Dr. Jill Bross, the chief pediatric resident in charge of the case, testified on behalf of the DHS that during physical therapy, Rebecca told her that her parents had injured her in this way.

Dr. Bross testified that, in her opinion, the burns on Rebecca's feet were submersion burns. This opinion is based upon a number of reasons: both feet had second to third degree burns; the pattern of the burns; the burns stopped at a single line of demarcation; there were no splashmarks; the burns extended down in between the toes and all the way around the feet. Dr. Bross testified that Rebecca related to her that the appellee burned her feet with a cigarette and that her mother put her feet in hot water. Rebecca also told Dr. Bross that the appellee pulled her hair out and cut her lip.

Dr. Bross also testified that, in an unofficial capacity, she examined Patsy. This examination revealed bruises in the vaginal area. Dr. Bross testified that such bruises are not of an accidental type because there were no surrounding marks in the leg area.

Scottie testified that he did not want to return to living with his father and Joyce due to the physical abuse that he endured. Scottie testified that his father and Joyce made him and Rebecca eat out of the garbage bin and that they sometimes put Rebecca to sleep on the floor. He also testified that his father and Joyce put shaving cream in Rebecca's mouth because she could not pronounce certain words correctly and also did this when she used bad words. Scottie testified that his father and Joyce taped Rebecca's hands behind her back and made her walk through the hallway under this condition, and that they burned him and Rebecca with cigarettes on numerous occasions. He further testified that his father and Joyce did not make him attend school, and that they put "Nair," a hair removal substance, on his and Rebecca's hair, making their hair fall out.

Scottie also testified that he liked the couple with whom he was currently living, and that he desired to stay with them. He also testified that he currently attends school regularly, is an honor roll student while living with this couple, and is active in extracurricular activities such as scouts and basketball, activities in which his father and Joyce would not allow him to participate. See footnote 7

Rebecca also testified. She was five years old at the time of the hearing in this case. Her testimony was brief and some of it was contradictory. She testified that both parents burned her feet by holding them in a pan of water. However, she also testified that she could not remember who was with her at the time her feet were burned, or even if her mother came to her assistance. See footnote 8 Rebecca also testified that the appellee had burned her foot with a cigarette.

Marjorie Barker, a case worker for the DHS, was involved with this case from its very beginning. One of her responsibilities was to schedule for the children visits with the appellee and Joyce during the period the children were in the temporary legal custody of the DHS. Barker testified that she was usually present during these visits, and that it was evident that the appellee and Joyce did not always exercise the best judgment. See footnote 9

Barker also testified that, in her opinion, it would not be in the children's best interests to be returned to the appellee and Joyce because they would be in danger of injury. Furthermore, Barker testified that it is her opinion that there is very little bonding between the children and their parents.

Joyce D. denied all allegations of abuse and neglect, even though she acknowledged previously pleading guilty in the related criminal proceeding.

Joyce testified that on the night of February 8, 1985, Rebecca told her that she was going out on the front porch in order to urinate. See footnote 10 When Rebecca came back into the house, she told Joyce that she had stepped on an ax and cut her toes, and when Joyce was in the kitchen getting cold water to treat the cut toes, Rebecca stepped into a pan of hot water in the living room, which was to be used for mopping the floor. Joyce testified that she never saw Rebecca standing in the water. Joyce testified that she then went to get her husband, the appellee, from his parents' house next door. She called an ambulance and Rebecca was taken to the hospital.

Joyce testified that Rebecca got into the Nair hair remover herself, mistakenly believing that it was baby lotion. Joyce claimed that Rebecca rubbed the Nair in her own hair. As for Rebecca's cut lip, Joyce claimed that it opened due to being chapped.

When asked about two small circular burns on Rebecca's foot, Joyce testified that a pair of boots had caused the markings. Joyce also testified that neither she nor her husband ever put shaving cream in Rebecca's mouth, and that she never made Rebecca sleep on the floor.

The appellee, Ronald D., testified as well. The appellee's testimony is consistent with Joyce's to the extent that it is supportive of her testimony. In addition to denying the commission of any abusive acts toward the children, the appellee essentially testified that he believed that the injuries to the children occurred in the manner as expressed to him by his wife, Joyce.

Specifically, with respect to the hot water burns on Rebecca's feet, the appellee testified that he was at his parents' house, which is about fifty to seventy-five feet from his own, when Joyce came to tell him of Rebecca's burns. The appellee alleges that his wife told him that Rebecca got into the mop water by herself and that he has never discussed it with her since that time.

The appellee testified that he once asked Joyce how Rebecca's hair came out and was told by Joyce that Rebecca got into the Nair hair remover herself. Furthermore, like Joyce, he testified that Rebecca's cut lip was the result of it being chapped.

As for the cigarette burns, the appellee testified that he had never noticed such burns on Rebecca's hands, but the burns on her feet were the result of wearing a particular pair of boots. This testimony is consistent with Joyce's version. In regard to cigarette burns on Scottie, the appellee testified that Scottie ran into him when he had a cigarette in his hand.

The appellee also testified that Joyce told him about Rebecca cutting her foot on the ax. This occurred after Rebecca was taken to the hospital on the night of February 8, 1985. See footnote 11

II

This Court has recognized the fundamentally protected right of a natural parent to the custody of minor children.

> In the law concerning custody of m inor children, no rule is m ore firm ly established than that the right of a natural parent to the custody of his or her infant child is param ount to that of any other person; it is a fundam ental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

Syl. pt. 1, *In re Willis,* 157 W.Va. 225, 207 S.E.2d 129 (1973).

This principle, however, is tempered, thus, such right is not absolute. "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae,* if the parent is proved unfit to be entrusted with child care." *Id.,* syl. pt. 5.

Under *W.Va.Code,* 49-6-2 [1984], the standard as to whether a child is abused or neglected is "by clear and convincing proof." Accordingly, our review of the facts before the circuit court in this case is based upon a "clear and convincing" standard.

The appellant, as stated previously, contends that this case contains clear and convincing evidence that the appellee either: (1) took no action with respect to the abuse inflicted upon his children; or (2) actually aided or protected the abusing parent, Joyce, by supporting her version as to how the children were injured.

In *In re Darla B.,* 175 W.Va. 137, 331 S.E.2d 868 (1985), this Court affirmed the trial court's termination of a father's parental rights as proper, despite his contention that he was not a direct participant in the acts giving rise to the termination petition, but where he supported his wife's testimony as to physical injuries, which testimony was inconsistent with medical evidence. In *Darla B.,* we noted:

> The father asserts that he should not have his rights terminated because he was not a direct participant in the acts giving rise to the petition [for termination of parental rights]. However, in light of the circumstances of this case, termination of the rights of both parents is the proper result. We note that appellant Dwayne B. supports the testimony of his wife entirely, even though the explanation is inconsistent with the medical evidence. Further, he testified that he was in attendance when the first injury to Darla B. occurred, which involved the child's right frontal lobe. Importantly, the explanation given for this injury by both appellants is inconsistent with the medical evidence. Aside from his direct support of his wife's version of the reasons for the infant's injuries, it is ludicrous for him to assert that he should be held blameless for his nonaction in protecting his child.

175 W.Va. at 141, 331 S.E.2d at 873.

The appellee maintains that the *Darla B.* case is distinguishable because in that case, *both* parents were present at the time of one of the child's injuries and it was obvious that they were both lying to protect each other. In this case, the appellee contends that because he was not present at the time of the injury (referring to Rebecca's hot water burns), then the purpose of his testimony was not to protect his wife.

However, this distinction is inapposite and somewhat inaccurate. As we said in *Darla B.* and quoted herein, "it is ludicrous for [the nonparticipating father] to assert that he should be held blameless for his *nonaction* in protecting his child." *Darla B.*, 175 W.Va. at 141, 331 S.E.2d at 873 (emphasis supplied). Although the appellee's version does not *expressly* support his wife's account, it is nonetheless *supportive*, and, importantly, inconsistent with the medical evidence presented. This is especially apparent from the appellee's testimony that he never discussed Rebecca's burns with Joyce after Joyce explained how such burns occurred. Obviously, the appellee believed his wife's version, and, therefore, he is supportive of this version.

Furthermore, the injury to Rebecca's foot was not the only critical event in this case. On the contrary, the record is replete with instances of injuries suffered by the children, some caused not only by the appellee's inaction, but his actions as well.

As pointed out in note 3 *supra*, *W.Va.Code*, 49-1-3(a)(1) [1990] provides the definition of an "abused child":

> (a) 'Abused child' means a child whose health or welfare is harmed or threatened by:

> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or *knowingly allows* another person to inflict, physical injury, or substantial mental or emotional injury, upon the child *or another child in the home*[.]

(emphasis supplied)

We spoke to this statutory provision in syllabus point 3 of *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988):

> W.Va.Code, 49-1-3(a) [, as amended], in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Clearly, the appellee's actions and inaction come within this standard, and the evidence presented below was clear and convincing to support this standard.

Therefore, we reiterate our holding in *Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985). Termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va.Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

Based upon the experiences through which the children in this case suffered, we fail to see how the circuit court reached the conclusion that the appellee's children are not abused within the meaning of *W.Va.Code*, 49-1-3, as amended, insofar as their father is concerned.

Accordingly, we reverse the March 17, 1989 order of the Circuit Court of Boone County as it applies to the appellee in this case, Ronald D.

III

The appellant also contends that the circuit court erroneously limited the role of the guardian *ad litem* for the children in this case.

W.Va.Code, 49-6-2(a) [1984] provides, in part:

> (a) In any proceeding under the provisi ons of this article, the child, his parents, his custodian or other persons standing in loco parentis to him , such persons other than the child being hereinafter referred to as other party or parties, shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pa y for the services of counsel, that counsel will be appointed.

Rule XIII of the *West Virginia Trial Court Rules for Trial Courts of Record* provides:

> In any proceeding in which a guardian ad litem is appointed, such guardian ad litem shall be selected independently of any nomination by the parties or counsel.
> Any guardian ad litem shall make a fu ll and independent investigation of the facts involved in the proceeding; and either by his testim ony made of record, or by full and complete answer therein, make known to the court his recommendations, concerning the action sought in the proceedings unless otherwise ordered or instructed by the court. Such guardian ad litem shall be paid such com pensation as m ay be allowed by the court, which compensation shall be taxed as part of the costs.

Specifically, the appellant contends that he, as the guardian *ad litem,* was denied latitude in cross-examining witnesses, presenting evidence, and arguing before the trial court.

Based upon our review of the record, we believe that the guardian *ad litem* in this case was allowed to effectively represent the children.

However, we believe it appropriate to clarify the role of the guardian *ad litem* in similar cases.

Under *W.Va.Code,* 49-6-1 [1977], the DHS is authorized to petition a circuit court for relief on behalf of children that are believed to be neglected or abused. The record in this case, as we have pointed out, overwhelmingly supports termination of parental rights. The fact that the DHS did not pursue an appeal in this case is troublesome to this Court. See footnote 12

Fortunately for the children, though, their guardian *ad litem did* pursue an appeal, thus, seeking review of the circuit court's erroneous order. The guardian *ad litem* is to be commended for his diligence in protecting the rights of the children in this case.

In a comparable context, the "guardian ad litem representing an infant plaintiff has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end." 42 Am.Jur.2d *Infants* § 178, at 165 (1969). Securing the infant's rights includes taking an assertive role and, if in the judgment of the guardian *ad litem,* a case so warrants, prosecuting an appeal.

It is well established that "[a]fter judgment adverse to his ward, the guardian ad litem has the right to appeal and the duty to do so if it reasonably appears to be to the advantage of the minor[.]" *Robinson v. Gatch,* 85 Ohio App. 484, 487, 87 N.E.2d 904, 906 (1949). This is based upon the principle that a guardian *ad litem* has a duty to represent the child(ren) to whom he or she has been appointed, as effectively as if the guardian *ad litem* were in a normal lawyer-client relationship.

Similarly, the Supreme Court of Wisconsin has held that a "guardian ad litem has the right--if not the duty--to appeal from an adverse decision of a court if he believed the appeal meritorious and necessary for the protection of the children[.]" *In re Estate of Trotalli,* 123 Wis.2d 340, 349, 366 N.W.2d 879, 883 (1985). *See also In re Ross,* 29 Ill.App.3d 157, 161-62, 329 N.E.2d 333, 336-37 (1975); *State ex rel. Kassen v. Carver,* 355 S.W.2d 324, 332-33 (Mo.Ct.App.1962); *Carton v. Borden,* 8 N.J. 352, 357, 85 A.2d 257, 259 (1951).

The *Rules of Professional Conduct* recognize the guardian *ad litem* 's duty to appeal as well. Specifically, Rule 1.14(a) provides: "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority,* mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *normal client-lawyer relationship* with the client." (emphasis supplied). Obviously, a "normal" client-lawyer relationship entails prosecuting an appeal if necessary. Furthermore, Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

Accordingly, we hold that in a proceeding to terminate parental rights pursuant to *W.Va.Code,* 49-6-1 to 49-6-10, as amended, a guardian *ad litem,* appointed pursuant to *W.Va.Code,* 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian *ad litem,* an appeal is necessary.

IV

Based upon the foregoing, the March 17, 1989 order of the Circuit Court of Boone County is reversed. See footnote 13

Reversed.

Footnote: 1 Consistent with our practice in cases involving sensitive matters, we use initials rather than full names. See In re Jonathan P., 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989) (citing cases).

Footnote: 2 The Department of Human Services is now known as the "division of human services," and is now a part of the "department of health and human resources." See W.Va.Code, 5F-2-1(d)(2) [1990]; W.Va.Code, 5F-2-1(j) [1990]; and W.Va.Code, 9-2-1a [1985].

Footnote: 3 W.Va.Code, 49-1-3 was amended in 1990. The 1984 version of this provision was in effect at the time this action was commenced. However, the amendments have no bearing on the pertinent part of W.Va.Code, 49-1-3, which provides:
(a) 'Abused child' means a child whose health or welfare is harmed or threatened by:
(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury, or substantial mental or emotional injury, upon the child or another child in the home [.]
(emphasis supplied)

Footnote: 4 Upon Crystal D.'s birth, the other three children had already been removed from their home by the DHS, and, consistent with this action, she too was placed in the temporary legal custody of the DHS.
Ronald D. did not adopt as his child, Rebecca W., nor did Joyce D. adopt as her child, Scottie D.

Footnote: 5 Subsequent to the filing of the DHS petition, criminal proceedings were instituted against the appellee and Joyce D. Both were indicted by a grand jury in Boone County and charged with malicious wounding and child abuse.
Joyce D. pled guilty and was sentenced to prison for one to three years.
Ronald D. was tried on the indictment and the case was dismissed, on the prosecutor's motion, due to contradictory testimony as well as a lack of critical testimony on the part of a key witness, namely, Rebecca W.

Footnote: 6 The appellee and Joyce D. were divorced on June 1, 1988.

Footnote: 7 Slight variations in the testimony were revealed when Scottie took the stand. During cross-examination, Scottie testified that around the time that the children were removed from the home, when he was only six years old, he was not completely truthful with the deputy sheriff who was investigating the situation. Specifically, the untruthful statements concerned: whether Rebecca slept on the floor at all times; whether Scottie liked attending school, and, hence, whether he was angry with his father for not making him attend; and whether he loved his father. However, Scottie, who was nine years old

at the time of the hearing in court, testified that when he spoke with the deputy sheriff, he was only attempting to protect his father. When asked what he meant by protecting his father, Scottie replied: "I didn't want him to go to jail, but now I am telling the truth."

Footnote: 8 Rebecca was only three years old at the time her feet were burned in the water.

Footnote: 9 For example, Barker testified that on one occasion, the appellee told Scottie that he (the appellee) sold Scottie's dog. This upset Scottie to a point where he almost cried, until his father told him that he was only joking.

Footnote: 10 Joyce testified that their house did not have running water.

Footnote: 11 Furthermore, the record in this case contains the findings and report of Dr. LaRee Naviaux, a licensed clinical psychologist, social worker, and counsellor.
Dr. Naviaux examined the children from August, 1989, to May, 1990. These examinations were very thorough, and included, among other things, depression tests, personality questionnaires, history and background evaluations, and intelligence tests. Based upon the evidence, Dr. Naviaux found that the behaviors of the children are consistent with neglect and abuse. Dr. Naviaux's recommendation is as follows: There appears to be no basic relationship which could be developed into an appropriate parent-child relationship with love and trust. Thus, it is not in the best interests of these children as individuals or as a family unit to be returned to the custody of their father. Considerable trauma would be added to the life of each child. Regression, emotional problems, and deterioration of behavior, with acting-out would likely occur. Self-esteem would diminish and a zest for life would disappear. Living would become surviving.
They are already children at risk for what they have experienced thus far in their lives and with their inherited abilities and characteristics. A return to their father would increase the at risk status.

Footnote: 12 W.Va.Code, 49-7-22 [1936] provides: "Cases under this chapter, if tried in any inferior court, may be reviewed by writ of error or appeal to the circuit court, and if tried or reviewed in a circuit court, by writ of error or appeal to the supreme court of appeals."

Footnote: 13 The March 17, 1989 order of the Circuit Court of Boone County is not reversed as it applies to Joyce D. Joyce D. is not an appellee herein inasmuch as no appearance was made on her behalf.
The appellant also assigns other errors, which, in light of our holding, we need not address. These other errors include: the circuit court's failure to address the question of whether the appellee, Ronald D., could benefit from counselling; and the circuit

court's failure to consider the passage of four years since the children lived with the appellee.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
June 29, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2001 Term

RELEASED
July 2, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 28888

IN RE: SHANEE CAROL B.

Appeal from the Circuit Court of Nicholas County
Honorable Gary Johnson, Judge
Civil Action No. 00-JA-15

REVERSED

Submitted: June 12, 2001
Filed: June 29, 2001

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JUSTICE MAYNARD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus Point 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

2. "In . . . custody matters, we have traditionally held paramount the best interests of the child." Syllabus Point 5, in part, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

3. "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syllabus Point 4, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

4. W.Va. Code § 49-2-14(e) (1995) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding

brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit *or* that placement of the child with his or her siblings is not in the best interests of one or all of the children.

5. "Questions relating to . . . custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, *Nichols v. Nichols*, 160 W.Va. 514, 236 S.E.2d 36 (1977).

Maynard, Justice:

This is a disputed adoption case. The Circuit Court of Nicholas County awarded the infant, Shanee Carol B.,[1] to her paternal aunt and uncle, Ralph and Patricia B., the appellees. The infant's maternal aunt and uncle, Richard and Valerie A., now appeal this ruling. For the reasons stated below, we reverse.

I.

FACTS

In September, 2000, Eric and Krissa B., the biological parents of Shanee Carol B. ("Shanee"), born on July 16, 1998, relinquished their parental rights to Shanee after a finding of neglect. Subsequently, Ralph and Patricia B. ("the *Bs"),* the paternal aunt and uncle of Shanee, appellees herein, sought to adopt her. The appellants, Richard and Valerie A. ("the *As"),* Shanee's maternal aunt and uncle, also sought to adopt her. Previously, Richard and Valerie A. adopted Shanee's siblings, Eric, born on January 1, 1996, and Shaquilla, born on January 23, 1993, after the children's biological parents relinquished their parental rights to these children. Shanee has been living with Richard and Valerie A. since May 2000, when she was temporarily placed there by the West Virginia Department of Health and Human

[1]Consistent with our practice in cases involving sensitive matters and children, we use Shanee's last name initial as well as the last name initial of her biological parents and maternal and paternal aunts and uncles.

Resources ("DHHR").

The Circuit Court of Nicholas County held several hearings to determine the ultimate placement of Shanee. During one of these hearings, Shanee's Child Protective Services Worker from the DHHR testified that Shanee should be placed with Richard and Valerie A. This recommendation was based in large part on the "sibling preference" found in W.Va. Code § 49-2-14(e), and on the psychological profiles of the prospective parents. The guardian ad litem recommended that Shanee be placed with Ralph and Patricia B. Admitted into evidence were the psychological profiles performed by Stephen L. O'Keefe, Ph.D., and his letter to the judge in which he recommended shared parenting between the parties. Also, Dr. O'Keefe, who performed the psychological profiles on both sets of prospective parents, testified that, although both couples are appropriate for the placement of Shanee, he recommended Mr. and Mrs. B.[2]

By order of November 21, 2000, the circuit court found that it is in the best interests of Shanee to be placed with Ralph and Patricia B., and that visitation of one weekend a month be continued

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[2] Dr. O'Keefe explained that the *As*' advantage is that they have already adopted Shanee's siblings. The disadvantage is that Eric, Shanee's brother, is very active and difficult to manage, so that having both Eric and Shanee may be quite difficult for Mr. and Mrs. A. The advantage of placing her with Ralph and Patricia B. is that she would be the only child in the home. The disadvantage is that Mr. B. had been the main source of support of Shanee's biological parents, who lived on the same property, so that Shanee's placement with Mr. and Mrs. B. may be compromised by contact with her biological parents. (Shanee's biological parents no longer live on the same property.) When pressed to choose between the prospective parents, Dr. O'Keefe concluded that "[t]he value of having [Shanee] in a home that does not demand the competition that's there with another sibling who is as close and is as demanding as [Eric] is, I think tips the balance towards placing [Shanee] in the [*Bs*'] home. That's in direct contrast to a value that says children ought to stay together, and I realize that."

with Richard and Valerie A. for six months. The circuit court made the following findings of fact and conclusions of law.

> 1. The Court has considered the preference for sibling placement contained in West Virginia Code §49-2-14 and find [sic] the presumption of placement is rebutted due to the following:
> a. The infant, Shanee Carol [B.], was born to the natural parents after the rights to any siblings had been terminated and said siblings had been adopted.
> b. No sibling bond was ever formed between the infant . . . and her siblings and therefore no siblings [sic] relationship actually exists, also there were occasional visits on holidays.
> c. The Court originally place[d] the infant . . . in the temporary care of the [sic] Ralph and Patricia [B.], and was asked to move the child to the [*As*] by the [DHHR] as they felt placement with the siblings was mandatory. At the time the infant . . . was moved, the Court stated that it would not consider the move when deciding final placement.
> d. The relationship between Ralph [B.] and Patricia [B.] on the one hand and the infant . . . were [sic] formed while the child was still quite young and before the removal of the infant . . . as Ralph [B.] and Patricia [B.] babysat for the infant . . . , fed her and bathed her.
> 2. Placement of the infant . . . with Ralph [B.] and Patricia [B.] would be in the best interest of the infant . . . for the following reasons:
> a. Ralph [B.] and Patricia [B.] are the natural uncle and aunt of the infant, Shanee Carol [B.], and were frequent caretakers of the child and provided financial and support services to said infant . . . before her removal from the home of the biological parents.
> b. After an investigation the Guardian-Ad-Litem recommended that placement with [the *Bs*] would be in the best interests of the infant[.]
> c. A psychological evaluation of Dr. Stephen O'Keefe found that either of the homes would be beneficial to the child but that placement with [the *Bs*] was in the best interest of the infant[.]
> d. The [DHHR's] recommendation of placement with [the *As*] was because they felt they were bound by West Virginia Code §49-2-14.

> e. Even though both fathers had psychological issues with placing the child in the home according to Dr. O'Keefe, the scales in that regard tilt in favor of placement with [the *Bs*].
> f. Even though both prospective fathers had criminal records that would be considered minor and would not interfere with either's ability to be an appropriate parent.
> g. The infant, Shanee Carol [B.], had bonded with both [the *Bs*] and [the *As*].
> h. Dr. Stephen L. O'Keefe, a psychologist who conducted a psychological evaluation on all of the relevant parties, recommended placement of the infant . . . with Ralph [B.]and Patricia [B.].
> i. [The *Bs*] do not have a child in their home.
> j. Based upon the testimony of Dr. O'Keefe, the two (2) siblings are [sic] in the home of [the *As*], are very demanding siblings.
> 3. The Court does conclude by finding that the placement of the child with [the *Bs*] in which the infant . . . is the only child in the home, would allow the infant . . . to have greater security, attention and resources, and further, that Dr. O'Keefe found that placement with the infant's . . . siblings may not be in the best interest of any of the children due to the extra stress that would be placed on the parents.

The circuit court stayed the execution of the order for seven days in order to allow Richard and Valerie A. to file an appeal. This Court subsequently granted the petition for appeal and stayed the execution of the circuit court's order pending resolution of the appeal.

II.

STANDARD OF REVIEW

Prior to discussing the issues raised by the parties, we set forth the applicable standards of review.

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syllabus Point 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Also, "[w]e review the circuit court's application of the law to undisputed facts *de novo.*" *In Re Petrey*, 206 W.Va. 489, 490, 525 S.E.2d 680, 681 (1999). *See also Lee v. Gentlemen's Club, Inc.*, 208 W.Va. 564, 542 S.E.2d 78 (2000); *State ex rel. United Mine Workers v. Waters*, 200 W.Va. 289, 489 S.E.2d 266 (1997); and *Lawrence v. Cue Paging Corp.*, 194 W.Va. 638, 461 S.E.2d 144 (1995).

III.

DISCUSSION

Richard and Valerie A. and the DHHR aver that the circuit court erred in failing to adhere to the strong sibling preference mandated by West Virginia statute and case law. They argue that our law prefers that Shanee remain with her two siblings absent clear and convincing evidence to the contrary.

Ralph and Patricia B. and the guardian ad litem respond that the sibling preference expressed in W.Va. Code § 49-2-14 is rebutted by the evidence. First, they note that Shanee never developed a close bond with her siblings because they were removed from the household prior to her birth,

and there is no evidence that Shanee even knew her siblings prior to being placed with Richard and Valerie A. in May 2000. Second, W.Va. Code § 49-2-14(e) provides for the separation of siblings if harm would result to one or more of the siblings by joining them, and if reunification would not be in their best interests. The guardian ad litem claims that both of these circumstances are present here as shown by Dr. O'Keefe's testimony that Eric, Shanee's brother, is "hyper"[3] and demanding, and that his competition with his sister Shaquilla is "unusual" and "extreme." The guardian ad litem concludes that the needs of both Shanee and Eric would be compromised by competition for attention in the A. household. Finally, the guardian ad litem points to Dr. O'Keefe's finding that Richard A. is emotionally detached from the children and his wife and dissatisfied with life in general as evidence that Shanee should not be placed with Richard and Valerie A.

This case is governed by W.Va. Code § 49-2-14(e) (1995)[4] which states:

> (e) When a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the department to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that said child may be united or reunited with a sibling or

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[3]Dr. O'Keefe clarified that he was not diagnosing Eric as having Attention Deficit Hyperactivity Disorder.

[4]During oral argument before this Court, there was some discussion regarding the applicability of W.Va. Code § 49-2-14(f) to this case. This code section concerns circumstances where two or more siblings have been placed in separate foster care arrangements and the foster parents of the siblings have applied to enter a foster care arrangement with the sibling or siblings not in their home, or where two or more adoptive parents seek to adopt a sibling or siblings of a child they have previously adopted. In such instances, placement is based solely on the best interests of the siblings. In the instant case, however, both of Shanee's siblings are in one adoptive arrangement, and the issue is whether Shanee should be united with them. Therefore, W.Va. Code § 49-2-14(e) is the more applicable code section.

> siblings, the state department shall upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings: Provided, That if the department is of the opinion based upon available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the department can document that the reunification of the siblings would not be in the best interest of one or all of the children, the state department may petition the circuit court for an order allowing the separation of the siblings to continue: Provided, however, That if the child is twelve years of age or older, the state department shall provide the child the option of remaining in the existing foster care arrangement if remaining is in the best interests of the child. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the court determines that clear and convincing evidence supports the department's determination. In any proceeding brought by the department seeking to maintain separation of siblings, notice shall be afforded, in addition to any other persons required by any provision of this code to receive notice, to the persons seeking to adopt a sibling or siblings of a previously placed or adopted child and said persons may be parties to any such action.

The parties agree that this code section expresses a preference that siblings be placed in the same household. As noted above, however, Richard and Valerie A. aver that the circuit court improperly disregarded the "sibling preference," and Ralph and Patricia B. assert that the "sibling preference" is rebutted by the evidence.

West Virginia has a "public policy of attempting to unite siblings in foster care placements."

State ex rel. Paul B. v. Hill, 201 W.Va. 248, 257, 496 S.E.2d 198, 207 (1997). *See also In Re Michael Ray T.*, 206 W.Va. 434, 439 n. 15, 525 S.E.2d 315, 320 n. 15 (1999). This Court has held:

> In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

Syllabus Point 4, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991). In *James M.*, 185 W.Va. at 658, 408 S.E.2d at 410, we recognized that "sibling relationships often become more meaningful for brothers and sisters when they are permanently separated from their mothers and fathers[.]"

Other courts also have articulated a preference for keeping siblings together in various contexts. In *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 451 N.Y.S.2d 658, 662, 436 N.E.2d 1260, 1264 (1982), the Court of Appeals of New York explained:

> [I]t is often in the child's best interests to continue to live with his siblings. . . . "Close familial relationships are much to be encouraged." (*Matter of Ebert v. Ebert, supra*, at p. 704, 382 N.Y.S.2d 472, 346 N.E.2d 240.) "Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful." (*Obey v. Degling, supra*, at p. 771, 375 N.Y.S.2d 91, 337 N.E.2d 601; *Matter of Gunderud v. Gunderud*, 75 A.D.2d 691, 427 N.Y.S.2d 92; *Bistany v. Bistany, supra.)*

Likewise, the Court of Appeals of Louisiana opined in *Theriot v. Huval*, 413 So.2d 337, 341 (1982):

> The separation of children of a family, though sometimes necessary, is a custodial disposition that courts seek to avoid. Normally, the welfare of these children is best served by leaving

> them together, so they can have the full benefit of companionship and affection. When feasible, a court should shape it orders to maintain family solidarity. (Quoting *Tiffee v. Tiffee*, 254 La. 381, 223 So.2d 840 (La. 1969)).

See also, In Re Marriage of Smiley, 518 N.W.2d 376, 380 (Iowa 1994) ("Siblings should not be separated from one another without good and compelling reasons"); *Cochenour v. Cochenour*, 642 S.W.2d 402, 404 (Mo.Ct.App. 1982) ("Absent exceptional circumstances, the children of divorced parents should not be separated"); *In the Matter of the Marriage of Scott*, 31 Or.App. 975, 571 P.2d 1281 (1977); *Bake v. Bake*, 772 P.2d 461 (Utah Ct.App. 1989); *Price v. Price*, 611 N.W.2d 425 (S.D. 2000); and *In the Interest of Pena*, 999 S.W.2d 521 (Tex.App. 1999).

Further, it is axiomatic in this Court that "[i]n . . . custody matters, we have traditionally held paramount the best interests of the child." Syllabus Point 5, in part, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996). On numerous occasions we have said that "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). During oral argument, Mr. and Mrs. A. asserted that W.Va. Code § 49-2-14(e) subordinates the best interests of the child consideration to the sibling preference. Mr. and Mrs. B. countered that the best interests of the child consideration remains paramount in cases such as the instant one, and that the sibling preference is a secondary consideration. We believe that both sibling preference and best interests of the child considerations are incorporated in W.Va. Code § 49-2-14(e). In order to determine how these considerations interact, we look to the clear provisions of the statute.

W.Va. Code § 49-2-14(e) provides that the DHHR is the entity charged with deciding whether to place a child in the same household of his or her siblings. Further, the DHHR is to place the child with his or her siblings if it determines that the persons with whom the child's siblings reside are fit *and* that placement with the child's siblings is in the best interests of all of the children. The statute lists three instances in which the DHHR may seek the separation of the siblings. These are if the DHHR determines that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children; if the child being placed has a physical or mental disability which the child's existing placement can better accommodate; or if the DHHR can document that the siblings' reunification would not be in the best interests of one or all of the children. Significantly, the code section provides that in instances where the DHHR seeks the siblings' separation, "such separation may be ordered only if the court determines that clear and convincing evidence supports the [DHHR's] determination." W.Va. Code § 49-2-14(e).

In the instant case, the DHHR did not determine that Shanee should be separated from her siblings but rather that she should be united with them. The standard to be used by the circuit court in reviewing the DHHR's determination that siblings should be united, instead of separated, is not specifically provided for in W.Va. Code § 49-2-14(e). However, because the statute provides that the circuit court is not to order separation, when recommended by the DHHR, in the absence of clear and convincing evidence supporting the DHHR's determination, we believe that it follows that the circuit court is not to disregard the DHHR's recommendation that siblings should be united, unless it finds that clear and

convincing evidence indicates to the contrary.

Therefore, we hold that W.Va. Code § 49-2-14(e) (1995) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child, who is in the department's custody, with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit *or* that placement of the child with his or her siblings is not in the best interests of one or all of the children. We now review the circuit court's decision in light of this standard.

Initially, we note that Ralph and Patricia B. and the guardian ad litem essentially challenge the relevance of the sibling preference under the instant facts because, until Shanee was temporarily placed with Richard and Valerie A. by the circuit court, Shanee apparently had little contact with her siblings and had not bonded with them. We do not believe, however, that this fact negates the sibling preference. Shanee and her siblings are still quite young in age so that, given the opportunity, Shanee can still bond with

her siblings, come to appreciate their companionship, and ultimately enjoy all of the advantages in life afforded by growing up with brothers and sisters. This Court should not disregard the fact that Shanee has siblings merely because, up to this point in her young life, she unfortunately has not had ample opportunity to enjoy their association. Accordingly, we believe it is proper to apply the sibling preference in our consideration of this case.

By all accounts both sets of prospective adoptive parents in this case would be suitable parents for Shanee. Dr. O'Keefe, in whose assessment the circuit court placed great weight, found both households "to meet all of the standards of adequacy." He determined, however, that the balance tipped toward Ralph and Patricia B. due to the fact that Shanee's siblings, who live with Richard and Valerie A., are extremely active and demanding children. Dr. O'Keefe concluded that Shanee would be better off in the B. household where she would be the only child and would not have to compete with her siblings for attention. Dr. O'Keefe realized, however, that his assessment is "in direct contrast to a value that says children ought to stay together[.]" The circuit court essentially hinged its decision to disregard the recommendation of the DHHR and the sibling preference on Dr. O'Keefe's opinion, and found that,

> the placement of the child with [*the Bs*] in which the infant, Shanee Carol [B.], is the only child in the home, would allow the infant, Shanee Carol [B.], to have greater security, attention and resources, and further, that Dr. O'Keefe found that placement with the infant's . . . siblings may not be in the best interest of any of the children due to the extra stress that would be placed on the parents.

Ordinarily, "[q]uestions relating to . . . custody of the children are within the sound

discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused." Syllabus, *Nichols v. Nichols*, 160 W.Va. 514, 236 S.E.2d 36 (1977). In the instant case, however, the circuit court is bound to apply the legal standard set forth in W.Va. Code § 49-2-14(e) to the facts of the case in order to determine whether there is clear and convincing evidence to rebut the sibling preference. Because this matter concerns the circuit court's application of the law to undisputed facts, we will review the circuit court's decision *de novo*. *See In Re Petrey*, *supra*. In other words, we look at the evidence as if for the first time.

According to W.Va. Code § 49-2-14(e), the DHHR's recommendation that Shanee be placed with Mr. and Mrs. A. is not to be disregarded absent clear and convincing evidence to the contrary. "Clear . . . and convincing proof . . . is the highest possible standard of civil proof defined as 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *Wheeling Dollar Savings & Trust v. Singer*, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954) (citation omitted). We are simply not persuaded that clear and convincing evidence supports the conclusion that it is in Shanee's best interests to be separated from her siblings.

The evidence indicates that Richard and Valerie A. have been good parents to Shanee's siblings. According to the findings of fact of the circuit court, based on Dr. O'Keefe's psychological evaluations, "either of the homes would be beneficial to the child[.]" The circuit court found further that Shanee had bonded with both Ralph and Patricia B. and Richard and Valerie A. In fact, the only negative

unique to the A. household contained in the circuit court's findings is that Shanee's two siblings are "very demanding."[5]

In addition, Dr. O'Keefe testified that he is convinced that Richard and Valerie A. "are very fine parents for the two children they already have, and that they could handle this third child without difficulty." The evidence shows also that Richard and Valerie A. are mature, stable people. Although the psychological profiles indicated areas of concern for both Mr. A. and Mr. B., Dr. O'Keefe adjudged Mr. A. to be "a very competent parent." He described Mr. A. as "pretty mild tempered," and free of any type of alcohol or drug abuse, or unmanageable psychological conflicts or threatening stresses. According to Dr. O'Keefe, Mr. A. "probably would handle any life changes very effectively. . . . [H]e has a lot of emotional reserve to take the roll with the punches, take whatever comes his way." Dr. O'Keefe concluded that "it would be a reasonable choice to place [Shanee] with [the *As*]," and added that "[t]he only disadvantage I see from [the *As*] is that [Shanee's two siblings] are very, what I'm going to call, high maintenance kids."

In light of this evidence concerning Richard and Valerie A., in addition to the sibling preference found in W.Va. Code §49-2-14(e), this Court concludes that the fact that Shanee's two siblings are active and demanding does not constitute clear and convincing evidence that it is in Shanee's best interests to be separated from them. In other words, after considering all of the evidence adduced below, we are not left with a firm conviction that separation is in the best interests of Shanee and/or her siblings.

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[5]The circuit court found that both Mr. A. and Mr. B. have psychological issues with placing Shanee in their household, and that both of them have minor criminal records.

Accordingly, we find that the circuit court erred in failing to give due consideration to the sibling preference in W.Va. Code § 49-2-14(e), and in ordering that Shanee be separated from her siblings.[6]

---

[6]Richard and Valerie A. raised other assignments of error in their appeal to this Court, but because we grant them the relief which they seek for the reasons stated above, we do not find it necessary to address the other assignments of error.

We do note, however, that Mr. and Mrs. A. allege that the guardian ad litem acted improperly because he represented Mrs. B. in a "lemon law" case in 1996-1997 prior to representing Shanee in the instant case. Further, there was no disclosure made by the guardian ad litem to the trial court or Mr. and Mrs. A. of his prior representation of Mrs. B. before the circuit court ruled on Shanee's placement. In addition, during oral argument it was asserted that the guardian ad litem did not interview Mr. and Mrs. A. before recommending that Shanee be placed with Mr. and Mrs. B. The circuit court held a hearing on the guardian ad litem's alleged conflict of interest and found that the guardian ad litem did nothing improper. Because we have reversed on other grounds, we will not review the circuit court's order. We do not wish to leave the impression, however, that the conduct of the guardian ad litem in this case is the acceptable standard for guardians ad litem in future cases. Accordingly, we believe that a few appropriate comments are in order.

Children, in cases like the instant one, have a right to be represented by counsel in every stage of the proceedings. The chief duty of guardians ad litem is to act in the best interests of the children for whom they are appointed. Guardians ad litem must act with competence, reasonable diligence, and promptness. Also, guardians ad litem are to make a full and independent investigation of the facts involved in the proceeding prior to making their recommendations to the court. *See* Syllabus Point 5, *In Re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993). A full and independent investigation includes interviewing all prospective parents when a child's placement is at issue.

We believe, further, that the duties set forth above require guardians ad litem to avoid conduct which reflects adversely on the undivided devotion owed by guardians ad litem to the children they represent. Guardians ad litem, therefore, have an affirmative duty to disqualify themselves following cognizance of good cause and to disclose facts that possibly could disqualify them from representing children in certain instances. Also, courts should be careful to appoint guardians ad litem who are free from any hint of conflict of interest.

Applying the above principles to the facts before us, we believe that it would have been better if Shanee's guardian ad litem had no prior recent relationship with either set of prospective parents. Also, the guardian ad litem should have disclosed his recent representation of Mrs. B. to the circuit court and to Mr. and Mrs. A. Finally, he should have interviewed Mr. and Mrs. A. before recommending Mr. and Mrs. B. for Shanee's placement.

We note in closing that the circuit court was faced in this case with a very difficult decision affecting the lives of three young children. Compounding the difficulty of the circuit court's decision was the task of choosing between prospective parents all of whom, the evidence indicates, are good people who would be responsible and capable custodians of Shanee. If the sibling preference articulated by this Court and set forth by the legislature in W.Va. Code § 49-2-14(e) were not a factor in determining Shanee's placement, we would be hard pressed to find fault with the circuit court's decision. Nevertheless, our law prefers, in the absence of compelling circumstances, that siblings enjoy the many advantages of growing up together and the attendant opportunities to forge meaningful, life-long relationships.

IV.

CONCLUSION

For the reasons stated above, we reverse the November 21, 2000 order of the Circuit Court of Nicholas County, and we order that the infant, Shanee, be placed for adoption with her siblings in the household of Richard and Valerie A.

Reversed.

Having said all of the above, however, we realize that this is not a perfect world and there are no perfect cases. Accordingly, we conclude by emphasizing that our statements are meant to be instructive in future cases, and we certainly do not find any intentional wrongdoing on the part of the guardian ad litem in this case.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED
April 14, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30597

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

ARTIE SHREWSBURY,
Defendant Below, Appellant

Appeal from the Circuit Court of Mercer County
The Honorable John R. Frazier, Judge
Criminal Action No. 00FE-253-F

AFFIRMED

Submitted: January 15, 2003
Filed: April 14, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W. Va. 639, [643,] 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syl. Pt. 2, *State v. James Edward S*, 184 W. Va. 408, 400 S.E.2d 843 (1990).

3. "We modify our holding in *James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court's subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding." Syl. Pt. 2, *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999).

4. "'Even though the unavailability requirement has been met, the Confrontation Clause contained in the Sixth Amendment to the United States Constitution mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception.' Syllabus Point 5, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990)." Syl. Pt. 4, *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995).

5. "For purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception." Syl. Pt. 6, *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995).

6. "The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. W.Va.R.Evid. 803(4)." Syl. Pt. 4, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

7. "The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis." Syl. Pt. 5, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

8. "When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001), *cert. denied*, 534 U.S. 1142 (2002), *cert. denied*, 534 U.S.1142 (2002).

9. "'Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.' Syllabus Point 1, *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964)." Syl. Pt. 3, *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991).

10. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996).

11. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

12. "[Plain error] doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. Pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988).

Per Curiam:

This is an appeal by Artie Gene Shrewsbury (hereinafter "Appellant") from a November 6, 2001, order of the Circuit Court of Mercer County sentencing him to four consecutive terms of one to five years in the penitentiary and five years probation upon his conviction of seven counts of first degree sexual assault and four counts of first degree sexual abuse. The Appellant contends that the lower court erred in admitting the testimony of the children's play therapist regarding statements made by the alleged victims of abuse. Upon thorough review of the record and the arguments of the parties, we disagree with the Appellant's contentions and affirm the lower court.

I. Factual and Procedural History

On October 11, 2000, the Appellant was indicted for seven counts of first degree sexual assault and four counts of first degree sexual abuse. The indictment alleged that, from November 1996 through November 1999, the Appellant had engaged in sexual intercourse with his step-nephews, J.C., a minor under the age of eleven years, and R.S., the younger brother of J.C.[1] The Appellant's trial was conducted on August 30 and 31, 2001. During trial, the children's mother, Debra. S., testified that she had been concerned about the behavior of the

[1]Consistent with this Court's practice in cases involving sensitive matters, only the initials of the victims will be used. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n. 1 (1990).

children and had consulted Southern Highlands Community Mental Health Center regarding J.C.'s behavior problems in 1997. The children's mother also admitted J.C. for an evaluation and observation at Highland Hospital in December 1997, due to violence toward his younger brother and threats of suicide. J.C. thereafter spent approximately one year living with a cousin and her husband. Upon his return to his family, the children's mother testified that she began to notice disturbing behavior in both boys, including touching one another's genitals and touching the genitals of animals. The children's mother testified that on November 10, 1999, J.C. informed her that his Uncle Artie, the Appellant, had touched him in private parts of his body. The children's mother also testified that R.S. admitted that the Appellant had also engaged in such contact with him.

Subsequent to this revelation, the children's mother scheduled counseling with Phyllis Hasty, a children's counselor and play therapist at Southern Highlands Community Mental Health Center. At trial, Ms. Hasty testified that she engaged in several forms of child-directed play therapy with the boys, including activities such as workbooks, drawing pictures, letter writing, painting, and hitting an "anger bop bag" to express feelings. Ms. Hasty testified that the children had talked to her about Artie touching and fondling them, as well as requests from Artie that the children also touch him. Ms. Hasty also testified that the children informed her that oral sex was involved, with J.C. offering the statement that "he didn't understand about the white stuff that comes out of Artie's thing." Ms. Hasty explained that the children had told

her that they witnessed each other being abused. R.S. related an incident to Ms. Hasty in which Artie had attempted to penetrate R.S. while J.C. watched.

II. Standard of Review

A trial court's rulings on the admissibility of evidence, "including those affecting constitutional rights, are reviewed under an abuse of discretion standard." *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996). In syllabus point two of *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983), this Court explained: "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W. Va. 639, [643,] 301 S.E.2d 596, 599 (1983). "

III. Discussion

The Appellant attacks the admissibility of the testimony of witness Phyllis Hasty on two grounds.[2] First, he maintains that Ms. Hasty should not have been permitted to provide information to the jury regarding comments made by the children and that such testimony violated the Appellant's right to confront his accusers. Second, the Appellant contends that

[2]The Appellant fails to include any formal assertion of "assignments of error" in his petition for appeal, which also serves as his brief. Based upon this Court's reading of the Appellant's petition for appeal, we interpret the Appellant's apparent assignments of error and divide them into two essential components.

Ms. Hasty should not have been permitted to testify regarding her therapy with the child victims which involved play therapy.[3]

A. Constitutional Right To Confront Witnesses

1. Unavailability Issue

The Appellant asserts that the lower court improperly admitted the therapist's testimony regarding the statements of the children without first determining that the children were unavailable to testify at trial. The Appellant asserts that the trial court's admission of such statements consequently violated his constitutional right to confront his accusers.[4] In syllabus point two of *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), this Court explained: "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." In syllabus point two of *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999), however, this Court substantially modified that holding, as follows:

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[3]The Appellant does acknowledge that the children had disclosed the sexual abuse to their mother prior to any contact with Ms. Hasty.

[4]The Appellant does not assign error to the admission of the mother's testimony concerning the statements of the children; nor does he assign error to the admission of the testimony of a juvenile probation officer, Ms. Kerry Buzzo, regarding the emotional distress suffered by the children upon seeing the Appellant in a parking lot at a court hearing.

> We modify our holding in *James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), to comply with the United States Supreme Court's subsequent pronouncements regarding the application of its decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to hold that the unavailability prong of the Confrontation Clause inquiry required by syllabus point one of *James Edward S.* is only invoked when the challenged extrajudicial statements were made in a prior judicial proceeding.

In *Kennedy*, this Court concluded: "Given the fact that the extrajudicial statement in this case -- the autopsy report -- does not involve statements given in a prior judicial proceeding, we conclude that the unavailability analysis pertinent to the Confrontation Clause inquiry under *James Edward S.* is not applicable." 205 W. Va. at 229, 517 S.E.2d at 462.

This issue of the role of unavailability in a determination of admissibility was also addressed in *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001), a case very similar to the one at bar. In *Pettrey*, this Court evaluated the admissibility of a play therapist's testimony regarding statements made by two young children describing sexual abuse. This Court analyzed issues similar to those raised by the Appellant in the present case and concluded that "the statements made by the children to Ms. Akers [the victim's teacher] and Ms. Hasty [the victim's therapist] were obviously not made in a prior judicial proceeding. Therefore, the unavailability analysis pertinent to the Confrontation Clause is not applicable." *Id.* at 457, 549 S.E.2d at 331.

Likewise, the challenged statements in the case sub judice were made to the therapist after the children had revealed the abuse to their mother. Since there is no issue regarding a statement made at a prior judicial proceeding, we concluded that the unavailability issue is not relevant, and the State was not required to establish that the children were unavailable to testify prior to introducing the testimony of the play therapist regarding statements made by the children.[5]

2. Reliability Issue

The Appellant also attacks the admissibility of the statements in the present case based upon the alleged absence of reliability. As this Court recognized in syllabus point four of *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995),

> "Even though the unavailability requirement has been met, the Confrontation Clause contained in the Sixth Amendment to the United States Constitution mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception." Syllabus Point 5, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990).

[5]The Appellant also references West Virginia Code § 62-6B-1 to -5 (2001) (Supp. 2002) and suggests that these statutory procedures could have been utilized to procure the testimony of the child witnesses through closed-circuit television. West Virginia Code § 62-6B-3 authorizes such testimony "[u]pon a written motion filed by the prosecuting attorney, and upon findings of fact determined pursuant to subsection (b) of this section. . . ." A request for implementation of this manner of procuring child testimony was not made in the present case.

In syllabus point six of *Mason*, this Court further explained: "For purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception."

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the United States Supreme Court clarified that hearsay evidence that falls under a firmly rooted exception to the hearsay rule or alternatively, when such evidence is accompanied by "particularized guarantees of trustworthiness," is admissible without any affront to the Confrontation Clause. *Id.* at 66. Specifically, the *Roberts* Court held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*

In syllabus point four of *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990), this Court explained:

> The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. W.Va.R.Evid. 803(4).

In syllabus point five, the *Edward Charles L.* Court continued:

> The two-part test set for admitting hearsay statements pursuant to W.Va.R.Evid. 803(4) is (1) the declarant's motive in

> making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

The issue of reliability and reliance upon Rule 803(4) was also raised in *Pettrey*. In that case, this Court affirmed the lower court's finding that Ms. Hasty's testimony in *Pettrey* was reliable because it fell within the medical diagnosis or treatment exception to the hearsay rule.[6] The *Pettrey* Court reviewed the *Edward Charles L.* analysis quoted above and determined that

> [t]he statements made to Ms. Hasty by the children regarding the sexual abuse were made in a therapeutic context. Her sole involvement with K.R. and D.R. was diagnosis and treatment. Also, the statements were such that they were reasonably relied upon by Ms. Hasty in her diagnosis and treatment. Ms. Hasty's testimony was properly admitted at trial.

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[6]*See also In re Jessica C.*, 690 A.2d 1357, 1363 (R.I. 1997) ("the statements to Tovar [a therapist] were helpful in determining whether Heather had been sexually abused and in assessing her treatment needs, and therefore, the testimony was properly admitted under Rule 803(4)"); *Moore v. State*, 82 S.W.3d 399, 410 n. 3 (Ct. App. Texas 2002) ("Courts have been willing to construe the exceptions to the rule against hearsay broadly to permit out-of-court statements of alleged victims of child abuse to be admitted into evidence as excited utterances, statements for purposes of medical treatment, or under the residual exception of the hearsay rule"); *Gohring v. State*, 967 S.W.2d 459 (Ct. App. Texas 1998) (finding that victim's statements to drama therapist were admissible in sexual assault case under exception to hearsay rule as statements made for purposes of medical diagnosis or treatment); *Dependency of M.P.*, 882 P.2d 1180, 1184 (Wash. 1994) (holding that proponent of statement made by child to doctor or therapist may utilize hearsay exception for statements for medical diagnosis or treatment and "should not have to overcome such a presumption" that young children lack ability to understand that their statements are for purpose of getting help for sickness, pain or emotional discomfort).

209 W. Va. at 460, 549 S.E.2d at 334. The *Pettrey* Court concluded as follows in syllabus point nine:

> When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.

We find no legitimate basis upon which to distinguish the circumstances of the present case from those evaluated by this Court in *Pettrey*. We consequently conclude that the statements of the children to the therapist fall within the medical diagnosis or treatment exception to the hearsay rule and thereby possess sufficient indicia of reliability to satisfy the reliability requirement of the Confrontation Clause. We affirm the decision of the lower court in this regard.

B. Testimony of Ms. Hasty as a Play Therapist

The Appellant also appears to assert that Ms. Hasty's testimony should not have been admitted because her mechanisms for facilitating discussion with the children were based upon the concept of play therapy. The Appellant did not, however, assert a proper objection to such subject matter during trial. Although counsel for the Appellant did object to two

questions during Ms. Hasty's testimony which would have elicited an opinion from Ms. Hasty, neither of these objections was founded upon the grounds now asserted on appeal.[7]

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[7]Counsel for the Appellant was provided with adequate opportunity to advance an objection to Ms. Hasty's testimony, had he so desired. The lower court specifically inquired of defense counsel whether he intended to raise an objection to Ms. Hasty's testimony:

> THE COURT: I don't know if we need to - - to do that now or at a later time, I assume you're gonna object to Ms. Hasty, just for the record?
>
> MR. WILLIAMS: I'm really not, Your Honor, I mean depending on maybe a - - I - - I read the Nichols case and I saw - -
>
> THE COURT: Pettrey case, I think.
>
> MR. WILLIAMS: - - yeah, I'm sorry you're right, that's right, the one you referred to, I got it here I think.
>
> THE COURT: Well, I just thought you wanted to make that for the record, but in any event we'll be in recess for about ten minutes.

Counsel for the Appellant did object during a line of questioning concerning the issue of whether Ms. Hasty always endorsed what children told her during therapy. When Ms. Hasty provided an answer in which she estimated the percentage of time she believes children give her unreliable information, defense counsel made the following objection:

> MR. WILLIAMS: Your Honor, I'm gonna object at this time and I'd like to come to the bar.
>
> THE COURT: The jury just relax a moment and we'll take up the objection.
>
> MR. WILLIAMS: Your Honor, in that case that we cited earlier, which came out of this County involving her - -
>
> THE COURT: A Pettrey case.

(continued...)

[7](...continued)
MR. WILLIAMS: - - yeah, they set out the delineations of exactly what her limitations were and I'm willing to - - to stay within those boundaries but we're getting into an area that was not set out in that - - that court case. The idea was - -

THE COURT: Where she's talkin' about the percentages, and so forth?

MR. WILLIAMS: - - about other kids in play therapy, I'm talkin' about the Court goes in - - she's indicated over to a play therapist for a medical diagnosis as part of their treatment plan then she could testify to what they said.

THE COURT: Well I'm sure Ms. Garton is gonna get in the treatment idea. I - - I assume she would just - -

MR. WILLIAMS: I think - -

MS. GARTON: I'm laying a foundation.

MR. WILLIAMS: - - I think making conclusions are outside her realm, I - - I relied upon that - - I think that case gave some leeway but not just opened it up.

THE COURT: So exactly what are you asking the Court and what are you objecting to?

MR. WILLIAMS: We just ought to get right to the point here, I mean let's get to the point if she saw these kids on some referral then set up some foun - - there's no foundation here, how these children got over there.

THE COURT: Well, I'm sure we can get into all that?

MS. GARTON: Yes.

THE COURT: And I assume you're doin' this to show the - -

(continued...)

This Court has consistently held that "[o]bjections on non-jurisdictional issues, must be made in the lower court to preserve such issues for appeal." *Loar v. Massey*, 164 W. Va. 155, 159, 261 S.E.2d 83, 86 (1979). "'Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.' Syllabus Point 1, *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964)." Syl. Pt. 3, *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991).

The necessity for precise and specific objections was acknowledged by this Court in syllabus point two of *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996), as follows: "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Rule 103 of the West Virginia Rule of Evidence is also indicative of this principle, providing in pertinent part, as follows:

> (a) *Effect of errroneous ruling*. – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

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[7](...continued)
MS. GARTON: It's a part of the foundation.

THE COURT: The objection is overruled you may proceed.

> (1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .

In the case sub judice, based upon the Appellant's failure to raise an adequate objection, the issue of whether testimony regarding statements elicited during therapy sessions which included a component of play therapy should have been admitted at trial has not been preserved for appellate review. While the plain error doctrine has been utilized to correct errors of great magnitude even in the absence of an objection, we do not believe that the circumstances of this case warrant such a result. This Court explained the use of the plain error doctrine as follows in syllabus point seven of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995): "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." In pertinent part of syllabus point four of *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988), this court stated that the plain error "doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result."

We conclude that the lower court did not abuse its discretion in admitting testimony in the Appellant's trial. We consequently affirm the decision of the lower court.

Affirmed.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33135

FILED
November 17, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: SKYELAN H., EARL K.,
MERSADIES K. and CODY K.

Appeal from the Circuit Court of Roane County
Hon. David Nibert, Judge
Case Nos. 05-JA-6N, 05-JA-7N, 05-JA-8N, and 05-JA-9N

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: October 25, 2006
Filed: November 17, 2006

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

Per Curiam:

In this appeal from the Circuit Court of Roane County, we are asked to consider a circuit judge's order that dismissed an abuse and neglect petition involving four children that was filed by the West Virginia Department of Health and Human Resources ("DHHR"). While we find the judge's decision was likely correct based upon the evidence presented by the parties, we reverse based upon the new circumstances presented during the parties' arguments before this Court.

I.

The respondents in this case are Dawn K. (now Dawn B.) and Earl K.; they separated prior to the filing of the DHHR's petition in this case and are now divorced. Dawn is the mother of Skyelan H., whose natural father is unknown. Dawn and Earl are the parents of three other children: Earl K., Jr.; Mersadies K.; and Cody K.

In mid-April 2005, Mersadies was diagnosed with a severe pelvic infection that required a two-week hospitalization. On April 19th, the DHHR filed an abuse and neglect petition against both Dawn K. and Earl K. claiming that Mersadies was hospitalized only as a result of the DHHR's intervention, and alleged Dawn's inaction in seeking medical treatment constituted a threat to the safety and welfare of the four children (who were between the ages of two and five when the petition was filed). The DHHR also alleged that the respondents abused and/or neglected the children by allowing the oldest child, Skyelan,

to accrue too many absences from kindergarten; by not having sufficient stocks of food in the house; and by Earl's past repeated bouts of domestic violence against Dawn. Based upon the DHHR's allegations, the circuit court entered an emergency order permitting the DHHR to remove the children from the household and place them in foster care.

After four hearings, on November 23, 2005, the circuit court entered a detailed order dismissing the DHHR's petition. The circuit court concluded that, while the mother had exhibited some mistakes of judgment and had poor budgeting skills, the DHHR had failed to prove by clear and convincing evidence that those errors constituted abuse or neglect.

Following entry of the dismissal order, on December 5, 2005, the guardian *ad litem* for the children revealed to the circuit judge some medical records suggesting that three of the children may have been subjected to sexual abuse. When that abuse occurred, and whether the respondents caused, contributed to, or could have prevented the abuse, was not offered. The guardian *ad litem* then moved the circuit judge for a stay of the dismissal order. The circuit judge denied the motion in an order dated January 17, 2006. The guardian *ad litem* now appeals the circuit judge's orders; the DHHR did not appeal the circuit judge's actions.

II.

In this case we are guided by two principles. First, the findings of a circuit court in an abuse and neglect case will not be set aside by a reviewing court unless they are clearly erroneous – that is, although there is evidence to support the findings, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). Second, "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

The guardian *ad litem* for the children argues on appeal that the circuit court erred in concluding that the DHHR failed to establish that the allegations contained in the petition rose to a level of legal "abuse or neglect." *See W.Va. Code*, 49-1-3 [2006]. The respondent parents persuasively argue that the circuit court's decision dismissing the petition was correct. If the attention of this Court were solely upon the petition and the circuit court's decision thereon, our inclination is that the decision was correct.

We are, however, troubled by the additional evidence submitted into the record after the circuit court's decision. After entry of the court's dismissal order, the guardian *ad litem* proffered to the court evidence suggesting that three of the children may have been victims of sexual abuse. While the evidence, standing alone, proves nothing, the circuit court should have taken a more proactive role in compelling a further investigation of the evidence.

In other words, we believe that the circuit court was empowered to demand that the DHHR investigate and report to the circuit court whether the evidence could or should be the basis of further action to protect the interest of the children. *See, e.g.*, *Rules of Procedure for Child Abuse and Neglect Proceedings*, Rule 3a [2006]; *Rules of Practice and Procedure for Domestic Violence Civil Proceedings*, Rule 25a [2006].

Further compounding our difficulty in resolving this case is a revelation by the parties during oral arguments before this Court: that a new petition alleging abuse and neglect has been filed against Dawn B. regarding the children. It appears that the circuit court has as a result of the new petition removed the children from the respondent mother's custody, and placed the children with the respondent father, Earl K.

On the basis of the parties' statements during oral argument, we find that the result which will best protect the interests of the children is to reverse the circuit court's decisions and remand the case. On remand, the court should give full consideration to the allegations raised by the guardian *ad litem* in this appeal, in conjunction with any allegations of abuse and neglect raised in the petition currently pending before the circuit court.

III.

The circuit court's November 23, 2005 and January 17, 2006 orders are reversed. The case is remanded, and the circuit court is ordered to consolidate this case with any pending petitions involving the children, and to fully consider all evidence pertaining to the alleged abuse and neglect of the children.

Reversed and Remanded with Directions.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

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OF WEST VIRGINIA

No. 32697

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

v.

KIMBERLY SMITH,
Respondent

Certified Question from the Circuit Court of Cabell County
Honorable Alfred E. Ferguson, Judge
Case No. 04-D-1080

CERTIFIED QUESTION ANSWERED

Submitted: October 11, 2005
Filed: December 2, 2005

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JUSTICE STARCHER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

2. "When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va. Code*, 51-1A-1, *et seq.* and *W.Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court." Syllabus Point 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

3. When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.

4. When a circuit judge enters an order on an abuse or neglect petition filed pursuant to Chapter 49 of the *West Virginia Code*, and in so doing alters the custodial and decision-making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, *W.Va. Code*, 49-7-5 [1936] requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

5. Any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the *West Virginia Code* must use the *Guidelines for Child Support Awards* found in *W.Va. Code*, 48-13-101, *et seq.*

Starcher, J.:

The Circuit Court of Cabell County presents three certified questions to this Court relating to the jurisdiction of a family court to establish a parent's support obligation for a child, when the child is also the subject of an abuse or neglect proceeding in the circuit court. We are asked to decide whether in such cases the authority to impose a child support obligation lies in the circuit court or in the family court.

As set forth below, we find that jurisdiction to establish a child support obligation lies solely with the circuit court that is adjudicating, or has adjudicated, the custody and decision-making responsibility for the child as a result of an abuse or neglect petition.

I.
Facts & Background

The three certified questions in this case concern the child support obligation of a parent, whose children have been placed into the custody of the Department of Health and Human Resources as a result of an abuse or neglect proceeding filed in a circuit court, all pursuant to Chapter 49 of the *West Virginia Code*. The questions essentially ask us to resolve a single, jurisdictional question: between a circuit court and a family court, which court should calculate and enforce the parent's child support obligation?

On June 30, 2003, the Department of Health and Human Resources ("the Department") filed a petition in the Circuit Court of Cabell County alleging that the four children of Kimberly Smith had been abused or neglected. Pursuant to a circuit court order, the children were temporarily removed from Ms. Smith's custody and placed into foster care. After several hearings, the circuit court concluded in an order dated June 7, 2004 that clear and convincing evidence of abuse and neglect had been presented and terminated Ms. Smith's parental rights to the children. The Department was granted permanent physical and legal custody of the children, and they were subsequently placed with foster families.

While the children were in temporary foster care pursuant to the circuit court's order, on February 11, 2004, the Department initiated a separate civil action by filing a new petition in the Family Court of Cabell County seeking to establish a child support obligation for Ms. Smith. The Department alleged in the petition for child support that it was "currently paying expenses for the minor children" and that Ms. Smith "owes a duty of support to the children which she is not meeting." The Department therefore requested that the family court enter an order requiring Ms. Smith "to pay such sum or sums of money sufficient for the support and maintenance of the minor children, in accordance with the child support formula, while the children are in foster care[.]"

The family court, however, refused to exercise jurisdiction over the Department's petition for child support. In an order dated June 11, 2004, the family court stated:

> The Family Court does not have jurisdiction in the present case. . . . Jurisdiction for establishing the support obligation lies exclusively with the [Circuit] Court that Ordered the placement of the child(ren).

The family court's order dismissed the Department's petition for child support.

The Department appealed the family court's dismissal order to the circuit court. The Department argued to the circuit court that, as a general proposition, it was experiencing difficulty establishing child support obligations in abuse and neglect cases because family courts and circuit courts were in disagreement concerning which court could or should establish the support obligation. As the Department stated:

> [T]he Family Court dismissed the action holding that the Family Court lacks jurisdiction to establish child support and that jurisdiction lies wholly with the Circuit Court which removed the child from the custody of the parent. . . .
>
> The [Department] has previously appealed the same ruling of the Family Court [of Cabell County] regarding jurisdiction in eleven (11) other cases. In each of the appeals assigned to the Honorable Alfred E. Ferguson, the order of dismissal by the Family Court was *affirmed* . . . The appeals assigned to the Honorable Dan O'Hanlon were *remanded* to the Family Court for entry of a support order. . . .
>
> . . . [The Department] is experiencing difficulty establishing the federally-mandated child support obligation in Chapter 49 [abuse and neglect] cases as the split of decision regarding jurisdiction is typical across the State.

The Department therefore asked the circuit court to certify questions to this Court to clarify the procedure that the Department, family courts and circuit courts should pursue to establish a parent's child support obligation when an abuse or neglect petition has been filed.

In an order dated December 15, 2004, the circuit court certified the following questions to this Court:[1]

> Certified Question One:
>
> Does the Family Court have jurisdiction to establish child support if the same child is also the subject of a pending proceeding or order under Chapter 49 of the West Virginia Code, when no order of the Circuit Court addresses child support?
>
> Answer of the Circuit Court: Yes.
>
> Certified Question Two:
>
> May the Circuit Court transfer jurisdiction to the Family Court to calculate child support in a proceeding under Chapter 49 of the West Virginia Code by administrative order en masse?
>
> Answer of the Circuit Court: No.
>
> Certified Question Three:
>
> May the Circuit Court transfer jurisdiction to the Family Court to calculate child support in a proceeding under Chapter 49 of the West Virginia Code by administrative order on a case by case basis?
>
> Answer of the Circuit Court: No.

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[1]This Court recently received a *Report on the Overlap of Child Abuse and Neglect Cases in Family and Circuit Courts* from the West Virginia Court Improvement Oversight Board. The report identifies four problematic areas of overlap between circuit courts and family courts in the context of abuse and neglect actions, and suggests solutions for the Court, the Legislature, the Executive and other individuals to pursue, so as to more efficiently address the needs of abused and neglected children. One of those four areas is, coincidentally, encompassed by the questions certified in the instant case.

II.
Standard of Review

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

III.
Discussion

It is well established that this Court has the authority to reformulate certified questions.

> When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va. Code*, 51-1A-1, *et seq.* and *W.Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Syllabus Point 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

After considering the record and the briefs and arguments of the Department, we believe that the circuit court's three certified questions should be reformulated and distilled down into this single question:

> If a child is either the subject of an abuse or neglect proceeding in a circuit court, or the subject of a circuit court order affecting the custodial or decision-making responsibility for the child pursuant to Chapter 49 of the *West Virginia Code*, does the circuit court have exclusive jurisdiction to establish a child support obligation for that child?

As we discuss below, we believe that the answer to this question is "Yes."

We begin our analysis of this question by looking to the historical purpose behind the creation of the family court system, and its relationship to the circuit courts.

In October 1997 this Court entered an order that established the "Commission on the Future of the West Virginia Judicial System." The Commission was charged with examining the State court system and proposing "structural, organizational, and procedural changes that will ensure a just, effective, responsive, and efficient court system into the next century." One of the many areas examined by the Commission was the inefficient, piecemeal approach taken by the then-existing court system in addressing legal issues concerning parents and children.

After extensive public hearings and deliberations, the Commission determined – as the law stood in 1998 – that families entering the court system faced a "fragmented and duplicative" system:

> [A] family in crisis could encounter five different decision makers in the course of attempting to resolve its problems: a magistrate, to hold hearings on a domestic violence petition; a family law master, to hear evidence on a divorce; a circuit judge, to conduct an abuse and neglect proceeding; a different circuit judge to conduct a delinquency proceeding regarding the behavior of one of the children; and a panel of county commissioners to conduct a proceeding regarding the contested legal guardianship of a minor.

Report of the Commission on the Future of the West Virginia Judicial System at 34 [1998]. The Commission recognized that judicial decision makers, acting without coordination, were likely to issue inefficient and/or conflicting orders:

> [W]hen there is no coordination between different segments of the court system, it is possible that a judge hearing an abuse and neglect case may not be aware of a pending divorce, a disputed non-testamentary legal guardianship, a juvenile delinquency proceeding, and/or a recent domestic violence petition. This lack of integration and consolidation does not serve the best interest of the families, interferes with the ability of the system to provide a quality resolution, and does not make efficient use of judicial resources.

Id.

To resolve this problem, in December 1998 the Commission proposed that the Legislature establish a "unified family court." The Commission, relying upon studies by the American Bar Association and upon an examination of family court systems devised by twenty-five other states, proposed a "one judge, one family" system. Under this system, one judicial officer would be empowered to make decisions concerning families, parents and children. The unified family court system crafted by the Commission contemplated that one, specially-trained judge[2] would have "comprehensive jurisdiction of all family law cases, including juvenile matters," and that all cases pertaining to one family – such as divorce, domestic violence, paternity, or abuse and neglect – would be assigned to that judge. *Id.* at 34-37.

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[2]The Commission recommended that

> . . . Unified Family Court judges gain office in the same manner, and have the same status, pay, and benefits as circuit judges. . . . Other states with Unified Family Courts have determined that equal stature for Unified Family Court Judges and adequate additional support personnel are absolutely essential to the success of this plan.

Report of the Commission on the Future of the West Virginia Judicial System at 35.

The Legislature responded to the Commission's recommendations by creating the current family court system. The Legislature did not, however, wholly adopt the recommended "one judge, one family" concept and did not establish the family court system as a "unified court" with the powers necessary for resolution of all family law matters. Instead, the system adopted by the Legislature makes clear that "[a] family court is a court of limited jurisdiction." *W.Va. Code*, 51-2A-2(d) [2004]. We interpreted this language in *State ex rel. Silver v. Wilkes*, 213 W.Va. 692, 584 S.E.2d 548 (2003) to mean that the Legislature established the family courts as courts of limited jurisdiction that are "inferior" to the circuit courts.[3]

The Legislature did consolidate jurisdiction over many family law issues into the original jurisdiction of the family courts. Following the recommendations of the Commission, family courts now have jurisdiction over divorces – including the power to dissolve a marriage, equitably distribute marital property, and determine child and spousal support obligations[4] – and have contempt power to enforce any family court decrees.[5]

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[3]As we stated in Syllabus Point 4 of *State ex rel. Silver v. Wilkes*:

> Pursuant to Article VIII, Sections 6 and 16 of the West Virginia Constitution, W.Va. Code § 51-2-2 (1978), and the Family Court statutes, W.Va. Code §§ 51-2A-1 to 23 (2001), family courts are courts of limited jurisdiction and are inferior to circuit courts. Family courts are, therefore, subject to both the appellate jurisdiction and the original jurisdiction of the circuit courts in this State.

[4]*W.Va. Code*, 51-2A-2(a)(1) [2004] states:

> The family court shall exercise jurisdiction over . . . All actions

(continued...)

Family courts also have jurisdiction over actions seeking child support, when the parents have never married;[6] over actions to establish paternity;[7] over civil domestic violence cases seeking a protective order;[8] and over infant guardianship cases.[9]

But not all areas of family law were placed before the family courts. One significant area of family law discussed by the Commission remains within the sole jurisdiction of the circuit courts: child abuse or neglect proceedings under Chapter 49 of the *West Virginia Code*.

In the instant case we are asked to determine whether, and to what extent (if any), family courts may exercise jurisdiction over a parent's child support obligation, when

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[4](...continued)

> for divorce, annulment or separate maintenance brought under the provisions of article three, four or five, chapter forty-eight of this code[.]

W.Va. Code, 51-2A-2(a)(8) and (9) permit a family court judge to enter temporary orders in such proceedings, and to later modify any orders entered.

[5]*See W.Va. Code*, 51-2A-2(a)(10) [2004], giving family courts authority "to enforce an order of spousal or child support or to enforce an order for a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child," including through civil contempt proceedings. *See also*, *W.Va. Code*, 51-2A-9 [2001] (setting forth the contempt powers of a family court judge).

[6]*See W.Va. Code*, 51-2A-2(a)(2) [2004].

[7]*See W.Va. Code*, 51-2A-2(a)(3) [2004].

[8]*W.Va. Code*, 51-2A-2(a)(12) [2004] gives family courts jurisdiction over "[a]ll final hearings in domestic violence proceedings[.]"

[9]*W.Va. Code*, 51-2A-2(a)(17) [2004] gives family courts jurisdiction over "[a]ll proceedings relating to the appointment of guardians or curators of minor children . . . exercising concurrent jurisdiction with the circuit court."

the child is subject to an abuse or neglect proceeding in the circuit court. To answer this question we must examine the various legislative enactments delineating the jurisdiction of the family and circuit courts in the context of abuse or neglect cases.

W.Va. Code, 49-6-1 [2005] clearly states that an abuse or neglect petition may only be filed in "the circuit court in the county in which the child resides[.]" Likewise, the statute setting forth the jurisdiction of the family courts, *W.Va. Code*, 51-2A-2(c) [2004], states that when an abuse or neglect petition is filed in a circuit court, and "an action for divorce, annulment or separate maintenance" is at the same time pending in a family court, the family court must defer to the circuit court. As the statute states, any orders of the circuit court "shall supercede and take precedence over an order of the family court respecting the allocation of custodial and decision-making responsibility for the child between the parents."[10]

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[10]*W.Va. Code*, 51-2A-2(c) [2004] states:

> If an action for divorce, annulment or separate maintenance is pending and a petition is filed pursuant to the provisions of article six, chapter forty-nine of this code alleging abuse or neglect of a child by either of the parties to the divorce, annulment or separate maintenance action, the orders of the circuit court in which the abuse or neglect petition is filed shall supercede and take precedence over an order of the family court respecting the allocation of custodial and decision-making responsibility for the child between the parents. If no order for the allocation of custodial and decision-making responsibility for the child between the parents has been entered by the family court in the pending action for divorce, annulment or separate maintenance, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making

(continued...)

The instant case arises, however, because of what the family court jurisdiction statute regarding abuse or neglect jurisdiction *does not* say. *W.Va. Code*, 51-2A-2(c) places limitations upon the family court's "allocation of custodial and decision-making responsibility;" it says nothing of the family court's power to create and enforce a child support obligation. Concerning that power, *W.Va. Code*, 51-2A-2(a)(2) and (10) state:

> The family court shall exercise jurisdiction over the following matters: . . .
>
> (2) All actions to obtain orders of child support . . . ; . . .
>
> (10) All actions brought, including civil contempt proceedings, to enforce an order of spousal or child support. . . .

Relying upon these two subsections, the Department argues that family courts retain jurisdiction to determine a parent's support obligation for a child who is subject to an abuse or neglect petition. The Department asserts that it may therefore turn to the family courts to obtain an order for the support of a minor child whenever a parent is obligated to support the

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[10](...continued)

> responsibility for the child between the parents and defer to the orders of the circuit court in the abuse or neglect proceedings.

We note that this provision regarding the jurisdiction of the family court appears to apply only when a "divorce, annulment or separate maintenance" action has been filed between the parents of a child who is the subject of a later abuse or neglect petition. The statute is silent regarding the course of action to be taken when any other type of action – such as a paternity action or an action to establish child support between unmarried individuals – is filed between the parents of the child.

child and is failing to do so[11] – even when a circuit court has placed that child in the custody of the Department as a result of the filing of an abuse or neglect petition.

After carefully examining the statutory scheme concerning the establishment of child support obligations in abuse or neglect cases, we reject the Department's interpretation of *W.Va. Code*, 51-2A-2. We believe that when an abuse or neglect petition has been filed, the family courts are divested of jurisdiction to establish a support obligation for the child and that the duty to establish a support obligation lies solely with the circuit court.

The circuit court's duty to impose a child support obligation upon hearing an abuse or neglect petition is found in *W.Va. Code*, 49-7-5 [1936]. That statute states, in part:

> If it appears upon the hearing of a petition under this chapter that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge shall order the person to pay the state department, institution,

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[11]The Department also cites to *W.Va. Code*, 48-14-101 [2001] as its authority to initiate a separate action in family court to establish a child support obligation when an abuse or neglect petition regarding the child is pending in circuit court. The statute states:

> An action may be brought in family court to obtain an order for the support of a minor child when:
>
> (1) The child has a parent and child relationship with an obligor;
>
> (2) The obligor is not meeting an obligation to support the child;
>
> (3) An enforceable order for the support of the child by the obligor has not been entered by a court of competent jurisdiction; and
>
> (4) There is no pending action for divorce, separate maintenance or annulment in which the obligation of support owing from the obligor to the child is at issue.

> organization, or private person to whom the child was committed, a reasonable sum from time to time for the support, maintenance, and education of the child.

This statute – adopted in 1936 – indicates that a circuit court "shall" require a parent to pay support for a child to the Department if the parent "is able to contribute to the support of such child." The determination of whether and how much a parent can contribute to the support of a child is not, however, a visceral, unfettered decision for the circuit court; rather, the existence and amount of a child support obligation under *W.Va. Code*, 49-7-5 must now be computed in light of recent statutes which pertain to the calculation of a support obligation. *See* Syllabus Point 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953) ("The Legislature, when it enacts legislation, is presumed to know of its prior enactments."); Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908) ("A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject-matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.").

The current statutory scheme regarding child support obligations requires judges – family court or circuit court – to use the *Guidelines for Child Support Awards* found in Article 13 of Chapter 48 to calculate the existence and amount of a parent's child support obligation. The *Guidelines for Child Support Awards* are not limited to being applied only

by family courts, but are to be used by *any* court that is assessing *any* child support obligation. Specifically, *W.Va. Code*, 48-13-701 [2001] states that "[t]he guidelines in child support awards apply as a rebuttable presumption to *all* child support orders established or modified in West Virginia." (Emphasis added). The statute mandates that the *Guidelines* "be applied to all actions in which child support is being determined including . . . foster care, . . . public assistance, nonpublic assistance and support decrees arising despite nonmarriage of the parties."[12]

The *Guidelines for Child Support Awards* were designed by the Legislature to ensure uniformity in child support awards, and to increase predictability for parents, children, and "other persons who are directly affected by child support orders" – which we interpret to include the Department of Health and Human Resources in the context of an abuse and neglect petition. It is therefore presumed that any order entered by a court in accordance with the *Guidelines* "is the correct amount of child support to be awarded." *W.Va. Code*, 48-13-

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[12]*W.Va. Code*, 48-13-701 [2001] states:

> The guidelines in child support awards apply as a rebuttable presumption to all child support orders established or modified in West Virginia. The guidelines must be applied to all actions in which child support is being determined including temporary orders, interstate (URESA and UIFSA), domestic violence, foster care, divorce, nondissolution, public assistance, nonpublic assistance and support decrees arising despite nonmarriage of the parties. The guidelines must be used by the court as the basis for reviewing adequacy of child support levels in uncontested cases as well as contested hearings.

101 [2001].[13] The *Guidelines* may, however, be disregarded or adjusted to "accommodate the needs of the child or children or the circumstances of the parent or parents" only if the court makes specific findings that the use of the *Guidelines* is inappropriate. *W.Va. Code*, 48-13-702 [2001].

Furthermore, "to ensure greater uniformity" and "to increase predictability" as contemplated by the Legislature in enacting the *Guidelines*, orders concerning child support obligations must be entered promptly. When support orders are not entered at the same time that the circuit court alters the allocation of custodial and decision-making responsibility for the child, the child's parents and the Department are deprived of the ability to order their affairs. If the circuit court gives custody of the child to one parent or another responsible person in the abuse or neglect action, then in the absence of a support obligation upon the non-custodial parent, the custodial parent or responsible person must fall back on the resources of the Department. If the court places the child into the sole custody of the Department, in the absence of a support obligation, taxpayers must unfairly foot the entire bill. In either case, when a court delays the calculation of a support obligation, the parents

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[13]*W.Va. Code*, 48-13-101 [2001] states:

> This article establishes guidelines for child support award amounts so as to ensure greater uniformity by those persons who make child support recommendations and enter child support orders and to increase predictability for parents, children and other persons who are directly affected by child support orders. There is a rebuttable presumption, in any proceeding before a court for the award of child support, that the amount of the award which would result from the application of these guidelines is the correct amount of child support to be awarded.

may be unfairly surprised to be forced to pay past support, education or medical expenses paid by the Department, in addition to making current, monthly support payments.

The record in this case prompts us to raise one additional issue of concern regarding the prompt resolution of child abuse or neglect actions. In 2004, the Court – through the assistance of the Court Improvement Oversight Board – issued the *Judicial Benchbook for Child Abuse and Neglect Proceedings* and issued a series of computerized forms called the *Juvenile Abuse and Neglect Information System*.[14] The *Benchbook* contains a summary of the statutes, rules, caselaw and procedures in abuse and neglect cases, as well as checklists to ensure a thorough review of each case. Tied into the *Benchbook* is the *Juvenile Abuse and Neglect Information System* – better known by its initials "JANIS" – which is a computerized tool for judges and other practitioners to use to expedite the handling of child abuse and neglect cases. The JANIS system improves the speed and quality of judges' and attorneys' work product by automating the creation of case orders and motions. It is our understanding that many practitioners and judges are unaware of these two resources. We would suggest, in the future, that judges, attorneys, and the Department (and thereby children and their parents) would substantially benefit from the use of these resources in the adjudication of abuse and neglect cases.

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[14]Both the *Benchbook* and JANIS are available on the Supreme Court of Appeals' internet website, www.state.wv.us/wvsca. The *Benchbook* may be downloaded or reviewed at www.state.wv.us/wvsca/benchbook_04/cover.htm, while the JANIS system may downloaded or accessed at www.wvjanis.com.

We therefore hold that when a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.

When a circuit judge enters an order on an abuse or neglect petition filed pursuant to Chapter 49 of the *West Virginia Code*, and in so doing alters the custodial and decision-making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, *W.Va. Code*, 49-7-5 [1936] requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

Finally, any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the *West Virginia Code* must use the *Guidelines for Child Support Awards* found in *W.Va. Code*, 48-13-101, *et seq.*

IV.
Conclusion

The question before the Court is this:

> If a child is either the subject of an abuse or neglect proceeding in a circuit court, or the subject of a circuit court order affecting the custodial or decision-making responsibility for the child pursuant to Chapter 49 of the *West Virginia Code*, does the circuit court have exclusive jurisdiction to establish a child support obligation for that child?

We answer the certified question "Yes."

Certified Question Answered.

207 W. Va. 631, 535 S.E.2d 475

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
July 11, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 12, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 27313

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

THOMAS SNODGRASS,
Defendant Below, Appellant

Appeal from the Circuit Court of Marion County
Honorable Rodney B. Merrifield, Judge
Civil Action No. 98-F-62

REVERSED AND REMANDED

Submitted: June 13, 2000
Filed: July 11, 2000

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CHIEF JUSTICE MAYNARD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article [III], section 14 of the West Virginia Constitution to preclude the witness from testifying." Syllabus Point 1, *State v. Ward*, 188 W.Va. 380, 424 S.E.2d 725 (1991).

2. "Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syllabus Point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

3. The offense of child abuse creating a risk of injury as set forth in W.Va. Code § 61-8D-3(c) (1996) is committed when any person inflicts upon a minor physical injury by other than accidental means and by such action, creates a substantial possibility of serious bodily injury or death.

Maynard, Chief Justice:

This case is before this Court upon appeal of a final order of the Circuit Court of Marion County entered on April 19, 1999. In that order, the circuit court sentenced the appellant and defendant below, Thomas Snodgrass, to an indeterminate term of one to five years in the West Virginia State Penitentiary for his conviction of child abuse creating a risk of injury. The court further sentenced the appellant to one year in the Marion County Jail for his conviction of destruction of property and to one year in the Marion County Jail for his conviction of fleeing an officer.

In this appeal, the appellant contends that the circuit court committed constitutional error when it excluded the testimony of defense witness Lawrence Barnette. The appellant also contends that the evidence was insufficient to establish child abuse as a matter of law. The appellant further asserts that the circuit court erred by denying his motion to suppress his custodial statements. Finally, the appellant argues that the circuit court committed reversible error by improperly admitting the rebuttal testimony of Karen Caufield.

This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is reversed.

I.

The appellant's convictions arose out of a domestic dispute with his ex-wife, Kim Haught. The dispute occurred on June 27, 1997, when Mrs. Haught and her husband, Matt Haught, arrived early to pick up Lee, the appellant and Mrs. Haught's son. Lee had spent the week with the appellant who maintained that Mrs. Haught was not supposed to pick him up until two days later. Mrs. Haught claimed that she was only two hours early.

When the Haughts arrived, the appellant was on a tractor mowing hay. Mrs. Haught put Lee in her car and started to drive away. The appellant approached the car to see what was happening. After some discussion, the Haughts drove away. The appellant got his car and followed the Haughts down the road. The Haughts claim that the appellant "chased" them and pulled his car in front of their car forcing them to turn down a dead-end road. However, a defense witness testified that the appellant did not pass the Haughts' car or exhibit any other improper driving behavior.

Eventually, the vehicles stopped. According to the Haughts, the appellant jumped on the hood of their car, tore off a side mirror, and broke the passenger side window with a rock causing glass to fall on all the occupants of the vehicle. Mrs. Haught testified that Lee sustained scratch marks and a cut finger from the broken glass. The appellant maintains that he jumped on the hood of the Haughts' car to keep them from running over him. He claims that he picked up a rock in self-defense against Matt Haught and that the rock went through the window when they got into a struggle.

Sergeant Donald Wheeler, a police officer from the town of Mannington, was the first to arrive on the scene. He had been notified by the Marion County Sheriff's Department which had been

telephoned by Mrs. Haught on a cellular phone shortly after the dispute began. Sergeant Wheeler had been instructed not to allow anyone to leave the scene. Upon his arrival, the appellant told Sergeant Wheeler that nothing had happened and nothing was wrong. Shortly thereafter, two deputies from the Marion County Sheriff's Department arrived. After talking to the Haughts, one of the officers approached the appellant and told him he was under arrest.[1] The appellant attempted to run away, but the officers tackled him. He kicked one of the officers in the face before being subdued.

Following a three-day trial that began on July 28, 1998, the appellant was found guilty of child abuse creating a risk of injury, destruction of property, and fleeing an officer. He was acquitted of domestic battery of Mrs. Haught, battery of Mr. Haught, and unlawful assault on a police officer.[2]

II.

The appellant's primary assignment of error concerns the circuit court's refusal to allow defense witness Lawrence Barnette to testify. The appellant contends that by excluding Mr. Barnette's testimony, the circuit court violated his right to compulsory process under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution.[3] The circuit court

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[1]The appellant maintains that he was never told that he was under arrest.

[2]One count of child abuse of the Haughts' 16-month-old daughter, Ali, who was also a passenger in the car on June 27, 1997, was dismissed prior to trial.

[3]The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor[.]" Likewise, Article III, Section 14 of the West Virginia Constitution

(continued...)

refused to allow Mr. Barnette to testify because the appellant had not provided the State with a correct phone number for him pursuant to a pretrial discovery order.

Almost a month before trial, the appellant gave the State the names of fifty potential witnesses. The misspelled name of "Lawrence Burnett" was on the list. No addresses or telephone numbers were listed with any of the witnesses. Thus, the State filed a motion to exclude the testimony of all the defense witnesses, or in the alternative, to compel the appellant to disclose the addresses and telephone numbers of the witnesses along with a brief synopsis of their expected testimony. On July 20, 1998, the circuit court ruled that it would prohibit these witnesses from testifying unless the defense provided the State with the telephone numbers and/or addresses of the witnesses by 4:00 p.m. on July 22, 1998. In response, the appellant provided more specific information about eleven of the witnesses, and at some point, the State was given a phone number for Mr. Barnette. However, when the prosecutor called the phone number, he was told that Mr. Barnette did not live at that residence.

Mr. Barnette appeared on the first day of trial after having been served with a subpoena by the appellant's process server the previous day. An investigator for the State approached Mr. Barnette at that time, but he refused to talk to him. When Mr. Barnette was called to testify on the second day of trial, the State objected on the grounds that it had not been given a correct phone number for Mr. Barnette and as a result, had been unable to contact him prior to trial. Counsel for the appellant responded that he

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[3](...continued)
provides that, "[i]n all such [criminal] trials . . . there shall be awarded to [the accused] compulsory process for obtaining witnesses in his favor."

had given the State the only phone number he had for Mr. Barnette and that even after Mr. Barnette was served the subpoena, he did not have an address or a correct phone number because Mr. Barnette was found on the street.

The appellant proffered that Mr. Barnette would testify that he was at the Satterfield farm where the altercation took place on June 27, 1997. He further stated that Mr. Barnette would testify that he observed a red car come down the road to the Satterfield farm and turn around. About a half hour later, Mr. Barnette observed the vehicle come back, this time followed by a white car.

The appellant claimed that Mr. Barnette's testimony supported his theory that his ex-wife had initiated the dispute so that she could obtain exclusive custody of Lee. He claimed that Mrs. Haught had "set him up" because she knew that he would follow her if she picked Lee up early. The appellant stated that Mr. Barnette's testimony showed that Mrs. Haught was selecting the site where she would drive to once he began following her.

In *State v. Ward*, 188 W.Va. 380, 424 S.E.2d 725 (1991), this Court upheld a trial court's refusal to allow a defense rebuttal witness to testify. Counsel for the defendant failed to disclose the witness to the State prior to trial, and in addition, the witness violated the trial court's sequestration order. With respect to the failure to disclose the witness, this Court, adopting the holding of the United States Supreme Court in *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), held in Syllabus Point 1 of *Ward* that,

> Where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule of Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article [III], section 14 of the West Virginia Constitution to preclude the witness from testifying.

In the case *sub judice*, the circuit court found that the appellant had knowledge of where Mr. Barnette could be located and had failed to give the State proper notice. However, the evidence shows that Mr. Barnette was not located by the process server until the day prior to trial, and that the appellant still did not have an address or telephone number for him because he was found on the street. The only phone number the appellant had for Mr. Barnette was the one given to the State prior to trial. Evidently, by calling that phone number, the process server was able to ascertain that Mr. Barnette was in the area and eventually, he located him on the street. The State apparently did not make any further attempt to locate Mr. Barnette after calling the phone number and learning that Mr. Barnette did not live at that residence anymore.

Unlike the defendant's attorney in *Ward*, who knew about the witness and the content of his testimony three months prior to trial, the appellant's counsel in this case never spoke to Mr. Barnette prior to trial. However, Mr. Barnette was disclosed as a potential defense witness. In addition, when Mr.

Barnette appeared on the first day of trial, he refused to speak with the State, indicating that he probably would not have been cooperative if he had been previously located.

After reviewing all of the evidence, we are unable to conclude that the appellant's failure to disclose Mr. Barnette's location was willful or motivated by a desire to obtain tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence. The evidence shows that Mr. Barnette was essentially "homeless" and that appellant's process server only located him on the street one day prior to trial. Contrary to the circuit court's ruling, there is no evidence in the record that a mutual friend kept the appellant informed of Mr. Barnette's location. Mr. Barnette's testimony was crucial to the appellant's theory of the case, and thus, we find that the circuit court erred by refusing to allow him to testify. Accordingly, we reverse the final order of the circuit court and remand this case for a new trial.

In light of our finding that the appellant's convictions must be reversed because the circuit court erred by excluding Mr. Barnette's testimony, we need not address the remaining assignments of error. However, for the purpose of providing guidance to the circuit court upon remand, we feel compelled to examine the parties' arguments with respect to the meaning of W.Va. Code § 61-8D-3(c) (1996). This statute provides that,

> Any person who abuses a child and by the abuse creates a substantial risk of serious bodily injury or of death to the child is guilty of a felony and, upon conviction thereof, shall be fined not more than three thousand dollars and confined to the custody of the division of corrections for not less than one nor more than five years.

W.Va. Code §61-8D-3(c). W.Va. Code § 61-8D-1(1) (1988) defines "abuse" as "the infliction upon a minor of physical injury by other than accidental means."

Initially, the appellant argued that the evidence was insufficient to support his conviction because it did not show that his son had suffered an "injury" as set forth in the statute. During oral argument, the appellant's counsel conceded that under the statute, a child did not have to suffer a serious bodily injury. However, counsel argued that at least a "substantial probability" of injury was necessary. In other words, counsel asserted that the term "risk," which is not specifically defined by the statute, means "probability." In response, the State asserted that the evidence only needed to show a "substantial possibility" of injury to support a conviction under the statute.

In accordance with this Court's longstanding rules of statutory construction, "'[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)." Syllabus Point 2, *Szturm v. Huntington Blizzard Hockey Associates Limited Partnership*, 205 W.Va. 56, 516 S.E.2d 267 (1999). In addition, "'[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)." Syllabus Point 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997). However, "[e]ach word of a statute should be given some effect and a statute must be construed in accordance with the import of its language.

Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syllabus Point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

Following these rules of statutory construction, we agree with the State's conclusion that the term "risk" denotes a "possibility." The common, ordinary, and accepted meaning of the word "risk" is a "possibility of loss or injury." *Webster's New Collegiate Dictionary* 992 (1981). Therefore, applying this definition to the statute, we hold that the offense of child abuse creating a risk of injury as set forth in W.Va. Code § 61-8D-3(c) is committed when any person inflicts upon a minor physical injury by other than accidental means and by such action, creates a substantial possibility of serious bodily injury or death.[4]

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Marion County entered on April 19, 1999, is reversed, and this case is remanded for a new trial.

Reversed and remanded.

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[4]Although no instructional error was asserted in this appeal, we note that State's Instruction No. 9 occasionally omitted the words "substantial risk of serious bodily injury" as set forth in W.Va. Code § 61-8D-3(c). Upon remand, the instruction should use the full language of the statute consistent with our holding today.

179 W. Va. 686, 371 S.E.2d 614

Supreme Court of Appeals of West Virginia

STATE of West Virginia

v.

Elmer STACY

No. 18063.

July 18, 1988

SYLLABUS BY THE COURT

1. At common law, trial courts assessed the admissibility of infant testimony in terms of the child's competence to testify, leaving juries to determine the credibility of the witness. In reality, with child witnesses the distinction between competency and credibility is blurred. With the adoption of *W.Va. Rules of Evidence* 601, which tracks its federal counterpart, the analysis of competency is replaced by a balancing of the probative value of the testimony against any unfair prejudice resulting from it under *W.Va. Rules of Evidence* 403. While the adoption of the *W.Va. Rules of Evidence* has changed the terminology of the analysis, the underlying problems of child witness testimony in sexual abuse cases remain substantially unchanged.

2. "When a child's capacity to testify that she was the victim of a sexual abuse or neglect is [in question], the court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview." Syllabus Point 2, *Burdette v. Lobban,* 174 W.Va. 120, 323 S.E.2d 601 (1984).

Kendrick King, Welch, for Elmer Stacy.

Charles G. Brown, Atty. Gen., Silas Taylor, Dist. Atty. Gen., Charleston, for state.

NEELY, Justice:

Elmer Stacy was convicted by a jury on 25 July 1986, of first-degree sexual abuse for sexual contact with a five-year-old girl. Defendant is a twenty- eight-year-old of limited intelligence See footnote 1 who was invited to live in the home by the victim's parents. The state relied almost exclusively on the victim's testimony that defendant touched her between the legs (through clothing), touched her "titties," and tried to kiss her. The state's evidence included the testimony of the victim's parents that their daughter told them defendant touched her in this manner and the testimony of a physician's assistant who examined the child two days later. The physician's assistant testified that the child's hymen was intact and that there was no evidence of sperm, but that there was "quite a bit of irritation in the vaginal area." He further testified that this irritation was consistent with the alleged sexual contact, but also that there were numerous other possible causes

and that he receives many complaints of such irritation from young girls, particularly during warm months.

Before the child's testimony, the court conducted an *in camera* competency hearing. The court and both attorneys asked the child questions to gauge her intelligence, her ability to remember and relate facts, and her understanding of the necessity to tell the truth. The defendant's counsel argued that the child should be interviewed by an independent psychiatrist or psychologist to make a determination of the child's competency before allowing her to testify in accordance with our decision in *Burdette v. Lobban,* 174 W.Va. 120, 323 S.E.2d 601 (1984). The trial judge overruled the defendant's motion and allowed the child to take the stand. Defendant renewed his *Burdette* challenge in a motion to set aside the jury verdict, which motion was denied.

On appeal, defendant assigns as error the court's ruling on the victim's competence to testify, citing *Burdette.* We find merit to this assignment See footnote 2 and reverse.

In *Burdette,* the guardian *ad litem* of a five-year-old child in an abuse and neglect proceeding, under *W.Va. Code,* 49-6-1 [1977], *et seq.* sought a writ of prohibition against a circuit judge who ordered that the infant be interviewed by her father's counsel outside the presence of her guardian *ad litem.* After ruling that the child was statutorily entitled to the presence of counsel, this Court also stated:

> Often a child in an abuse proceeding is the only potential witness. Thus, the problem confronting any court at the outset of an abuse proceeding is whether the child is competent to testify against her parents. When dealing with adult witnesses, the issues of competency and credibility are separable. These distinctions become blurred in the case of a five-year-old, however. In some situations a child may be engaging in phantasy. For example, the child may desire to 'hurt' the parent for a real or imagined grievance. In other cases, the child may be incapable of making rational judgments on his own without being unduly influenced by others. *See,* Note, "Lawyering for the Abused Child: You Can't Go Home Again" 29 *UCLA L.Rev.* 1216, at 1241-44 (1982).
>
> Therefore, we understand a trial court's concern to determine that a child is a competent witness before she is allowed to be the prime accuser. To do this the court should appoint a neutral child psychologist or psychiatrist to inquire into the child's capacity.

Burdette v. Lobban, 174 W.Va. 120, 122, 323 S.E.2d at 603 (1984).

The requirement for this interview by a psychiatrist or psychologist under *Burdette* is not mandatory, but rather subject to the sound discretion of the trial judge and the facts of the case.

At common law, competency, decided by the judge, was strictly distinguished from credibility, which was determined solely by the jury. Generally, See footnote 3 there was a rebuttable presumption against competency for children under fourteen. Many states have enacted statutes establishing a rebuttable presumption against competency for children less than ten or fourteen. See footnote 4 This presumption can be overcome by showing the child is able to receive and relate accurately and truthfully the facts in question. The latter part of this test requires that the child understands the difference between truth and falsity and comprehends the legal and moral obligation to tell the truth.

We noted in *Burdette* that when dealing with infant witnesses, the issues of competency and credibility are not clearly separable. As the Supreme Court of Alaska pointed out in *McMaster v. State,* 512 P.2d 879 (1973), a case involving a five-year-old witness:

> As a general rule it is said that th e court is the judge of a witness' s competency but that the credibility of a witness is a matter to be determined by a jury. However, competency to te stify and credibility of a witness are concepts whose boundaries merge. When a judge decides that a witness is incompetent to testify, he is stating that the witness' s ab ility to observe, to remember, to relate, or to be truthful is so im paired that his testim ony is untrustworthy. When a witness is adjudged com petent to testify, this merely means that he has some mi nimum ability to perform the four functions of a witness. It does not , however, mean that he will do so. Counsel for either party may, of course, attempt to impeach his ability to observe, remember, relate and tell the trut h in each particular case. Thus competency and credibility are concepts which weigh the same factors in evaluating a witness' s testim ony. Whether a testim onial im pairment renders a witness incompetent or merely impeaches his credibility is simply a matter of degree.

512 P.2d at 881, note 4.

The fact that the difference between competency and credibility is largely a matter of degree is inherently recognized by *FRE* 601 See footnote 5 which establishes a general presumption of competency for all witnesses. After our decision in *Burdette,* this Court adopted the *West Virginia Rules of Evidence* effective February 1, 1985. Rule 601, "General Rule of Competency" tracks *FRE* 601 and states: "Every person is competent to be a witness except as otherwise provided for by statute or these rules." In addition, West Virginia's rape shield statute, *W.Va. Code,* 61-8B-11(c) [1984] provides: "In any

prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying." A strict reading of Rule 601, *W.Va. Rules of Evidence* would suggest that a judge is powerless to exclude any witness on grounds of competency. However, many courts implementing the federal counterpart of our rule still leave the question of competency to the discretion of the trial judge and allow a witness to be excluded on this basis should he be incapable of telling the truth or appreciating the significance of his oath. See footnote 6

Professor Cleckley has examined the impact of Rule 601 and argues that the best approach for the trial judge is not to focus on the distinction between competency and credibility.

> "The plain m eaning of Rule 601 appear s to deprive the trial judge of any discretion whatsoever to exclude testimony on grounds of competency.... The preferable approach may be to focus the analysis not on general competency under Rule 601 but on relevancy under Rules 401 and 403."

F. Cleckley, *Handbook on Evidence for West Virginia Lawyers,* 2.2(B) at 28 [1986].

Rule 401, *W.Va. Rules of Evidence,* defines "Relevant Evidence" and Rule 403 See footnote 7 allows a trial judge discretion to exclude testimony should the danger of unfair prejudice substantially outweigh the probative value of the testimony.

With the presumption of competency established by Rule 601, we agree that the proper course is for the trial court to weigh the probative value of the evidence against the prejudice resulting from its allowance. However, the fact that Rule 601 has changed the terminology used to analyze the problem surrounding an infant's testimony does not significantly change the underlying problem.

In sexual abuse cases, it can be highly inflammatory for a jury to hear an infant speak of sexual abuse by a defendant. What juror will not tend automatically to believe a five-year-old when she says she was sexually abused? Yet to exclude the victim's testimony because of its prejudicial effect would make the prosecution of such cases nearly impossible because the victim's testimony is usually the mainstay of the state's evidence. We believe that the better course is to order an evaluation in accordance with our decision in *Burdette* when the balance of probative value versus prejudice of a child's testimony is a close question.

In *State v. Jones,* 178 W.Va. 519, 362 S.E.2d 330 (1987), we held that the trial judge did not abuse his discretion in finding a seven-year-old competent to testify against her father on a charge of first-degree sexual abuse. The crime in that case was committed in

September, 1984, prior to our adoption of Rule 601. Therefore, our analysis of that case was made under the then existing common-law rules of competency.

In *Jones,* the witness was seven years old and understood the obligation to speak the truth on the witness stand. In addition, "She had an independent recollection of the events and understood the nature of the questions posed to her." 178 W.Va. at 521, 362 S.E.2d at 332. We cannot say in the case before us that the five-year-old witness here understood the nature of the questions posed to her.

Recently, in *State v. Ayers,* 179 W.Va. 365, 369 S.E.2d 22 (W.Va.1988), an appeal from a conviction of first degree sexual assault and incest, we held that the trial judge did not abuse his discretion in failing to grant defendant's motion for an independent psychiatric competency evaluation. In *Ayers,* the victim (H) was seven years old and was playing with her cousin when she began to cry and said that her stepfather, the defendant, had sexually assaulted her. Two days later the child was taken to the family physician who recorded her history. H stated that her stepfather attempted intercourse with her on seven occasions. She graphically detailed her stepfather's actions and stated that penetration had occurred on three occasions during the previous week.

A week later, H was hospitalized for 12 days for an adjustment disorder precipitated by her court-ordered removal from the home. She was treated by a psychiatrist who was not subpoenaed by either side, but whose records were used extensively at the *in camera* hearing on H's competency. The defendant called a witness with a master's degree in social work at this hearing. This witness discussed the psychiatrist's notes and then was asked by defendant's counsel if he believed the psychiatrist's report created "at least some question" of undue influence by family members that would justify an independent psychiatric evaluation of the child's competency. He stated: "[I]t would be no loss to the Court to have a second opinion to ascertain whether this child has been coached or her testimony might be valid. I see no loss whatsoever that this would not and could not be done."

The trial judge ruled that H was competent to testify, without resorting to an additional psychiatric evaluation, and we upheld his decision on appeal. In *Ayers,* however, the victim was seven years old, she described the sexual assault in a detailed and graphic manner, and she was examined by a psychiatrist who was not called at trial, but whose notes were extensively used at the *in camera* competency hearing. The defendant's own witness, in answer to a leading question, refused to say that an additional psychiatric evaluation was indicated but that it would "be no loss to have a second opinion."

In the case before us today, the victim was five years old. Two years is a significant difference when we are talking about young children. In addition, unlike the *Ayers* victim, this five-year-old victim was never examined by a psychiatrist. On direct

examination, the child did not remember how to play the card game "war" she and defendant were playing when the incident occurred, and she did not remember a visit she received from two protective services workers. More significantly, one of her first statements on direct examination was that defendant "raped" her, although her earlier testimony was that defendant touched her between the legs through her clothing. Then, on cross-examination, the child stated that she knew what "rape" meant, but could not answer when asked to define or explain the term.

The child witness in this case also testified on cross-examination that she did not want to tell her mother of the incident because she (the victim) was "jealous," but was unable to respond coherently to counsel's questions about the meaning of the word "jealous" and her own supposed feelings of "jealousy." Clearly, this child's ability to recall events and to testify truthfully about them was put into serious question. Also, there was significant impairment of defendant's right to confront his accuser through effective cross-examination. Repeatedly, the victim was either non-responsive or responded incoherently to cross-examination. The ability to respond to questions is an inherent part of the ability to relate facts which the Alaska Court, *supra,* discussed as one of the four requirements for testimony to be sufficiently trustworthy to be considered admissible evidence. When a victim will testify only about the fact of abuse by a defendant, and will not effectively respond to cross- examination attempting to elicit more detail of the incident or evidence relevant to impeachment, a constitutional question of defendant's right to confront the witness against him may be raised. See footnote 8

The *W.Va. Rules of Evidence* are supplemented in sexual abuse cases by *W.Va. Code,* 61-8B-11(c) [1984] See footnote 9 which provides that neither age nor mental capacity precludes a victim of sexual abuse from testifying. Although the policy articulated in this statute is perfectly appropriate to the extent that it rectifies previous arbitrary presumptions against competency in the common law rules of evidence, *W.Va. Code,* 61-8B-11(c) [1984] may be required to yield if it conflicts with well-established due process constitutional rights.

Under the facts of this case, it was error for the trial judge not to grant defendant's motion for an evaluation by an independent psychiatrist in accordance with our decision in *Burdette v. Lobban,* and for that reason this case is reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Footnote: 1 Testimony suggested defendant is "closer to having the mind of a child or young teenager than that of an adult."

Footnote: 2 *As we reverse this conviction on the Burdette issue, we need not address defendant's other assignments of error.*

Footnote: 3 *West Virginia presumed incompetency of children under fourteen. State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).*

Footnote: 4 *See 60 ALR 4th 369.*

Footnote: 5 *FRE 601, titled "General Rule of Competency," reads:*
Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law.

Footnote: 6 *U.S. v. Gutman, 725 F.2d 417 (7th Cir.1984), cert. denied 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 183 (1984), (Trial court has a duty in appropriate case to conduct competency hearing regarding witness's sanity, but judge did not abuse discretion in disallowing hearing in this case); U.S. v. Odom, 736 F.2d 104 (4th Cir.1984) (Can disqualify as incompetent a witness who does not have knowledge of the relevant facts, lacks the capacity to recall, or who does not understand duty to testify truthfully, but no error where trial judge found witnesses competent); but see, U.S. v. McRary, 616 F.2d 181 (5th Cir.1980), cert. denied, 456 U.S. 1011, 102 S.Ct. 230, 73 L.Ed.2d 1307 (1982), ("Under the new Federal Rules of Evidence it is doubtful that mental incompetence would even be grounds for disqualification of a prospective witness." Error peremptorily to exclude witness's testimony.)*

Footnote: 7 *Rule 403, titled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time," reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."*

Footnote: 8 *Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (A primary purpose of the confrontation clause of sixth amendment is to secure right to cross-examination); Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (Violated confrontation clause to prevent defense counsel from asking principal witness his correct name and address).*

Footnote: 9 *Text supra at p. 616.*

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

No. 30654

FILED
July 1, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: STEPHEN TYLER R.

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Juvenile Action No. 01-JA-16-B

AFFIRMED

Submitted: January 21, 2003
Filed: July 1, 2003

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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

2. "Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court." Syllabus point 10, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000).

3. "In exercising its discretion to decide whether to permit an

incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors." Syllabus point 11, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000).

4. In order to activate the procedural protections enunciated in Syllabus points 10 and 11 of *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000), an incarcerated parent who is a respondent to an abuse and neglect proceeding must inform the circuit court in which such case is pending that he/she is incarcerated and

request the court's permission to attend the hearing(s) scheduled therein. Once the circuit court has been so notified, by the respondent parent individually or by the respondent parent's counsel, the determination of whether to permit the incarcerated parent to attend such hearing(s) rests in the court's sound discretion.

5. "[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements." Syllabus point 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980).

6. "The duty of a parent to support a child is a basic duty owed by the parent to the child[.]" Syllabus point 3, in part, *Wyatt v. Wyatt*, 185 W. Va. 472, 408 S.E.2d 51 (1991).

7. Pursuant to the plain language of W. Va. Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.

8. A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2001), amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

Davis, Justice:

The appellant herein and respondent below, Robert R.[1], appeals from an order entered November 27, 2001, by the Circuit Court of Raleigh County terminating his parental rights to his minor child, Stephen Tyler R., upon a finding of abuse and neglect. Before this Court, Robert R. asserts that the circuit court erred by (1) holding the adjudicatory hearing in his absence in violation of his due process rights; (2) concluding that he had abused and/or neglected Stephen; and (3) exceeding its authority by requiring him to pay child support for Stephen after it had terminated his parental rights to this child. Upon a review of the parties' arguments, the record submitted for appellate review, and the pertinent authorities, we affirm the ruling of the circuit court. We conclude that the circuit court committed no reversible error by holding the adjudicatory hearing in Robert R.'s absence; properly found that Robert R. subjected his son, Stephen Tyler R., to the conditions of abuse and/or neglect; and acted within its statutorily-granted discretion to continue Robert R.'s support obligation following the termination of his parental rights.

[1]"In this case involving sensitive facts, we adhere to our usual practice adopted in other such cases and refer to the parties by their last initials rather than by their complete surnames." *In re Emily B.*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000) (citations omitted).

I.

FACTUAL AND PROCEDURAL HISTORY

The instant abuse and neglect proceeding commenced when the appellee herein and petitioner below, the West Virginia Department of Health and Human Resources [hereinafter referred to as "DHHR"], filed, in the Circuit Court of Raleigh County, on February 20, 2001, a petition alleging that the infant child, Stephen Tyler R.,[2] had been abused, neglected, and/or abandoned. Such allegations were based upon a purported suicide attempt by the child's mother and Mr. R.'s girlfriend, Aisha S., on January 13, 2001; Ms. S.'s alleged marijuana use; Mr. R.'s felony drug charges; and ongoing instances of domestic violence between the child's parents, Mr. R.[3] and Ms. S., which violence ultimately endangered the safety of case workers who were attempting to provide home services to prevent the removal of Stephen from his parents' home pursuant to a January 30, 2001, family treatment plan.[4] During an emergency hearing on February 20, 2001, the court deemed Stephen to be in imminent danger and placed him with Ms. S.'s grandmother, Leva V. The court further awarded supervised visitation to both

[2]Stephen was born on April 2, 2000.

[3]Although Mr. R. was not listed on Stephen's birth certificate as his father, the parties do not dispute that Mr. R. is, in fact, Stephen's biological father. It is unclear from the record whether Mr. R. has submitted to a paternity test to conclusively establish this relationship.

[4]The parties initially began receiving services through DHHR in conjunction with a family treatment plan developed on August 11, 2000. This intervention by DHHR was necessitated by Ms. S.'s suicide attempt in May, 2000, and reports of domestic violence between Mr. R. and Ms. S.

parents. Following this proceeding, Ms. S. and Mr. R. waived their rights to a preliminary hearing.

An adjudicatory hearing was scheduled for April 20, 2001, and was ultimately held on June 8, 2001. Mr. R. did not appear for this hearing because he was incarcerated in Kentucky in connection with an unrelated offense.[5] At the hearing, Mr. R.'s counsel informed the court that her client was not present, but was not aware that his absence was due to his Kentucky incarceration. Despite the objections of Mr. R.'s counsel to conducting the hearing without him being present, the court proceeded with the hearing. Based upon testimony concerning various instances of domestic violence between Mr. R. and Ms. S., and, in particular, Mr. R.'s alleged beating of Ms. S. on November 19, 2000, while she was holding Stephen, the court determined that Mr. R. had abused his child. The court also found that Ms. S. had neglected her child as a result of her stipulation that Stephen had been neglected when she had exposed him to hostile situations. By orders entered July 13, 2001, the court rendered the above findings of abuse and neglect and granted Ms. S. a six-month post-adjudicatory improvement period. The court did not, however, grant Mr. R. a similar improvement period as his counsel made no such request.

[5]In May, 2001, Mr. R., while seeking employment in Kentucky, was involved in a motor vehicle accident in that State and charged with wanton endangerment, terroristic threats, and leaving the scene of an accident. The record is unclear regarding the crime(s) of which he was convicted and the length of his resultant sentence therefor.

Although Mr. R.'s dispositional hearing was scheduled for July 27, 2001, it was not held until September 12, 2001. At this hearing, the court considered and denied Mr. R.'s motion for a post-adjudicatory improvement period.[6] Counsel for Mr. R. also renewed his earlier objection that the court had conducted the adjudicatory hearing in Mr. R.'s absence. Mr. R. provided brief testimony regarding his Kentucky incarceration at the time of the adjudicatory hearing, but the court again overruled counsel's objection on this point. By order entered November 27, 2001, the circuit court terminated Mr. R.'s rights to his minor child, Stephen Tyler R., but continued his duty to support his son.[7] From these dispositions, Mr. R. appeals to this Court.[8]

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[6]Due to staff changes in the Raleigh County Public Defender's Office, Mr. R. was represented by one attorney at the adjudicatory hearing, and by different counsel at the dispositional hearing. It appears that counsel who represented Mr. R. at the dispositional hearing did not file a motion for a post-adjudicatory improvement period until September 6, 2001, approximately one week before said hearing.

[7]The circuit court did not, however, terminate Ms. S.'s parental rights to Stephen. Rather, the court continued the six-month post-adjudicatory improvement period it had granted her following the June 8, 2001, adjudicatory hearing. Since the court's disposition of this matter, though, DHHR has moved the court to discontinue Ms. S.'s improvement period and to terminate her parental rights, as well. In any event, Ms. S. is not a party to the instant appellate proceeding.

[8]On January 25, 2002, the circuit court extended the time within which Mr. R. was required to file his petition for appeal to permit for the preparation and acquisition of transcripts of the proceedings had in this matter.

II.

STANDARD OF REVIEW

Procedurally, this matter comes before us as an appeal from the lower court's conclusion that the subject child was abused and/or neglected and its corresponding determination that his best interests necessitated the termination of his father's parental rights. In appeals of abuse and neglect cases, such as the instant proceeding, we apply a compound standard of review.

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). With this standard in mind, we proceed to consider the parties' arguments.

III.

DISCUSSION

On appeal to this Court, Mr. R. raises three assignments of error, arguing that the circuit court erred by (1) holding the adjudicatory hearing in his absence in violation of his due process rights; (2) concluding that he had abused and/or neglected his son; and (3) exceeding its authority by requiring him to pay child support for Stephen after it had terminated his parental rights to his child.

A. Due Process

Mr. R. first contends that he was denied his right to due process when the circuit court conducted the adjudicatory hearing in his absence. In the proceedings underlying the instant appeal, an adjudication of whether Mr. R. had abused and/or neglected Stephen was initially scheduled to be held on April 20, 2001. This hearing did not take place, however, until June 8, 2001. At the appointed hearing time, Mr. R. was absent from the proceedings, and neither the circuit court nor his counsel knew of his whereabouts, although Mr. R.'s counsel did object to the conduction of the hearing in her client's absence. Mr. R. represents that he was absent from this proceeding because he was being held in the Pike County, Kentucky, jail incident to a traffic arrest. Additionally, Mr. R. claims that he wrote a letter to the presiding judge in Pike County, Kentucky, to request leniency so that he could participate in the Raleigh County, West Virginia, abuse and neglect proceedings regarding Stephen. Nevertheless, there is no indication from the

record that Mr. R. similarly attempted to notify either the circuit court or his counsel about his Kentucky confinement. On appeal to this Court, Mr. R. claims that the circuit court's decision to hold the adjudicatory hearing in his absence violated his due process right to participate therein, specifically his opportunity to be heard and to cross-examine witnesses.

Although we previously have recognized that an incarcerated parent may participate in an abuse and neglect proceeding, this right is conditional, not automatic, and subject to many limitations.

> Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.
>
> In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of

> incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

Syl. pts. 10-11, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000). In the case *sub judice*, the circuit court did not consider whether Mr. R. should be permitted to participate in the adjudicatory hearing or whether such proceeding should be continued until his presence could be secured because, in short, the circuit court did not know that the reason for Mr. R.'s absence was his Kentucky incarceration. While we do not treat lightly an individual's right to receive the process which he/she is constitutionally due, we similarly do not expect our circuit court judges to serve as omnipotent soothsayers who can foretell the location of any party who is absent from proceedings held in their courtrooms.

When constitutionally-protected rights are involved in a particular case, we frequently have found that the party entitled to the protections thereof can also effectuate a forfeiture or waiver of such safeguards. *See, e.g.*, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 682, 510 S.E.2d 507, 516 (1998) (concluding that "[t]he failure of respondents . . . to request an administrative hearing within the time provided by statute constituted a waiver of their right to do so and their [driver's] licenses were properly revoked"); *State v. Crabtree*, 198 W. Va. 620, 629, 482 S.E.2d 605, 614 (1996) (observing that a criminal defendant's right to be present at all critical stages of a criminal proceeding "is not

absolute and can be waived by the voluntary action of the defendant" (citation omitted)); Syl. pt. 1, *State v. Crouch*, 178 W. Va. 221, 358 S.E.2d 782 (1987) ("For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel."); *State ex rel. Arbogast v. Mohn*, 164 W. Va. 6, 13-14, 260 S.E.2d 820, 824-25 (1979) (recognizing that, when criminal penalties for offense are modified by Legislature, criminal defendant may waive right to elect under which statute he/she wishes to be sentenced); Syl. pt. 1, *State v. McArdle*, 156 W. Va. 409, 194 S.E.2d 174 (1973) ("Since waiver of juvenile jurisdiction is a critical stage in criminal proceedings against a juvenile, constitutional due process demands that the child, his parents and his counsel be afforded reasonable notice of the waiver hearing, the charge to be considered, a reasonable opportunity to prepare a defense to such waiver and a meaningful hearing at which evidence on behalf of the juvenile should be permitted."). *Accord Dusanek v. Hannon*, 677 F.2d 538, 542-43 (7th Cir. 1982) ("The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure." (citations omitted)). *See also United States v. Tipton*, 90 F.3d 861, 872-76 (4th Cir. 1996) (distinguishing between waiver of right and forfeiture of right resulting from failure to timely assert entitlement thereto). *But see, e.g., Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995) (refusing to find motorist had waived due process right to administrative hearing where neither attorney nor respondent was responsible for untimely

request for continuance).

This is particularly true where, as in the instant matter, the process that is due varies with the circumstances of the party seeking the protections thereof. For example, when a respondent parent to an abuse and neglect proceeding is incarcerated, additional procedural safeguards must be considered to ascertain whether he/she may physically participate in the attendant proceedings, whereas such concerns generally are not at issue when the respondent parent has not been confined. *See generally Jeanette H.*, 207 W. Va. 154, 529 S.E.2d 865. *Accord In re Emily B.*, 208 W. Va. 325, 331 n.11, 540 S.E.2d 542, 548 n.11 (2000). Nevertheless, when such protective measures are in place, "'a state cannot be held to have violated due process requirements when it made procedural protection[s] available and the [complaining party] has simply refused to avail himself of them.'" *Heston v. Marion County Parks & Recreation Comm'n*, 181 W. Va. 138, 143 n.6, 381 S.E.2d 253, 258 n.6 (1989) (per curiam) (quoting *Dusanek v. Hannon*, 677 F.2d at 543) (additional citations omitted).

In the proceedings underlying the instant appeal, Mr. R. was entitled to have the circuit court consider whether he could be released from his Kentucky incarceration for the limited purpose of attending the West Virginia adjudicatory hearing regarding Stephen. *See* Syl. pts. 10-11, *Jeanette H.*, 207 W. Va. 154, 529 S.E.2d 865. Our holding in this regard, though, presupposes that the presiding circuit court has knowledge of said

respondent parent's confinement through the communication of such fact by either the parent, him/herself, or the parent's attorney.[9] *See, e.g.*, *id.*, 207 W. Va. at 159, 529 S.E.2d at 870 (discussing proposed order Jeanette sent to Cabell County Circuit Court "directing her transportation from the McDowell County Jail so that she might attend the [Cabell County abuse and neglect] proceedings"). Given that the preeminent concern in abuse and neglect proceedings is the best interests of the child(ren) subject thereto[10] and the speedy resolution thereof[11], it seems unduly burdensome to require circuit courts to conduct an inquiry as to the whereabouts of every respondent parent who fails to appear for a scheduled hearing in order to ascertain whether their absence is attributable to incarceration and whether, as a result of such confinement, they should be afforded further

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[9]"In child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel because of the requirements of the Due Process clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *State ex rel. Lemaster v. Oakley*, 157 W. Va. 590, 203 S.E.2d 140 (1974). *See also* W. Va. Code § 49-6-2(a) (1996) (Repl. Vol. 2001) ("In any proceeding under the provisions of this article, . . . [the child's] parents . . . shall have the right to be represented by counsel at every stage of the proceedings[.]"); Syl. pt. 8, in part, *In re Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995) ("Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *incident to the filing of each abuse and neglect petition*." (emphasis in original)).

[10]"Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996).

[11]"Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

procedural protections attendant thereto.

Rather, we find that the better course is to require the party seeking the benefit of additional safeguards to affirmatively notify the presiding tribunal of the facts which may require the court to invoke such protective measures.[12] Such a procedure will thus adequately protect the respondent parent's interests in his/her parental rights to his/her child(ren)[13] without hindering the overwhelming policy of resolving abuse and

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[12]We have recognized a similar duty to exist in administrative proceedings wherein we have required an aggrieved party who wishes to benefit from certain procedural protections to alert the presiding tribunal as to their applicability. *See, e.g.*, Syl. pt. 4, *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997) ("In order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), an aggrieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default."). *See also Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 209 W. Va. 83, 88 n.13, 543 S.E.2d 364, 369 n.13 (2001) ("recommend[ing] that future civil service officers observe basic concepts of fairness and judicial economy by timely filing a request [for a pre-termination hearing] when their employers fail to honor their statutory rights" (citation omitted)).

[13]"In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syl. pt. 1, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973). *See also* W. Va. Code § 49-6-2(c) ("In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses."); Syl. pt. 2, *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 ("West Virginia Code, Chapter 49, Article 6, Section 2, as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having (continued...)

neglect matters promptly in order to secure the subject child(ren)'s safety and well-being.[14] Accordingly, we hold that, in order to activate the procedural protections enunciated in Syllabus points 10 and 11 of *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000), an incarcerated parent who is a respondent to an abuse and neglect proceeding must inform the circuit court in which such case is pending that he/she is incarcerated and request the court's permission to attend the hearing(s) scheduled therein. Once the circuit court has been so notified, by the respondent parent individually or by the respondent parent's counsel, the determination of whether to permit the incarcerated parent to attend such hearing(s) rests in the court's sound discretion.

It is undisputed that Mr. R. received notice of the adjudicatory hearing at issue in this assignment of error, and that, in spite of his absence therefrom, he was represented by counsel at that hearing.[15] However, during the proceedings underlying the instant appeal, Mr. R. failed to notify either the Circuit Court of Raleigh County or his counsel that he would be absent from the adjudicatory hearing because he was

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[13](...continued)
legal custody of his child, without notice and the opportunity for a meaningful hearing."); Syl. pt. 4, *In re Sutton*, 132 W. Va. 875, 53 S.E.2d 839 (1949) ("A parent having legal custody of his child (Acts of the Legislature, 1941, Chapter 73, Article 6, Section 2) cannot be divested of parental rights without notice and an opportunity for hearing.").

[14]*See supra* notes 10 & 11.

[15]Additionally, counsel for Mr. R. objected to the hearing proceeding in her client's absence, and presented evidence and cross-examined witnesses on Mr. R.'s behalf.

incarcerated in Kentucky. Neither does the record evidence a request by Mr. R. that the Raleigh County proceedings be continued until a determination had been made as to whether he could be released from confinement for the limited purpose of attending and participating in the adjudicatory hearing. In the absence of even the slightest communication of this fact to the presiding tribunal or his legal representative, we are reluctant to find that Mr. R. acted to invoke the safeguards necessary to protect his due process rights in this regard. Moreover, further postponement of the adjudicatory hearing, without knowledge of Mr. R.'s confinement and the attendant analysis provided by *Jeanette H.*, would have been improper considering the fact that this hearing had already been continued from April 20, 2001, until June 8, 2001, and the overriding concern that abuse and neglect matters should be promptly resolved.[16] *See* W. Va. R. Proc. for Child Abuse & Neglect Proceed. 7 (requiring good cause be shown for continuance of proceedings). Accordingly, we affirm the circuit court's decision to hold the adjudicatory hearing in Mr. R.'s absence and its resultant ruling.

[16]*See supra* note 11 and accompanying text.

B. Findings of Abuse and/or Neglect

For his second assignment of error, Mr. R. complains that the circuit court improperly found that he had abused and/or neglected his son, Stephen, and concluded that

he was not likely to substantially correct such conditions of abuse and/or neglect.[17] In this regard, Mr. R. asserts that the allegations against him, that he had allegedly battered Ms.

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[17]Additionally, Mr. R. complains that the circuit court did not timely enter the dispositional order in this case as required by Rule 36 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. *See* W. Va. R. Proc. for Child Abuse & Neglect Proceed. 36(a) ("At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provisions of W. Va. Code § 49-6-5. The court shall enter a disposition order, including findings of fact and conclusions of law, *within ten (10) days of the conclusion of the hearing*." (emphasis added)). In support of this argument, Mr. R. represents that the order was required to be entered within ten days of the September 12, 2001, dispositional hearing, but was in fact entered on November 27, 2001, which was approximately two and one-half months after the hearing date. While we agree with Mr. R.'s interpretation of this procedural rule, we do not find that the circuit court's delay in entering its order constitutes reversible error.

> We previously have held that
>
> > [w]here it appears from the record that the process established by the Rules of Procedure for Chid Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

Syl. pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001). Although we find that the temporal requirements for the entry of a dispositional order were not satisfied in this case, such error is harmless as the delay did not substantially frustrate the purpose of such procedural rules. *See* W. Va. R. Proc. for Child Abuse & Neglect Proceed. 2 ("These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child. . . ."). Nevertheless, we admonish courts in which abuse and neglect cases are pending to be ever vigilant and mindful of the procedural rules governing such proceedings in order that the purpose thereof not be defeated.

S. in Stephen's presence and that he was using marijuana during the case worker's February 14, 2001, visit to his home do not constitute abuse and/or neglect as those terms are defined by the governing statute. *Citing* W. Va. Code § 49-1-3 (1999) (Repl. Vol. 2001). Mr. R. also suggests that DHHR failed to adhere to its statutory duty to make every reasonable effort to reunite and preserve the family unit. *Citing* W. Va. Code § 49-6-12(i) (1996) (Repl. Vol. 2001) (charging DHHR with responsibility of "mak[ing] reasonable efforts to reunify [the] family"); W. Va. Code § 49-6D-2(a)(2) (1984) (Repl. Vol. 2001) (recognizing purposes of chapter as including duty of State to "preserve and strengthen the family ties wherever possible, while recognizing both the fundamental rights of parenthood and the State's responsibility to assist the family"); *State ex rel. W. Va. Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987). Responding to Mr. R.'s contentions, DHHR asserts that the circuit court properly found Stephen to be an abused and/or neglected child.

At issue in this assignment of error is whether the evidence presented to the circuit court supports a finding that Mr. R. had abused and/or neglected his son. W. Va. Code § 49-1-3 (1999) (Repl. Vol. 2001) enumerates the criteria for making such a determination:

> (a) "Abused child" means a child whose health or welfare is harmed or threatened by:
>
> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows

another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or

(2) Sexual abuse or sexual exploitation; or

(3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen [§ 48-4-16], article four, chapter forty-eight of this code.

In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

. . . .

(c) "Child abuse and neglect" or "child abuse or neglect" means physical injury, mental or emotional injury, sexual abuse, sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child.

. . . .

(h) (1) "Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

(2) "Neglected child" does not mean a child whose

> education is conducted within the provisions of section one [§ 18-8-1], article eight, chapter eighteen of this code.

In evaluating the evidence presented on the issue of a child's abuse and/or neglect,

> the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

W. Va. Code § 49-6-2(c) (1996) (Repl. Vol. 2001).

Where, however, the court makes

> a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, [the court shall] terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.

W. Va. Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001).[18] *Accord* Syl. pt. 2, *In re R.J.M.*,

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[18]Since the time the proceedings underlying the instant appeal were initiated, the Legislature has amended W. Va. Code § 49-6-5. *Compare* W. Va. Code § 49-6-5 (1998) (Repl. Vol. 2001) *with* W. Va. Code § 49-6-5 (2002) (Supp. 2003). Although the (continued...)

164 W. Va. 496, 266 S.E.2d 114 (1980) ("Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W. Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W. Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.").

> In pertinent part,
>
> "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" . . . mean[s] that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
>
> (1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;
>
> (2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's

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[18](...continued)
amendments were generally stylistic, rather than substantive, in nature, we will nevertheless base our decision herein upon the former version of this statute as that is the law that existed at the time of the relevant events in this case.

> return to their care, custody and control;
>
> (3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;
>
> . . . .
>
> (5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child[.]

W. Va. Code § 49-6-5(b).

During the proceedings underlying the instant appeal, the circuit court considered the evidence presented on behalf of Mr. R. as well as that submitted by DHHR. The court ultimately determined, by adjudicatory order entered July 13, 2001, that Mr. R. had abused and/or neglected Stephen and rendered findings of fact evidencing this conclusion:

> The continued residence of the infant child in the home and in the care and custody by the Respondent Father is contrary to the best interest of the child for reasons stated herein.
>
> That the danger presented by the infant child's present circumstances creates an emergency situation making efforts

> to avoid removing the child from the home unreasonable or impossible;
>
> That there are no reasonable, available, and less drastic alternatives to removing the child from custody by the Respondent Father;
>
> . . . .
>
> That the conduct of the respondent father's violence toward the respondent mother has been more than one time and at least once in the presence of the infant child;
>
> That the November 19, 2000, incident was a planned methodical beating in the presence of the infant child without regard for the infant child nor the respondent mother's welfare;
>
> That [the] evidence supports the fact that the respondent father has subjected the infant child to abuse and/or neglect, therefore the respondent father has abused and neglected the infant child in respect to his conduct;
>
> That the infant child suffers from being in the environment created by the respondent father[.]

Based upon these findings, and the additional record evidence of Mr. R.'s repeated unwillingness to cooperate in the development and execution of a family case plan, we do not conclude that the circuit court erred by determining that Mr. R. had abused and/or neglected his son. Perhaps the most disturbing evidence of such abuse is the incident referenced in the circuit court's findings in which Mr. R. not only battered Ms. S., but did so while she was holding Stephen, who was then only seven months old, in her arms. *See* W. Va. Code § 48-27-101(a)(2) (2001) (Repl. Vol. 2001) (recognizing that

"[c]hildren . . . [who] witness violence against one of their parents . . . . may suffer deep and lasting emotional harm . . . from [such] exposure to domestic violence"); Syl. pt. 8, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991) ("Prior acts of violence, physical abuse, or emotional abuse . . . are relevant in a termination of parental rights proceeding[.]"). *See also Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 714, 356 S.E.2d 464, 468 (1987) ("[S]pousal abuse is a factor to be considered in determining parental fitness for child custody." (citation omitted)); *Collins v. Collins*, 171 W. Va. 126, 297 S.E.2d 901 (1982) (per curiam) (finding that child's mother who had committed acts of domestic violence was unfit custodian for child). Additional record evidence indicated that Mr. R. used marijuana in his son's presence, which can also support a finding of abuse and neglect. *See, e.g., In re Aaron Thomas M.*, 212 W. Va. 604, 609, 575 S.E.2d 214, 219 (2002) (per curiam) (upholding circuit court's finding that "children were emotionally abused by [mother's] repeated drug use in their presence"). Finding no reversible error, we affirm the circuit court's finding that Mr. R. had abused and/or neglected Stephen.

Furthermore, the record is replete with testimony from Mr. R., himself, as well as from professionals who have examined him, indicating that he does not believe he should undergo therapy to manage his anger and evidencing his unwillingness to cooperate in family case plans designed to improve the stability of the family structure in order to provide a safe and suitable home environment for Stephen. Not only does this lack of cooperation delay the correction of the problems initially identified by DHHR in

its petition for abuse and/or neglect as being harmful to Stephen, but such blatant refusal to participate in these plans, in and of itself, suggests that an improvement period would be highly unsuccessful and constitutes grounds for termination of parental rights. *See, e.g.*, W. Va. Code §§ 49-6-5(b)(2-3) (stating that "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" is deemed to exist when the abusing parent refuses to cooperate in the development of a family case plan or has not complied with said family case plan or other rehabilitative services designed to correct such conditions of abuse and/or neglect). *Cf. State ex rel. Virginia M. v. Virgil Eugene S. II*, 197 W. Va. 456, 461, 475 S.E.2d 548, 553 (1996) (per curiam) (indicating that "one instance of alleged abuse . . . . does not constitute the 'compelling circumstances' sufficient to deny the natural mother . . . any chance for rehabilitation" and, thus, granting mother improvement period).

Additionally, DHHR presented evidence that, during its lengthy involvement with this family, Mr. R. has failed to attend scheduled visitations with Stephen provided by various voluntary family treatment plans. This evidence also suggests that an improvement period is not warranted in this case. *See In re Carlita B.*, 185 W. Va. at 628, 408 S.E.2d at 380 ("A parent's level of interest in visiting with his or her child during an out-of-home improvement period is an extremely significant factor for the circuit court to review."). In sum,

> courts are not required to exhaust every speculative possibility

> of parental improvement . . . where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

Syl. pt. 1, in part, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114. *See also* W. Va. Code § 49-6-12 (1996) (Repl. Vol. 2001) (conditioning grant of improvement periods, at all stages of abuse and neglect proceedings, upon clear and convincing evidence that parent will fully participate therein). Based upon the circuit court's findings and the record evidence in this case, we find that Mr. R. was not likely to substantially correct the conditions of abuse and/or neglect with which he had been charged and that granting him an improvement period would have been a futile gesture. Finding that the circuit court did not commit reversible error by denying Mr. R. an improvement period, we affirm the court's ruling in this regard.

C. Continuing Duty to Support Child after Termination of Parental Rights

Lastly, Mr. R. argues that the circuit court erred by continuing his obligation to pay child support for Stephen even though it terminated his parental rights to this child. In rendering its dispositional ruling in this matter, the circuit court ordered "[t]hat it is in the best interest of the infant child that the parental rights of Robert [R.] are hereby **TERMINATED** and forever gone as to the infant child, Stephen Tyler [R.], *but for his duty to pay child support for said infant child.*" (Emphasis added). On appeal to this Court,

Mr. R. complains that the circuit court's ruling is fundamentally unfair because he no longer has the right to visit with his son. He further suggests that future inequities could occur if he is required to pay child support and someone ultimately adopts Stephen; under this scenario, Mr. R. argues that the adoptive parent could then enjoy the rights and benefits of parenthood without also having to pay for Stephen's support and maintenance. Finally, Mr. R. asserts that a continuing duty of support is inconsistent with the complete severance of parental rights and the cessation of contact between the child and such parent. *Citing* W. Va. Code § 49-1-3(o) (defining "parental rights" as "any and all rights and duties regarding a parent to a minor child, including, but not limited to, custodial rights and visitational rights and rights to participate in the decisions affecting a minor child"). By contrast, DHHR contends that the circuit court did not abuse its discretion by ordering Mr. R. to pay child support for Stephen after it terminated his parental rights because a parent is obligated to support his or her child. *Citing Wyatt v. Wyatt*, 185 W. Va. 472, 408 S.E.2d 51 (1991). Moreover, DHHR states that the circuit court's ultimate disposition in abuse and neglect proceedings is discretionary, and may include the termination of parental rights and/or responsibilities. *Citing* W. Va. Code § 49-6-5(a)(6).

W. Va. Code § 49-6-5 (1998) (Repl. Vol. 2001) is the statutory provision that governs final dispositions in abuse and neglect proceedings. Pursuant to its terms,

> [t]he court shall give precedence to dispositions in the following sequence:

> (1) Dismiss the petition;
>
> (2) Refer the child, the abusing parent, or other family members to a community agency for needed assistance and dismiss the petition;
>
> (3) Return the child to his or her own home under supervision of the department;
>
> (4) Order terms of supervision calculated to assist the child and any abusing parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;
>
> (5) Upon a finding that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court. . . . The court order shall also determine under what circumstances the child's commitment to the department shall continue. . . . The court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with section five [§ 49-7-5], article seven of this chapter; or
>
> (6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency[.]

W. Va. Code §§ 49-6-5(a)(1-6). *Cf.* W. Va. Code § 49-6-5b (1998) (Repl. Vol. 2001)

(delineating circumstances in which circuit court is required to terminate parental rights). It is the most drastic of these alternatives, the complete termination of a parent's parental rights to his/her child(ren), to which the court resorted in the case *sub judice* and from which Mr. R. now appeals. Thus, we must now consider whether the applicable statutory provision, W. Va. Code § 49-6-5(a)(6), permits a circuit court to terminate a parent's parental rights while continuing his/her obligation to pay child support for the child to which his/her rights have been terminated.

When called upon to discern the meaning of a legislative enactment, this Court resorts to well-accepted rules of statutory construction. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). In order to determine this legislative intent, we must consider the precise language employed by the Legislature in promulgating the statutory provision enactment at issue. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997) ("'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)."); *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630, 474 S.E.2d 554, 560

(1996) ("We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." (internal quotations and citation omitted) (footnote omitted)).

Turning now to the case *sub judice*, the specific statutory provision upon which the circuit court relied in rendering its disposition is subsection (a)(6) of W. Va. Code § 49-6-5. This language provides, in pertinent part,

> [t]he court shall give precedence to dispositions in the following sequence:
>
> . . . .
>
> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, *terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent* and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency[.]

W. Va. Code § 49-6-5(a)(6) (emphasis added). The plain language of this statute affords the circuit court the options of either terminating the abusing parent's parental rights, terminating his/her responsibilities, or terminating both the parent's parental rights and responsibilities. *See id.* "Parental rights" are defined by the Legislature to "mean[] any and all rights and duties regarding a parent to a minor child, including, but not limited to, custodial rights and visitational rights and rights to participate in the decisions affecting

a minor child." W. Va. Code § 49-1-3(o). However, the "responsibilities" to which W. Va. Code § 49-6-5(a)(6) refers have not been so defined.

Where, as here, a word employed in a statute is not specifically defined by the Legislature, we resort to the commonly accepted usage of that term. "Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984). *Accord* Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use."). Our inquiry, then, is whether the realm of parental responsibilities referenced in W. Va. Code § 49-6-5(a)(6) contemplates the obligation of child support.

A parent's duty to support his/her child(ren) has long been recognized to be an integral part of the rubric of parental responsibilities. "The duty of a parent to support a child is a basic duty owed by the parent to the child[.]" Syl. pt. 3, in part, *Wyatt v. Wyatt*, 185 W. Va. 472, 408 S.E.2d 51 (1991). Stated otherwise, "[p]rovision of shelter and financial support for children is one of the most basic components of parental responsibility." *In re Jamie Nicole H.*, 205 W. Va. 176, 183, 517 S.E.2d 41, 48 (1999).

The Legislature, too, has recognized the extreme importance of providing support for one's own child(ren). "It is the intent of the Legislature that to the extent practicable, the laws of this state should encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care." W. Va. Code § 48-11-101(a) (2001) (Repl. Vol. 2001). Such an "obligation of child support is grounded in the moral and legal duty of support of one's children from the time of birth." *Supcoe v. Shearer*, 204 W. Va. 326, 330, 512 S.E.2d 583, 587 (1998) (per curiam). In fact, the duty of support is recognized as being so inherently a parental responsibility that a parent who fails to fulfill this obligation can be sanctioned with criminal penalties. *See* W. Va. Code § 61-5-29 (1999) (Repl. Vol. 2000) (enumerating elements for crime of "[f]ailure to meet an obligation to provide support to a minor" and establishing penalties therefor).[19] *Accord* 18 U.S.C. § 228 (1998) (2000 ed.) (defining

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[19]The complete text of W. Va. Code § 61-5-29 (1999) (Repl. Vol. 2000) provides:

> (1) A person who: (a) Persistently fails to provide support which he or she can reasonably provide and which he or she knows he or she has a duty to provide to a minor; or (b) is subject to court order to pay any amount for the support of a minor child and is delinquent in meeting the full obligation established by the order and has been delinquent for a period of at least six months' duration, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or confined in the county or regional jail for not more than one year, or both fined and confined.

(continued...)

instances in which "[f]ailure to pay legal child support obligations" constitutes a federal criminal offense).[20]

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[19](...continued)

(2) A person who persistently fails to provide support which he or she can reasonably provide and which he or she knows he or she has a duty to provide to a minor by virtue of a court or administrative order and the failure results in: (a) An arrearage of not less than eight thousand dollars; or (b) twelve consecutive months without payment of support, is guilty of a felony and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not less than one year nor more than three years, or both fined and imprisoned.

(3) In a prosecution under this section, the defendant's alleged inability to reasonably provide the required support may be raised only as an affirmative defense, after reasonable notice to the state.

[20]Title 18, section 228 of the United States Code imposes criminal penalties for the "[f]ailure to pay legal child support obligations":

(a) Offense.–Any person who–

(1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;

(2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or

(3) willfully fails to pay a support

(continued...)

[20](...continued)

> obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000;
>
> shall be punished as provided in subsection (c).

(b) Presumption.–The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.

(c) Punishment.–The punishment for an offense under this section is–

> (1) in the case of a first offense under subsection (a)(1), a fine under this title, imprisonment for not more than 6 months, or both; and
>
> (2) in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a)(1), a fine under this title, imprisonment for not more than 2 years, or both.

(d) Mandatory restitution.–Upon a conviction under this section, the court shall order restitution under section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.

(e) Venue.–With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for–

> (1) the district in which the child who is

(continued...)

See also State ex rel. West Virginia Dep't of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 207 W. Va. 290, 295, 531 S.E.2d 669, 674 (2000)

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[20](...continued)

> the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an "obliger") failed to meet that support obligation;
>
> (2) the district in which the obliger resided during a period described in paragraph (1); or
>
> (3) any other district with jurisdiction otherwise provided for by law.
>
> (f) Definitions.–As used in this section–
>
> (1) the term "Indian tribe" has the meaning given that term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a);
>
> (2) the term "State" includes any State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
>
> (3) the term "support obligation" means any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.

18 U.S.C. § 228 (1998) (2000 ed.).

("The State has a broad role in the enforcement of child support[.]"). Thus, it goes without saying that the responsibilities contemplated by W. Va. Code § 49-6-5(a)(6) most certainly include the obligation to pay child support. Accordingly, we hold that, pursuant to the plain language of W. Va. Code § 49-6-5(a)(6) (1998) (Repl. Vol. 2001), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.[21]

Applying this statutory construction to the case *sub judice*, we find that the circuit court did not err by both terminating Mr. R.'s parental rights and continuing his obligation to support Stephen as such disposition was clearly authorized by W. Va. Code § 49-6-5(a)(6). In presenting his arguments on this point to the Court, however, Mr. R. has raised several legitimate concerns which already have been adequately addressed by coordinate statutory provisions but which nevertheless warrant clarification herein.

The first such contention raised by Mr. R. is his assertion that the circuit court's decision to continue his support obligation is patently unfair when he no longer has

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[21]It should be noted, however, that this holding is limited to those cases involving child support obligations in abuse and neglect proceedings. Thus, based upon the narrow scope of the governing statute, W. Va. Code § 49-6-5(a)(6), our decision herein should not be construed as determinative of the propriety, or impropriety, of child support awards in other contexts. *See Rebecca Lynn C. v. Michael Joseph B.*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 5 n.4 (No. 30411 July 1, 2003) (per curiam).

the right to visit or otherwise have contact with his son. We begin by reiterating our earlier observation to the effect that "the duty to pay child support and the right to exercise visitation are not interdependent." *Carter v. Carter*, 198 W. Va. 171, 177, 479 S.E.2d 681, 687 (1996). Moreover, our decision herein is consistent with the Legislature's intended disposition of abuse and neglect cases. Under W. Va. Code § 49-6-5(a)(6), discussed above, the presiding circuit court is granted the authority to choose between the alternatives of terminating parental rights and/or parental responsibilities to achieve the result appropriate in a particular case. However, the dispositional alternative enumerated in W. Va. Code § 49-6-5(a)(5) specifically commands the court selecting this disposition to enter "an appropriate order of financial support by the parents or guardians" even though this alternative also entails the temporary transfer of custody of the subject child(ren) to a guardian other than the child(ren)'s parents. *See also* W. Va. Code § 49-7-5 (1936) (Repl. Vol. 2001) (ordering "person [who is] legally liable for the support of [a] child [who has been placed in home, institution, or under guardianship] [and who] is able to contribute to the support of such child . . . to pay . . . a reasonable sum from time to time for the support, maintenance, and education of the child").

This emphasis on the child(ren)'s right to receive support, rather than on his/her parent's right to retain custody or visitation privileges, is based on the fact that "child support payments are exclusively for the benefit and economic best interest of the child." *Carter v. Carter*, 198 W. Va. at 176, 479 S.E.2d at 686 (citations omitted). *Accord*

Supcoe v. Shearer, 204 W. Va. at 330, 512 S.E.2d at 587 ("[C]hild support is for the benefit of the child[.]"); *Lang v. Iams*, 201 W. Va. 24, 28, 491 S.E.2d 24, 28 (1997) (per curiam) ("An initial child support order is entered for the benefit of the child or children involved."). *See also Carter*, 198 W. Va. at 176, 479 S.E.2d at 686 ("A fundamental concept in the public policy of this State is that the best interest and welfare of the children are paramount when deciding matters of visitation, child support and child custody." (citations omitted)). Above all, "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995).

Mr. R. also suggests that the continuation of his support obligation could have inequitable consequences if Stephen is ultimately adopted by another individual.[22] In this scenario, Mr. R. contends that the adoptive parent would then essentially be relieved of his/her obligation to support Stephen because such responsibility had already been attributed to Mr. R. Again, though, the Legislature has foreseen and definitively addressed this quandary.

[22]It goes without saying, however, that Mr. R.'s argument on this point, and our analysis thereof, pertains only to the limited context of adoptions of children whose parent's parental rights have been terminated as a result of abuse and/or neglect proceedings. Our discussion herein does not apply to adoptions generally or to cases involving the voluntary relinquishment of parental rights.

Although seemingly final, dispositions made in accordance with W. Va. Code § 49-6-5 may subsequently be modified. W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2001) directs

> [u]pon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, That a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5(a)(6)] shall not be modified after the child has been adopted. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department.

Where, as here, multiple statutes relate to the same general body of law, they must be read consistently with one another. "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361. *Accord* Syl. pt. 2, in part, *Beckley v. Kirk*, 193 W. Va. 258, 455 S.E.2d 817 (1995) ("Statutes in pari materia, [sic] must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect." (internal quotations and citations omitted)); Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.").

Reading W. Va. Code § 49-6-6 in conjunction with W. Va. Code § 49-6-5 leads to the logical conclusion that a modification motion may be made to request the presiding court to review a disposition that has imposed upon a parent an obligation to provide support for his/her child. Therefore, we hold that a circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2001), amend a parent's continuing child support obligation or the amount thereof.[23] The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.[24]

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[23]Permitting a court to modify child support awards in abuse and neglect cases is consistent with the statutory law permitting such modification in other domestic matters. *See generally* W. Va. Code § 48-11-105(a) (2001) (Supp. 2003) (allowing court to modify child support order upon proper motion demonstrating "a change in the circumstances of a parent or another proper person or persons").

[24]Such a limitation upon the circuit court's ability to modify orders of support has been explicitly stated by both this Court and by the Legislature. *See, e.g.*, W. Va. Code § 48-1-204 (2001) (Repl. Vol. 2001) ("[A] child support order may not be retroactively modified so as to cancel or alter accrued installments of support."); Syl. pt. 2, in part, *Goff v. Goff*, 177 W. Va. 742, 356 S.E.2d 496 (1987) ("The authority of the circuit courts to modify . . . child support awards is prospective only and, absent a showing of fraud or other judicially cognizable circumstance in procuring the original award, a circuit court is without authority to modify or cancel accrued . . . child support installments."); Syl. pt. 2, *Horton v. Horton*, 164 W. Va. 358, 264 S.E.2d 160 (1980) (per curiam) ("A circuit court lacks the power to alter or cancel accrued installments for child support."). *See also* W. Va. Code § 48-1-204 ("[T]he total of any matured, unpaid installments of child support required to be paid by an order entered or modified by a court of competent jurisdiction, or by the order of a magistrate court of this state, . . . shall stand, by operation of law, as a decretal judgment against the obligor owing such support."); *Carter v. Carter*, 198 W. Va. 171, 175, 479 S.E.2d 681, 685 (1996) ("[C]hild support (continued...)

Having found the circuit court's order terminating Mr. R.'s parental rights while continuing his support obligation to have been within the court's statutory authority to render dispositions in abuse and neglect cases, we find no reversible error and affirm the circuit court's ruling to that effect.

IV.

CONCLUSION

For the foregoing reasons, we find that the circuit court did not commit reversible error by holding the adjudicatory hearing in Robert R.'s absence; finding Mr. R. to be responsible for the abuse and/or neglect of his son, Stephen Tyler R.; and ordering Mr. R. to continue paying child support following the termination of his parental rights to his son. Accordingly, the November 27, 2001, order of the Circuit Court of Raleigh County is hereby affirmed.

Affirmed.

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[24](...continued)
payments vest as they accrue, and matured installments thereof stand as decretal judgments against the party owing such support payments." (internal quotations and citation omitted)); Syl. pt. 1, in part, *Goff v. Goff*, 177 W. Va. 742, 356 S.E.2d 496 ("Matured installments provided for in a decree, which orders the payment of monthly sums for . . . child support, stand as 'decretal judgments' against the party charged with the payments."); Syl. pt. 2, in part, *Kimble v. Kimble*, 176 W. Va. 45, 341 S.E.2d 420 (1986) ("A decretal child support obligation may not be modified, suspended, or terminated by an agreement[.]").

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2008 Term

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February 26, 2008
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33386

IN RE: SUMMER D.

Appeal from the Circuit Court of Brooke County
Hon. Martin J. Gaughan, Judge
Case No. 05-JA-12

REVERSED AND REMANDED

Submitted: January 9, 2008
Filed: February 26, 2008

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions." Syllabus Point 4, *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997).

3. "To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court

discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations." Syllabus Point 5, *In re: Randy H.*, 220 W.Va. 122, 640 S.E.2d 185 (2006).

Per Curiam:

In this appeal from the Circuit Court of Brooke County, we are asked to review a circuit court order that denied a guardian *ad litem*'s motion to amend a petition alleging that a child had been abused and/or neglected. As set forth below, we reverse the circuit court's order.

I.

This case centers upon the welfare of Summer D., a 37-month-old child (at the time of this opinion) who has spent all but four months of her life in foster care. Summer D. is the natural daughter of April T. and Douglas D.

Summer D. was born in December 2004, and resided with her parents in West Virginia. In April 2005, the West Virginia Department of Health and Human Resources ("DHHR") learned that April T. had previously mothered two children by a different father, and that the State of Missouri had entered an order terminating April T.'s parental rights to those two children because of neglect. Following receipt of the Missouri order, the DHHR filed a petition in the instant case alleging generally that Summer D. had been abused and/or neglected by her parents, April T. and Douglas D.

As a result of the petition, Summer D. was placed in foster care in the custody of the DHHR, and a guardian *ad litem* was appointed to represent her before the circuit court. After hearings before the circuit court, an improvement plan was implemented for April T.

No improvement plan was offered or implemented for Douglas D. who, although not married, lived with April T.

In September 2006, Summer D.'s guardian *ad litem* filed two motions with the circuit court. In the first motion, the guardian *ad litem* asked the circuit court to terminate April T.'s improvement plan. The guardian *ad litem*'s second motion asked the circuit court for permission to amend the DHHR's petition to allege that April T. had "significant deficits as a result of her lower I.Q., which impairs her ability to parent appropriately and safely." The motion also proposed that the petition be amended to allege that because Douglas D. "refuses to acknowledge that [April T.] has significant deficits that impair her parenting skills," Douglas D. could not adequately protect Summer D. from harm.

After taking evidence from the parties, in an order dated January 18, 2007, the circuit court granted the guardian *ad litem*'s motion to terminate April T.'s improvement plan. The circuit court concluded that although she had made a good faith effort, April T. would never be able to meet the requirements of the plan.

However, the circuit court denied the guardian *ad litem*'s motion to amend the petition. The circuit court found that April T. and Douglas D. had been cooperative during the proceedings. Further, the circuit court expressed confidence in Douglas D.'s parenting skills, and found him to be "a supportive father to the child" and "a supportive companion" to April T. As a matter of law, the circuit court concluded:

> [T]he failure of Respondent Douglas [D.] to acknowledge the impairment of Respondent April [T.] is not a sufficient legal basis to seek termination of parent rights[.]

The circuit court then ordered the parties to develop a plan to gradually return the child to Douglas D.'s custody.

The guardian *ad litem* and the DHHR now appeal the circuit court's January 18, 2007 order. The order was stayed pending the resolution of this appeal.

II.

The guardian *ad litem* and the DHHR argue that the circuit court's decisions concerning Douglas D. were in error on two grounds. They argue, first, that this Court should weigh the evidence of record, declare Douglas D. to be an unfit parent, and prohibit the circuit court from ever returning Summer D. to his custody.

Much to our dismay, court-appointed counsel for Douglas D. failed to file any briefs with this Court – briefs that might have expedited this Court's response to the arguments posed by the guardian *ad litem* and the DHHR. Fortunately, counsel for Douglas D. did appear at oral arguments to offer a response, albeit a cursory one. Essentially, counsel for Douglas D. asserted that even though the circuit court refused to permit the amendment of the abuse and/or neglect petition, and even though no improvement plan or other assessment focused solely upon Douglas D.'s parenting skills was performed, the circuit court had sufficient evidence to find Douglas D. to be a fit parent.

Our standard of review in abuse and neglect actions was set forth in Syllabus Point 1 of *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), where we held:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

The record in this case was developed as an assessment of April T.'s abilities, and not Douglas D.'s parenting skills. In the circuit court, the parties – including the guardian *ad litem* and the DHHR – focused entirely upon April T.; evidence regarding Douglas D.'s abilities appears to have been developed secondary to the process.

In an abuse and neglect action, this Court must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. We find that the record was not sufficiently developed with respect to Douglas D.'s parenting skills to render a competent decision either way. As the record currently stands, this Court cannot – as the appellants wish – render a decision regarding Douglas D.'s parenting skills *ab initio*. That is an assessment that must be performed by the circuit court in the first instance.

The appellants' second argument is that the circuit court should have permitted the guardian *ad litem* to amend the petition to include allegations against Douglas D. The

appellants argue that reasonable cause exists sufficient to believe that neglect of Summer D. may be imminent. As such, the appellants argue that the circuit court was legally empowered to not only permit an amendment, but to go so far as to compel an amendment of the petition, to allow the development of a record on this point. We agree with the appellants' position.

Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* states, in pertinent part:

> The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment.

In Syllabus Point 4 of *State v. Julie G.*, 201 W.Va. 764, 500 S.E.2d 877 (1997), we interpreted Rule 19 to liberally allow amendments to an abuse or neglect petition:

> Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

And in Syllabus Point 5 of *In re: Randy H.*, 220 W.Va. 122, 640 S.E.2d 185 (2006) we held that circuit courts could compel the amendment of a petition if reasonable cause exists to believe that additional abuse or neglect is imminent, but not encompassed by the allegations in the existing petition:

> To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or

> neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

We believe that the existing record contains evidence and allegations sufficient to present reasonable cause to believe that additional abuse or neglect of Summer D. by the respondent, Douglas D., is imminent, but is not encompassed by the allegations contained in the DHHR's original petition. Accordingly, we find that the circuit court erred when it refused to permit the guardian *ad litem*'s motion to amend the petition.

III.

The circuit court's January 18, 2007 order denying the guardian *ad litem*'s motion to amend the petition was in error. On remand, the circuit court should permit the liberal amendment of the petition, so that the allegations of potential harm to Summer D. may be more fully developed, clarified, and promptly resolved.

Reversed and Remanded.

172 W. Va. 47, 303 S.E.2d 685

Supreme Court of Appeals of West Virginia

STATE of West Virginia

v.

T.C., Infant and B.B., Mother; and P.B., Stepfather

No. 15793

May 25, 1983

SYLLABUS BY THE COURT

1. In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49-6-5, it must hold a hearing under W.Va.Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

2. W.Va.Code, 49-6-1, *et seq.,* does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

Chauncey H. Browning, Atty. Gen., and Mary Beth Kershner, Asst. Atty. Gen., Charleston, for appellant.

Howard J. Blyler, Cowen, for appellees.

MILLER, Justice:

This is an appeal by the State of West Virginia protesting an order of the Circuit Court of Nicholas County, which restored the custody of T.C., then age four and one-half years, to the appellees, the child's mother and stepfather. We are asked to determine what procedures are required by West Virginia law in cases of alleged child abuse and to determine if those requirements were met in this case.

In June, 1980, T.C., then age three and one-half years, was brought by her stepfather, P.B., to the emergency room of the hospital in Summersville. He explained that the little girl had injured her leg by falling in the bathtub while bathing. X-rays taken in Summersville and subsequently in Charleston revealed a spiral fracture of her left upper leg and a healing spiral fracture of her left upper arm. Pursuant to these findings, a report of child abuse was made to the Department of Welfare in Nicholas County under W.Va.Code, 49-6A-2. See footnote 1

In July, 1980, the Department of Welfare filed a petition for emergency custody of T.C., and an order was entered removing her from the custody of her mother and stepfather and placing the child with her mother's aunt.

At a hearing on July 23, 1980, the testimony of Dr. Jacobson, who had examined T.C. at the Summersville hospital, was presented. The doctor's opinion was that the child's fractures could only have been caused by "a significant rather marked force applied in the opposite direction to the upper and lower end of the leg." Before the next witness could testify, a private conference was held by the child's parents, the Welfare personnel, and all counsel. The parties agreed that the child would be taken out of the aunt's custody and placed in a foster home, that the mother and stepfather would undergo psychological evaluations, and that the parents could visit the child during this period. The court approved this agreement, but no finding of abuse was made.

No further action was taken in this case for almost eight months. On March 6, 1981, Welfare Department workers, the parents, and counsel for the parties again appeared before the court. At that time, the court was advised of what had transpired since the last hearing, but no evidence was taken. The court noted that the parents' psychological evaluations in 1980 had not revealed "anything bad" and that no criminal charges had been brought against P.B. See footnote 2 Based upon further information that the child had been out of the parents' home for a long time, and that visitation arrangements had been difficult in the foster home and at alternative sites, the court determined that the child's custody should be returned to the parents after a transition period of five-weeks of increased visitation. No order was entered reflecting these arrangements.

On August 10, 1981, over one year after T.C.'s injuries, a third hearing was held. This hearing was apparently based on a new petition filed in June, 1981, by the Welfare Department, which alleged the same instances of abuse as set forth in the first petition and the need for a rehabilitation program. This hearing was, however, conducted as a continuation of earlier proceedings and has been referred to by the appellants as a dispositional hearing under W.Va.Code, 49-6-5. Again, no testimony was heard. The Nicholas County Prosecuting Attorney acknowledged that the child was then in the custody of the parents. See footnote 3 The prosecutor requested that legal custody remain with the Department such that the child could physically reside with her parents but that the Department could legally enter the home at frequent intervals to observe and monitor the home situation. At the August 10, 1981, hearing the court ordered a "rehabilitation plan" such that the legal *and* physical custody went to the parents, and that the Welfare Department would be permitted to monitor the child and the home. The order was entered in October, 1981.

In April, 1982, the State appealed the order returning custody to the parents, and requested a stay of that judgment. We granted the appeal and stay, and on January 26,

1983, ordered that temporary physical custody be awarded to the Department of Welfare pending the outcome of this decision.

The State's primary argument is that W.Va.Code, 49-6-1, *et seq.*, requires certain mandatory hearings and findings by a circuit court once an abuse or neglect petition has been filed, and that these statutory requirements have not been met. In *State ex rel. Miller v. Locke*, 162 W.Va. 946, 253 S.E.2d 540 (1979), we found that W.Va.Code, 49-6-1, *et seq.*, meets the constitutional due process standards set out in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and in *In Re: Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973). We also concluded that its various sections should be read *in pari materia.*

It is instructive to briefly review some of the procedural steps authorized by this statute. The content and service of the initial petition to institute a child abuse or neglect proceeding is contained in W.Va.Code, 49-6-1. In the next section, general provisions are made for the right to counsel and the appointment of counsel in cases of indigency. This section also permits the parents or custodian to have an improvement period, provides for hearing rights (i.e., a meaningful opportunity to be heard), and requires that the court "shall make findings of fact and conclusions of law as to whether such child is abused or neglected." W.Va.Code, 49-6-2(c). Finally, this section authorizes the right to a transcript of the hearing for purposes of an appeal. W.Va.Code, 49-6-2(d).

It is important to note the interrelationship between W.Va.Code, 49- 6-2, and W.Va.Code, 49-6-5, which provides for dispositional alternatives and begins with this statement:

> "Following a determination pursuant to section two [§ 49-6-2] of this article, the court m ay request from the state department information about the history, physical condition and present situation of the child. The court shall forthwith proceed to dis position giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence."

We believe that the statutory structure is clear and that before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49-6-5, it must have held a hearing under W.Va.Code, 49-6-2, and have determined "whether such child is abused or neglected." Such a finding is the prerequisite to any further proceedings in the case. If the court determines that there is insufficient evidence to warrant a finding of abuse or neglect, then the petition is dismissed under W.Va.Code, 49-6-5(a)(1). On the other hand, if neglect or abuse is found, then the other dispositional alternatives under W.Va.Code, 49-6-5, are to be considered. See footnote 4

The primary purpose of making an initial finding of abuse or neglect is to protect the interest of all parties and to justify the continued jurisdiction under W.Va.Code, 49-6-1, *et seq.* Several courts have spoken to this issue under statutes which are analogous to ours, as illustrated by this discussion in *In the Interest of T.M.M.*, 267 N.W.2d 807, 812 (N.D.1978):

> "The Act clearly provides for a tw o-stage hearing on petitions alleging deprivation. The first phase of th e hearing is often referred to as the adjudicatory phase, wherein the only que stion for decision is whether the child is ' deprived' within the meani ng of Section 27-20-02, subsection 5. In the adjudicatory phase of the hearing, the primary issue is not what is in the best interest of the child, but rather whether there is clear and convincing evidence that the child is deprived. *Interest of R.D.S.*, 259 N.W.2d 636 (N.D.1977); *In Interest of M.L.*, [239 N.W.2d 289 (N.D.1976)]. It is only after the court has f ound the child to be deprived that the question of what disposition will best serve the interests of the child arises. "The second phase of the hearing, the dispositional phase, is to be conducted only after the court has first found the child deprived. If there is no such finding, the court ' shall di smiss the petition' and no longer has jurisdiction of the case. *In Interest of M.L., supra.*"

A similar result was reached by the Montana court in *In the Matter of L.F.G.*, 183 Mont. 239, 245-46,, 598 P.2d 1125, 1129 (1979), where the court stated:

> "[T]hese statutes make it clear th at a finding of abuse, neglect, or dependency is the jurisdictional prerequisite to any court ordered transfer of custody.... Appellants argue it is then, a nd only then, that the ' best interest of the child' standard so well established by this Court has its application in the resolution of the question of custody .... Thus, before the District Court may consider what the ' best interests of the child' may in fact be, the court must have found that the child in ques tion was in fact abused or neglected pursuant to statutory definition in section 41-3-102(2), MCA." (Citations omitted)

See also Custody of a Minor, 377 Mass. 876, 389 N.E.2d 68 (1979); *In the Interest of LaRue*, 244 Pa.Super. 218, 366 A.2d 1271 (1976).

While today's result is based upon our construction of W.Va.Code, 49-6-1, *et seq.*, we are aided by this Court's decision in *In Re: Willis, supra,* which established the constitutional protections afforded to parents in permanent child removal cases. In Syllabus Point 6, the "clear, cogent and convincing" standard of proof was set, and that standard was recently adopted under Fourteenth Amendment Due Process principles in *Santosky v.*

Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In Syllabus Point 8 of *Willis, supra,* we also said:

> "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody."

The central theme of *Willis* was that the integrity of the family as a unit arises from the freedom of choice in matters of family life, which is a "fundamental personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment." 157 W.Va. at 237, 207 S.E.2d at 136, *citing Stanley v. Illinois, supra.* Similar language is found in *Santosky v. Kramer, supra.* As recognized in *Willis* and in United States Supreme Court cases, the state does have a right to intervene where parents are shown to be unfit to protect the interests of the children, as illustrated by this quotation from *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 555, 54 L.Ed.2d 511, 520 (1978):

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, *without some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-63, [97 S.Ct. 2094, 2119, 53 L.Ed.2d 14, 46-47] (1977) (Stewart, J., concurring in judgment)." (Emphasis added)

It is apparent that the state's right to intervene is predicated upon its initial showing that there has been child abuse or neglect, which constitutes unfitness on the part of the parents to continue, either temporarily or permanently, in their custodial role.

In the present case, the hearing under W.Va.Code, 49-6-2, was aborted when the parties entered into some type of voluntary arrangement regarding the custody of T.C. While we do not find that W.Va.Code, 49-6-1, *et seq.,* forecloses the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question, which is the issue of abuse or neglect. See footnote 5 Thus, we find that the procedure in the lower court contains a palpable error, which is the absence of an initial finding by the court that there has or has not been child abuse or neglect. Absent such a finding, the dispositional aspects of the case could not be considered.

It could be that some confusion was engendered in the lower court by the fact that the child had been initially taken into temporary custody under W.Va.Code, 49-6-3(a). The parties and the court appeared to conceive that the issue at the July 23, 1980, hearing was whether temporary custody should be continued. However, it is clear that W.Va.Code, 49-6-3(a), permitting an *ex parte* taking of temporary custody, does not provide for a further hearing to determine whether temporary custody should be continued. See footnote 6 This provision, as we have stated in *State ex rel. Miller v. Locke,* 162 W.Va.at 949, 253 S.E.2d at 542-43, is designed to permit

> "a circuit court to order emergency-taking only after the court has found (1) that there exists an imminent danger to the physical well-being of the child; and (2) that there are no reasonably ava ilable alternatives to removal of the child, including, but not limited to, the provision of medical, psychological, or homemaking services to eliminat e the danger and permit the child to remain in his current custody."

Furthermore, while W.Va.Code, 49-6-3(b), See footnote 7 authorizes an alternative procedure for a court to utilize in taking temporary custody of a child by providing for an expedited preliminary hearing with notice to the parents, this procedure does not operate to bypass the hearing to determine neglect or abuse required under W.Va.Code, 49-6-2. This construction arises because of the provision in W.Va.Code, 49-6-3(b), that requires the court to find "that there are no alternatives less drastic than removal of the child *and that a hearing on the petition cannot be scheduled in the interim period.*" (Emphasis added)

Because there was no initial finding of abuse in this case, we must remand this case with directions that the lower court promptly hold a hearing under W.Va.Code, 49-6-2, in order to determine if the child was abused. At such hearing, the court may consider the evidentiary transcript of the July 23, 1980, hearing since all parties were present and had an opportunity to cross- examine. After holding the hearing and making findings of fact of whether the child was abused, the lower court should then proceed to make an appropriate disposition under W.Va.Code, 49-6-5.

Remanded.

Footnote: 1 The relevant portion of W.Va.Code, 49-6A-2, is:
"When any medical, dental or mental health professional, christian science practitioner, religious healer, schoolteacher or other school personnel, social service worker, child care or foster care worker, peace officer or law-enforcement official has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately

report the circumstances or cause a report to be made to the state department child protective service."

Footnote: 2 Ordinarily, whether or not the State has filed criminal charges in regard to child abuse is irrelevant in a proceeding under W.Va.Code, 49-6-1, et seq., to remove custody of the child. In the Interest of Black, 273 Pa.Super. 536, 417 A.2d 1178 (1980). The purpose of the removal proceeding is to protect the well-being of the child.

Footnote: 3 Apparently, one week before this hearing the Welfare Department had, pursuant to its newly filed petition, again removed T.C. and replaced her in the foster home. Immediately thereafter, the parents retrieved the child.

Footnote: 4 The material dispositional provisions of W.Va.Code, 49-6- 5(a), are:
"The court shall give precedence to dispositions in the following sequence:
"(1) Dismiss the petition;
"(2) Refer the child and the child's parent or custodian to a community agency for needed assistance and dismiss the petition;
"(3) Return the child to his own home under supervision of the state department;
"(4) Order terms of supervision calculated to assist the child and the child's parent or custodian which prescribe the manner of supervision and care of the child and which are within the ability of the parent or custodian to perform;
"(5) Upon a finding that the parents or custodians are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court; "(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

Footnote: 5 We recognize that W.Va.Code, 49-6-2(c), provides that in an abuse or neglect case "[t]he petition shall not be taken as confessed." We conceive that this provision is designed to preclude a court from removing custody based merely on the allegations of the original petition. In In re Nicole B., 93 Cal.App.3d 874, 155 Cal.Rptr. 916 (1979), the court found that under voluntary stipulations by the parties a showing of abuse and neglect had been made. See also State v. Worrell, 198 Neb. 507, 253 N.W.2d 843 (1977).

Footnote: 6 *W.Va.Code, 49-6-3(a), states:*
"Upon the filing of a petition, the court may order that the child be delivered for not more than ten days into the custody of the state department or a responsible relative, pending a preliminary hearing, if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such child to the state department or a responsible relative."

Footnote: 7 *W.Va.Code, 49-6-3(b), provides:*
"Whether or not the court orders immediate transfer of custody as provided in subsection (a) of this section, if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child, the court may schedule a preliminary hearing giving the respondents at least five days' actual notice. If the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary custody of the state department or an appropriate person or agency for a period not exceeding thirty days: Provided, that if the court grants an improvement period as provided in subsection (b), section two [§ 49-6-2] of this article, the thirty-day limit upon temporary custody may be waived."

230 W. Va. 172, 737 S.E.2d 69

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2012 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 11-1628

IN RE: T.W., C.W., S.W., AND J.W.

Appeal from the Circuit Court of Berkeley County
Honorable John Yoder, Judge
Civil Action No. 10-JA-92, 93, 94 AND 95

Vacated and Remanded with Directions

Submitted: September 25, 2012
Filed: November 14, 2012

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Justice McHugh delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "In a child abuse and neglect [case], before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49–6–5, it must hold a hearing under W.Va.Code, 49–6–2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case." Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983).

4. "W.Va.Code, 49-6-1, *et seq.*, does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect." Syl. Pt. 2, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983).

5. "Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order." Syl. Pt. 5, *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001).

6. "A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources." Syl. Pt. 4, *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002).

7. "In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 (1999) and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed." Syl. Pt. 3, *State ex rel. DHHR v. Hill*, 207 W.Va. 358, 532 S.E.2d 358 (2000).

8. "In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and

35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights." Syl. Pt. 2, *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998).

9. In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5.

10. "To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations." Syl. Pt. 5, *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006).

11. "'"Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code* [§] 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client." Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).' Syl. Pt. 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)." Syl. Pt. 4, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005).

McHugh, Justice:

This is an appeal by Stephanie D.[1] (hereinafter "Petitioner") from an order of the Circuit Court of Berkeley County accepting the voluntary relinquishment of parental rights by John W. (hereinafter "John W." or "father") to his two eldest children and dismissing his two youngest children from the case. Upon thorough review of the briefs, arguments, applicable precedent, and the record, this Court reverses the lower court's order and remands this matter for further proceedings consistent with this opinion.

I. Factual and Procedural History

This matter involves abuse and neglect allegations affecting the four children of John W. His eldest two children, T.W. and C.W. were born on March 8, 1995, and March 25, 1996, respectively. The mother of these two children, Wendy P., has not had substantial contact with T.W. or C.W., has relinquished her parental rights to these children, and is not a party to this action. John W.'s two youngest children, S.W. and J.W., were born on April 4, 1997, and April 10, 2006, respectively. The mother of these two children is Petitioner Stephanie D., and these two children have resided with her in the State of Maryland since the

[1]In cases of a sensitive nature, this Court is careful to protect the identity of the parties. "We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dept. of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 689 n. 1, 356 S.E.2d 181, 182 n. 1 (1987) (citations omitted).

divorce of John W. and Stephanie D. and the award of primary custody to Stephanie D. on March 3, 2010. Visitation was granted to the father, John W., every other weekend.

On June 12, 2010, a boyfriend of one of the older daughters allegedly raped S.W. while she was visiting her father in West Virginia.[2] That was the final visit between the father and the younger two children residing in Maryland. On June 22, 2010, Stephanie D. obtained a ninety-day temporary order suspending visitation between John W. and S.W. and J.W., based upon that allegation of sexual misconduct by the older daughter's boyfriend. That temporary order had expired by the time the underlying abuse and neglect proceedings were initiated.

On October 25, 2010, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") received a referral indicating that the father, John W., had abandoned his two older children, T.W. and C.W., in West Virginia and that the living conditions in their home were deplorable. The DHHR investigated the allegations and filed an October 29, 2010, Abuse and Neglect Petition alleging that the father had abandoned the two older children. The DHHR cited deplorable home conditions, including the lack of running water; sanitation issues involving toilets and soiled clothing; lack of supervision for

[2]According to the DHHR brief, there was a juvenile petition filed against that perpetrator, and a rape kit confirmed the allegations of S.W.

the children; physical abuse; and sexual misconduct.[3] Notably, although the petition named *all four* children, it did not include the allegations of rape of S.W. by her older sister's boyfriend while S.W. was visiting the father's home in West Virginia. On December 10, 2010, the DHHR filed an amended petition based upon T.W.'s malnourishment; a bruise on the hip of T.W., allegedly caused by physical violence; and sexual abuse of C.W. Even in the amended petition, there was no reference to the rape which allegedly occurred while S.W. was visiting in West Virginia.

On December 21, 2010, the Maryland court handling the divorce between John W. and Stephanie D. stayed further proceedings pending the outcome of the abuse and neglect proceedings in the Circuit Court of Berkeley County, West Virginia. On June 28, 2011, a hearing on the abuse and neglect proceedings was held in the Circuit Court of Berkeley County. At that hearing, counsel for John W. indicated that John W. wished to relinquish his parental rights to T.W. and C.W., but John W. maintained that he had not abused or neglected any of his children. Counsel for John W. further indicated that John W. did not want findings to be made on the abuse and neglect petition and apparently made his relinquishment of parental rights contingent upon the absence of further proceedings against him on the abuse and neglect petition. The DHHR moved to dismiss the case concerning S.W. and J.W., the two children residing in Maryland, and the lower court dismissed those

[3]One daughter had disclosed that her father had exposed his naked body to her, watched pornography in her presence, and forced her to participate in his sexual acts.

two children from the case. Further, the lower court refused to consider an in camera hearing to consult with the older two children regarding the allegations of abuse and neglect and also accepted John W.'s voluntary relinquishment of parental rights for T.W. and C.W. without further inquiry.

Subsequent to the lower court's ruling, Stephanie D., as the non-offending parent, appealed that ruling to this Court. In her assignments of error on appeal, Petitioner contends that the lower court erred in (1) accepting John W.'s voluntary relinquishment of parental rights to T.W. and C.W. without conducting an evidentiary hearing to make factual findings on the allegations of abuse and neglect and to consider the best interests of S.W. and J.W.; (2) failing to appoint a separate guardian ad litem for S.W. and J.W., the two younger children residing in Maryland, as requested by the guardian ad litem who had been appointed for *all four* children; (3) failing to conduct an *in camera* hearing on the issue of potential testimony by the older children, T.W. and C.W., regarding allegations of abuse; and (4) dismissing the matter with regard to the children residing in Maryland, S.W. and J.W.

II. Standard of Review

This Court has consistently utilized a compound standard of review in matters of this nature. In *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000), this Court stated that abuse and neglect proceedings will be evaluated under a "compound standard of review:

conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." 208 W.Va. at 332, 540 S.E.2d at 549. The following standard of review, also applicable to this case, is enunciated in syllabus point one of *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996):

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

This Court also remains mindful of the primary objective in cases of allegations of abuse and neglect. As this Court stated in syllabus point three of *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996), "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Observing these standards of review, this Court addresses the arguments of the parties in this case.

III. Discussion

A. Circuit Court Hearing

In determining the appropriate resolution of any abuse and neglect proceeding, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). West Virginia Code § 49-6-1 (2005) (Supp. 2009) governs the filing and of an abuse and neglect proceeding and guides a circuit court in its consideration of such matters. That statute permits a petition to be filed when a child is believed to be abused and/or neglected and enumerates a circuit court's obligations in dealing with such a petition, providing as follows:

> (a) If the department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or if the petition is being brought by the department, in the county in which the custodial respondent or other named party abuser resides, or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no circumstance may a party file a petition in more than one county based on the same set of facts. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child. When there is an order for temporary custody pursuant to section three [§ 49–6–3] of this article, the hearing shall be held within thirty days of the order,

> unless a continuance for a reasonable time is granted to a date certain, for good cause shown.

Following the mandates of the statutory scheme for the management of abuse and neglect cases, this Court has observed that "[i]n a child abuse and neglect [case], before a court can begin to make any of the dispositional alternatives under W.Va.Code, 49-6-5, it must hold a hearing under W.Va.Code, 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a *prerequisite* to further continuation of the case." Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983) (emphasis supplied).[4] In syllabus point two of *T.C.*, this Court held as follows:

> W.Va.Code, 49–6–1, *et seq.*, does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

Furthermore, in syllabus point five of *In re Edward B.*, 210 W.Va. 621, 558 S.E.2d 620 (2001), this Court explained the essential requirement that a reviewing court adhere to the mandates of the statutory scheme, stating as follows:

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of

[4]West Virginia Code § 49-6-2 generally governs the procedures for the adjudicatory phase of an abuse and neglect case, and West Virginia Code § 49-6-5 generally governs the procedures for the dispositional phase of an abuse and neglect case.

> cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

This Court has also specifically stated that "[d]ismissal of the petition without a hearing is a direct violation of the statutory mandate to hold a hearing on abuse and/or neglect petitions." *In re Emily G.*, 224 W.Va. 390, 396, 686 S.E.2d 41, 47 (2009).

With regard to John W.'s offer of voluntary relinquishment of parental rights in the present case, this Court has stated that a circuit court has discretionary authority in an abuse and neglect proceeding to accept a voluntary relinquishment of parental rights and to terminate parental rights based upon such relinquishment. *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002); *see also In re Kristopher E.*, 212 W. Va. 393, 572 S.E.2d 916 (2002). However, an independent review of all relevant factors must be undertaken prior to such determination, as this Court explained in syllabus point four of *James G.*,

> A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be *exercised after an independent review of all relevant factors*, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

211 W. Va. at 341, 566 S.E.2d at 228 (emphasis supplied). This Court also addressed an issue regarding the effect of an offer of voluntary relinquishment of parental rights in an

abandonment abuse and neglect case in *State ex rel. DHHR v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000). This Court observed the requirement for a dispositional hearing and held as follows in syllabus point three:

> In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, *even where there are written relinquishments of parental rights*, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49–6–5 (1999) and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

207 W.Va. at 359, 532 S.E.2d at 359 (emphasis supplied).[5] Similarly, where the parties have stipulated to all facts necessary for a termination of parental rights, this Court has still held

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[5]The Rules of Procedure for Child Abuse and Neglect Proceedings place certain requirements on actions involving voluntary terminations. Rules 33 and 35 address the voluntariness of consent to such terminations and whether they are in the best interests of the child or children. Rule 33(b) provides as follows:

> (b) *Voluntariness of consent*.—Before determining whether or not to accept a stipulation of disposition, the court shall determine that the parties and persons entitled to notice and the opportunity to be heard, understand the contents of the stipulation and its consequences, and that the parties voluntarily consent to its terms. The court must ultimately decide whether the stipulation of disposition meets the purposes of these rules, controlling statutes and is in the best interests of the child. The court shall hear any objection to the stipulation of disposition made by any party or persons entitled to notice and the opportunity to be heard. The stipulations shall be specifically incorporated in their entirety into the court's order reflecting disposition of the case.

Rule 35(a) addresses uncontested termination of parental rights and provides, in pertinent part, as follows:

> If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing:
>
> . . . .
>
> (3) If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

that a court cannot dispense with the dispositional hearing. In syllabus point two of *In re Beth Ann B.*, 204 W.Va. 424, 513 S.E.2d 472 (1998), this Court stated as follows:

> In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* are made, prior to terminating an individual's parental rights.

In the case sub judice, grievous allegations of abuse and neglect were raised, and the potential still exists for future visitation between John W. and the two children to whom his parental rights were not terminated. The granting of a consensual termination of parental rights without investigation into those allegations or findings with regard to the best interests of *all four* of these children is inconsistent with both the mandate of the statutes articulating the protocol for abuse and neglect cases and the prior cases decided by this Court.

Based upon the requirement of West Virginia Code § 49-6-1(a) that a circuit court presented with an abuse and neglect petition must hold a hearing thereon and further based upon the specific circumstances of this case, as reviewed above, this Court finds that the lower court abused its discretion by accepting the father's voluntary relinquishment of parental rights to two of his children and dismissing two other children without holding a full

evidentiary hearing to address the specific allegations of abuse and neglect. In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5. The evidence of abuse and neglect in the present case was not evaluated in any meaningful fashion during the hearing, no evidence was taken, and the best interests of all four children, including the two children who were dismissed and residing with their mother in Maryland, were not addressed. This Court therefore vacates the lower court's order and remands this case to the circuit court for a full evidentiary hearing on all issues raised in the petition.

Furthermore, documentation was apparently presented to the DHHR during the pendency of this proceeding indicating that S.W. had been the victim of rape or sexual misconduct by her sister's boyfriend while S.W. was visiting her father in West Virginia, as referenced above. The DHHR should have included these allegations in an amended petition even though the facts underlying such allegations may not have been completely known when the original petition was filed. As this Court stated in syllabus point five of *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006):

> To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse

> and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

Based upon the foregoing, the DHHR is directed, upon remand, to include allegations in the amended petition regarding the alleged rape and/or sexual misconduct suffered by S.W. while she was visiting her father in West Virginia.

B. Appointment of Guardian ad ltem

With regard to the appointment of a guardian ad litem for the four children involved in this case, this Court notes that the guardian ad litem originally appointed for all four children failed to conduct any meaningful investigation regarding the two children residing with their mother in Maryland. This Court has imposed strict requirements regarding guardians ad litem and has explained their duties as follows:

> "'Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va.Code* [§] 49–6–2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*,

> respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.' Syllabus Point 5, in part, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 4, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. Pt. 4, *In re Elizabeth A.*, 217 W.Va. 197, 617 S.E.2d 547 (2005).

In the present case, the guardian ad litem attempted to exercise his duties with respect to the two children residing with their father in West Virginia and ultimately requested the lower court to appoint a separate guardian ad litem for the children residing in Maryland. This Court finds that the lower court abused its discretion in failing to grant the motion for the appointment of a separate guardian ad litem for John W.'s children residing in Maryland. Upon remand, the lower court is directed to appoint a separate guardian ad litem for the children residing in Maryland and to permit adequate time for that guardian ad litem to prepare for a full evidentiary hearing regarding the best interests of these children.

C. In Camera Hearing

West Virginia Code § 49-6-5(a)(6)(C) (2011) provides that a court "shall give consideration to the wishes of a child fourteen years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights." This Court has addressed that statutory requirement and has acknowledged that the wishes of such a child must be considered prior to a determination on the termination of

parental rights.[6] In *In re Jessica G.*, 226 W.Va. 17, 697 S.E.2d 53 (2010), the thirteen-year-old child did not want her father's parental rights terminated. This Court found as follows:

> After reviewing the circuit court's order terminating the Appellant's parental and custodial rights, as well as a review of the transcript of the dispositional hearing, we find that the circuit court failed to adequately explain why Jessica G.'s, who was thirteen years old at the time of the dispositional hearing (and is now fourteen years old), was not "otherwise of an age of discretion," *Id.*, and why her wishes were not factored into whether termination of the Appellant's parental rights, and the concomitant bond between Jessica G. and her father, might be contrary to Jessica G.'s best interest and emotional well-being.

Jessica G., 226 W.Va. at 22, 697 S.E.2d at 58; *see also In re Ashton M.*, 228 W.Va. 584, 723 S.E.2d 409 (2012).

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[6]As this Court explained in *Edward B.*,

> As this most important area of the law has expanded, this Court has insisted that the directives of applicable rules and legislative enactments must be carefully identified, respected, and incorporated within our court system. The Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children.

210 W.Va. at 632, 558 S.E.2d at 631.

In the present case, the two oldest children were aged fourteen or older, and counsel for Petitioner had allegedly advised the lower court that those two older children had indicated their desire to inform the court about the specific conduct of their father. The lower court, relying upon the arguments of the DHHR and the guardian ad litem regarding the contention that the children might suffer emotional harm by testifying, determined that an *in camera* hearing was not necessary. Thus, the lower court refused to conduct an *in camera* hearing with these children, considered only the representations of counsel, and took no further action to ascertain the specific wishes of the children.

Based upon the requirement of West Virginia Code § 49-6-5(a)(6)(C) and the expression of the desire of these children to speak with the trial court, this Court finds that the trial court should have provided a meaningful opportunity for these children to express their concerns with regard to the conditions of abuse and neglect allegedly existing within their home, as well as their wishes regarding the termination of their father's parental rights. On remand, the trial court is directed to determine the most appropriate manner in which these two children may make their wishes known to the court.

D. Dismissal of John W.'s Younger Two Children Residing in Maryland

Petitioner contends that the lower court erred by dismissing the younger two children, S.W. and J.W., from this abuse and neglect action. She argues that the trial court

was presented with a DHHR petition regarding the alleged abuse and neglect of *all four* children and should have addressed the issues raised with regard to all four of those children. She further contends that the lower court erred in assuming that the Maryland divorce court would address issues relating to these younger two children. No referral had been made to Maryland Child Protective Services personnel, and Maryland had already stayed its divorce proceedings awaiting a West Virginia decision on the abuse and neglect matter.

Upon review by this Court, we find that the lower court abused its discretion by dismissing the two children residing in Maryland and, as explained above, in failing to hold a hearing regarding the abuse and neglect issues involving those children. Those two children, although residing primarily with their mother in Maryland, had exercised visitation with their father in West Virginia and had also allegedly been the victims of the conditions of abuse or neglect referenced in the DHHR petition. The lower court did not have the benefit of a guardian ad litem report regarding these children, heard no testimony regarding these children, and ultimately dismissed these children from this abuse and neglect case without testimonial evidence regarding the alleged abuse and neglect they suffered or a finding regarding their best interests. This ruling was a clear abuse of discretion.

IV. Conclusion

Based upon this Court's thorough review of this matter and for the foregoing reasons, the order of the Circuit Court of Berkeley County accepting John W.'s voluntary relinquishment of parental rights and dismissing the abuse and neglect petition with regard to S.W. and J.W. is hereby vacated. Furthermore, this case is remanded to the Circuit Court of Berkeley County for the appointment of a guardian ad litem for S.W. and J.W. and for an additional evidentiary hearing consistent with this opinion.

Vacated and Remanded with Directions.

180 W. Va. 295, 376 S.E.2d 309

Supreme Court of Appeals of West Virginia

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES, Appellee,

v.

TAMMY B., Appellant

No. 18217

Dec. 14, 1988

SYLLABUS BY THE COURT

1. " 'In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.' Syllabus Point 1, *In re Willis,* 157 W.Va. 225, 207 S.E.2d 129 (1973)." Syllabus Point 1, *In Interest of Betty J.W.,* 179 W.Va. 605, 371 S.E.2d 326 (1988).

2. "*W.Va.Code,* 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.,* 168 W.Va. 366, 284 S.E.2d 867 (1981).

3. "W.Va.Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syllabus Point 2, *State ex rel. Dept. of Human Services v. Cheryl M.,* 177 W.Va. 688, 356 S.E.2d 181 (1987).

4. "W.Va.Code, 49-6-2(b) (1984), allows a parental improvement period, while the child is temporarily physically removed from the alleged abusive situation, as the court may require temporary custody in the state department or other agency during the improvement period." Syllabus Point 2, *In Interest of Betty J.W.,* 179 W.Va. 605, 371 S.E.2d 326 (1988).

5. "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code,* 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code,* 49-6-5(b) [1977] that conditions or neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980).

J. David Judy, III, for appellant.

Karen L. Garrett, Moorefield, guardian ad litem for children.

Charles G. Brown, III, Atty. Gen., for W.Va. Dept. of Human Services.

PER CURIAM:
Tammy B. is the natural mother of three infant children: Cynthia D. ("Cindy"), born out of wedlock on September 10, 1979, William B., Jr. ("Willie") born to the union of Tammy B. and William B., Sr. on July 14, 1980 and Paul L., born on April 21, 1985 during the marriage of Tammy B. and William B., Sr. but with Roger L. named as father. See footnote 1 As a result of a child abuse and neglect proceeding, Tammy B.'s parental rights were terminated. See footnote 2 On appeal to this Court, Tammy B. argues that she failed to receive personal notice of the hearing on the removal petition, the judgment is not supported by the evidence, the trial court failed to allow a meaningful improvement period, and the trial court failed to adopt the least restrictive alternative.

Throughout the proceedings below, Tammy B. lived with Roger L., although she was married to William B., Sr. Between October 21, 1983 and March 20, 1984, the Department of Human Services investigated four separate incidents of domestic violence between Tammy B. and Roger L. Two of these instances of domestic violence resulted in injury to Cindy. On November 4, 1983 Cindy was cut by flying glass and on March 20, 1984, Cindy was struck in the face with a shovel by Roger L. See footnote 3 During this period, DHS received other reports that the children were left unattended or taken to bars late at night.

On July 26, 1985 Sandra Jones, a case worker for DHS, investigating a report that Roger L. had choked Willie, found Willie had stitches in his head. Both Tammy B. and Roger L. denied that Willie had been choked and said that Willie had fallen from a swing.

On August 6, 1985, Tammy B. reported to DHS that Roger L. threw her through a door and she had left him. DHS offered her protective services which were refused. Shortly thereafter, Tammy B. returned with her children to Roger L. On August 26, 1985, DHS received another report of domestic violence which Tammy B. denied.

At 3:00 a.m. on October 11, 1985, Tammy B. called the state police and requested help to leave Roger L. The state police drove Tammy B. and the children to the home of Tammy's mother. Tammy B. refused to file charges and called Mrs. B., Willie's grandmother, to pick up Willie and Cindy. When Mrs. B. arrived to get the children, Tammy B. and the children had already returned to Roger L.

Because of the ongoing nature of the endangerment to the children, on October 21, 1985, DHS filed a petition with the Circuit Court of Hardy County charging Tammy B. with abuse and neglect of the infant children. A hearing was scheduled for November 7, 1985 on the petition and Tammy B. was personally served. The hearing was rescheduled for November 19, 1985 and Tammy B. was notified by mail.

On November 19, 1985 although Tammy B. did not appear, the trial court heard testimony and found that the children, then 5 and 6 years old, were engaging in inappropriate sexual activity, and that the domestic violence affected the children sufficiently adversely to warrant their immediate removal. The children were removed immediately and placed in the physical and legal custody of DHS. Cindy and Willie were placed with Willie's grandmother, Mrs. B., and the infant, Paul L., was placed in foster care.

On November 21, 1985, counsel for Tammy B. filed a petition to reopen the hearing and various motions, including a motion to disqualify the Honorable John M. Hamilton which was ultimately rejected by this Court by letter opinion dated December 19, 1985.

After the removal, Tammy B. began to work with DHS and a service plan was composed in early January 1986, signed by counsel for Tammy B. on January 16, 1986 and signed by Tammy B. on February 4, 1986. The family case plan was revised and signed on April 30, 1986. Between January 1986 and July 10, 1986, numerous visits were arranged between the children and Tammy B. Tammy B. completed DHS's parenting skills class, had a psychological evaluation and attended counseling on the basic causes of abuse and neglect. On July 8, 1986 the counselor, Dr. Bailey, recommended family counseling and requested the children be returned home to facilitate counseling. The circuit court ordered the return of the two children to facilitate family counseling pursuant to the family service plan and to avoid having Cindy change schools. Two children were returned; Paul L., on July 10, 1986 and Cindy, on August 25, 1986. Willie remained with his grandmother and legal custody of all the children remained with DHS.

Problems developed immediately. Although DHS explained to Tammy B. the school's requirement of a "tine test" and had offered to provide transportation, Cindy did not attend the first few days of school because she lacked the test. About 10:30 p.m. on September 8, 1986, Tammy B. took both children to the parking lot of the Friendly Tavern looking for Roger L. When a woman who Tammy B. thought had been with Roger L. emerged from the tavern, a violent disagreement ensued between the women. Both Cindy and Paul were left alone in the car and watched the fight. As a result Tammy B. left Roger L. but shortly thereafter, she began to help him clean a trailer during the day.

On September 29, 1986, "Squirrel" S., an acquaintance of Roger L., entered the trailer when no one was home and passed out on the floor. When Tammy B., Roger L. and the children entered the trailer, they found Squirrel and, because they could not awaken him, they left him in the trailer and went outside to clean up the yard. Later, as dinner was being served, two DHS workers accompanied by a deputy sheriff, arrived. Just then Squirrel appeared from the back of the trailer and asked for a beer. After a brief disturbance, DHS removed both children. After a hearing held on January 15 and 16, 1987 the circuit court ordered the termination Tammy B.'s parental rights.

I

Because of the constitutional protections surrounding the right of a natural parent to the custody of her infant children, notice of the petition and hearing to terminate those rights is required. In our recent examination of parental rights, we stated in Syllabus Point 1, *In Interest of Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988):

> In the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions. Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

W.Va.Code, 49-6-1(b) [1977] indicates that personal service of the termination petition and notice of the hearing is preferred but not required. See footnote 4

In the present case Tammy B. was personally served on October 22, 1985 with a copy of the petition and a notice of hearing scheduled for 9:00 a.m. November 7, 1985. The hearing was continued to 1:00 p.m. November 19, 1985 and an amended notice of hearing was sent by first class mail to Tammy B. On appeal Tammy B. contends that she did not receive the amended notice and, therefore, the circuit court had no right to conduct a hearing in her absence.

Even though Tammy B. did not receive the amended notice of hearing, the personal service of the petition and original notice of hearing meets both due process and statutory notice requirements. If Tammy B. had appeared or even inquired on November 7, 1985, the original hearing date, she would have been informed of the continuance. We find that the personal service of the petition and notice of original hearing to Tammy B. meets both due process and statutory notice requirements.

II

W.Va.Code, 49-6-2(c) [1984] requires that in a child abuse or neglect case, the Department of Human Services is to prove that the "conditions existing at the time of the

filing of the petition ... by clear and convincing proof." In Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981), we stated:

> *W.Va.Code*, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

The burden of proof remains with DHS through any improvement period. In Syllabus Point 2, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981), we stated:

> Even when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings.

In the present case, DHS presented evidence of child abuse and neglect in the November 19, 1985 hearing through a report dated September 25, 1985 and testimony from law enforcement officers who had investigated the incidents of domestic violence, Mrs. B., Willie's grandmother, and Sandra Jones, a child protective services worker. The testimony was subject to cross-examination by the guardian ad litem for the children. We find that the court's finding of November 19, 1985 that the children were abused and that an immediate danger was present to their safety and welfare was supported by clear and convincing proof.

The court order terminating Tammy B.'s parental rights was based on Tammy B.'s failure to continue to implement the family service plan after the two children were returned. The record indicates that Cindy missed school, and that Cindy and Paul were left unattended in a tavern parking lot at 10:30 p.m., witnessed a fight between their mother and another woman, were left with inappropriate babysitters, were exposed to drunkenness with the seeming approval of their mother, and continued to experience domestic violence and instability. Counseling on substance abuse stopped and Tammy B. did not conscientiously attend family counseling, even though counseling was the reason for the children's return. See footnote 5 We find that the decision of the circuit court permanently to terminate the parental rights of Tammy B. because she failed to act as a responsible parent for an appreciable period is supported by clear and convincing proof.

III

Parental rights are protected by the statutory requirement that, in the absence of compelling circumstances to justify a denial, the circuit court, if requested, must allowed a parent an improvement period. See footnote 6 In Syllabus Point 2, *State ex rel. Dept. of Human Services v. Cheryl M.,* 177 W.Va. 688, 356 S.E.2d 181 (1987), we stated:

> W.Va.Code, 49-6-2(b) (1984), perm its a parent to m ove the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial.

An improvement period can be granted to a parent without custody of her children in order to provide the parent with an opportunity to overcome the perceived problems. In Syllabus Point 2, *In Interest of Betty J.W.,* 179 W.Va. 605, 371 S.E.2d 326 (1988), we stated:

> W.Va.Code, 49-6-2(b) (1984), allows a parental improvement period, while the child is tem porarily physically rem oved from the alleged abusive situation, as the court m ay require tem porary custody in the state department or other agency during the improvement period.

See State v. Scritchfield, 167 W.Va. 683, 280 S.E.2d 315 (1981).

When an improvement period is ordered, the Department of Human Services is required to prepare a family case plan. *Cheryl M., supra,* 177 W.Va. at 688, 356 S.E.2d at 181. *W.Va.Code,* 49-6D-3(a) [1984] requires the family problems be identified in an organized and realistic manner and that logical goals be set to resolve or lessen those problems. See footnote 7 *W.Va.Code,* 49- 6D-3(b) [1984] provides that the plan should result from input by the parent, the child, if appropriate, counsel for the participants and DHS. The plan should be furnished to the court with thirty days after entry of the order referring the case to DHS. *Id.*

We recognized the purpose of the family case plan in Syllabus Point 5, *State ex rel. Dept. of Human Services v. Cheryl M.,* 177 W.Va. 688, 356 S.E.2d 181 (1987), when we stated:

> The purpose of the family case plan as set out in W.Va.Code, 49-6D- 3(a) (1984), is to clearly set forth an orga nized, realistic m ethod of identifying family problems and the logical steps to be used in resolving or lessening these problems.

In the present case Tammy B. contends that she was denied a meaningful improvement period. The record indicates that although Tammy B. did not request an improvement period, an improvement period was worked out between the parties on December 12,

1985. The improvement period began while the children were in the temporary custody of DHS. A family case plan was developed by early January 1986, signed by all parties, submitted to and approved by the court. See footnote 8 The family case plan substantially met requirements specified in *W.Va.Code,* 49-6D-3 [1984]. During the plan's first stage the focus of improvement plan was on parenting skills, counseling for substance abuse and reducing domestic violence in order to achieve the goal of returning the children. After the children were returned, the focus of the improvement plan was on family counseling. However, after the return of the two children, improvement under the plan stopped. See footnote 9 The improvement period granted to Tammy B. met the statutory requirements and clearly was an opportunity for Tammy B. to alleviate the perceived problems.

We find that Tammy B. had a meaningful improvement period with a family case plan and that during the improvement period Tammy B. failed to act as a responsible parent.

IV

Finally Tammy B. contends that the trial court failed to allow the least restrictive alternative regarding her rights as a natural parent. Tammy B.'s reliance on the least restrictive preference prescribed in *W.Va.Code,* 49-6-5(a) [1984] is misplaced.

In Syllabus Point 1 of *In re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980) we held:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W.Va.Code,* 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

See also In Interest of Darla B., 175 W.Va. 137, 331 S.E.2d 868 (1985). In the present case the children were repeatedly exposed to violent domestic arguments, were cut by flying glass, were choked, and were hit on the head with a shovel. Further, the children were reported to have been exposed to sexual acts in the home with the result that the older children were engaging in inappropriate sexual activity. Cindy was reported to have been sexually abused or exploited by Roger L. and William B., Sr., each of whom denied the allegation.

Given this violent history the circuit court's order of November 19, 1985 gave preference to the least restrictive alternative when it placed the children in the temporary custody of DHS, attempted an improvement period and later even returned two of the children.

However, the return of the children coincided with Tammy B.'s failure to continue the behavior specified in the family case plan. In Syllabus Point 2, *In Re R.J.M.,* 164 W.Va. 496, 266 S.E.2d 114 (1980), we stated:

> Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code,* 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code,* 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.

W.Va.Code, 49-6-5(b) [1984] describes six non-exclusive circumstances that demonstrate there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected. In the present case, the circuit court found two such circumstances: (1) Tammy B. refused to cooperate in developing a family case plan before the filing of the petition, (*W.Va.Code,* 49-6- 5(b)(2) [1984]), and (2) Tammy B. did not follow through with reasonable rehabilitative efforts, (*W.Va.Code,* 49-6-5(b)(3) [1984]). See footnote 10

We find that the circuit court's termination of the parental rights of Tammy B. was based upon clear and convincing proof that there was "no likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." *W.Va.Code,* 49-6-5(a) [1984].

In her appeal Tammy B. requests that she be given an improvement period with a family case plan directed at reuniting the family. Because Tammy B. has been given a meaningful improvement period, we find that this case presents "compelling circumstances to justify a denial" of an additional improvement period within the meaning of *W.Va.Code,* 49-6- 2(b) [1984] and hereby affirm the decision of the circuit court.

AFFIRMED.

Footnote: 1 We follow our past practice in juvenile and domestic relations cases that involve sensitive facts by not using the last names of the parties. See e.g. State ex rel. Dept. of Human Services v. Cheryl M., 177 W.Va. 688 n. 1, 356 S.E.2d 181 n. 1 (1987);

West Virginia Dept. of Human Services v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985); State v. Ellsworth, 175 W.Va. 64 n. 1, 331 S.E.2d 503 n. 1 (1985).

Footnote: 2 Although the same proceeding terminated the parental rights of David W., the alleged father of Cindy, and the parental rights of Roger L., neither have appealed to this Court. The parental rights of William B., Sr. were not terminated and Willie was placed in the temporary custody of the Department of Human Services.

Footnote: 3 A deputy sheriff testified about the November 4, 1983 incident and a state trooper testified about the March 20, 1984 incident.

Footnote: 4 W.Va.Code, 49-6-1(b) [1977] states in pertinent part:
The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten days' notice, and notice shall be given to the state department. In case wherein personal service within West Virginia cannot be obtained after due diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall be mailed to such person by certified mail, addressee only, return receipt requested, to the last known address of such person.

Footnote: 5 The record indicates that in the approximate one month period when both children were in the home, Tammy B. kept two of the weekly family counseling appointments. Tammy B. saw Dr. Bailey on October 1 and 21, 1986, but Dr. Bailey discontinued the sessions because Tammy B. did not attempt to deal with her own problems. Although encouraged by DHS to seek counseling, Tammy B. had no other counseling. The substance abuse counseling was discontinued in July 1986.

Footnote: 6 W.Va.Code, 49-6-2(b) [1984] provides:
In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three [§ 49-6D-3], article six-D of this chapter.

Footnote: 7 W.Va.Code, 49-6D-3(a) [1984] requires each family case plan to contain the following:
(1) A listing of specific, measurable, realistic goals to be achieved;
(2) An arrangement of goals into an order of priority;
(3) A listing of the problems that will be addressed by each goal;

(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;
(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;
(6) A list of the services which will be provided;
(7) Time targets for the achievement of goals or portions of goals;
(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers, and to other participants in the planning process; and
(9) A designation of when and how often tasks will be performed.

Footnote: 8 The family service plan was filed with the circuit court on February 6, 1986. The delay in filing was caused by Tammy B.'s motion to disqualify the circuit court judge and because Tammy B. did not wish to sign the plan until her attorney had signed. The revised service plan of April 1986 and DHS's monthly reports were filed with the court.

Footnote: 9 W.Va.Code, 49-6-2(b) [1984] specifies that the improvement period last for three to twelve months. The actual improvement period for Tammy B. began in December 1985 although the court's adoption of the family case plan was not formally reflected until the July 10, 1986 order.

Footnote: 10 W.Va.Code, 49-6-5(b)(2) [1984] provides:
(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control.
W.Va.Code, 49-6-5(b)(3) [1984] provides:
(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child.

201 W. Va. 60, 491 S.E.2d 607

Supreme Court Of Appeals Of West Virginia

IN THE MATTER OF: TAYLOR B.

No. 23997
Submitted: June 3, 1997
Filed: July 14, 1997

SYLLABUS BY THE COURT

1. "In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va. Code, sec. 49-6-10 (1996) that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings." Syl. pt. 4, State ex rel. Diva P. v. Kaufman, No. 23928, ___ W. Va. ___, ___ S.E.2d ___ (July 11, 1997).

2. A civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to W. Va. Code, 49-6-1 [1992], et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

3. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996).

4. "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, In the Interest of : Tiffany Marie S., 196 W Va. 223, 470 S.E.2d 177 (1996).

5. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, In re Jeffrey R.L., 190 W. Va. 24, 435 S.E.2d 162 (1993).

6. "Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. pt. 2, In the Matter of Scottie D., 185 W Va. 191, 406 S.E.2d 214 (1991).

7. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. pt. 5, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

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McHugh, Justice:
This case is before this Court upon appeal from the final order of the Circuit Court of Tucker County, West Virginia, entered on March 12, 1996. This is a child abuse and neglect matter concerning injuries suffered by Taylor B., a three-month-old infant, while in the care of his parents, James B. and Regina B. See footnote 1 According to the West Virginia Department of Health and Human Services, the injuries were consistent with "shaken baby syndrome," and the rights of the parents should have been terminated. However, as the final order indicates, the circuit court concluded that, although the injuries to Taylor B. "could have" been caused by James B., the parents have since been educated concerning shaken baby syndrome and that, therefore, a termination of parental rights was not warranted.

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. Upon a careful review of the record, and for the reasons expressed below, this Court is of the opinion that the circuit court committed error in failing to terminate the parental rights of James B. and Regina B. to Taylor B. We reach this conclusion in view of clear and convincing proof that the injuries to Taylor B. were, in fact, consistent with shaken baby syndrome and incurred while in the sole presence of James B., that the explanations of the parents to the contrary were inconsistent with the medical evidence, and that the parents have failed to acknowledge that any abuse or neglect of Taylor B. occurred.

Accordingly, we reverse the final order and remand this case to the circuit court for the entry of an order (1) terminating the parental rights of James B. and Regina B. to Taylor B., (2) directing the Department of Health and Human Resources to develop a permanency plan under the provisions of W. Va. Code, 49-6-5 [1996], for the permanent placement of Taylor B. in another home and (3) granting the parents supervised visitation. In so ruling, this Court is not unmindful that Taylor B. is now 3 years of age and has continued to reside with James B. and Regina B. throughout this litigation. We, therefore, further order the circuit court to explore, with the assistance of the parties, the possibility of the permanent placement of Taylor B. with a family relative of the parents. In the event the possibility of such placement with a family relative is confirmed, the Department shall develop a plan for the removal of Taylor B. from the home of James B. and Regina B. upon a progressive basis, subject to monitoring by the Department of Taylor B.'s safety.

I

The facts in this case are disturbing. Regina B. and James B., her male companion, lived in a home near Parsons, West Virginia, in Tucker County. See footnote 2 Taylor B., born on January 23, 1994, is the sole child of the relationship. On May 4, 1994, Regina B., upon leaving her employment for the day, picked up Taylor B. at her mother's house and returned home. Upon her arrival, James B. asked her to go back to her mother's house, which was across the road, to borrow a vacuum cleaner. Regina B. placed Taylor B., then three months old, in a baby swing and left to get the vacuum cleaner. When she returned approximately five minutes later she found Taylor B. lying on the floor, limp and unresponsive. James B., who had been alone with Taylor B. during that time, told Regina B. that he had placed Taylor B. upon the couch and that, while he was working in another area of the home, Taylor B. had fallen to the floor. The couch seat was approximately 12 inches from the floor, and a coffee table was nearby. The floor was carpeted.

James B. and Regina B. immediately sought medical treatment for Taylor B. at the Tucker County Emergency Ambulatory Center and later at Davis Memorial Hospital in Elkins, West Virginia. Soon after, Taylor B. was admitted at Ruby Memorial Hospital in Morgantown, West Virginia. Taylor B. remained at the latter hospital until his discharge on May 11, 1994.

As stated on the discharge summary from Ruby Memorial Hospital, Taylor B. was diagnosed with a subdural hematoma, "interhemispheric blood," and retinal hemorrhages, as a result of the incident. In particular, Dr. Susan A. Schmitt, who treated Taylor B. at the Emergency Ambulatory Center, later testified that Taylor B. was in "grave danger" on May 4, 1994, and was suffering from shaken baby syndrome. Moreover, Dr. Schmitt testified that she did not believe that Taylor B. had sustained the injuries from falling off a couch. See footnote 3 In addition, Dr. John B. Bodensteiner, a pediatric neurologist who examined Taylor B. at Ruby Memorial Hospital, testified that, as a result of the incident, Taylor B. sustained a subdural hematoma and retinal hemorrhages, consistent with shaken baby syndrome. Moreover, as did Dr. Schmitt, Dr. Bodensteiner stated that the injuries Taylor B. sustained were inconsistent with a fall from a couch. See footnote 4 Upon his discharge from Ruby Memorial Hospital, the Department of Health and Human Resources obtained emergency custody of Taylor B., and a petition seeking the termination of the parental rights of James B. and Regina B. was filed. W. Va. Code, 49-6-1 [1992]. At about that time, James B. moved out of the parties' Tucker County residence. On May 17, 1994, the circuit court conducted a preliminary hearing, at the conclusion of which an order was entered returning Taylor B. to Regina B. In addition, James B. was granted supervised visitation. Subsequently, the circuit court entered an order granting Regina B. an improvement period.

In October 1994, the Department of Health and Human Resources completed a written family case plan, applicable to both parents, to assist the parties and the circuit court in the ultimate disposition of the case. W. Va. Code, 49-6-2 [1992]. The plan required, in part, an acknowledgment by James B. and Regina B. of any "conditions and circumstances" relevant to the safety and well-being of Taylor B. However, although they subsequently attended parenting classes concerning their child, both James B. and Regina B. refused to sign the family case plan. In fact, the parents have never stated or recognized that any abuse or neglect of Taylor B. occurred. Specifically, James B. asserted that, the medical evidence notwithstanding, he never shook or harmed Taylor B. in any way on May 4, 1994, or at any other time. Moreover, Regina B., although conceding that Taylor B. was seriously injured on May 4, asserted that James B. was not responsible for the injuries, "because that's what he told me."

In addition to the abuse and neglect petition filed against James B. and Regina B. by the Department of Health and Human Resources, criminal proceedings were instituted against James B. by the Tucker County prosecuting attorney concerning the incident of May 4, 1994. On March 29, 1995, the criminal proceeding was resolved upon James B.'s plea of nolo contendere to the misdemeanor offense of presenting false information to attending medical personnel. W. Va. Code, 61-8D-7 [1988]. See footnote 5 According to James B. and the prosecuting attorney (who was representing the State in the criminal proceeding and the Department in the abuse and neglect proceeding), the nolo contendere plea was to result, additionally, in the dismissal of the abuse and neglect proceeding instituted by the Department. Nevertheless, upon objection by both the Department of Health and Human Resources and the guardian ad litem for Taylor B., the circuit court declined to dismiss the abuse and neglect proceeding, and, instead, a special prosecutor was appointed to represent the Department. See footnote 6 Following the nolo contendere plea, however, James B. moved back into the residence of Regina B. and Taylor B.

On August 31, 1995, the circuit court conducted an evidentiary hearing upon the abuse and neglect petition. The evidence of the Department consisted, chiefly, of establishing that, in spite of medical evidence to the contrary, neither James B. nor Regina B. ever acknowledged that any abuse or neglect of Taylor B. occurred. Included in the evidence of the Department was the testimony of two psychologists, Dr. Allan L. LaVoie and Dr. John M. Marstiller, who indicated that, in the absence of recognition by a parent that child abuse has occurred, the child remains at risk.

On the other hand, in addition to denying that any abuse or neglect of Taylor B. had occurred, the evidence of James B. and Regina B. consisted of establishing that they were good parents, that they had successfully completed the parenting

classes required by the Department and that they had cooperated with all authorities involved in the case, short of stating that abuse and neglect had taken place.

Following the evidentiary hearing, the circuit court entered the final order of March 12, 1996, returning full custody of Taylor B. to James B. and Regina B. In language, which appears to this Court, however, to be rather uncertain, the circuit court stated:

As to this recent and acute hematoma, there appears sufficient evidence from the expert that this activity seen upon physical examination of the child and from the CT testing done, is a circumstance of 'Shaken-Impact Syndrome' applicable to infants. . . . This father, in handling this fussy child, could have taken him out of the swing, could have violently pushed him against the soft back of the couch, or put him violently down on the soft cushion of the couch seat. This activity could have resulted in the physical damage to the child, with the subdural hematoma and the bilateral retinal hemorrhages in the eyes. . . . Considering these presenting circumstances, the father and mother of this infant, together with the maternal grandmother, took all necessary action to obtain medical assistance . . . . The clearer and more convincing evidence adduced at the hearing is the knowledge that both the parents, with knowledge that one of them took certain actions which precipitated the mental and physical condition of the child, have now been educated as to what caused the damage.

II

As a preliminary matter, this Court notes that, in response to the petition for appeal of the Department of Health and Human Resources, James B. asserts that the abuse and neglect petition filed against him and Regina B. should have been dismissed as a part of his nolo contendere plea to the offense of presenting false information to attending medical personnel. According to James B. that misdemeanor conviction resulted from a plea bargain, part of which included a promise by the prosecuting attorney to terminate the abuse and neglect proceeding. This Court concludes, however, that James B.'s assertion is without merit.

In the case of In re Jonathan G., ___ W. Va. ___, 482 S.E.2d 893 (1996), this Court recognized the dual role of county prosecutors "in the area of civil/criminal abuse and neglect cases." Citing the provisions of W. Va. Code, 49-6-10 [1984], which requires prosecuting attorneys to "fully and promptly cooperate" with those seeking relief in child abuse and neglect matters, we stated in that case that "the prosecuting attorney stands in the traditional role of a lawyer when representing DHHR in connection with abuse and neglect proceedings." ___ W. Va. at ___, 482 S.E.2d at 909. Thus, observing that the prosecutor's authority is more limited within the civil arena of abuse and neglect proceedings, as compared to the

criminal side of such proceedings, the opinion, in In re Jonathan G., holds: "Based on our conclusion that the prosecuting attorney's role as related to DHHR in an abuse and neglect proceeding is that of a traditional attorney-client, we further determine that a prosecuting attorney has no independent right to formulate and advocate positions separate from its client in these cases." ___ W. Va. at ___, 482 S.E.2d at 909.

The above principle thus expressed in In re Jonathan G. comports with the recent decision of this Court in State ex rel. Diva P. v. Kaufman, No. 23928, ___ W. Va. ___, ___ S.E.2d ___ (July 11, 1997). In State ex rel. Diva P., we stated in syllabus point 4:

> In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated through W.Va. Code, § 49-6-10 (1996) that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.
>
> (emphasis provided).

In the framework of In re Jonathan G. and State ex rel. Diva P., it is, therefore, clear that the circuit court, in this case, ruled correctly in declining to dismiss the abuse and neglect petition against James B. and Regina B. and in appointing a special prosecutor to represent the Department. Accordingly, as a corollary to those cases, this Court holds that a civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to W. Va. Code, 49-6-1 [1992], et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution. Contrary to the assertion of James B., civil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply "companion cases" to criminal prosecutions. As this Court stated in syllabus point 3 of In re Katie S., 198 W.Va. 79, 479 S.E.2d 589 (1996): "Although parents have substantial rights that must be protected, the primary goal

in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Here, the circuit court quite properly stated: "I still am not going to accept the plea bargain agreement in this civil case. At this time, I'm finding it is in the best interest of the child that I proceed [.]"

III

In this case, the Department of Health and Human Resources and the guardian ad litem for Taylor B., contend that the circuit court committed error in not terminating the parental rights of James B. and Regina B. According to the Department and the guardian ad litem, the evidence established that Taylor B. was the victim of shaken baby syndrome, a life threatening, nonaccidental circumstance. Moreover, the parents admitted that Taylor B. sustained serious injuries on May 4, 1994, even though they denied any abuse or neglect. In that regard, the Department and the guardian ad litem indicate that the failure of James B. and Regina B. to acknowledge that abuse or neglect occurred, in spite of medical evidence to the contrary, and the parents' refusal to sign the family case plan, erected a barrier to Taylor B's safety. James B., on the other hand, denies abusing or neglecting Taylor B. in any way, and Regina B. supports James B.'s version of the incident in question. In addition, both parents contend that the evidence proved that they were good parents who attended parenting classes and that they cooperated with all authorities involved in the case. Thus, James B. and Regina B. assert that the final order of the circuit court should be affirmed.

In syllabus point 1 of In the Interest of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), this Court observed:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

See also syl. pt. 1, State ex rel. Virginia M. v. Virgil Eugene S., 197 W.Va. 456, 475 S.E.2d 548 (1996).

An "abused child" is defined in W. Va. Code, 49-1-3 [1994], as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" See footnote 7 In addition, W. Va. Code, 49-1-3 [1994], defines a "neglected child" as a child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian [.]"

In particular, with regard to the termination of parental rights, W. Va. Code, 49-6-5(a)(6) [1992], provides that a circuit court may

> [u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and/or responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the state department or a licensed child welfare agency.

Moreover, W.Va. Code, 49-6-5(b) [1992], provides:

> As used in this section, 'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
>
> (2) The abusing parent or parents have wilfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control [.]

In In re Jeffrey R. L., 190 W.Va. 24, 435 S.E.2d 162 (1993), a guardian ad litem asserted that the circuit court erred in failing to terminate the parental rights to an infant, where the infant had suffered numerous bone fractures, and physicians had diagnosed the infant as suffering from battered child syndrome. Noting that the mother's explanations for the infant's injuries were inconsistent with the medical

evidence and that neither the mother nor the father was cooperative with regard to identifying the perpetrator of the injuries, this Court, in In re Jeffrey R. L., agreed with the guardian ad litem and held that there was clear and convincing evidence in the record warranting the termination of parental rights. As syllabus point 3 of Jeffrey R. L. holds:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

See W. Va. Code, 49-6-2 [1996], which requires that abuse and neglect must be established by clear and convincing proof; syl. pt. 2, In re Danielle T., 195 W. Va. 530, 466 S.E.2d 189 (1995).

Moreover, as this Court stated in syllabus point 2 of In the Matter of Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991):

> Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W. Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

See also syl. pt. 2, In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985).

In this case, the evidence is clear and convincing that Taylor B. sustained a subdural hematoma, "interhemispheric blood," and retinal hemorrhages, as a result of the incident of May 4, 1994. According to Dr. Schmitt, Taylor B. was in "grave danger" that evening, and neither Dr. Schmitt nor Dr. Bodensteiner was of the opinion that Taylor B. had sustained those injuries from falling off a couch. As the evidence of record and the final order of the circuit court indicate, the injuries

Taylor B. sustained were consistent with shaken baby syndrome. Without question, shaken baby syndrome is life-threatening to an infant. See Doris S., supra, concerning the death of a twenty-two-month old child from shaken baby syndrome. See footnote 8

In spite of the medical evidence, however, James B. denies that any abuse or neglect of Taylor B. occurred, and Regina B. supports James B.'s version of the incident in question. Nevertheless, as Regina B. testified on August 31, 1995:

> Q: You also did not agree or believe or admit that James did it?
>
> A: No, I did not.
>
> Q. If James, in fact, did this abuse and he continues to live in your home it can happen again, true?
>
> A: Yes.

In Doris S., supra, this Court stated that, for a parent to remedy the problem of abuse and neglect, "the problem must first be acknowledged." 197 W. Va. at 498, 475 S.E.2d at 874. Here, the medical evidence notwithstanding, James B. and Doris B. deny that any abuse or neglect occurred and have refused to sign the family case plan because of its indication that there may have been "conditions and circumstances" in the home adverse to the safety and well-being of Taylor B. Such conduct on the part of the parents, however, renders those conditions and circumstances untreatable. As Dr. LaVoie and Dr. Marstiller stated, in the absence of recognition by a parent that child abuse has occurred, the child remains at risk. Specifically, Dr. LaVoie testified before the circuit court as follows:

> Q: Even if Regina [B.] had went through parenting classes and counseling if she had not yet acknowledged that abuse had occurred what, who ever the person who did it would she be safe to have this child back?
>
> A: In my opinion, not.

Upon a careful review of the record, therefore, this Court is of the opinion that the injuries sustained by Taylor B. could not have occurred in the manner testified to by James B. and Regina B. before the circuit court. Rather, as indicated by the medical testimony, the injuries were consistent with shaken baby syndrome, a life-threatening circumstance. Moreover, neither James B. nor Regina B. has ever acknowledged that any abuse or neglect of Taylor B. occurred. Accordingly, this

Court concludes that the circuit court committed error in failing to terminate the parental rights of James B. and Regina B.

In syllabus point 5 of In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995), this Court held:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

See also In re Danielle T., supra, 195 W. Va. at 535, 466 S.E.2d at 194.

Accordingly, upon all of the above, the final order of the Circuit Court of Tucker County, entered on March 12, 1996, is reversed, and this case is remanded to the circuit court for the entry of an order (1) terminating the parental rights of James B. and Regina B. to Taylor B., (2) directing the Department of Health and Human Resources to develop a permanency plan under the provisions of W. Va. Code, 49-6-5 [1996], for the permanent placement of Taylor B. in another home and (3) granting the parents supervised visitation. In so ruling, this Court further orders the circuit court to explore, with the assistance of the parties, the possibility of the permanent placement of Taylor B. with a family relative of the parents. In the event the possibility of such placement with a family relative is confirmed, the Department shall develop a plan for the removal of Taylor B. from the home of James B. and Regina B. upon a progressive basis, subject to monitoring by the Department of Taylor B.'s safety.

Reversed and remanded.

Footnote: 1 We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P., 182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote: 2 As the brief filed by James B. in this Court indicates, James B. and Regina B. were married subsequent to the events in question. Specifically, the brief of James B. States: "The parties who are now married, were not married at the time but were living together near Seven Islands in Tucker County."

Footnote: 3 During her testimony, Dr. Schmitt stated:
[Taylor B.] was not able to respond, would not look at anything. He was lying very limp on the table with his eyes open but his eyes rolled back and rhythmically moving from left to right. He did not respond to verbal commands. . . . I did a physical exam and found that he had a bulging fontanel which is the soft spot of the head which is indicative of some kind of an intracranial process. It meant that there was increased pressure inside of his brain. I did a physical exam and I was very concerned about this child. . . . [H]e was in danger. If you look at the kinds of injuries that he sustained, thirty percent of these children die, thirty percent of these children are seriously damaged, and only thirty percent of babies that have sustained this kind of an injury have a normal outcome neurologically.

Footnote: 4 It should be noted that, during the medical treatment of Taylor B. following the incident of May 4, 1994, a second, older subdural hematoma was discovered. As in the case of the injuries of May 4, 1994, the cause of the older subdural hematoma was controverted during the proceedings below. Specifically, Dr. Bodensteiner, indicating that the older injury was nonaccidental testified:

Q. In the present case where you have an old injury and a new injury are you able to, to give us an opinion as to whether it's likely that these were accidental or not? Based upon the history you had in this case?

A. Well, the history we have identifies nothing that would account for either of those injuries. So I, I, I can't say whether, I mean, I can say that the history we have doesn't correlate with it. To [injure] a child at this age twice, this badly is, in my opinion, extremely difficult to do accidentally.

On the other hand, James B. and Regina B. asserted that the second, older subdural hematoma could have occurred at Taylor B.'s birth, which had been a difficult birth, or could have been caused by an accidental kick to the head by an older child visiting the home. Nevertheless, Dr. Bodensteiner stated that Taylor B.'s medical history did not suggest that the older subdural hematoma occurred at birth. Moreover, Dr. Bordensteiner indicated that the kick to the head would have had to have been "severe" to produce such an injury.

Footnote: 5 Article 8D of chapter 61 of the West Virginia Code is entitled "Child Abuse," and W. Va. Code, 61-8D-7 [1988], provides:

Any person who presents false information concerning acts or conduct which would constitute an offense under the provisions of this article to attending medical personnel shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars, and shall be confined in the county jail not more than one year.

As the record indicates, James B. was originally charged with a felony offense under W. Va. Code, 61-8D-3 [1992], which statute concerns the infliction of "serious bodily injury" upon a child.

Footnote: 6 It should be noted that, although both the criminal proceeding and the abuse and neglect proceeding were instituted in Tucker county, separate circuit court judges presided in those matters.

Footnote: 7 In syllabus point 7 of West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S., 197 W. Va. 489, 475 S.E.2d 865 (1996), this Court stated that the term "knowingly" as used in W. Va. Code, 49-1-3, "does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred."

Footnote: 8 The following statement found in the brief filed by James B. in this Court raises concern:

Dr. Boyd, a pediatrician, testified that the child at the time of the hearing, age 19 months, was not susceptible to 'Shaken Baby Syndrome' because he now had better head control. Obviously, the child is now 3 years old and is even less susceptible to this type of injury than that at the time of the hearing.

At best, that statement provides nothing of value with regard to whether Taylor B. was, or may yet be, the victim of abuse or neglect.

Workman, Chief Justice, concurring:

The opinion of the majority is well-written and absolutely correct on the law. I find the result sufficiently troubling, however, that I feel compelled to write separately. What the opinion does not reflect is that these parents were almost encouraged by the policy of the circuit court in this abuse and neglect case not to acknowledge responsibility for the abuse that occurred to Taylor. The lower court in its final order made this finding:

> This Court would come to the legal conclusion that there is no clear and convincing evidence to support the facts that these parents, or either of them, in the face of knowledge of this abuse, took no action or did not identify the perpetrator of this abuse, or are knowingly hiding the identity of the abuser, or are otherwise actually aiding and protecting the abusing parent. The clearer and more convincing evidence adduced at the hearing is the knowledge that both the parents, with knowledge that one of them took certain actions which precipitated the mental and physical condition of the child, have now been educated as to what caused the damage.

Although the court's obvious mistake of clear law in this regard does not exonerate the parents of responsibility for their failure to acknowledge, it appears to have led at least the mother down a primrose path that will now result in the loss of parental rights to this child. What is also disturbing is that Taylor has now been in the almost constant custody of these parents for all of his three and one-half years. As we have said previously, such sudden alterations can be so traumatic that they may create an adverse impact for the duration of that child's life. As we said in syllabus point three of James M. V. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991):

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

At the most recent West Virginia State Judicial Conference, Dr. Rosalind Folman, a research assistant at the University of Michigan who holds a Ph.D. in Developmental Child Psychology and Social Work, identified this problem in her remarks to the judges of this state. She urged that judges overseeing children's cases attempt to avoid at all costs the sudden, traumatic removal of children from their familiar settings.

Thus, in the event that no suitable relative is found for the permanent placement of Taylor, then at least there should be a gradual transition of this little boy to his permanent adoptive home. He should not be unceremoniously routed out of the only home he has ever known, and he should not be placed in a temporary foster home pending the location of an adoptive home. He should be moved directly, but very gradually, to what will become his permanent adoptive home. If the Department or the guardian ad litem feel that the child is in imminent danger in

the home of his biological parents, then the home of the maternal grandmother who has been very involved in his life, or some other relative who Taylor already knows and loves, should be chosen to care for him during the gradual transition.

Lastly, the circuit court in developing the post-termination visitation plan should bear in mind the necessity of minimizing the pain and trauma this little boy will endure in making this major transition in his life. Contact with the parents should be maximized, even if in a supervised setting, so as to facilitate that goal. I urge these principles be followed not for the protection of the parents' rights, but for the protection of Taylor's rights not to have further trauma visited upon his life.

Starcher, Justice, dissenting:

I am concerned that the majority opinion has, in effect, applied a bright-line rule: unless a parent who abuses their child admits to the abuse, and unless the other parent accuses the "abuser parent" of abuse, neither parent will ever be the child's parent again.

I understand the reasoning behind this sort of rule, but because it seemingly admits to no exceptions, I think that it may run contrary to the principle of assuring that the best interests of the child are held paramount.

Probably a large percentage of parents who commit abuse to a child will never admit to the abuse -- because it is a crime for which they can be imprisoned, and/or because the admission is psychologically so difficult. The same reasoning holds true for making accusations of abuse against one's fellow parent.

But it seems to me to be unreasonable to assume that parents who can't or won't "'fess up" or make an accusation regarding abuse can't *ever* become and behave as acceptable parents. Nothing in our statutes says that this is a judgment that the Legislature has made, and I don't think this is an accepted principle of social science. So how can we make this the premise of such a harsh rule, a rule that certainly will have the effect of tearing some children away from basically loving and caring parents, and placing these children into the highly problematic worlds of foster care and adoption?

In the instant case, there was a remarkable uniformity of opinion in the testimony that the mother in this case is a good, hard-working and caring parent. The evidence also showed that the father -- although he very likely seriously abused the child once or twice by a fit of shaking -- was otherwise a loving, decent parent who was improving and trying to do better. Moreover, it's been over three years

since the shaking injury to this child, and there's been no evidence that everything is not going okay with the child in the mother's care.

I certainly think that there is strong reason for DHHR to pay extremely close attention to this situation. It would make sense to require the father to continue parenting education indefinitely. But I think it is complete overkill to terminate the mother's and the father's parental rights simply because the mother refuses to point an accusing finger to her husband and he will not acknowledge his acts of abuse.

Like the trial judge, I think that the weight of the evidence in this case at this time is that this situation can be salvaged, and the child protected completely -- without using the drastic step of terminating parental rights.

Because I don't think it is wise, necessary or legally required to preclude **all** parents who do not admit or accuse abuse from being parents -- and because I think the trial judge made the right call in this particular case -- I respectfully dissent.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 13, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
June 14, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29964

IN RE: TESSLA N.M. AND SARAH S.B.

Appeal from the Circuit Court of Wayne County
Honorable Darrell Pratt, Judge
Civil Action Nos. 00-JA-21 and 00-J-022

AFFIRMED

Submitted: January 9, 2002
Filed: June 13, 2002

Steven T. Cook, Esq.
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JUSTICE MAYNARD delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. Pursuant to Rule 35(a)(1) of the West Virginia Rules of Procedure for Child Abuse and Neglect, an oral voluntary relinquishment of parental rights is valid if the parent who chooses to relinquish is present in court and the court determines that the parent understands the consequences of a termination of parental rights, is aware of less drastic alternatives than termination, and is informed of the right to a hearing and to representation by counsel.

2. An oral voluntary relinquishment of parental rights made on the record in open court is valid regardless of whether the parent who chooses to terminate his or her rights executes and submits a duly acknowledged writing pursuant to W.Va. Code § 49-6-7.

Maynard, Justice:

On November 17, 2000, during a status review hearing in the Circuit Court of Wayne County, the appellant, Bonita W., voluntarily relinquished her parental rights to her daughters, Sarah S.B. and Tessla N.M. The appellant subsequently filed a motion seeking to set aside the voluntary termination. The circuit court denied the motion. She alleges the court erred because the oral relinquishment was not verified in writing and was made under duress. We find no error.

I.

FACTS

Sarah S.B. is the daughter of Bonita W. and Dennis G. and is currently seven years old. Tessla N.M. is the daughter of Bonita W. and Ricky M. and is currently five years old.[1] The West Virginia Department of Health and Human Resources (DHHR) has provided assistance to the appellant since Sarah was approximately eight months old. On May 2, 2000, Sarah and Tessla were referred to DHHR because both girls alleged that their mother's husband, Tester Wayne W., sexually abused them. The girls also reported that their mother sexually and physically abused them.

[1]Bonita W. recently gave birth to a third child who is not involved in this appeal.

On May 16, 2000, Deborah Roach, a social worker for DHHR, filed a petition in the interest of the children. The petition stated that Sarah and Tessla reported that they had been sexually abused by Wayne W.; that both girls were infested with head lice; that the home was dirty with dog feces on the floor; that one child was observed eating food off of the porch floor; and that Sarah must repeat kindergarten even though she is of average intelligence because she missed over forty days of school. The petition stated that the appellant took the girls to Wayne Health Services to see a doctor regarding sexual abuse but failed to take them to the sexual abuse examinations which Wayne Health Services scheduled in Huntington. The appellant also failed to bring the girls to interviews that were scheduled with DHHR. When DHHR suggested that a Child Protective Services (CPS) case might be opened to protect the children, the appellant threatened to take the children to visit her father in Ohio and not return to West Virginia. This was a real concern for DHHR because the appellant moved to Virginia once before while a CPS case was open. The children also indicated that Wayne W. would move with them.[2]

DHHR petitioned for emergency removal of the children from the home. On May 22, 2000, the circuit court determined the children were neglected or abused and set the matter for preliminary hearing on May 26, 2000. The order does not specify the physical

[2]During oral argument, the appellant's counsel informed the Court that the appellant divorced Wayne W. and moved in with her mother. We note that the record indicates that the appellant's mother was deemed unsuitable as a guardian for the children due to health concerns and inability to care for the children.

placement of the children at that time.[3] Counsel was appointed to represent the appellant and that representation has continued throughout these proceedings. At the close of the May 26, 2000 hearing, the court found "by clear and convincing proof that the children are neglected or abused by reason of the following facts: (1) That the children may have been touched inappropriately; and (2) that there are severe problems in the cleanliness and care of the children." DHHR retained temporary legal custody of the children who were to remain in their present placement; the appellant was granted supervised visitation; Dennis G.'s schedule of visitation continued; Ricky M. would have no contact with the children until he appeared before the court; and Wayne W. was prohibited from having any contact with the children.

Following a review hearing which was held on July 6, 2000, the court directed DHHR to develop a family case plan and ordered the appellant to fully comply with the plan. The appellant subsequently filed a motion for an improvement period. The dispositional hearing was held on August 11, 2000 at which time the court found that the appellant "has recently begun to be minimally compliant with [DHHR]." Consequently, she was granted a post-adjudicatory improvement period of six months. DHHR retained legal custody of the children and Patricia G., Dennis G.'s mother, was granted physical custody of both girls.

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[3]Dr. Melody Cyrus examined Sarah on May 24, 2000. Her report states that Sarah was living with her paternal grandmother, Patricia G.

A status review hearing was held on November 17, 2000. At the beginning of the hearing, Steven Cook, the appellant's attorney, made a proffer to the court stating that the appellant was considering voluntarily relinquishing her parental rights. During the hearing, Mr. Cook questioned the appellant. He specifically asked her if she contacted him "several months ago . . . about considering a relinquishment of your rights." She answered, "Yes, I did." He then asked, "But as of today's date you have decided to bring this to the Judge's attention and you would like to voluntarily relinquish; is that correct?" She answered, "Yes." The appellant explained her reasoning to the court. She stated that the girls were doing well with Patricia G. and seemed happy. She believed the girls were confused and hurting from being "pull[ed] back and forth not knowing and wondering[,]" and she thought the time had come to stop the uncertainty. She stated that she wanted "them to be able to make a transition and go ahead and hopefully be happy[.]"

Mr. Cook questioned the appellant extensively regarding whether she was making this decision "of [her] own free will[]" and whether she understood that she did not have to voluntarily relinquish her rights. She unequivocally stated that she understood what she was doing and that she was making the decision of her own free will. As to post- termination visitation, the appellant stated that she understood the girls could see her if they so chose. She also understood that she would have no actual right to see the children and could not force visitation. Her attorney finally asked, "You have had a long time to think about this; correct?" The appellant answered, "Yes. I have had seven months and two days to think about this."

The court accepted the voluntary relinquishment by stating,

> I believe the mother has made a reasoned and voluntary decision based on the fact that she has recognized what she believes to be in the best interest of the children and has voluntarily relinquished her parental rights. I'm going to accept the voluntary relinquishment. Her parental rights will be terminated.

The improvement period and the appellant's parental rights were terminated in the court's order which was entered on December 22, 2000. Thereafter, on February 13, 2001, the appellant filed a motion seeking to set aside the oral relinquishment of her parental rights. In support of her motion, she argued that an agreement to terminate parental rights cannot be valid unless it is made by a duly acknowledged writing.[4] She stated further that she did not wish to relinquish her rights at that time; therefore, any termination would not be voluntary. On April 13, 2001, the court entered an order which terminated Ricky M.'s parental rights to Tessla N.M. due to abandonment; ordered DHHR to determine whether post-termination visitation would take place between the appellant and the children; and denied the appellant's motion to revoke her voluntary relinquishment of parental rights. It is from this order that the appellant appeals.

II.

STANDARD OF REVIEW

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[4]W.Va. Code § 49-6-7 (1977) states, "An agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud."

This appeal presents a question of law involving interpretation of a statute. Accordingly, "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Moreover,

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Syllabus Point 1, *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996).

III.

DISCUSSION

On appeal, the appellant contends the circuit court erred by terminating her parental rights pursuant to an oral relinquishment when W.Va. Code § 49-6-7 requires a duly acknowledged writing. She also believes the voluntary relinquishment should be set aside because the decision was made under duress. DHHR argues that the statute does not contemplate that a parent may only relinquish parental rights in writing and this becomes clear when the statute is read together with the Rules of Procedure for Child Abuse and Neglect.

DHHR also contends there is no evidence to support the appellant's belated claim that she was compelled to relinquish her rights under duress. We agree.

The first issue which we must resolve is whether an oral voluntary relinquishment of parental rights is valid when the relinquishment is made in open court on the record but is not followed up with a duly acknowledged writing. In the case *sub judice*, the appellant admits she voluntarily terminated her rights to both girls on the record in open court. There is no question the voluntary relinquishment occurred after extensive questioning by the appellant's attorney. She, nonetheless, argues on appeal that because of duress and because she was later informed the State would not pursue sexual assault charges against Wayne W., she did not intend to voluntarily terminate her rights on November 17, 2000. She believes this is borne out by the fact that no duly acknowledged writing exists.

The appellant's argument is confusing. In the brief she submitted on appeal, the appellant admits that she voluntarily relinquished her rights but at the same time she argues "that she never intended to relinquish her parental rights." She obviously cannot have it both ways. It appears, from reading her brief and the record submitted on appeal, that the appellant fully intended to voluntarily relinquish her rights during the November 17, 2000 court hearing but later changed her mind. Three months passed between the voluntary termination and the date on which the appellant filed her motion seeking to set aside the voluntary relinquishment. She relates that at some point during this time she understood the State would not pursue

sexual abuse charges against Wayne W. and indicates that she changed her mind at that time. However, that is not what she argues; instead, she tries to convince this Court that she did not intend to do what she did during the November 17, 2000 hearing. The transcript of the hearing suggests otherwise.

At the beginning of the hearing, the appellant's attorney[5] made a proffer to the court. He stated, "I will just proffer that she is considering a voluntary relinquishment and we would like to put some things on the record." Her attorney then questioned the appellant regarding whether she wanted to relinquish her rights and whether the relinquishment was voluntary. He also had the appellant explain her reasoning to the court. The court accepted the relinquishment on the record in open court and subsequently entered an order stating that "the Court is of the opinion that the least restrictive alternative which is in the best interest of the children in this case is to accept the voluntary relinquishment of parental rights by Bonita W. and to terminate such parental rights." Given this set of facts, we cannot say the circuit court abused its discretion by terminating the appellant's rights and by refusing to set the voluntary termination aside. The remaining question is whether the termination is valid minus a written agreement.

[5]We note that the attorney who questioned the appellant in the November 17, 2000 hearing is the same attorney who represents her on appeal.

When one reconciles W.Va. Code § 49-6-7 with the West Virginia Rules of Procedure for Child Abuse and Neglect,[6] it becomes obvious that a voluntary relinquishment made on the record in open court is valid regardless of whether the oral relinquishment is followed by a duly acknowledged writing. Rule 35(a)(1) contains the procedure whereby rights may be terminated when the parent(s) is/are present in court and has/have *not* signed a relinquishment of parental rights; Rule 35(a)(3) contains the procedure whereby rights may be terminated when the parent(s) is/are present in court and has/have voluntarily relinquished parental rights in writing. If rights could only be terminated by a signed agreement, then Rule

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[6]Rules 35(a)(1) and (3) of the Rules of Procedure for Child Abuse and Neglect read as follows:

> (a) *Uncontested termination of parental rights.*--If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing:
>
> (1) If the parent(s) is/are present at the hearing but fail(s) to contest termination of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.
>
> (3) If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

35(a)(1) would be unnecessary. Either way, the circuit court must determine whether the parent understands the consequences of terminating his or her rights, is aware of less drastic alternatives, and has been informed of the right to a hearing and to representation by counsel.

In the case at bar, the appellant was present in a court hearing and was represented by counsel; she fully understood the alternatives which the department might pursue; and she stated that she understood the consequences of voluntarily relinquishing her rights. The requirements of the rule were satisfied. A signed agreement was not required under these circumstances; we will discuss, *infra*, when signed agreements are required. We hold that, pursuant to Rule 35(a)(1) of the Rules of Procedure for Child Abuse and Neglect, an oral voluntary relinquishment of parental rights is valid if the parent who chooses to relinquish is present in court and the court determines that the parent understands the consequences of a termination of parental rights, is aware of less drastic alternatives than termination, and is informed of the right to a hearing and to representation by counsel.

Voluntary relinquishments do not always take place in a court room. Parents may be in an extrajudicial setting when they choose to terminate their rights. For instance, a parent may choose to terminate his or her rights when he or she is in a DHHR office or when he or she is involved in a private adoption proceeding. It is these situations to which W.Va.

Code § 49-6-7 applies, and these relinquishments are valid only "if made by a duly acknowledged writing[.]"

In contrast to what he now argues, the transcript of the February 9, 2001 interim judicial review hearing demonstrates that appellant's counsel agreed with the court that an oral relinquishment is valid when a parent who chooses to terminate his or her rights is present before the court. The following colloquy took place:

> THE COURT: The way I read that [W.Va. Code § 49-6-7] is if the parent doesn't appear here, they may enter a valid voluntary relinquishment signed and notarized and presented in court. It's valid. It can be a valid voluntary relinquishment without being present in court. She was present in court.
>
> MR. STAPLETON: That is correct, Your Honor. We do not intend to mislead the Court in any way. The Court inquired of her and she said several times that she did consent to it.

We agree with the circuit court that parents who relinquish their parental rights outside of a court setting must submit a signed and notarized agreement in order for the relinquishment to be valid. We, therefore, hold that an oral relinquishment of parental rights made on the record in open court is valid regardless of whether the parent who chooses to terminate his or her rights executes and submits a duly acknowledged writing pursuant to W.Va. Code § 49-6-7

(1977).[7] Of course, all agreements to terminate parental rights must be made free from duress and fraud.

That is the appellant's final complaint. She contends that she agreed to terminate her rights under duress and, as a result, the relinquishment cannot be accepted by the court as valid. In the brief she submitted on appeal she states that the duress amounted to a DHHR worker explaining to her that relinquishment would be in the best interests of the children and telling her that she would be able to visit the children through a post-termination visitation plan. The transcript of the hearing does not substantiate this complaint.

During the hearing, the appellant specifically stated that she wished to voluntarily relinquish; that she was relinquishing of her own free will; that she first approached her attorney to suggest voluntary relinquishment; and that she understood the decision regarding post-termination visitation would be left up to the children and DHHR. Three months later the appellant's attorney represented to the court for the first time that the appellant had changed her mind and did "not desire to have her parental rights terminated." He asked the court to set

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[7]This ruling conforms with our recent decision in the case of *In re: James G. and Emmett M.L., III*, ___ W.Va. ___, ___ S.E.2d ___ (No. 30039, June 13, 2002). While the instant opinion deals with an oral voluntary relinquishment made in open court which the parent later wished to retract, the *James G.* opinion deals with a written agreement. We hold in *James G.* that the consent of the DHHR is not required for a parent's voluntary relinquishment of parental rights to be valid, provided the requirements of W.Va. Code § 49-6-7 (1977) are met and the provisions of the Rules of Procedure for Child Abuse and Neglect are satisfied.

aside the voluntary termination. The court reviewed the circumstances under which the relinquishment took place and considered the best interests of the children. The motion to revoke was denied. Under these circumstances, we cannot say the court abused its discretion by "deny[ing] [the appellant] the right to withdraw her voluntary relinquishment."

The appellant chose to voluntarily relinquish her parental rights on the record in open court. The court correctly determined the relinquishment was valid minus a notarized written agreement. The appellant understood the consequences of termination; her attorney assured her that he would "vigorously defend" against termination and fight for less drastic alternatives; and she was represented by counsel during these entire proceedings. The court fully complied with the requirements of the statute and the rules.

For the foregoing reasons, the order of the circuit court which denied the appellant's motion to set aside her voluntary termination of parental rights to Sarah S.B. and Tessla N.M. is affirmed.

Affirmed.

172 W. Va. 429, 307 S.E.2d 465
Supreme Court of Appeals of West Virginia

In re Ester Sue THAXTON, Louis Frederick Thaxton and Eugene Scott Thaxton

No. 15756
July 5, 1983
Rehearing Denied Oct. 20, 1983

SYLLABUS BY THE COURT

"Where a court having jurisdiction of child neglect or abuse proceedings denies a motion by a parent or guardian for an improvement plan under W.Va.Code § 49-6-2(b), the court must state on the record the compelling circumstances warranting the denial of such motion." Syllabus Point 3, *State v. Scritchfield,* 167 W.Va. 683, 280 S.E.2d 315 (1981).

Douglass & Douglass and Ernest M. Douglass, Parkersburg, for appellant, Nancy Thaxton, mother.

James M. Bradley, Jr., Parkersburg, for Ester Sue Thaxton, et al.

Elizabeth A. Pyles, Asst. Pros. Atty., Parkersburg, for State.

PER CURIAM:

The appellant, Nancy Thaxton, appeals from a final order of the Circuit Court of Wood County which permanently terminated her parental rights to her three children. Thaxton is the mother of Ester Sue Thaxton, 14; Louis Thaxton, 12; and Eugene Scott Thaxton, 10. The children's father was not identified during the trial and is not a party in this case.

The case began February 9, 1981, when Christine Cooke, a social worker for the Department of Welfare, filed a verified petition alleging that Ester Sue, Louis and Eugene were neglected children. W.Va.Code § 49-6-3 (1980 Repl.Vol.).

In Cooke's petition, the Department of Welfare asked that it be given permanent custody of the children with the right to consent to their adoption.

The court conducted an adjudicatory hearing March 12, 1981, on the petition's allegations. The state presented testimony by various school officials, including the children's teachers, and Cooke regarding the children's absences and lateness at school. They also testified about the inadequate care given the children by their mother which resulted in them arriving at school sleepy, with rumpled and/or dirty clothing.

Thaxton and a neighborhood youth testified for the appellant. Thaxton admitted the children had been absent and/or late at school, but gave various reasons why that had occurred. The boy testified that he had not bruised Ester Sue's throat by kissing her as the State had charged.

The court ruled that the children were neglected, continued the custody in the Department of Welfare, and set the case for dispositional hearing. See footnote 1 The court concluded that Thaxton had

failed to ensure that her children attended school and arrived on time properly clothed and rested. Additionally, the court found that Thaxton had failed to ensure that Louis wore his glasses to school.

At a hearing April 2, 1981, appellant's counsel submitted a motion for an improvement period. The motion outlined specific actions which the appellant would have to take concerning the well-being of her children. The trial court deferred ruling on the motion pending a psychological examination of the children.

Prior to the dispositional hearing, the children underwent psychological testing. Thaxton also met with a psychologist who evaluated her children, but did not undergo extensive evaluation herself.

The appellant entered into an informal agreement October 20, 1981, with the Department of Welfare which outlined efforts she needed to make in order to regain custody of her children. The plan required Thaxton to obtain suitable housing for her family and to attend parenting classes at a local counseling center. Additionally, Thaxton was to meet with Cooke twice a month in order to visit her children.

The lower court conducted a dispositional hearing December 2, 1981, and March 25, 1982. The evidence showed that Thaxton was mildly retarded and her children suffered from learning disabilities. Expert psychological testimony indicated that Thaxton could not adequately care and supervise her children. Two psychologists recommended that contact between mother and children be retained, but that day-to-day custody remain with the Department of Welfare.

Cooke testified that Thaxton had made some attempt to secure housing, but was still living with her parents at the time of the hearing. Additionally, she had failed to attend the parenting classes and had stopped the twice-monthly meetings with her children in early December, 1981. Cooke testified that she had not detected any improvement in Thaxton's ability to care for her children.

In response, the mother testified that she had missed her visits with the social worker, and presumably the parenting classes, because she had been caring for a sick aunt. She also testified that she had been sick in December, 1981, and January, 1982.

The lower court ordered that permanent custody be given to the Department of Welfare and terminated Thaxton's parental rights. The court found that "there is no reasonable likelihood that the conditions of neglect ... can be substantially corrected in the future ..." The court noted that Thaxton had "failed to respond and follow through with reasonable rehabilitative efforts designed to reduce and prevent the neglect of [her] children." In its ruling, the court noted the psychologists' recommendation that some contact remain between children and mother, but observed that it did not

see how permanent custody with the right of adoption could be given to the Department of Welfare subject to continued contact between mother and children.

The appellant's primary argument is that the lower court erred by severing Thaxton's parental rights since a less drastic alternative remedy was available. The appellant, however, does not specify what this alternative is. Rather, Thaxton argues that she be permitted to retain contact with her children even if permanent custody is awarded to the Department of Welfare.

W.Va.Code § 49-6-5(a)(6) authorizes termination of parental rights when "there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected ...." W.Va.Code § 49-6-5(b) specifies the circumstances which justify parental termination.

However, W.Va. Code § 49-6-2(b) permits a parent to move the court for an improvement period of three to twelve months. "The court shall allow such an improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or another agency during the improvement period." *Id.*

"Where a court having jurisdiction of child neglect or abuse proceedings denies a motion by a parent or guardian for an improvement plan under W.Va. Code § 49-6-2(b), the court must state on the record the compelling circumstances warranting the denial of such motion." Syllabus Point 3, *State v. Scritchfield,* 167 W.Va., 683, 280 S.E.2d 315 (1981).

Upon the record before us, we do not find that the trial court ever ruled on the appellant's motion for an improvement period. Therefore, since the trial court did not rule, it could not have stated its reasons for denying such a motion. The appellant was entitled to the granting of her motion absent a finding of compelling circumstances. Since the trial court did not set forth any such reasons on the record, we conclude that the appellant is entitled to an improvement period.

The record indicates that the appellant and the Department of Welfare entered into an informal plan to improve the appellant's child-rearing ability. The record is silent, however, as to whether this agreement was an improvement plan submitted pursuant to W.Va.Code § 49-6-2(b) or that the trial court approved the agreement as a formal improvement plan.

Therefore, we reverse the judgment of the lower court and direct that a formal improvement plan be drawn up by the appellant and the Department of Welfare subject to the lower court's approval. Custody of the children is to remain with the parties designated by the Department of Welfare during the improvement plan.

Reversed and remanded.

Footnote: 1 *The appellant's petition for appeal of the neglect ruling was denied by this Court. The sole issue in this appeal is whether the trial court imposed the appropriate remedy after the finding of neglect.*

NEELY and McHUGH, JJ., dissent for the reason that they believe that the trial court properly terminated the parental rights and ordered that permanent custody of the children be given to the Department of Welfare.

196 W. Va. 223, 470 S.E.2d 177

Supreme Court Of Appeals Of West Virginia

IN THE INTEREST OF: TIFFANY MARIE S., TAYLOR BROOK S., CHILDREN UNDER THE AGE OF EIGHTEEN YEARS

NANCY S.E., Appellant

DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Appellee

No. 23198
Submitted: February 6, 1996
Filed: March 20, 1996

SYLLABUS BY THE COURT

1. Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

2. "Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law." Syl. pt. 8, In the Matter of Lindsey C., ___ W. Va. ___, ___ S.E.2d ___ (No. 23065 12/14/95). (Emphasis in original).

3. "Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984)."

Syl. pt. 3, State ex rel. W. Va. Department of Human Services v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987).

4. "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. pt. 4, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991).

5. "W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syl. pt. 1, In the Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981).

Kin Sayre
Beckley, West Virginia
Guardian Ad Litem

Pat Lamp Joanna Bowles
Assistant Public Defender Assistant Attorney General
Beckley, West Virginia Charleston, West Virginia
Attorney for Appellant Attorney for Appellee

Cleckley, Justice:
Nancy S.E. See footnote 1 appeals a final order entered May 8, 1995, by the Circuit Court of Raleigh County, which terminated her parental rights to her two daughters, Tiffany Marie S. and Taylor Brook S. She asserts the circuit court erred by (1) failing to timely appoint counsel to represent her; (2) ordering an improvement period in excess of twelve months; (3) admitting irrelevant and prejudicial evidence of unrelated criminal charges; (4) conducting the termination hearing in her absence, and (5) finding she abused or neglected her two children. Nancy S.E. also contends the West Virginia Department of Health and Human Resources (Department) did not timely formulate a family case plan or show she failed to comply with the case plan. After reviewing the record, we find no reversible error and affirm the decision of the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

On February 24, 1993, Alice Oglesby, a social worker with the Department, filed a petition pursuant to W. Va. Code, 49-6-1 (1992), See footnote 2 alleging that six-year-old Michael Emerson J., three-year-old Tiffany Marie S. and one-month-old Taylor Brook S. were abused and/or neglected children according to W. Va. Code, 49-1-3 (1992). See footnote 3 More specifically, the petition alleged that Brian S. See footnote 4 sexually molested Michael and Tiffany, that he had been arrested and charged with sexual assault, See footnote 5 and that Nancy S.E. had initially denied his guilt. The Department also expressed concern that Nancy S.E. would not be able to protect her children should Brian S. be released on bond, and the Department sought legal and physical custody of the children, but placed Taylor, Tiffany, and Michael with Nancy S.E.

The circuit court entered an order on February 24, 1993, filing the Department's petition, setting the matter for further hearing, advising the parties of their right to counsel, and granting the Department temporary custody. On April 19, 1993, the circuit court held a hearing, at which Nancy S.E. appeared unrepresented by counsel. See footnote 6 The circuit court continued the temporary legal and physical custody of the three children with the Department for an additional ninety days. See footnote 7

Nancy S.E. then determined she was unable to deal with all three children and sent Michael to live with her mother and Tiffany to stay with a family friend. On July 13, 1993, the circuit court held a preliminary hearing at which Nancy S.E. again appeared unrepresented by counsel. The circuit court further continued the temporary legal and physical custody of Taylor, Tiffany, and Michael See footnote 8 with the Department. The circuit court also granted Nancy S.E. a twelve-month improvement period and ordered the Department and Nancy S.E. to jointly formulate a family case plan within thirty days. See footnote 9 Following this hearing, the Department placed Tiffany in foster care in August, 1993.

Throughout the fall of 1993, Taylor continued to reside with Nancy S.E. The Department provided supervised visitation between Nancy S.E. and Tiffany because Nancy S.E. admitted she was seeing Brian S. Nancy S.E. worked at various jobs during this period and left Taylor with a babysitter for days and weeks at a time. The Department responded to several complaints that Taylor's babysitter was providing an unsuitable environment but found no evidence of inadequate conditions. In March, 1994, Nancy S.E. informed the Department she wanted to give Taylor to a male friend and his girlfriend. The Department on March 9, 1994, placed Taylor in foster care incident to her change of guardianship. Nancy S.E. subsequently stated she would like to have Taylor returned to her.

The circuit court held a hearing on May 19, 1994, at which Nancy S.E. appeared in person and by counsel. See footnote 10 As a result of this hearing, the circuit court ordered the Department to formulate a family case plan, directed Taylor's return to Nancy S.E. by July 5, 1994, and extended the improvement period until July 18, 1994.

Thereafter, the Department returned Taylor to Nancy S.E. on July 4, 1994. During the July 18, 1994, hearing, the parties reached an agreement which the circuit court entered on September 14, 1994. The agreed order extended the improvement period for an additional three months, returned Taylor's full custody to Nancy S.E., dismissed the Department's petition as to Taylor, and continued the Department's custody of Tiffany. The Department then returned Tiffany to Nancy S.E. on August 23, 1994. At an October 17, 1994, hearing, the circuit court accepted an agreed order whereby the Department agreed to return Tiffany's full custody to Nancy S.E. and to monitor the family for an additional three months.

The record indicates that during the fall of 1994, Nancy S.E. again worked at various jobs for up to eighty hours a week and frequently left Taylor and Tiffany with daycare providers and babysitters for periods of three to four weeks. In late November, 1994, Nancy S.E. telephoned Kim Peck and admitted using crack cocaine. Nancy S.E. also stated she was performing undercover work for the police to prevent being arrested on bad check charges. On November 29, 1994, the Department placed Taylor and Tiffany in respite foster care. Nancy S.E. alternately tried to regain custody of the girls and agreed to their placement in respite foster care. She also missed appointments with home services and scheduled visitations with her daughters.

The circuit court held a hearing on January 6, 1995, during which Kim Peck testified as to Nancy S.E.'s self-reported drug use and undercover work. Additionally, Nancy S.E. indicated she would voluntarily relinquish her parental rights to Taylor and Tiffany if Brian S. would do the same. Following this hearing, Nancy S.E. moved to Florida and decided she did not want to relinquish her parental rights to her two daughters. The circuit court on January 10, 1995, entered an order ratifying the Department's emergency taking of Taylor and Tiffany and granting the Department temporary legal custody of the girls once more.

Nancy S.E. continued to reside in Florida and maintained regular telephone contact with Taylor and Tiffany. However, she failed to attend drug rehabilitation meetings or to keep in regular contact with the Department. See footnote 11 On March 14, 1995, the Department filed a second petition pursuant to W. Va. Code, 49-6-1, See footnote 12 alleging that two-year-old Taylor and five-year-old Tiffany were abused and/or neglected children. See footnote 13 More specifically, the petition recounted the children's case history, beginning with the February 24,

1993, petition, and detailed Nancy S.E.'s unstable lifestyle and indecisiveness regarding custody of Taylor and Tiffany. In sum, the Department emphasized the girls' need for emotional stability and sought termination of Nancy S.E.'s parental rights. See footnote 14

On May 1, 1995, the circuit court held a final hearing in this matter. At the hearing, Nancy S.E.'s attorney requested a continuance, reporting that Nancy S.E. was "stuck in Georgia." See footnote 15 The circuit court denied this motion. Later in the proceedings, the circuit court admitted evidence of Nancy S.E.'s numerous outstanding arrest warrants in West Virginia for bad checks, commenting that her absence was most likely related to these charges. In addition, the Department presented the testimony of Kim Peck. Ms. Peck testified that Nancy S.E. was difficult to locate; failed to attend counseling sessions, rehabilitative treatments, and parenting classes; and was fired from numerous jobs. Ms. Peck further indicated that, given the case history, the Department felt Nancy S.E. would not be able to change her behavior or become an effective parent. The Department also called as a witness Saundra Kate Leeber, Tiffany's therapist. Ms. Leeber stated that Tiffany's demeanor had greatly improved after placement with stable foster families but cautioned that Tiffany's best interests require a stable, permanent placement. Finally, the guardian ad litem recommended termination of Nancy S.E.'s parental rights.

Based on the foregoing evidence, the circuit court entered a final order on May 8, 1995, finding Taylor and Tiffany to be abused and/or neglected children. The circuit court noted further that Nancy S.E. was an unstable person who had not complied with the Department's family case plan, that there was no reasonable likelihood that the conditions of abuse or neglect could be substantially corrected in the near future, and that the girls require stability and continuity of care. In conclusion, the circuit court terminated Nancy S.E.'s parental rights to Taylor and Tiffany and placed their permanent guardianship with the Department.

II.
DISCUSSION

After a brief discussion of the appropriate standard of review, we split our analysis into six segments. First, we consider the applicability of the harmless error doctrine to the failure to promptly appoint counsel in child abuse and neglect cases. Next, we examine the voluntary extension of an improvement period in excess of twelve months. Thirdly, we review the circuit court's rulings regarding the admission of "prejudicial evidence" and the denial of the request for a continuance or postponement of the final adjudicatory hearing. Finally, we mull the circuit court's findings on abuse and neglect and the lack of compliance with the family case plan under the deferential standard of review that pertains in this context.

At the outset, it should be noted that this case has lingered in the circuit court for approximately three years. Although what we say below adequately explains the reason this judgment should be affirmed, we feel obliged to comment on a larger issue. We are hard pressed to fathom why abuse and neglect cases are not given the same priority at the circuit court level as asbestos cases, personal injury cases, criminal cases, and cases involving boundary disputes when W. Va. Code, 49-6-2(d) (1992), rigidly commands that child abuse and neglect

> "proceeding[s] . . . shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under article two-a [Section 48-2A-1 et seq.], chapter forty-eight of this code and actions in which trial is in progress. Any petition filed under the provisions of this article shall be docketed immediately upon filing. Any hearing to be held at the end of an improvement period and any other hearing to be held during any proceedings under the provisions of this article shall be held as nearly as practicable on successive days and, with respect to said hearing to be held at the end of an improvement period, shall be held as close in time as possible after the end of said improvement period."

Rule 8 of the Rules on Time Standards for Circuit Courts further instructs circuit courts to expeditiously process and timely dispose of abuse and neglect proceedings. See footnote 16

Furthermore, we have repeatedly urged circuit courts not only to give these matters serious and detailed consideration but also to advance them to the top of the trial calendar. In Syllabus Point 1 of In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), we expressed our concern over the all-too-frequent delays accompanying abuse and neglect cases:

> "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts."

We additionally recognized

> "[t]he clear import of the statute [W. Va. Code, 49-6-2(d)] is that matters involving the abuse and neglect of children shall take

> precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible."

Syl. pt. 5, Carlita B., supra. See also In the Matter of Brian D., 194 W. Va. 623, 634-35, 461 S.E.2d 129, 140-41 (1995) (lamenting failure of circuit courts to accord abuse and neglect cases priority pursuant to Carlita B.); State ex rel. S.C. v. Chafin, 191 W. Va. 184, 192, 444 S.E.2d 62, 70 (1994) (refusing to tolerate lengthy delays in child abuse and neglect cases); Syl. pt. 3, Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993), quoting Syl. pt. 1, Carlita B..

> It is vital to the rule of law that legislative and appellate commands be honored. A judge is free, of course, to manage his or her own docket but, when such managerial decisions transgress appellate commands, it is incumbent upon the trial judge to avoid the further (and quite different) impression that he or she has crossed the line into disregard. The circumstances of the case at bar underscore this danger. A circuit court is not at liberty to disregard lawful directives of the Legislature and this Court simply because those directives conflict with the judge's individual notions of efficiency or docket control. In the last analysis, it is crucial to public confidence in the courts that judges be seen as enforcing the law and as obeying it themselves. Exactly so. This is the short of it--and there is no long of it. See footnote 17

A.
Standard of Review

Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court "shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected[.]" W. Va. Code, 49-6-2(c). Under Rule 52(a) of the West Virginia Rules of Civil Procedure, these findings shall not be set aside by a reviewing court "unless clearly erroneous." "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Board of Educ. v. Wirt, 192 W. Va. 568, 579 n.14, 453 S.E.2d 402, 413 n.14 (1994), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, 766 (1948). However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm "[i]f the [circuit] court's account of the evidence is plausible in light of the record viewed in its entirety[.]'" In re Jonathan Michael D., 194 W. Va. 20, 25, 459 S.E.2d 131, 136 (1995), quoting Anderson v. Bessemer

City, N.C., 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). Finally, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings[.]" 470 U.S. at 575, 105 S. Ct. at 1512, 84 L.Ed.2d at 529. Deference is appropriate because the trial judge was on the spot and is better able than an appellate court to decide whether the error affected substantial rights of the parties. Martin v. Randolph County Bd. of Educ., ___ W. Va. ___, ___, 465 S.E.2d 399, 406 (1995). Applying this blend of deferential-plenary standards of review to the facts of this case, we are of the opinion that the circuit court's findings were not clearly erroneous nor wrong as a matter of law.

B.

Appointment of Counsel

Nancy S.E. first argues the circuit court erred by failing to timely appoint counsel to represent her. She asserts she was unrepresented by counsel from February 23, 1993, until May, 1994. More specifically, Nancy S.E. complains she was not represented during the hearings held on February 23, 1993; April 19, 1993; and July 13, 1993.

A circuit court has broad statutory and case authority to appoint counsel in child abuse and neglect cases. As suggested above, these are important proceedings and the appointment and participation of counsel will often be critical to the outcome. Abuse and neglect proceedings are designed to be adversarial, see In re Christina L., 194 W. Va. 446, 453, 460 S.E.2d 692, 699 (1995), and the circuit court's role is to ensure that litigants are adequately represented by counsel from the beginning to the end of these proceedings. In emphasizing the role of the circuit court and counsel, we do not write on a pristine page. This Court recently constructed a bright-line rule to be followed when there is any doubt as to how to proceed. In Syllabus Point 8 of In the Matter of Lindsey C., ___ W. Va. ___, ___ S.E.2d ___ (No. 23065 12/14/95), we stated:

> "Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel

> appointed in these circumstances are entitled to compensation as permitted by law." (Emphasis in original).

We caution circuit courts to follow this procedure in order to prevent potential prejudice to unrepresented indigent parents in abuse and neglect proceedings. W. Va. Code, 49-6-2(a) (1992), provides, in part:

> "In any proceeding under the provisions of this article, [the] parents . . . shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. If the other parties have not retained counsel and the other parties cannot pay for the services of counsel, the court shall, by order entered of record, at least ten days prior to the date set for hearing, appoint an attorney or attorneys to represent the other party or parties and so inform the parties."

It appears that in the proceedings involving the original petition filed February 24, 1993, the circuit court did inform Nancy S.E. of her right to be represented by counsel. However, the record does not indicate whether the circuit court ever informed Nancy S.E. of her right to have counsel appointed to represent her in the event she could not afford to hire an attorney. Regardless of the information provided by the circuit court, Nancy S.E. does not assert on appeal that she was indigent during the period in question.

Assuming, arguendo, that Nancy S.E. was entitled to appointed counsel during the period in question, we find she was not prejudiced by the circuit court's failure to earlier appoint counsel. During the February 23, 1993, hearing, the circuit court granted temporary legal and physical custody of Taylor and Tiffany to the Department, which voluntarily placed the children with Nancy S.E. Thus, Nancy S.E. retained the right to keep Taylor and Tiffany in her home and was not prejudiced by the circuit court's ruling or the Department's actions. Similarly, Nancy S.E. was not prejudiced by the April 19, 1993, proceedings; the circuit court merely ordered a ninety-day continuance of the temporary custody, and the Department did not disturb the children's placement with Nancy S.E. Finally, during the July 13, 1993, hearing, the circuit court again continued temporary custody with the Department, granted Nancy S.E. a twelve-month improvement period, and ordered the Department and Nancy S.E. to jointly develop a family case plan. Thus, Nancy S.E. was permitted an opportunity to regain her children's full custody and directed to participate in the development of the family case plan.

It should be noted that Taylor and Tiffany remained with Nancy S.E. throughout this entire period until Nancy S.E. decided she could no longer care for the girls

and voluntarily relinquished their care to the Department. See footnote 18 Moreover, both girls were returned to Nancy S.E.'s care, although she ultimately agreed to their later placement in respite foster care. See footnote 19 We do not find that Nancy S.E. was prejudiced by the failure of the circuit court to appoint counsel. It appears that Nancy S.E. is arguing that, when counsel is not appointed timely, all proceedings conducted without counsel should be presumed void. Though it certainly can be argued that strong reasons of public policy justify such a burden-shifting scheme, our cases have not committed to such a theory except in criminal cases involving critical stages. See State ex rel. Daniel v. Legursky, ___ W. Va. ___, ___, 465 S.E.2d 416, 423 (1995). While this point is intellectually interesting, we defer a definitive decision on it to a different day. After all, there is no clear indication that Nancy S.E. requested the appointment of counsel because of indigency.

C.

Duration of Improvement Period

Nancy S.E. asserts the circuit court erroneously ordered an improvement period in excess of twelve months. Pursuant to W. Va. Code, 49-6-2(b) (1992),

> "any parent or custodian may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof[.]."

In this case, the circuit court granted Nancy S.E. a twelve-month improvement period. See footnote 20 At the conclusion of this improvement period in July of 1994, the parties submitted an agreed order extending the improvement period for an additional three months. While the statute permits a maximum improvement period of only twelve months, Nancy S.E. and the Department voluntarily extended the duration of the improvement period beyond the maximum limit. See footnote 21

We find no reversible error in this situation. At no time during the proceedings below did Nancy S.E. voice any objection to the extension of time. Rather, she vigorously (and successfully) sought an extension of time. In other words, Nancy S.E. chose to roll the dice, apparently confident that more time would improve her position before the court at her final hearing. Having gambled and lost, she is in a perilously poor position to pursue this point. In any event, we regularly turn a deaf ear to error that was invited by the complaining party. See Smith v. Bechtold, 190 W. Va. 315, 438 S.E.2d 347 (1993) ("invited error" when appellant moved for the very delay that was the subject of the appeal). As a result, Nancy S.E. cannot now

complain on appeal that she was harmed by a fifteen-month improvement period when she agreed to this arrangement. Moreover, she has not shown that she was prejudiced by this improvement period.

D.

Admission of Criminal Charges

Nancy S.E. next contends the circuit court erred by admitting irrelevant and prejudicial evidence of unrelated criminal charges. She states that during the January 6, 1995, hearing, the State introduced evidence that she was performing undercover work for the police to prevent arrest on bad check charges. In the same manner, the State presented testimony at the May 1, 1995, hearing that Nancy S.E. had numerous outstanding arrest warrants for bad check charges. Nancy S.E. maintains this evidence was highly prejudicial and unrelated to the abuse and neglect proceedings.

The first question is easily answered. The decision whether to admit evidence rests within the sound discretion of the circuit court. See State v. Guthrie, 194 W. Va. 657, 680-81, 461 S.E.2d 163, 186-87 (1995). This discretion remains fully intact when the business of the day is abuse and neglect proceedings. Appellate review is therefore deferential; we will interfere with a circuit court's ruling on evidentiary matters only if an appellant demonstrates an abuse of the circuit court's substantial discretion. See State v. McGinnis, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). We discern no abuse in this situation.

Rather, we find Nancy S.E.'s assignment of error regarding the January 6, 1995, hearing to be without merit as she did not properly preserve her objection for appeal. The West Virginia Rules of Evidence declare that parties must object to the wrongful offer of evidence at a particular time and with reasonable specificity. The failure to object at the time and in the manner designated by Rule 103(a) of the West Virginia Rules of Evidence is treated as a procedural default, with the result that the evidence, even if erroneous, becomes the facts of the case. West Virginia practice imposes the same duty of diligence in regard to nonjury cases. Silence in the circuit court typically constitutes a waiver of objection. See W.Va.R.Evid. 103(a)(1). See footnote 22

The transcript of the January 6, 1995, hearing reveals that Nancy S.E.'s counsel never objected to the introduction of evidence of her undercover police work or moved to strike this testimony from the record. Evidence of Nancy S.E.'s criminal record and undercover drug work, while not dispositive, is a relevant factor in the circuit court's determination of her ability to provide a safe home environment for her children. To be sure, an appellate court may review an unpreserved error if the error is "plain." See W.Va.R.Evid. 103(d). However, this doctrine is reserved for the most egregious circumstances. State v. Miller, 194 W. Va. 3, 459 S.E.2d 114

(1995). Normally, the alleged error must have seriously affected the fairness or integrity of the trial. We find no error in this case.

Finally, Nancy S.E. was not prejudiced by the admission of her bad check charges during the May 1, 1995, hearing. Upon admitting this testimony, the circuit court expressly stated these charges were not indicative of abuse and neglect but were more probative as to why Nancy S.E. was not present at the final hearing. Therefore, the circuit court did not abuse its discretion in admitting evidence of Nancy S.E.'s unrelated criminal charges.

E.
Absence of Nancy S.E
At Final Termination Hearing

Nancy S.E. complains the circuit court improperly conducted the final termination hearing in her absence. Without doubt this is her most serious assignment of error. On the morning of May 1, 1995, the date of the final hearing, Nancy S.E. left a message on her attorney's answering machine stating she was "stuck in Georgia" and would not be at the termination hearing. During the final hearing, counsel for Nancy S.E. informed the circuit court of Nancy S.E.'s absence and requested a continuance of the proceedings. The circuit court denied this motion and proceeded to take evidence on the issue of abuse and neglect. Nancy S.E. asserts the circuit court should have continued the hearing to a time when she could be present so she could testify and explain her alleged failure to complete the Department's family case plan and her current, more stable lifestyle.

Whether a party should be granted a continuance for fairness reasons is a matter left to the discretion of the circuit court, and a reviewing court plays a limited and restricted role in overseeing the circuit court's exercise of that discretion. State v. Judy, 179 W. Va. 734, 372 S.E.2d 796 (1988) (when a matter is committed to the discretion of the trial court, its decision will not be disturbed unless there is a clear showing of abuse of such discretion); State ex rel. Holstein v. Casey, 164 W. Va. 460, 265 S.E.2d 530 (1980) (accord). Of course, discretion is not to be confused with imperiousness. State v. Bush, 163 W. Va. 168, 183, 255 S.E.2d 539, 547 (1979). When a circuit court rejects a civil litigant's request for a continuance because the party is unable to attend, the court must articulate reasons for taking that action, and those reasons must be plausible. Therefore, we structure our review in accordance with four salient factors that appellate courts consider when reviewing denials of requests for a continuance. First, we consider the extent of Nancy S.E.'s diligence in her efforts to be present and to ready her defense prior to the date set for the hearing. Second, we consider how likely it is that the need for a continuance could have been met if the continuance had been granted. Third, we consider the extent to which granting the continuance would have inconvenienced or been contrary to the interests of the circuit court, the witnesses, and the other

litigants, including the public interest in the prompt disposition of these types of proceedings. Finally, we consider the extent to which Nancy S.E. might have suffered harm as a result of the circuit court's denial. See footnote 23

Again, we acknowledge that the determination as to whether a denial of a continuance constitutes an abuse of discretion must be made on an ad hoc basis. When confronted with a motion for a continuance, the trial court may have a variety of concerns. Obviously, the reasons that the movant contemporaneously adduces in support of the request are important. Then, too, the court is likely to take into account prior postponements. Thus, the test for deciding whether the circuit court abused its discretion is not mechanical; it depends on the reasons presented to the circuit court at the time the request was made. In other words, this issue must be decided in light of the circumstances presented, focusing upon the reasons for the continuance offered to the circuit court when the request was denied. As we discuss above, there are important interests implicated other than those of the parents. In addition to the sacred rights of the affected children, there is a societal interest in providing for speedy disposition of abuse and neglect cases which exists separate from, and at times in opposition to, the parents' interest. The inability of courts to bring these matters to a prompt disposition contributes immeasurably to large backlogs of abuse and neglect cases and often prevents the courts from doing what is in the best interests of the children. The older a child becomes while waiting in the judicial system, the more difficult quality permanent placement becomes. In this context, abuse can be found in the denial of a continuance only when it can be seen as "an unreasoning and arbitrary `insistence upon expeditiousness in the face of a justifiable request for delay[.]'" Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L.Ed.2d 610, 620 (1983), quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921, 931 (1964). It is in the province of the circuit court to manage its docket, and within that province, to decide what constitutes a reasonable time to be prepared to defend these type allegations. See footnote 24

In determining whether the circuit court acted in an arbitrary or unreasonable manner, we consider the above relevant factors together, evaluating the extent of Nancy S.E.'s showing on each one. In order to obtain a reversal, Nancy S.E. must show at a minimum that she suffered prejudice as a result of the denial of her request. However, the mere fact that an appellant suggests a continuance could benefit him or her does not necessarily require the circuit court to grant the continuance. To be perfectly clear, even the presence of prejudice on the part of a party in an abuse and neglect proceeding does not require the circuit court to grant the requested relief if the other factors identified above are entitled to more weight. The weight we attribute to any single factor may vary with the extent of the showing on other factors. We regard none of the factors identified above as either a necessary or sufficient condition to the finding of an abuse of discretion.

Rather, they are related factors and must be considered together with such other circumstances as may be relevant. Each case is sui generis, and the compendium of relevant factors varies from situation to situation. In sum, these factors have no talismanic qualities; a court must still engage in a difficult and sensitive balancing process. But, because these proceedings involve fundamental rights of the parents and children, this process, which is specifically confirmed in our statute, must be carried out with full recognition of society's interests in speedy dispositions.

Here, the balance tilts heavily against Nancy S.E. and the circuit court offered an adequate explanation of why it believed the factors advanced by Nancy S.E. were not sufficiently compelling to justify another postponement of the ultimate judgment. Her reproof is mostly sound and fury, signifying little. At the time the request for a continuance was made, the circuit court had no assurance that Nancy S.E. would ever appear. As the circuit court suggested, there were outstanding criminal charges against Nancy S.E. in West Virginia. Although she states she wanted to testify in order to explain why she did not complete the family case plan, Nancy S.E. does not show that she exercised due diligence in attempting to attend the final hearing. Moreover, the rights of the public and, more importantly, the children are implicated when finality is not promptly achieved in these proceedings. This case had been pending in the circuit court for three years, and the rights and interests of the children were dangling in the balance. Although the circuit court could have afforded Nancy S.E. the continuance, it chose not to do so. In the absence of either a mistake of law or a palpable abuse of discretion, we cannot substitute our judgment for the circuit court's judgment. We need go no further.

In the final analysis, it is the circuit court that is in the best position to weigh competing interests in deciding whether to grant a continuance or postponement. An appellate court looks primarily to the persuasiveness of the trial court's reasons for refusing the continuance and gives due regard not only to the factors that inform our opinion but also to its superior point of vantage. We may not reweigh the grounds afresh and, absent an abuse of discretion, the decision of the circuit court to reject a request for a continuance will not be overturned by an appellate court. In this instance, the record confirms that the lower court was rather generous, rather than grudging, in the time allotted to bring this case to a final disposition. Therefore, we find the circuit court did not abuse its discretion in refusing Nancy S.E.'s request for a continuance.

F.

Finding of Abuse or Neglect

The next question is whether the circuit court's finding of abuse and neglect is supportable. Nancy S.E. argues the evidence fails to meet its heightened burden of proof. The Department is required to prove the "conditions existing at the time of

the filing of the petition . . . by clear and convincing proof." W. Va. Code, 49-6-2(c) (1992). Determining whether a parent or guardian has neglected or abused his or her children, like most adversarial-oriented explorations, is a predominantly factbound enterprise. It follows that, absent a mistake of law, an appellate tribunal should disturb a circuit court's determination only if it is clearly erroneous. This means, of course, that if there are two or more plausible interpretations of the evidence, the circuit court's choice among them must hold sway.

No clear error looms, and we find the circuit court was not clearly wrong in holding the Department satisfied its burden of proof. The evidence throughout this case concerned Nancy S.E.'s unstable lifestyle and provided examples of her indecisiveness about regaining full custody of her children, her repeated firings from good jobs, her pattern of leaving Taylor and Tiffany with babysitters for extended periods of time, her renewed usage of crack cocaine, and her failure to attend parenting classes and drug rehabilitation treatment sessions. During the final hearing, the Department called Kim Peck, who elaborated on the petition's allegations, and therapist Saundra Kate Leeber, who testified as to the emotional damage Tiffany had suffered from her unstable lifestyle with Nancy S.E. Finally, throughout the entire three-year case history, the Department filed regular court summaries to keep the circuit court apprised of recent developments. See footnote 25 Upon a review of the entire record, we find the circuit court had before it sufficient evidence with which to terminate Nancy S.E.'s parental rights. See footnote 26

We take no pleasure in upholding a finding of abuse or neglect of children. But the court below did not reach this conclusion lightly, and the record, carefully examined, does not give rise to a firm conviction that the circuit court's judgment is wide of the mark. Accordingly, the finding of abuse and neglect must stand.

G.
Family Case Plan

First, Nancy S.E. contends the Department failed to timely formulate a family case plan. In Syllabus Point 3 of State ex rel. West Virginia Department of Human Services v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987), we directed:

> "Under W. Va. Code, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to W. Va. Code, 49-6D-3 (1984)."

See also In re Elizabeth Jo "Beth" H., 192 W. Va. 656, 453 S.E.2d 639 (1994). W. Va. Code, 49-6D-3(b) (1984), further requires "the family case

plan . . . shall be furnished to the court within thirty days after the entry of the order referring the case to the department[.]"

During the proceedings below, the circuit court ordered a twelve-month improvement period on July 13, 1993, causing the family case plan to become due in August, 1993. However, the Department did not complete the family case plan until November 2, 1993. Kim Peck explained the delay as follows: "I was unable to make enough contact with Nancy due to the amount of work I have and at time I didn't hear from Nancy. . . . Nancy and I always talked about what we were working on even though it wasn't in writing."

While this delay is not excusable, we do find Nancy S.E. was not harmed by the late filing of the family case plan. In Syllabus Point 4 of In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), we explained that the preparation of a family case plan is a joint venture between the parents and the Department:

> "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family."

We recently reiterated this procedure in Syllabus Point 4 of In the Matter of Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995). The family case plan essentially serves as a map by which the parents, the Department, and the circuit court can chart the parents' progress during the improvement period. As a result, it is especially important to alert the parents as to what they must do in order to regain custody of their children. Although the family case plan should have been filed earlier in this case, both the Department and Nancy S.E. were obligated to work diligently to complete the case plan within the requisite thirty-day period. It further appears that prior to filing the case plan the Department maintained contact with Nancy S.E. and instructed her about the case plan's goals. Lastly, Nancy S.E. initially satisfied the requirements of the case plan, resulting in the return of her children at the end of her improvement period. Therefore, we find Nancy S.E. was not prejudiced by the Department's late filing of the family case plan.

Nancy S.E. further asserts the Department failed to show she did not comply with the requirements of the family case plan. Although the evidence suggests the Department proved Nancy S.E.'s noncompliance with the family case plan, the

Department was not required to prove this point. "DHS [the Department of Human Services] is not obligated, as [Nancy S.E.] would have us believe, to prove its case by showing that she failed to comply with the family case plan." West Virginia Dept. of Human Servs. v. Peggy F., 184 W. Va. 60, 63, 399 S.E.2d 460, 463 (1990). Rather, Syllabus Point 1 of In the Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981), recites the correct standard of proof in abuse and neglect cases:

> "W. Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden."

See also In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995). Moreover, we again emphasize what was made clear in Carlita B. 185 W. Va. at 626, 408 S.E.2d at 378:

> "As we explained in West Virginia Dept. of Human Serv. v. Peggy F., 184 W. Va. 60, 64, 399 S.E.2d 460, 464 (1990), it is possible for an individual to show 'compliance with specific aspects of the case plan' while failing 'to improve . . . [the] overall attitude and approach to parenting.' Thus, a judgment regarding the success of an improvement period is within the court's discretion regardless of whether or not the individual has completed all suggestions or goals set forth in family case plans.

'The improvement period is granted to allow the parent an opportunity to remedy the existing problems. The case plan simply provides an approach to solving them. As is clear from the language of the statute, . . . the ultimate goal is restoration of a stable family environment, not simply meeting the requirements of the case plan.'

184 W. Va. at 64, 399 S.E.2d at 464."

Having previously determined that the circuit court did not err in concluding the Department satisfied its burden of proof, we decline to further address this issue.

III.
CONCLUSION

For the foregoing reasons, we affirm the decision of the Circuit Court of Raleigh County.

Affirmed.

Footnote: 1 We follow our traditional practice in child abuse and neglect matters, and other cases involving sensitive facts, and do not use the last names of the parties. See, e.g., In the Matter of Scottie D., 185 W. Va. 191, 406 S.E.2d 214 (1991); State ex rel. Division of Human Servs. by Mary C.M. v. Benjamin P.B., 183 W. Va. 220, 395 S.E.2d 220 (1990).

Footnote: 2 W. Va. Code, 49-6-1(a), states, in part:

"If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides, or to the judge of such court in vacation. The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought. Upon filing of the petition, the court shall set a time and place for a hearing and shall appoint counsel for the child."

Footnote: 3 W. Va. Code, 49-1-3(a), defines an "abused child":

"'Abused child' means a child whose health or welfare is harmed or threatened by:
"(1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or
"(2) Sexual abuse or sexual exploitation; or
"(3) The sale or attempted sale of a child by a parent, guardian, or custodian[.]"

W. Va. Code, 49-1-3(g)(1), defines a "neglected child":

"'Neglected child' means a child:
"(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
"(B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's

parent or custodian[.]"

The statute was amended in 1994. The minor changes do not affect our determination of this case.

Footnote: 4 Nancy S.E. and Brian S. were married at the time the Department filed the February, 1993, abuse and neglect petition. In August, 1993, Nancy S.E. divorced Brian S.

Footnote: 5 Brian S. ultimately was charged with twenty-three counts of sexual assault against Michael and Tiffany and against the sister of Nancy S.E. Subsequently, Brian S. pleaded guilty to four of these counts (involving Nancy S.E.'s sister) and received four one-to-five year sentences: two sentences to run concurrently and the remaining two sentences to run concurrently with each other, but consecutively to the first two sentences.

Footnote: 6 The record is unclear as to whether the circuit court informed Nancy S.E. of her right to have counsel appointed for her if she was indigent. See W. Va. Code, 49-6-2(a) (1992).

Footnote: 7 It should be noted that the circuit court did not refer to this custodial arrangement as an improvement period.

Footnote: 8 Michael is no longer a party to the abuse and neglect proceeding. By an agreed order entered September 14, 1994, Nancy S.E. voluntarily relinquished legal and physical custody of Michael to her mother, Judy R., thereby dismissing that portion of the Department's petition. Therefore, further reference to Michael is omitted.

Footnote: 9 This family case plan was signed by Kim Peck, a child protective services worker, on November 2, 1993, and by Nancy S.E. on March 17, 1994. Explaining this delay, Ms. Peck stated:

"I was unable to make enough contact with Nancy due to the amount of work I have and at times I didn't hear from Nancy. I give my court cases priority when doing family case plans and I am still unable to get them done in thirty days. Nancy and I always talked about what we were working on even though it wasn't in writing."

Footnote: 10 Nancy S.E. was represented by appointed counsel at all subsequent hearings in this matter.

Footnote: 11 Kim Peck reported in February, 1995, that "Nancy has not had contact with me on a regular basis. On January 18, 1995 Nancy called me and then I didn't hear from her again until February 15, 1995. Every time she gave me a phone number and I tried to call her, it would be disconnected."

Footnote: 12 The pertinent part of W. Va. Code, 49-6-1, is set forth in note 2, supra.

Footnote: 13 The pertinent part of W. Va. Code, 49-1-3, is set forth in note 3, supra.

Footnote: 14 The petition also sought to terminate the parental rights of Brian S. (Tiffany's father) and Jerry M. (Taylor's father). Because these individuals are not parties to the present appeal, we omit further discussion of their interests.

Footnote: 15 On the morning of May 1, 1995, Nancy S.E. left a message on her attorney's answering machine stating she was "stuck in Georgia." She did not further explain her anticipated absence.

Footnote: 16 Rule 8 of the Time Standards for Circuit Courts provides in full:

"Abuse and neglect proceedings.

"(a) Applicability. --- The time standards set forth in this rule are not intended to supersede, but to supplement, statutory provisions applicable to civil abuse and neglect proceedings.

"(b) Pre-adjudicatory motions. --- An order shall be entered on pre-adjudicatory motions within one week of hearing on the motion.

"(c) Preliminary hearing. --- If a preliminary hearing is held, it shall be conducted within two weeks from the filing of the petition.

"(d) Adjudication. --- Unless continued for good cause to a date certain or unless a pre-adjudicatory improvement period is granted, the adjudicatory order shall be entered within one month of the filing of the petition if the child is not in temporary custody. If a pre-adjudicatory improvement period is granted, the adjudicatory order shall be entered within two weeks of the end of the pre-adjudicatory improvement period.

"(e) Disposition. --- If abuse or neglect is found, the dispositional order placing the child shall be entered within six weeks of the adjudicatory order.

"(f) Post-adjudicatory improvement period. --- A further dispositional order shall be entered within two weeks of the end of the post-adjudicatory improvement period.

"(g) Monitoring improvement period. --- An assessment of the status of the child(ren) and the progress of the parent(s) towards satisfying the conditions of the improvement period shall be conducted on a monthly basis.

"(h) Modification. --- An order shall be entered on a motion to modify within one month of the filing of the motion.

"(i) Foster case review. --- A further dispositional order shall be entered within one month of the filing of a petition for foster care review.

"(j) Reporting standard. --- The reporting standard from the filing of the petition to disposition shall be twelve months."

Footnote: 17 Under our supervisory authority over circuit courts, we may require the courts to follow procedures deemed desirable from the viewpoint of sound judicial policy and practice although they are not specifically commanded by the Constitution or the Legislature.

Footnote: 18 During the spring of 1993, Nancy S.E. sent Tiffany to stay with a family friend; the Department placed Tiffany in foster care in August, 1993. In March, 1994, Nancy S.E. wished to permanently give Taylor to a different family friend; the Department placed Taylor in foster care on March 9, 1994, in preparation for this arrangement.

Footnote: 19 On July 4, 1994, the Department returned Taylor's full custody to Nancy S.E. and, on August 23, 1994, the Department returned Tiffany's full custody to Nancy S.E. While the circuit court did ultimately terminate Nancy S.E.'s parental rights, the Department did not seek termination until March, 1995, nearly one year after counsel was appointed to represent her.

Footnote: 20 Nancy S.E. contends that prior to the twelve-month improvement period the circuit court granted a ninety-day improvement period during the April 19, 1993, hearing. The record does not support this contention as the circuit court merely granted a ninety-day continuance of the status quo.

Footnote: 21 *This is not to suggest that we in any way encourage agreed-upon extensions of improvement periods beyond the time allowed by statute. Furthermore, although the order granting the agreed improvement period extension reflects the guardian ad litem was present, the order gives no indication whether the guardian ad litem took a position on this issue. A guardian ad litem clearly has a right to enforce the child's statutory right to a limit on the extent and duration of improvement periods.*

Footnote: 22 *Rule 103(a) of the West Virginia Rules of Evidence (1996) provides in part:*

"(a) Effect of erroneous ruling. --- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
"(1) Objection. --- In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]"

Footnote: 23 *In Hutchinson v. Montgomery Memorial Park Corp., 128 W. Va. 419, 424-25, 36 S.E.2d 889, 891-92 (1945), we set forth the showing a party ordinarily must make when seeking a continuance to obtain absent witnesses. This showing includes the substance of the desired testimony; the relevance of the testimony; that the testimony could be obtained if a continuance were granted; and due diligence was exercised to obtain the testimony prior to the date of the proceedings. Because the elements of the showing specified in Hutchinson are applicable to various factors which we have identified as relevant to our review, we address these elements as part of our broader inquiry.*

Footnote: 24 *In Morris, the Supreme Court observed that "[t]rial judges necessarily require a great deal of latitude in scheduling trials," 461 U.S. at 11, 103 S. Ct. at 1616, 75 L.Ed.2d at 619, not the least of which is that of assembling the witnesses and lawyers at the same time. This burden counsels against continuances except for compelling reasons.*

Footnote: 25 *Although the court summaries were made a part of the record in this case, it is unclear whether the circuit court admitted these reports into evidence. We admonish circuit courts that while these summaries are suitable to be made a part of the record in abuse and neglect cases, the better practice is to formally admit these reports into evidence to ensure that all the information regarding the progress of the case is properly before the courts.*

Footnote: 26 As we expressed in In re Elizabeth Jo "Beth" H., 192 W. Va. 656, 659, 453 S.E.2d 639, 642 (1994):

"Consistent with our cases in other areas, we give appropriate deference to findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law."

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2004 Term

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No. 31608

_____

IN RE: TIFFANY P., ROBBY P., ALEXANDRIA F., AND CHEYENNE F.

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Judge
Civil Action No. 02-JN-6

REVERSED AND REMANDED

Submitted: April 27, 2004
Filed: May 28, 2004

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.
JUSTICE MCGRAW dissents.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'As a general rule the least restrictive alternative regarding parental rights to custody of a child . . . will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]' Syllabus point 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 3, *In re Aaron Thomas M.*, 212 W.Va. 604, 575 S.E.2d 214 (2002).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Mingo County entered on March 24, 2003. Pursuant to that order, the circuit court terminated the parental rights of the appellant, Bobby F., to his children, Alexandria F. and Cheyenne F. In this appeal, the appellant contends that the evidence did not support termination of his parental rights. He further contends that, at a minimum, the circuit court erred by denying him post-termination visitation with his children.

This Court has before it the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the final order is reversed, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

I.

FACTS

On February 21, 2002, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") sought and obtained emergency custody of Tiffany P., born December 30, 1986; Robby P., born September 13, 1988; Alexandria F., born April 28, 1997; and Cheyenne F., born February 5, 2000. The children were residing with Bobby F. and

Christine P. who are the biological parents of Alexandria F. and Cheyenne F.[1] Tiffany P. and Robby P. are Christine P.'s children from prior relationships.[2]

The DHHR had previously provided services to this family in connection with an abuse and neglect proceeding involving one of Bobby F.'s other children, Austin S. Bobby F. intervened in that proceeding and was granted physical custody of Austin S. and Austin's half-sister, Christina S.,[3] on July 30, 2001.[4] At that time, Bobby F. was residing with Christine P. and the children who are the subject of this abuse and neglect proceeding. The DHHR became concerned after a social worker reported finding bruises and bite marks on Austin S. and Christina S. during a home visit. Follow-up visits caused further concern as the house was in poor physical condition, and Alexandria F. and Cheyenne F. appeared dirty and unkempt.

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[1]Bobby F. is the biological father of six other children. Five of those children reside in North Carolina with their mother, Melissa D., to whom Bobby F. is still married. As discussed herein, Bobby F.'s parental rights to his other child, Austin S., were terminated in a separate abuse and neglect proceeding.

[2]Timothy Y. is the biological father of Tiffany P., and James P. is the biological father of Robby P. Both were parties to the proceedings below, but are not participating in this appeal. Likewise, Christine P. is not a party to this appeal. As discussed herein, the children were returned to her custody.

[3]Bobby F. is not Christina S.'s biological father.

[4]The parental rights of the mother of Austin S. and Christina S. were terminated. According to DHHR, Bobby F. intervened in that abuse and neglect case in an effort to obtain custody of Austin S.

On October 7, 2001, Christine P. phoned the abuse and neglect hotline and reported that Bobby F. had "taken off" two days ago and had not told her when he would be back. Christine P. said she believed that Bobby F. had quit taking his medication which had been prescribed to treat his diagnosis of paranoid schizophrenia. She was concerned because she had no parental or guardianship rights regarding Austin S. and Christina S., and therefore, could not sign any medical forms if the children needed treatment. As a result of this phone call, Austin S. and Christina S. were removed from the home. Subsequently, Bobby F.'s parental rights to Austin S. were terminated in a separate abuse and neglect proceeding.

The DHHR continued to provide services to the family, and on November 5, 2001, a social worker made another home visit. Bobby F. was at the home visiting the children. The social worker reported finding bruises on both Alexandria F. and Cheyenne F. The family said that a dog had bit Alexandria F. and that Cheyenne F. had fallen on the steps. About the same time, Tiffany P. reported that Bobby F. had cut himself with a knife in front of them. Christine P. said that she believed that Bobby F. was still not taking his medication, and she agreed to keep him out of the home.

However, about a month later, Bobby F. went to the DHHR office and said he wanted to move back home with Christine P. and the children. He indicated that he was now taking his medication. Two weeks later, though, Christine P. reported that she and Bobby

F. got into a fight in front of the children because he tried to take her food stamps. Christine P. had a bite mark on her wrist and a chipped tooth. She said there was a warrant for Bobby F.'s arrest for domestic battery. Christine P. was told that she could not allow Bobby F. to come near the children.

Finally, on February 7, 2002, the DHHR learned that both Bobby F. and Christine P. had been arrested. The record is not complete regarding the details of the arrests, but it appears that Christine P. was driving a car with Tiffany P. and Bobby F. as passengers. A police officer saw Bobby F. and attempted to stop the car because of the outstanding warrant for his arrest. However, Christine P. refused to pull over and a high speed chase ensued. Eventually, the car was stopped and both Christine P. and Bobby F. were arrested. Shortly thereafter, the DHHR filed the emergency petition and removed the children from the home.

An adjudicatory hearing was held on September 18, 2002. During the hearing, the court was advised that Bobby F. had recently been arrested for petit larceny and giving false information. The arresting police officer reported that he found four generic pain pills in Bobby F.'s pocket when he served the arrest warrants. Bobby F. did not have a prescription for the medication. At the end of the hearing, the court found that the children were abused and neglected. However, the children were returned to the physical custody of

Christine P. The court further ordered that Bobby F.'s supervised visitation should continue.

On October 21, 2001, the court conducted the disposition hearing. The DHHR did not recommend termination of the parental rights of any of the parents involved in this case. Instead, the DHHR indicated that the children should remain in Christine P.'s custody. However, the DHHR continued to express concern regarding Bobby F.'s behavior, and thus, recommended that he only be permitted to have supervised visitation with the children. Thereafter, the court entered the final order on March 24, 2003. Christine P. was granted legal and physical custody of the children, and Bobby F.'s parental rights were terminated. Bobby F. was not granted post-termination visitation with his children. This appeal followed.

II.

STANDARD OF REVIEW

As set forth above, Bobby F. appeals the termination of his parental rights and the denial of post-termination visitation with his children. This Court recently explained in *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000) that, "For appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact

are weighed against a clearly erroneous standard." Also, in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this Court held that:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With these standards in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

Bobby F. contends that the evidence does not support termination of his parental rights. He asserts that the circuit court based its decision upon erroneous findings of fact. He maintains that there is no clear and convincing evidence that he neglected or abused his children.

This Court has held that, "'As a general rule the least restrictive alternative regarding parental rights to custody of a child . . . will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened[.]' Syllabus point 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 3, *In re Aaron Thomas M.*, 212 W.Va. 604, 575 S.E.2d 214 (2002). Having carefully reviewed the record, we agree that the evidence in this case does not warrant termination of Bobby F.'s parental rights. Instead, we believe that the circuit court should have ordered supervised visitation as recommended by the DHHR.

During the dispositional proceedings below, the DHHR did not recommend termination of Bobby F.'s parental rights.[5] The guardian ad litem agreed with that decision. The Children's Case Plan, which was submitted prior to the dispositional hearing, stated that:

> The [DHHR] recognizes that Bobby [F.] is the biological father to the children Alex[andria] and Cheyenne [F.] Although [Bobby F.] has had his parental rights terminated to another child, the [DHHR] recognizes that the situation in this case is somewhat different and does not recommend parental termination at this time. The [DHHR] recognizes that [Bobby F.] has a strong bond with Alex[andria] and Cheyenne and has helped in the rearing of the children; however, the [DHHR] does not feel that [Bobby F.] could adequately take care of the children alone and should therefore not be considered as a primary caretaker. [Bobby F.] has a history of mental illness and

[5]In this appeal, DHHR did not object to the circuit court's findings and its decision to terminate Bobby F.'s parental rights.

> a history of not taking his prescription medication. [Bobby F.] also has a criminal background and currently has criminal charges pending against him. [Bobby F.] has been around drugs and has committed domestic assault against [Christine P.] [Bobby F.] has also displayed inappropriate behaviors in front of the children. Based on those concerns, while the [DHHR] does not recommend parental termination at this time, the [DHHR] does recommend that [Bobby F.] stay away from the residence of [Christine P.] and the said children. The [DHHR] recommends that [Bobby F.] receive supervised visitation at the discretion of [Christine P.]

The record clearly supports this disposition. As noted above, the children were returned to the custody of Christine P. upon the circuit court finding that the conditions that warranted the removal of the children from the home had been resolved. Bobby F. and Christine P. ended their relationship, and Bobby F. is no longer a custodial parent of the children.

In addition, there is no evidence in the record that Bobby F. abused his children. The final order of the circuit court states that some of the children suffered bruises and bites while in Bobby F.'s custody. However, at the preliminary hearing in this matter, DHHR's child protective services worker testified that she concluded that Cheyenne F. was biting the other children. She did not believe that either Bobby F. or Christine P. was abusing the children. Rather, she was concerned about a lack of supervision.

This court is certainly mindful of Bobby F.'s criminal history. As noted above, a domestic battery warrant was issued as a result of an altercation with Christine P. Bobby F. was also arrested for petit larceny. These facts must be considered when making a determination concerning whether or not to terminate parental rights. However, this Court has held that, "'A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.' Syllabus point 2, *State ex rel. Acton v. Flowers*, 154 W.Va. 209, 174 S.E.2d 742 (1970)." Syllabus Point 7, *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000).

In light of all of the above, we do not believe that the least restrictive alternative in this case was termination of Bobby F.'s parental rights. Since Bobby F. is no longer a custodial parent, we are unable to find that the welfare of the children will be seriously threatened absent termination of his parental rights. While Bobby F.'s actions, conduct, and behavior cause this Court great concern, the record in this case leads us to conclude that termination of his parental rights was not in the best interests of the children. In that regard, the record shows that Bobby F. has a strong bond with his children and that, until these proceedings were instituted, he was actively involved in caring for and raising his children. While this case was pending below, Bobby F. exercised his right to see his children, missing only two scheduled visitations. On numerous occasions, this Court has indicated that the best interest of the children is the polar star in the resolution of abuse and neglect cases. *See Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872

(1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."); Syllabus Point 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972) ("'In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Point 2, Syllabus, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302 [47 S.E.2d 221]."). Given the circumstances of this case, while it is clear from the evidence that Bobby F. should never be the custodial parent, we are unable to see how the children would benefit from the termination of Bobby F.'s parental rights at this juncture.

While we find that termination of parental rights is not appropriate in this case, we also believe that Bobby F.'s visitation with his children must be supervised. Bobby F. suffers from a serious mental illness, and in the past, he has exhibited very inappropriate behavior in front of the children including cutting himself with a knife. For that reason, his visitation with the children must be closely, strictly, and constantly supervised. To that end, we remand this case to the circuit court for entry of an order consistent with this opinion that will provide that any visitation of Bobby F. with these children must be strictly supervised.[6]

IV.

[6]In light of this decision, we need not address Bobby F.'s assignment of error relating to the denial of post-termination visitation.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Mingo County entered on March 24, 2003, is reversed, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

Reversed and remanded.

No. 31608 In Re: Tiffany P., Robby P., Alexandria F., and Cheyenne F.

FILED
June 25, 2004
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring:

I concur in the Court's opinion and judgment. I write separately to point out that the father in this case, Bobby F., has been diagnosed with schizophrenia and was not taking his prescribed medication.

Schizophrenia, a serious neurological brain disorder, strikes one out of one hundred people worldwide, with the usual onset of symptoms coming between the ages of 13 and 25. Like diabetes, there is no cure – only treatment, which is basically medication to relieve the symptoms of psychosis, disorganized thoughts, etc. The cause of schizophrenia is unknown, although there is some genetic-based component. Some of my best friends have adult children with schizophrenia.

Many people with schizophrenia "do well" if they consistently take prescribed medicine. (However, a substantial percentage, unfortunately, do not do well, despite the best treatment.) But many people with schizophrenia have a substantially diminished or no appreciation of the fact that they have an illness. These people often do not take prescribed medications, through no fault of their own.

The consequences of schizophrenia for patients, families, and our society – particularly untreated schizophrenia – are enormous. Most people with the illness are cared

for by their families; many others are isolated and/or homeless. For many family members and other treatment and care providers, getting a person who has schizophrenia to "voluntarily" take their medicine can be a very difficult – or impossible – task. The result is often a spiral into psychosis and expensive involuntary hospitalization.

Fortunately, new laws like "Kendra's Law" in New York have drastically reduced episodes of psychosis, violence, and homelessness among non-compliant patients – by using court orders and assertive community treatment as a less-restrictive alternative, to encourage patients with schizophrenia to take prescribed medicine.

In the instant case, the whole sorry series of events might have been avoided if Bobby F. had been required by a court order to take his prescribed medicine.

I pray that we will soon implement better laws in West Virginia to help health care providers and families and patients like Bobby F. and his children.

231 W. Va. 44, 743 S.E.2d 352

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

FILED
June 5, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 12-1138

IN RE: TIMBER M. AND REUBEN M.

Appeal from the Circuit Court of Greenbrier County
Honorable James J. Rowe
Civil Action Nos. 11-JA-46 and 11-JA-47

AFFIRMED, IN PART, VACATED, IN PART,
AND REMANDED WITH DIRECTIONS

Submitted: May 15, 2013
Filed: June 5, 2013

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JUSTICE LOUGHRY delivered the opinion of the Court.
CHIEF JUSTICE BENJAMIN concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.
JUSTICE WORKMAN concurs and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

3. "'"In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).' Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)." Syl. Pt. 2, *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 690 S.E.2d 131 (2010).

4. "'"'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).' Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010).

5. "'[C]ourts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

6. In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child.

LOUGHRY, Justice:

This case is before this Court upon the appeal of the petitioner, Norma G.,[1] from the Circuit Court of Greenbrier County's August 16, 2012, order terminating her parental rights to her children, Timber M. and Reuben M. The petitioner asserts that her due process rights have been violated, that no imminent danger existed at the time her children were taken into custody, that she should have been granted an improvement period, and that the lower court failed to impose the least restrictive alternative disposition so as to protect the best interests of her children. Based upon the record, the parties' briefs, and the arguments presented, we find no error. Accordingly, we affirm the termination of Norma G.'s parental rights; however, we remand for a determination of whether the permanent placement of the children with their biological father is appropriate.

I. Factual and Procedural Background

On August 9, 2011, Timber M., born on December 25, 2002, disclosed to her mother, the petitioner, Norma G. ("the mother"), that her stepfather, Jack G., had been showing her pornographic movies on a portable DVD player when she was with him in his truck. Timber also disclosed that Jack G. had exposed his genitals to her in a shed where the

[1]We follow our traditional practice in child abuse and neglect matters, as well as other cases involving sensitive facts, by abbreviating the last names of the parties. *See, e.g., In re Jessica G.*, 226 W.Va. 17, 697 S.E.2d 53 (2010). *See also* Rule 40(e)(1) of the *West Virginia Rules of Appellate Procedure*.

family kept their bicycles and that he attempted to coerce her into watching him masturbate. The mother testified below that on August 10, 2011, she instructed Timber on how to use her cell phone to make an audio recording. She then encouraged the eight-year-old Timber to go with Jack G. in his truck in hopes that Timber would be able to record his sexual abuse of her. The mother further testified that Timber did record a conversation with Jack G. regarding the pornographic videos.

The mother also testified that on August 12, 2011, she sent a text message to the cell phone of Corporal Roger Baker of the Greenbrier County Sheriff's Department[2] regarding Timber's recent disclosures and arranged to meet with him on August 15, 2011. The mother testified that the day before she was to meet with Cpl. Baker, she confronted Jack G., who admitted his misconduct with regard to Timber. The mother alleges that she told Jack G. to leave the home, but that he refused. She further testified that the following day, Cpl. Baker did not appear for their meeting. Cpl. Baker testified below that he did not remember receiving a text message from the mother on August 12, 2011.

The mother alleges that she protected Timber M. and Reuben M.[3] by moving her mother and her stepfather into the home and by ensuring the children were never alone

[2]Cpl. Baker handles child abuse and neglect cases in Greenbrier County.

[3]Reuben M. was born on July 12, 2004.

with Jack G. However, the testimony of the mother's stepfather revealed that he and his wife moved into another structure on the property–not into the family home. Further, the children revealed during these proceedings that contrary to the mother's testimony, they were left alone with Jack G. following Timber's disclosure.[4]

On December 20, 2011, more than four months after Jack G. admitted to the mother that he had abused Timber, the mother contacted Cpl. Baker to report the abuse and the fact that she could not get Jack G. to leave the home. On this same day, Jack G. gave a statement to Cpl. Baker during which he confessed to showing Timber pornographic movies and to exposing his genitals to her. Cpl. Baker made arrangements for Timber to undergo a forensic interview at the Child and Youth Advocacy Center ("CYAC") in Greenbrier County, and he also contacted Child Protective Services ("CPS") of the West Virginia Department of Health and Human Resources ("the Department"). The forensic interview of Timber was conducted on December 21, 2011, during which she disclosed the same allegations of sexual abuse by her stepfather, Jack G.

Also, on December 21, 2011, the mother was interviewed by a Department employee and CYAC workers during which she admitted that she had known about the

[4]The record contains a Court Appointed Special Advocate report dated February 2, 2012, which reflects that Timber told the guardian ad litem in this case that: "My Mommy told me to tell you that I was never alone with Jack after I told her [about the abuse]."

sexual abuse of Timber since August 9, 2011. She explained that she had taken matters into her own hands due to what she perceived were prior failures of the Department[5] and law enforcement to take action. The mother admitted that she had provided Timber with a cellular telephone so that the child could record Jack G.'s abuse of her, and that she then used the recording to persuade Jack G. to convey his real property[6] to her and to leave the home. Although Jack G. conveyed the property to her, he refused to leave.

On December 20, 2011, Jack G. was arrested and admitted to the sexual abuse of Timber. The following day, the Department removed the children from the home and an order ratifying emergency custody was entered in the Greenbrier County Magistrate Court.[7]

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[5]It appears that the mother is referencing the referral made to CPS on August 3, 2011, by Lorie Tilley, a person who attends the same church as the mother and the children. Ms. Tilley testified that she reported her suspicion that Timber M. was being abused, including sexual abuse, based upon disclosures made by Timber to Ms. Tilley's daughter, but that she had mistakenly identified the suspected abuser as Timber's biological father, Kevin M. Contrary to Ms. Tilley's testimony below, the Department alleges that its documentation on this referral did not contain any allegations of a sexual nature and that the referral was "screened out" because the allegations did not meet the "legal standard for abuse/neglect." The mother is also referencing her multiple referrals to CPS against Kevin M. between 2004 and 2008, following her separation from Kevin, which CPS found were either unsubstantiated or did not meet the statutory definition of abuse and/or neglect. While there are multiple references in the record to the parents' divorce, the mother testified that she was never married to Kevin M.

[6]It appears from the record that this property consisted of more than 100 acres in Greenbrier County.

[7]The record contains a Social Summary dated January 24, 2012, prepared by CPS worker Davina Agee, which reflects that the children were initially placed with a paternal (continued...)

On December 22, 2011, the Department filed a verified Petition to Institute Child Abuse and Neglect Proceedings in the Circuit Court of Greenbrier County.[8] The Department alleged, inter alia, that the conduct constituting abuse and/or neglect[9] included that the mother knew of the sexual abuse of Timber by Jack G. but failed to protect her daughter and allowed her to be alone with the stepfather. The Department also alleged that

> [i]t is not in the best interest of the children to remain in the home due to the sexual abuse in the home and [the mother's] blatant failure to protect her daughter and to continue to place

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[7](...continued)
uncle, then briefly with foster parents, and then with a maternal uncle and aunt, where they remained until disposition.

[8]On December 22, 2011, the circuit court entered an Initial Order Upon Filing of Petition in which it transferred custody of the children to the Department; appointed counsel for the mother, the father, Kevin M., and the stepfather, Jack G.; appointed a guardian ad litem to represent the children; and directed the Department to convene a Multi-Disciplinary Team. On January 4, 2012, the circuit court entered an Order Appointing Court Appointed Special Advocate to independently gather information into the circumstances of the children.

[9]West Virginia Code § 49-1-3(1)(A) (2009 & Supp. 2012) defines an "abused child," in relevant part, as one "whose health or welfare is harmed or threatened by: (A) A parent . . . who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home." Further,

> [w]here there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va. Code, 49-1-3(a) (1994).

In the Interest of Kaitlyn P., 225 W.Va. 123, 127 n. 6, 690 S.E.2d 131, 135 n. 6 (2010) (quoting Syl. Pt. 2, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995)).

> her in danger by allowing the sexual abuser to have unsupervised access to Timber [M.].

A preliminary hearing was held on January 4, 2012. At this hearing, the mother stipulated that at the time the children were removed from her home, probable cause existed that they were in imminent danger due to the distribution of obscene matter by the children's stepfather, Jack G., and due to her failure to protect the children.

In a Social Summary dated January 24, 2012, which was filed in the circuit court, CPS worker Davina Agee stated, as follows:

> The psychological and emotional well being of these children are paramount. . . . At this point, Timber [M.] has been sexually groomed by Jack [G.]. After telling her mother, Norma, about the abuse, the child was forced to live in the same house every day with her abuser for three[10] months, while Norma extorted Jack for property. That during the past three months, the children were not just made to live in the same house with Jack, but were also left alone with him on several occasions. Therefore, Norma, knowingly allowed unsupervised contact between her child and her abuser, and in doing so, Norma acted with complete disregard for Timber's well being, physical safety and mental/emotional needs.

(Footnote added).

On February 8, 2012, the mother filed a motion for a post-adjudicatory improvement period in which she relied upon the report of her forensic psychiatric evaluator,

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[10]As indicated previously, this time period was actually in excess of four months.

Bobby Miller, M.D., which stated that although the mother was not currently capable of providing adequate parenting to her children due to her "admitted poor judgment and parental inaction[,]" she could possibly be successful in an improvement period with special accommodations, such as the appointment of someone to act as mediator between her and the Department.

On February 17, 2012, the parties appeared before the circuit court for an adjudicatory hearing with the understanding that the mother would stipulate to the allegations of abuse and neglect upon which the Department would recommend an improvement period.[11] However, during this hearing, the mother would not admit that she had abused her children. Thereafter, a contested adjudicatory hearing was held on May 22, 2012, during which Cpl. Baker testified that after the mother contacted him on December 20, 2011, she told him that she had confronted her husband, Jack G., and told him, "here's what you're going to do, you're going to sign the farm over to us, and then you're going to leave, and I'm not going to go to the police." Cpl. Baker also testified that when he asked the mother whether Jack G. had, in fact, conveyed the farm to her, she responded, "yeah, I own it lock, stock, and barrel." CYAC employees testified similarly and noted that Jack G.'s refusal to

[11]During a subsequent hearing, the guardian ad litem explained that the MDT had drafted terms and conditions for this improvement period.

leave the home after he conveyed the farm to the mother was the reason she contacted law enforcement on December 20, 2011.

During the course of the May 22, 2012, hearing, the mother testified that she did not believe that Timber was in danger when she allowed her to get into a vehicle alone with Jack G., after she had disclosed the abuse. The mother testified that Jack G. "had not been violent. He had not done anything. She had already seen the [pornographic] videos. I felt that it was the only way I was going to . . . catch him." She further testified that Jack G. conveyed his farm to her shortly after she confronted him about Timber in August 2011. When asked whether she contacted law enforcement or the Department during the four months between Timber's disclosure on August 9, 2011, and when she contacted Cpl. Baker on December 20, 2011, the mother responded, "No, like I said what good would it have done. They didn't respond the first time."[12]

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[12]On June, 25, 2012, the Court Appointed Special Advocate director, Jenny Castle, filed a report with the circuit court in which she commented on the mother's four-month delay in contacting law enforcement, as follows:

> Was this due to the time it took to transfer all the titles and deeds over into her name? Why was she no longer "afraid" that he (Cpl. Baker) would not help her? How after this amount of time did she develop the "trust" in the system to call for assistance in removing [Jack G.] (because he refused to leave) yet when she was questioned about her responsibility of not protecting her children she immediately turned back to not being able to "trust the system"?

Ms. Castle further commented in this regard that she was "unaware of any specific treatment

(continued...)

On May 30, 2012, the circuit court entered an Order Following Adjudicatory Hearing in which it found that:

> 3. [The mother] had failed to protect the children from a known sexual abuser.
>
> 4. Reuben was at risk for being abused while remaining in the home with Jack [G.].
>
> 5. [The mother] knowingly allowed Jack [G.] to sexually exploit Timber.
>
> 6. [The mother] placed Timber at risk for further abuse while remaining in the home with Jack [G.].
>
> 7. Pursuant to West Virginia Code §49-6-2(c) there is clear and convincing evidence that, based upon the conditions existing at the time of the petition, the children have been abused as defined in West Virginia Code §49-1-3.

On July 24, 2012, a hearing was held on the mother's motion for a post-adjudicatory improvement period. During this hearing, Dr. Miller testified that not only did the mother not think that she had done anything wrong, but that she also believed that "she was actually justified in doing what she did." He added, "I still think she doesn't fully grasp that what she did was not the appropriate thing to do." During the mother's testimony, she again refused to acknowledge that her actions following Timber's disclosure constituted

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[12](...continued)
or program that would teach a parent not to allow their child to be continuously abused by living with her perpetrator in order to gain a $350,000 farm and all its equipment."

abuse of her children. Both the Department and the children's guardian ad litem ("GAL") asked that the mother's motion for a post-adjudicatory improvement period be denied. Thereafter, in the circuit court order denying the mother's motion, the court found, as follows:

> [T]he [mother] failed to demonstrate, by clear and convincing evidence, that she is likely to fully participate in the improvement period. Although [the mother] testified that she is willing to participate . . . in an improvement period, the Court finds that she has yet to take responsibility for her actions or inactions and acknowledge that her failure to protect the children constituted abuse to the children. Due to the [mother's] failure to acknowledge the existence of any problem the Court finds granting an improvement period would be futile at this point in the proceedings.

The case then moved forward to the disposition hearing, which was held on August 14, 2012. During this hearing, CPS worker Crystal Stock testified that the termination of the mother's parental rights was in the children's best interest and that there was no reasonable likelihood that the conditions of abuse and neglect could be corrected because of the mother's failure to admit that there are any problems.[13] The Court Appointed Special Advocate director, Jenny Castle, testified similarly. When asked during this hearing whether she had abused her children, the mother responded that Jack G. abused her children and that she could not say that she had abused them. Thereafter, the Department and the

[13]The Department states that it offered the mother the opportunity to participate in parenting and adult life skills, but those services were refused.

GAL advised the circuit court that they sought the termination of the mother's parental rights. The mother's counsel asked the circuit court to "terminate [the mother's] right to physical custody and terminate [the mother's] right to visitation . . . [but] leave the parental rights intact."[14] At the conclusion of the disposition hearing, the circuit court stated as follows:

> What brought this family into court in the first place is the lack on the part of their mother in the - - a fundamental requirement of every parent, and that is to have a basic fundamental understanding of what is reasonably necessary to protect children, and in this case protect young children and a daughter who's been exposed and . . . who was required to live in a household of an abuser . . . although [the mother] says, yes, she made a mistake . . . [,] the mistake would be corrected by gaining an insight, understanding as to what her obligation as to the children's mother is to provide basic protection from abusers and from sex offenders . . . .

The circuit court further explained that

> everyone it appears to be with the exception of [the mother] has worked towards focusing on the best interests of the children and tried to get this resolved but we couldn't get over that initial hurdle, and there's just simply no reason why the department should continue to expend resources for [the mother] if she's not willing to absorb and incorporate and make it a part of who she is, and this hasn't been evidenced from the get-go and so it's not really a tough decision at all. . . . I see no reasonable alternative other than to terminate her rights as their parent, and it doesn't mean that they don't have a right to have continued contact as it is in their best interest with their mother and reasonable

[14]The Department argued that a termination of the mother's custodial rights to her children, but not her parental rights in their entirety, would leave the door open for the mother to seek custody at a later time, which would not achieve permanency for the children. The Department further argued that permanency would be best achieved by placing the children with their biological father and terminating the parental rights of the mother.

> visitation . . . and that [the father] can . . . allow the children to have supervision with their mother as is in their best interests.[15]

(Footnote added).

On August 16, 2012, the circuit court entered a dispositional order accepting the children's permanency plan filed by the Department. The circuit court found that the mother is "presently unwilling to adequately provide for the children's needs[;]" that "[t]here is no reasonable likelihood that the conditions of abuse can be substantially corrected in the near future[;]" that the mother "has failed to comply with the requirements to rectify the conditions of abuse[;]" that she "has repeatedly failed to acknowledge that her actions constituted abuse of the children[;]" and that she "has failed to recognize that she failed to protect her children and that she does not have the capacity to recognize and remedy that failure in the near future." The circuit court found the welfare and best interests of the children required the termination of the mother's parental rights to Timber M. and Reuben M., and the court granted both physical and legal custody of the children to their biological father, Kevin M.

[15]During oral argument, counsel stated that the mother visits with her children every Sunday in Kevin M.'s home and she has the opportunity for telephone contact with them during the week.

II. Standard of Review

We are asked to review a circuit court's order entered upon a petition for termination of parental rights. We have previously stated that abuse and neglect proceedings will be evaluated under a "compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). Indeed, our standard of review in this regard is well established:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). With these standards in mind, the parties' arguments will be considered.

III. Discussion

In the present appeal, the mother asserts that the Department violated her due process rights by repeatedly ignoring applicable statutes, procedural rules, and the Department's Child Protective Services Policy manual ("policy manual").[16] She also asserts that the circuit court failed to protect the best interests of the children by failing to employ a dispositional alternative that was less restrictive than a termination of her parental rights. Further, the mother argues that because Jack G. was removed from the home on December 20, 2011, there was no imminent danger warranting the removal of the children from the home on December 21, 2011. Lastly, the mother asserts that she was denied a meaningful opportunity to request and participate in an improvement period.

> We begin our analysis of these issues by acknowledging that
>
> "[i]n the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and

[16]The mother also makes general references to the Department violating the "Gibson decree" in her appellate brief. The Department states that the "Gibson decree" is an amended consent decree entered in *Gibson v. Ginsberg*, No. 78-2375 (S.D.W.Va. Sept. 28, 1981), and that its terms have been incorporated into its policy manual in an effort to fully comply with its requirements. Because the mother fails to provide any analysis concerning this decree in her appellate brief, her references to the same are addressed herein only to the extent that the *Gibson* decree has been incorporated into the Department's policy manual. *See State, Dept. of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs." (Internal citations omitted).).

> guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." Syllabus Point 1, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. Pt. 2, *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003). We must also be mindful, however, of our basic tenet that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). Indeed, "'"[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).' Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995)." Syl. Pt. 2, *In the Interest of Kaitlyn P.*, at 123-124, 690 S.E.2d at 131-132.

A. Denial of due process.

The mother contends that she was denied due process because the Department allegedly ignored applicable statutes and rules of procedure, as well as its policy manual and its pamphlet titled: "A Parent's Guide to Working with Child Protective Services" ("pamphlet"). In particular, the mother asserts that the Department (1) failed to inform her of her right to counsel before interviewing her on December 20, 2011; (2) failed to notify her of the time and place of the emergency custody ratification hearing or her opportunity to be present for the same; and (3) failed to file either a family functioning assessment as required

by Department policy, a family case plan as required by West Virginia Code § 49-6-2(b), or a child case plan as required by West Virginia Code § 49-6-5, all of which deprived both her and the circuit court of necessary information. We find no merit in the mother's argument.

Regarding the right to counsel, the Department's policy manual simply requires its employee to ask the parent whether he or she has counsel and, if so, to contact the lawyer before interviewing the parent.[17] As the Department argues, and as we agree, the policy manual does not confer upon any parent additional procedural due process rights not already provided under existing law. Further, the Department's informational pamphlet merely describes a court appointing counsel *after* a legal proceeding has been instituted, which is consistent with West Virginia Code § 49-6-2(a) (2009 & Supp. 2012).[18] In short, the mother does not point to any law that affords a parent the right to counsel pre-petition. Moreover, the circuit court appointed counsel to represent the mother the same day the Department filed the abuse and neglect petition. For these reasons, we conclude that there was no denial of due process to the mother in this regard.

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[17]Although it is unclear from the record whether the Department worker asked the mother whether she was represented by counsel at the time of her initial interview, the mother does not claim that she was represented by counsel at that time. Consequently, her interview would have proceeded in the manner in which it did in any event.

[18]West Virginia Code § 49-6-2(a) requires the circuit court to advise a parent of his or her right to be represented by counsel in a child abuse and neglect proceeding and to appoint counsel if the parent cannot afford counsel.

We next address the issue of notice of the emergency ratification hearing. When the Department takes a child into emergency custody, the Department worker is required to immediately apply for an order ratifying the emergency custody under West Virginia Code § 49-6-3(c) (2009 & Supp. 2012) . This statute provides, in pertinent part, that "[t]he parents . . . of the child or children *may* be present at the time and place of application for an order ratifying custody . . . ." *Id.* (emphasis added). This statute further provides that "if at the time the . . . children are taken into custody . . . the worker knows which judge or referee is to receive the application [to ratify emergency custody], the worker shall so inform the parents . . . ." *Id.* The mother argues that the Department worker could have easily ascertained the time and place of the application. The Department asserts that assuming, *arguendo,* that the mother did not receive notice of the hearing, she has failed to show how she was harmed, and that her failure to raise this issue below deprived the circuit court of the opportunity to address it. Further, we note that during the preliminary hearing, the mother stipulated that at the time the children were removed from the home, probable cause existed that they were in imminent danger due to the distribution of pornographic material by the children's stepfather, Jack G., and her failure to protect the children.[19] Thus, under these circumstances, we again find that the mother was not denied due process.

[19]These admissions by the mother at the preliminary hearing also dispense with her argument that imminent danger no longer existed at the time the children were removed from the home on December 21, 2011.

With respect to the mother's argument that she was denied due process by the Department's failure to prepare a family functioning assessment and various case plans, we first note that a family functioning assessment is a tool the Department employs to assess the risk to children in a home. Here, as the Department argues, such an assessment became unnecessary when the children were removed from the home due to imminent danger findings made just hours after the Department's investigation began.[20] With regard to the mother's argument that the Department failed to prepare a family case plan under West Virginia Code § 49-6-2(b) (2009) (Supp. 2012), this statute provides, in pertinent part, as follows:

> In any proceeding brought pursuant to the provisions of this article, the court may grant any respondent an improvement period in accord with the provisions of this article. . . . *An order granting such improvement period shall require the department to prepare and submit to the court a family case plan* in accordance with the provisions of section three, article six-d of this chapter.

(Emphasis added). It is clear from this statute that the family case plan requirement is triggered by a court granting an improvement period.[21] Here, as the Department argues, there

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[20]The Department alleges that, although unnecessary, it ultimately prepared a family functioning assessment when the mother requested one. In preparing the assessment, the Department utilized information from its file concerning the events and its investigation.

[21]At the time these proceedings were instituted, West Virginia Code § 49-6D-3(a) (2009 & Supp. 2012) required the Department to prepare a family case plan within thirty days of an improvement period being granted to a person who had been referred to the Department. Again, here, an improvement period was not granted. While not argued by the parties herein, in 2012, this statute was amended to require the preparation of a "unified child

(continued...)

was no need for the Department to prepare a family case plan under West Virginia Code § 49-6-2(b) because no improvement period was granted. Regarding the child's case plan, West Virginia Code § 49-6-5(a) (2009) (Supp. 2012) provides that following a determination that a child is abused or neglected,

> the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. . . . Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel *at least five days prior to the dispositional hearing*.

[Emphasis added]. The Department filed the children's permanency plan the day prior to the disposition hearing; thus, it was untimely. *Id.* The record reflects that although the mother was offered a brief continuance given the late filing of this plan, the mother's counsel advised the circuit court that the mother wished to proceed with the disposition. For this reason, we find that the mother was not denied due process in the proceedings below.

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[21](...continued)
and family case plan" within thirty days of a parent being allowed an improvement period or within sixty days of a child being placed into foster care, whichever occurs first. This amendment became effective June 7, 2012. The Department's submission of a case plan to the circuit court on August 13, 2012, substantially complied with the time line in this amendment. Even assuming, *arguendo*, that it did not, the mother did not object to the plan submitted on this basis; therefore, she has waived any argument in that regard.

B. Denial of an improvement period

Next, the mother asserts that the circuit court erred in denying her an improvement period. As we have previously explained,

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

In re: Charity H., 215 W.Va. 208, 217, 599 S.E.2d 631, 640 (2004) (quoting *W. Va. Dept. of Health and Human Res. v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996)). We have further explained that "an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged." *In re Emily*, 208 W.Va. 325, 334, 540 S.E.2d 540, 551. Under this precedent, in order to remedy the abuse and/or neglect problem, the parent must recognize and acknowledge that his or her conduct constituted abuse. As the circuit court aptly explained during the hearing on the motion for a post-adjudicatory improvement period, "you don't have to have intentional abuse in order to have abuse[,]" and that "being a[n] amenably acceptable parent is more than simply not repeating the same mistakes. It's understanding what it takes to keep them [the children] safe and to keep them healthy."[22]

[22]It is clear from our review of the record that the circuit court encouraged the mother (continued...)

In the case at bar, the parties appeared at the first adjudicatory hearing with the understanding that the mother would stipulate to the allegations of abuse and neglect, based upon a stipulation reached among the parties at an MDT meeting, after which the Department would recommend an improvement period. At this hearing, however, the mother refused to follow through with the stipulation. The record similarly reflects that the mother had declined a pre-adjudicatory improvement period because she did not believe that she had done anything inappropriate or anything to cause a need for improvement.

Thereafter, a contested adjudicatory hearing was held. Following the mother being adjudicated as an abusing parent, the circuit court held an evidentiary hearing solely on the mother's motion for a post-adjudicatory improvement period. During this hearing, the circuit court heard the testimony of several witnesses, including that of Dr. Miller, the mother's forensic evaluating psychiatrist. While the mother asserts that the circuit court did not give enough weight to the testimony of Dr. Miller, it is clear from the record Dr. Miller's testimony was fully considered by the circuit court. In fact, the circuit court appointed the mother additional legal counsel, which was one of the very accommodations suggested by Dr. Miller, in an effort to assist her in admitting her issues and making her amenable to the services being offered to her by the Department.

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[22](...continued)
to put her past experiences with the Department behind her and to recognize that she had failed her children when they were with her.

Under West Virginia Code § 49-6-12(b)(2), the mother was required to prove "by clear and convincing evidence" that she was "likely to fully participate in the improvement period . . . ." *Id.* The mother failed to meet her burden. As the Department argues–and as the record reflects–the mother refused to acknowledge that she had abused her children by allowing Timber to get into a truck with Jack G. in hopes that he would sexually abuse her, again, so that it could be recorded with a cell phone. The mother further refused to acknowledge that she had abused her children by requiring both Timber and Reuben to live with this abuser for another four months *after* the abuse was disclosed. Indeed, the record reflects that instead of recognizing that her failure to protect her children was abuse, the mother persistently blamed others, including law enforcement and the Department.

Based upon the testimony and evidence received at this hearing on the mother's motion for an improvement period, the circuit court found, as discussed previously, that the mother had "failed to demonstrate, by clear and convincing evidence, that she is likely to fully participate in the improvement period[;]" that the mother had "yet to take responsibility for her actions or inactions and acknowledge that her failure to protect the children constituted abuse[;]" and that given the mother's failure to acknowledge the existence of any problem, "granting an improvement period would be futile . . . ."

Upon our review of the record and our prior case law, as discussed above, we find that the mother had a meaningful opportunity to seek an improvement period, but she failed to carry her evidentiary burden under West Virginia Code § 49-6-12(b)(2). Given that the grant of an improvement period is at the discretion of the circuit court,[23] this Court finds no error in the circuit court's denial of an improvement period under the facts and circumstances of this case.

C. Termination of parental rights

The mother argues that the circuit court committed error in terminating her parental rights because neither the circuit court nor the Department considered any alternatives less restrictive than termination. She further argues that because there was no finding of aggravated circumstances following adjudication, the Department was not relieved of its duty to work toward reunifying the family. Conversely, the Department argues that the circuit court correctly found that there was no less restrictive disposition than termination because the mother could not provide the children with the safety and security they need. The Department adds that the circuit court did consider a less restrictive alternative–i.e., an

[23]West Virginia Code § 49-6-2(b) provides, in relevant part, that "the court *may* grant any respondent an improvement period in accord with the provisions of this article." (Emphasis added).

improvement period–and held an evidentiary hearing specifically to address the mother's motion for the same.[24]

We have previously observed that the "'"'[t]ermination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977][,] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W.Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).' Syl. Pt. 1, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993)." Syl. Pt. 6, *In re Isaiah A.*, 228 W.Va. 176, 718 S.E.2d 775 (2010). Further, "'courts are not required to exhaust every speculative possibility of parental improvement . . . where it appears that the welfare of the child will be seriously threatened . . . .' Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, in part, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873. Moreover, under West

[24]We also observe from the record that while the mother had initially sought a post-dispositional improvement period, she retreated from that position during the disposition hearing when her counsel advised the circuit court that it was "not [the mother's] intention today to ask for a dispositional improvement period . . . ." He later argued that "ideally, yes, she'd like the petition dismissed and she'd like her children returned to her . . . . Realistically, the plan we would suggest to the Court is somewhat similar to the department's permanency plan. The Court return the children to [Kevin M.]." Counsel then asked that the circuit court "simply terminate the physical custody rights and visitation rights, not an absolute termination of parental rights." The Department's counsel responded that permanency would not be achieved short of a full termination of parental rights.

Virginia Code § 49-6-5(a)(6), courts are directed to terminate an abusing parent's parental rights "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child . . . ." *Id.*

In the case *sub judice*, the circuit court found in its disposition order that the mother "has failed to recognize that she failed to protect her children and that she does not have the capacity to recognize and remedy that failure in the near future." The circuit court further found that the Department had "made reasonable efforts, with the children's health and safety being the paramount concern, to preserve the family" and had made reasonable efforts "to prevent removal and to promote reunification . . . ." In addition, the circuit court found that "[t]here is no reasonable likelihood that the conditions of abuse can be substantially corrected in the near future and the children need continuity in care and caretakers, and a significant amount of time is required to be integrated into a stable and permanent home environment." The circuit court concluded that "[b]ased upon necessity for the welfare and best interests of the children . . . the parental rights of [the mother] are terminated."

Upon our review of the record, as discussed above, we find that the circuit court was presented with sufficient evidence upon which to base its findings that there was

no reasonable likelihood to believe that conditions of abuse and neglect could be substantially corrected in the near future and that termination was necessary for the children's welfare. The record reflects that the mother, through her words, action and inaction, demonstrated an intractable unwillingness and inability to acknowledge her culpability in this matter, to accept the services offered by the Department, and to protect her children in the future. Accordingly, we find no clear error in the circuit court's termination of the mother's parental rights to Timber M. and Reuben M. under the facts and circumstances of this case.

D. Custody of the children

In the circuit court's dispositional order entered August 16, 2012, the circuit court granted both physical and legal custody of Timber M. and Reuben M. to their biological father, Kevin M. Based upon our review of the record, we find that placement to be extremely troubling, as explained below.

The record in this case indicates that between 2004 and 2011, during which the mother and Kevin M. were involved in a custody dispute concerning Timber M. and Reuben M., there were thirteen referrals to CPS involving these children, at least eight of which the mother instituted or caused to be instituted against Kevin M. These referrals contained allegations that Kevin M. sexually abused Timber M., beat one or both of the children, and

allowed the children's head lice to go untreated. With regard to those specific allegations, the Department investigated and determined that they were "not substantiated."

In addition to the unsubstantiated allegations, the record does contain substantiated allegations of sexual abuse by Kevin M. The record contains a CPS social summary filed in the circuit court which indicates that Kevin M. had been accused of "sexual abuse on more than one occasion and with more than one victim[,]" and that when questioned about the matter, he "stated that every time he gets divorced or separated, someone accuses him of sexual abuse." One such instance involved a CPS referral in June of 2008 alleging that Kevin M. had been sexually abusing his then-stepdaughter, M.B., who was twelve years old at the time. The record reflects that these allegations, which involved Kevin M. fondling M.B.'s breasts and digitally penetrating her vagina two to three times a week, **were substantiated**. At the time, M.B. described Kevin M.'s digital penetration as being "so hard" that she felt that his finger "would come out her butt." The record further indicates that when Kevin M. was questioned concerning these allegations, **"he did not recall**" touching M.B.'s vagina and refused to take a polygraph examination. Subsequently, these allegations became the subject of an indictment returned against Kevin M. on February 2, 2010, charging him with two counts of third degree sexual assault, two counts of sexual abuse by a parent, guardian, custodian or person in a position of trust to a child, and two

counts of incest, each count naming M.B. as his victim.[25] *See State v. Kevin Dale M.*, Case No. 10-F-6.

This criminal proceeding against Kevin M. was referenced in the Department's abuse and neglect petition when the Department stated that it was considering the possibility of placing the children with their biological father, Kevin M., "upon further assessment of criminal charges" pending against him. On December 22, 2011, the same day the initial abuse and neglect petition was filed, the indictment against Kevin M. was dismissed on the motion of the prosecutor, who stated simply that "the State no longer wishes to prosecute."[26] In the Department's amended petition, also filed on December 22, 2011, the Department alleged that these criminal charges were dismissed "due to the victim not wishing the matter to proceed further, and due to certain other considerations of the Prosecuting Attorney's Office."[27] These same criminal charges were referenced by Kevin M.'s counsel during the hearing on the mother's motion for a post-adjudicatory improvement period when he implied that the criminal charges were dismissed against Kevin M. to pave the way for the children to be placed into his physical custody:

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[25]The reason or reasons for the delay in the filing of these criminal charges following the CPS referral in 2008 are not set forth in the record.

[26]The only information from this criminal action in the record is a copy of the indictment against Kevin M. and the circuit court's order dismissing that criminal action.

[27]The record is silent as to what these "certain other considerations" might be.

> My client was first called to [the Department] when these children were picked up and told to come and get your children. Well, then somebody apparently looked at the allegations that had been made against him and said, no, wait a minute, we've got to get this off your record . . . . And the prosecutor granted a quick dismissal and we got an order to do that. Then he was told, no, you can't have the children unless you go with your parents.

Significantly, although the criminal charges were dismissed by the circuit court, there is absolutely no indication in the record that M.B. ever retracted her allegations against Kevin M.

In addition to the specific allegations against Kevin M., the Department's amended petition also alleged that Kevin M. was minimizing the mother's culpability in the abuse and neglect matter, despite having first-hand knowledge that the mother had left the children for more than four months with their stepfather, Jack G., after knowing that Jack G. was exposing himself to Timber and showing her pornographic materials.[28] In fact, during the eight-month period that the abuse and neglect proceedings against the mother were litigated, all of the social summary notes and case report notes in the record indicate that Kevin M. continued to minimize the mother's culpability and, therefore, he ***"would not [be***

[28]All of the information in the record indicates that after the mother and Kevin M. moved past the child custody proceedings following their separation, they became "quite friendly" and often went hunting together, including during the four-month period in which the mother allowed Jack G. to continue to live in the home.

expected to] play a protective role" with respect to the children. These same summaries and reports further indicate that Kevin M. did not want custody.[29]

Thereafter, the record is silent as to why the Department recommended that Kevin M. be granted custody of Timber and Reuben, particularly when the children were, by all accounts, doing well in a foster placement. Although there might be pertinent information in the children's permanency plan, that document is not in the record.[30] Finally, there is nothing in the circuit court's dispositional order to suggest when, and why, Kevin M. decided to accept custody, or when, and why, the Department decided that was a good idea. Regrettably, the Department's counsel was unable to assuage this Court's concerns when questioned about this placement during oral argument other than to suggest, as did the GAL, that this placement was the result of the Department's inability to "prove" the allegations

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[29]While Kevin M. did not want custody, he did want visitation. In the circuit court's order entered following the preliminary hearing, it referred Kevin M.'s request for visitation, and the decision as to whether such visitation should be supervised, to the MDT. Apparently Kevin M. was granted supervised visitation because the record contains a report of the MDT meeting held on August 8, 2012, which states, in part, that "[t]he team . . . decided to no longer have [Kevin M.] be supervised with his children [and] that he can take them out in his vehicle alone and do different activities without the supervision of his parents." However, this Court could not find any discussion in any of the MDT meeting reports in the record regarding the prior sexual abuse allegations against Kevin M., nor any explanation for the MDT's decision to allow Kevin M. to have supervised visitation, nor any explanation for the MDT's decision that the visitations no longer needed to be supervised.

[30]While Rules 39 through 46 of the Rules of Procedure for Child Abuse and Neglect Proceedings contemplate permanent placement reviews and the entry of additional orders following these reviews, if any of this has occurred, that information is also not in the record.

against Kevin M. in the context of the instant proceeding. Of course, there is also nothing in the record to indicate that anyone talked to either the prosecutor or the victim in *State v. Kevin Dale M.*, or reviewed the discovery in that case, or otherwise made any attempt to ascertain the "certain other considerations" that led to the case being dismissed two years after it was instituted, other than the aforementioned statements made by Kevin M.'s counsel.

While the custodial placement for the children is not an issue raised in this appeal, this Court cannot ignore the alarming information in the record concerning Kevin M. As indicated above, this Court is unable to glean from either the record or the circuit court's dispositional order why the children's placement with the biological father was deemed appropriate in light of the information in the record concerning the father. As we have previously stated, "[w]ithout factual or legal findings, this Court is greatly at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong." *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 689, 724 S.E.2d 250, 293 (2011) (internal citations omitted). This is the position in which this Court now finds itself.

Although our general rule is that issues not raised on appeal will not be considered, Rule 2 of the West Virginia Rules of Appellate Procedure specifically provides, as follows:

> In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice.

With similar considerations, Rule 2 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides, in pertinent part, that "[t]hese rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children[,]" and further provides that "[t]hese rules are not to be applied or enforced in any manner which will endanger or harm a child."

Thus, it is clear from our procedural rules, as well as our prior case law, that "[t]here cannot be too much advocacy for children." *State ex rel. Diva P. v. Kaufman*, 200 W.Va. 555, 570, 490 S.E.2d 642, 657 (1997) (Workman, C.J., concurring). Indeed, if one thing is firmly fixed in our jurisprudence involving abused and neglected children, it is that the "polar star test [is] looking to the best interests of our children and their right to healthy, happy productive lives[.]" *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). This Court has repeatedly stated that a child's welfare acts as "the polar star by which the discretion of the court will be guided." *In Re: Clifford K.*, 217 W.Va. 625, 634, 619 S.E.2d 138, 147 (2005) (internal citation omitted). *See also In re D.P.*, 230 W.Va. 254, __737 S.E.2d 282, 285 (2012) ("It is axiomatic that, in any contest involving the care and

custody of a minor, 'the welfare of the child is the polar star by which the discretion of the court will be guided.' Syllabus Point 2, *State ex rel. Lipscomb v. Joplin*, 131 W.Va. 302, 47 S.E.2d 221 (1948).").

With these guiding principles in mind, this Court has previously addressed matters not raised in the appeal of cases involving the welfare of children. *See In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995) ("On the issue of the improvement period, we *sua sponte* address an issue of particular concern to this Court."); *In re Jamie Nicole H.*, 205 W.Va. 176, 183, 517 S.E.2d 41, 48 (1999) ("While Appellant has not raised the sufficiency of the trial court's dispositional order, we address this issue *sua sponte*."). *Cf. In re K.R.*, 229 W.Va. 733, __ n. 23, 735 S.E.2d 882, 893 n. 23 (2012) ("While neither party assigned this specific ruling as error, this does not affect this Court's ability to determine it to be error: '[I]t is within the authority of this Court to "sua sponte, in the interest of justice, notice plain error." *Cartwright v. McComas*, 223 W.Va. 161, 164, 672 S.E.2d 297, 300 (2008) (quoting Syl. Pt. 1, in part, *State v. Myers*, 204 W.Va. 449, 513

S.E.2d 676 (1998).”));[31] *Ringer v. John*, No. 11-1325 (W.Va. April 2, 2013) (Court deciding case on the basis of an issue not raised by the parties).[32]

Based on our prior precedent and firmly rooted in this Court’s concern for the well-being of children, we now hold that in cases involving the abuse and neglect of children, when it appears from this Court’s review of the record on appeal that the health and welfare of a child may be at risk as a result of the child’s custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child. Such action may include vacating the circuit court’s order of disposition with respect to the custodial placement, remanding the case for further proceedings, and directing the entry of an order fully explaining the propriety of the custodial placement. The thoroughness of such an order becomes extremely important if a circuit court were to determine on remand that its initial custodial placement was, in fact, appropriate.

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[31]Similarly, Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure provides, in relevant part, that “[i]n its discretion, this Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.”

[32]*See also* 5 Am. Jur. 2d Appellate Review § 762 (recognizing the power of appellate courts to remand cases for further proceedings “where justice demands that course in order that some defect in the record may be supplied; such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. (Internal citation omitted).”).

In reviewing the record submitted by the parties in the case at bar, there is a glaring evidentiary gap that leaves this Court with the firm conviction that no one in the proceedings below adequately considered the issue of Kevin M.'s fitness to have custody of Timber M. and Reuben M.[33] *Cf.* Syl. Pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996) ("A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."). Accordingly, we remand this case to the circuit court for further proceedings to determine whether permanent custodial placement of the children with Kevin M. is appropriate and for the entry of an order that fully explains the propriety of the custodial placement.

IV. Conclusion

Based upon this Court's thorough review of this matter and for the foregoing reasons, the order of the Circuit Court of Greenbrier County entered on August 16, 2012, is affirmed with regard to the termination of the petitioner's parental rights to her children, Timber M. and Reuben M., but vacated with regard to custodial placement. This case is remanded for further proceedings to determine whether permanent custodial placement of

[33]While there are various comments in the record as to the Department's services being in place to assist the father, Kevin M., those services appear to be directed to the father's reluctance and concern in assuming full-time responsibility for his children, as opposed to services related to his history of sexual abuse allegations involving children.

the children with Kevin M. is appropriate.[34] To facilitate the commencement of the proceedings on remand, the Clerk is directed to issue the mandate of the Court contemporaneously with the issuance of this opinion.

Affirmed, in part, Vacated, in part, and Remanded with Directions.

[34]In light of our decision today, the Department should immediately take all necessary actions to ensure the safety and welfare of both Timber M. and Reuben M.

No. 12-1138 - In Re: Timber M. And Reuben M.

FILED
June 24, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

Workman, Justice, concurring:

I concur in the Court's disposition of all issues relating to Norma G., the children's mother, who has demonstrated both by her words and her actions that she is unwilling and unable to acknowledge her culpability in this matter, unwilling and unable to accept services from DHHR,[1] and unwilling and unable to protect the children in the future. I write separately to express my wholehearted support of the Court's adoption of syllabus point six, which is consistent with our precedents but is now expressly adjudicated and "prefixed to the published report of the case" as set forth in Article Eight, Section 4 of the West Virginia Constitution. Justice Loughry, writing for the majority, has done a great service for the children of West Virginia by clarifying that it is *always* a court's duty to protect children who are before the court.

As painstakingly detailed in the Court's opinion, the record in this case indicates that

[1]Given the finite resources available to state agencies to fulfill their mission of assisting families in crisis, the suggestion that Norma G. should be provided a law-trained mediator to cajole her into accepting services from DHHR, or that agency workers from another county should be pulled into her case because she doesn't "like" or "trust" the workers in Greenbrier County, is frankly absurd. Norma G. was afforded a full panoply of procedural rights throughout these proceedings, and was further offered an array of services that might have enabled her to achieve the goal of unification with her children. She declined to accept the services because she deemed them unnecessary.

Kevin M. has been accused on multiple occasions of sexually-based offenses against minor children. Giving him the benefit of the doubt, as DHHR investigators did at the time, it may be inferred from the record that at least some of the charges, filed by Norma G. during the pendency of the couple's custody dispute, may have been bogus.[2] Others, according to Norma G.'s testimony in these proceedings, although instituted by her against Kevin M. involved incidents that she now believes to have been perpetrated by unnamed "others" in Kevin's household.[3]

Even putting aside the charges filed by Norma G. against Kevin M., the record in this case contains alarming information about other charges against Kevin G. that cannot be readily dismissed as bogus or otherwise groundless. As detailed in the Court's opinion, in February 2, 2010, Kevin M. was indicted by a grand jury on multiple charges of sexual assault and intrusion involving his then-stepdaughter, M.B., who was twelve years old at the time. *State v. Kevin Dale M.*, Case No. 10-F-6. On December 22, 2011, the indictment was dismissed on motion of the prosecutor, who stated the following as grounds for his action:

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[2]During the pendency of the parties' custody proceedings, and as part of what CPS termed an "ongoing custody battle," Norma G. instituted or caused to be instituted twelve investigations into allegations that Kevin M. sexually abused Timber M., beat one or both of the children, and allowed the children's head lice to go untreated. In each instance, DHHR investigated and determined that the allegations made against Kevin M. were "not substantiated."

[3]This, of course, begs the question of what Kevin M. was doing while the unnamed others in his household were sexually abusing his children.

"because the State no longer wishes to prosecute." On that same date, DHHR filed a petition, and then an amended petition, for temporary custody of Timber M. and Reuben M. In the original petition, DHHR sought temporary placement of the children with their paternal uncle, indicating that it was looking at placement with Kevin M. "upon further assessment of criminal charges." In the amended petition, DHHR clarified that the charges against Kevin M. had been dismissed due to "the victim not wishing the matter to proceed further, and due to certain other considerations of the Prosecuting Attorney's office."[4] In the amended petition, DHHR also alleged that Kevin G. was minimizing Norma G.'s culpability in the abuse and neglect matter, despite having first-hand knowledge that Norma G. had left the children with their stepfather, Jack G., after knowing that Jack G. was exposing himself to Timber M. and showing her pornographic materials.[5]

During the eight-month period in which the abuse and neglect proceedings against Norma G. were litigated, all of the social summary notes and case report notes indicate that Kevin M. continued to minimize Norma G.'s culpability and therefore "would not [be expected to] play a protective role" with respect to the children. Additionally, the notes indicate that although Kevin M. wanted visitation, and was amenable to services, he did not

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[4]The record is silent as to what these "certain other considerations" might be.

[5]All of the information in the appendix record indicates that after the conclusion of the custody proceedings between Norma G. and Kevin M., the two became "quite friendly" and often went hunting together – including hunting trips taken during the four-month period in which Norma G. allowed Jack G. to continue living with her and the children.

want custody. Finally, and most significantly, the notes indicate that although the criminal charges against Kevin M. had been dismissed because the victim, M.B., did not want to proceed with the case, *M.B. had never recanted her allegations against Kevin M.*

Thereafter, the appendix record is completely silent with respect to a key question: why, with the children by all accounts doing well in a foster placement, did the DHHR reverse course and recommend that Kevin M. be given custody of Timber M. and Reuben M.? As noted in the majority opinion, the appendix record submitted to this Court contains no information indicating that anyone talked to either the prosecuting attorney or the victim in *State v. Kevin Dale M.*, or reviewed the discovery in that case, or otherwise made any attempt to ascertain the "certain other considerations" that led to the case being dismissed two years after it was instituted. See text *supra*. Further, although there might be information in the Case Plan on this critical issue – one would hope, given the requirements of the law that a multidisciplinary treatment team consider every aspect of a case[6] – that document is, again, not contained in the appendix record. Finally, nothing in the circuit court's disposition order of August 14, 2012, gives any hint as to when, why, or on what

[6]*See* W. Va. Code § 49-6-5, "Disposition of neglected or abused children"; W. Va. Code § 49-6D-3, "Unified child and family case plans"; and Rule 28 of the West Virginia Rules of Procedure for Child Abuse and Neglect, "Disposition report by Department – The child's case plan; contents of the child's case plan."

basis the court became "comfortable" with the decision to give Kevin M. custody of the children.[7]

Although none of the parties to this case raised the issue of placement, this Court has both the right and the duty to address it. As the Court's opinion notes, both Rule 2 of the West Virginia Rules of Appellate Procedure and Rule 2 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings codify the Court's authority to suspend rules, and/or to liberally construe them, the former rule for the general purpose of "do[ing] substantial justice" and the latter rule for the specific purpose of "achiev[ing] safe, stable, secure permanent homes for abused and/or neglected children[.]" And as the Court's opinion also notes, we have not hesitated in the past to address issues sua sponte in cases involving the welfare of children. *See In re K.R.*, 229 W. Va. 733, __ n.23, 735 S.E.2d 882, 893 n.23 (2012) "[I]t is within the authority of this Court to 'sua sponte, in the interest of justice, notice plain error.'" (Internal citations omitted.)

I cannot conceive of a case more appropriate for the exercise of our authority to notice plain error "in the interest of justice" than one in which children may in danger as a result of

[7]At oral argument, it was suggested by counsel for DHHR that because the agency couldn't "prove" the charges against Kevin M., that was the end of the matter. Again, with no indication that anyone in this case has ever spoken to M.B., spoken to the prosecuting attorney, or reviewed the discovery in the criminal case, this excuse rings hollow.

an inappropriate placement. We have consistently held that in matters involving abused and neglected children, the "polar star test [is] looking to the best interests of our children and their right to healthy, happy productive lives[.]" *In re Edward B.*, 210 W. Va. 621, 632, 558 S.E.2d 620, 631 (2001); *see Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children."); *In re George Glen B. Jr.*, 207 W. Va. 346, 355, 532 S.E.2d 64, 73 (2000) ("[W]hen a petition alleging abuse and neglect has been filed, a circuit court has a duty to safeguard the child and provide for his or her best interests."). In reviewing the record submitted to this Court, which contains a significant evidentiary gap, four members of this Court are left with the definite and firm conviction that no one in the proceedings below adequately developed the issue of Kevin M.'s fitness to have custody of Timber M. and Reuben M. *Cf.* Syl. Pt. 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996) ("A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."). The dissenting justice, although expressing reservations as to the Court's adoption of syllabus point six, concurs in the Court's decision to vacate and remand for further proceedings on the custody issue.

The dissenting justice takes issue with the Court's recitation of the facts about accusations made against Kevin M. when Kevin M. is not a party to this appeal and "did not

have the opportunity to address the majority's concerns[.]" This begs the question: why was Kevin M. dismissed from the proceedings below?[8] It further assumes that this Court has adjudicated Kevin M.'s rights, which is not the case; we have vacated and remanded for further proceedings. If the circuit court is correct that Kevin M. is a fit and proper custodian for Timber and Reuben, then the remand proceedings will allow the parties to make a record, and the court to make specific findings, to support the court's conclusion.

Additionally, the dissenting justice expresses concern that syllabus point six of the Court's opinion is overly broad and "serves as an invitation to this Court to disregard long-settled standards of review." In my view, this concern is unfounded. First, our rules not only permit but in fact *require* that in abuse and neglect appeals, "[w]ithin one week of any oral argument . . . the parties shall provide a written statement of any change in the circumstances that were set forth in the briefs." W. Va. R. App. P. 11(j).[9] Second, it is well established in our jurisprudence that in cases involving the welfare of children, we may "*sua sponte* address

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[8]Consistent with the complete "information gap"in the record of these proceedings with respect to Kevin M., information in the file indicates that he was dismissed from the case prior to the final hearing but there is no circuit court order to that effect.

[9]Indeed, in an Administrative Order entered on December 10, 2012, *Re: Filings That Do Not Comply With the Rules of Appellate Procedure*, then-Chief Justice Ketchum specifically noted in paragraph 12 that "[b]riefs by all parties in abuse and neglect cases that do not set forth the information about the current status of the child that is required by Rule 11(j)" are not in compliance with this Court's rules.

an issue of particular concern to this Court."[10] Third, the issue of Kevin M.'s fitness fairly leaps off the face of the record in this case; whether or not the issue was raised by the parties, it permeates these proceedings.[11] For these reasons, I am unwilling to accept the proposition that because of a speculative concern about what could happen in some other case at some other time, this Court should passively accept the distinct possibility of harm to the children in this case. Timber M. and Reuben M. deserve more, and this Court's adoption of syllabus point six makes it clear that the interests of children are, and will always be, the "polar star" in abuse and neglect proceedings.

Accordingly, I concur in the Court's judgment.

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[10]*In re Jonathan Michael D.*, 194 W. Va. 20, 27, 459 S.E.2d 131, 138 (1995). The Court's opinion cites *Jonathan Michael D.* and a number of other cases standing for this proposition.

[11]In this regard, this case is completely different from *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971), *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978), and *Voelker v. Frederick Business Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995), all of which held, in syllabus points one, one and three, respectively, that "[i]n the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." This statement describes the Court's general practice, not the ambit of the Court's constitutional authority. Indeed, nothing in the text of these cases suggests, let alone compels, the conclusion that this Court is prohibited from noticing plain error, or raising an issue sua sponte, in the interest of justice. The dissenting justice concedes as much. And as noted earlier, this Court is not deciding the issue of Kevin M.'s fitness to have custody of the children; rather, we are requiring the parties to make a record sufficient to permit the circuit court to make findings of fact and conclusions of law in the first instance.

No. 12-1138 – *In Re: Timber M. and Reuben M.*

FILED
June 19, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Chief Justice, concurring, in part, and dissenting, in part:

I concur with the majority's decision to affirm the circuit court's termination of the mother's parental rights to Timber M. and Reuben M. Also, I agree with the majority's decision to vacate the order that placed the children in the custody of Kevin M. and to remand for further proceedings on the custody issue. However, I dissent to the majority's adoption of new syllabus point 6, because I believe that the majority could have addressed the concerns regarding Kevin M. without formulating a new, overly-broad syllabus point.

As made clear in the majority opinion, there is ample authority supporting this Court's power to consider *sua sponte* issues not raised by the parties on appeal if it is necessary to do so in the interests of justice. The interests of justice certainly include the welfare of children. Therefore, the majority could have relied upon existing precedent to vacate the custody order and remand for further proceedings.

In addition, new syllabus point 6 is overly broad and, as such, is ripe for abuse. According to the syllabus point, in order to protect the health and welfare of a child in a custody case "the Court will take such action as it deems appropriate and

necessary to protect the child." However, any action taken by this Court to protect a child is subject to a parent's constitutional rights and principles of due process which is not made clear in the syllabus point. Moreover, I am concerned that the broad language in the syllabus point serves as an invitation to this Court to disregard long-settled standards of review and to reverse a circuit court's decision in an abuse and neglect case simply because the Court would have decided the case differently.

The majority's decision with regard to Kevin M.'s custody of the children is a troubling example of the operation of the new syllabus point. The majority's decision greatly affects Kevin M., yet he is not a party to this appeal and he did not have the opportunity to address the majority's concerns regarding the custody issue. Further, the majority makes a significant finding regarding Kevin M.'s former conduct based on a cold and apparently incomplete record and absent Kevin M.'s participation as a party before the Court.

In sum, it would have been preferable for the majority to craft a more modest syllabus point that better reflects constitutional limitations on the Court's authority or simply to rely on existing precedent in addressing the issue of Kevin M.'s custody of the children.

For the reasons stated above, I concur with the majority's disposition of this case, but I dissent to the majority's adoption of new syllabus point 6.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2002 Term

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November 1, 2002
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OF WEST VIRGINIA

No. 30404

RELEASED
November 4, 2002
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: TONJIA M.

Appeal from the Circuit Court of Lewis County
Hon. Thomas H. Keadle, Judge
Case No. 00-JA-15

AFFIRMED

Submitted: September 18, 2002
Filed: November 1, 2002

The Opinion of the Court was delivered PER CURIAM.

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SYLLABUS BY THE COURT

1. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

2. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, *In Interest Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Per Curiam:

This appeal arises from an August 29, 2001 order of the Circuit Court of Lewis County, West Virginia terminating the parental rights of the appellant, Dorlen M., as to his daughter, Tonjia M.[1] The appellant asserts that the circuit court erred in four ways: first, by finding that Tonjia was an abused and neglected child; second, by denying the appellant's motion for an improvement period; third, by denying the appellant's request for supervised visitations with his daughter during the pendency of the case; and finally, by admitting into evidence photographs from a roll of undeveloped film found in the appellant's home.

I.

On May 5, 2000, a West Virginia Department of Health and Human Resources ("DHHR") Child Protective Services Worker, Jennifer Jonas Linger, filed a petition in Lewis County Circuit Court alleging that five-year-old Tonjia M. was an "abused and neglected child" as defined by *W.Va. Code*, 49-1-3 [1999].[2]

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[1]Because of the sensitive nature of this case, initials will be used to protect the names of the parties involved.

[2]*W.Va. Code*, 49-1-3(a) [1999] defines an "abused child" as:

> a child whose health or welfare is harmed or threatened by:
>
> (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or
>
> (2) Sexual abuse or sexual exploitation[.]

Specifically, the petition alleged that Tonjia's father, Dorlen M., had exposed Tonjia to sexually explicit adult movies, that he had struck her with his hand and with a switch, that he had touched and kissed her buttocks and genitalia, that Tonjia was afraid to return home to her father, and that Tonjia had gone to school dirty. The petition alleged other similar instances of neglect, unfitness, and improper parental care by Dorlen M. and by Tonya D., Tonjia's mother.

The circuit court determined that there was reasonable cause to believe that Tonjia' physical well-being was in imminent danger, placed Tonjia in the temporary custody of the DHHR pending further proceedings, and set the matter for preliminary hearing. The circuit court then appointed for Tonjia a guardian *ad litem*. Because Dorlen M. and Tonya D. were indigent, they were each appointed counsel.[3]

On May 11, 2000, Dorlen M. requested, and the circuit court granted, supervised visitation with Tonjia. The father had his first supervised visit with his daughter in late May 2000. Ms. Linger from the DHHR supervised the visit. On June 5, 2000, a hearing was held and Ms. Linger testified about Dorlen M.'s behavior during the supervised visit. Ms. Linger testified that Dorlen M. had acted inappropriately by repeatedly kissing his daughter "passionately" on the lips for a lengthy periods of time and that when the petitioner attempted to hold Tonjia, she would try to squirm away. Ms. Linger also testified that Tonjia's grandmother, who was also present during the visit, told Tonjia to "to stop telling stories, to

[3]Tonjia's mother, Tonya D., voluntarily relinquished her parental rights prior to the final adjudication during a hearing held on October 11, 2000.

stop lying" and that "she was getting him [her father] in trouble." According to Tonjia's foster parent, Tonjia was greatly upset by the visit with her father and grandmother. Ms. Linger further testified that Tonjia's psychologist had recommended cancelling visitation between Tonjia and her father and grandmother because of the effect it had on Tonjia. At the end of the hearing, the circuit court terminated Dorlen M.'s supervised visitation with Tonjia.[4]

On June 30, 2000, the circuit court reconvened the adjudicatory hearing, but then continued it because of the appellant's absence. However, at the hearing, Dorlen M.'s counsel sought permission to withdraw from representing Dorlen M. because of a conflict of interest.[5] The circuit court judge granted the request to withdraw, appointed Dorlen M. new counsel, and rescheduled the adjudicatory hearing.

The adjudicatory hearing was held over the course of three subsequent dates: December 4, 2000, May 7, 2001, and June 27, 2001. On December 4, 2000, Lewis County Deputy John J. Burkhart testified and described the condition of Dorlen M.'s home at the time that Tonjia was removed from the home. Deputy Burkhart testified that the home was dirty and cluttered, and that, pursuant to a search warrant, he removed numerous adult magazines and magazine pages from Dorlen M.'s bedroom, plus four pornographic videotapes stacked next to the television in the living room. The pornographic tapes were found mixed with Tonjia's

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[4]Despite Dorlen M.'s continued requests to reinstate supervised visits with his daughter, Dorlen M. was not permitted to visit his daughter again. Dorlen M.'s last contact with his daughter was in May of 2000 when she was five years old.

[5]Dorlen M.'s counsel, a mental hygiene commissioner, withdrew after an application for the commitment of Dorlen M. to a mental health institution was filed.

cartoon and video cassettes. Deputy Burkhart also testified that he seized an undeveloped roll of film from Dorlen M.'s residence. The Lewis County Sheriff's Department later developed the film and found it contained sexually explicit photographs of Tonjia's mother.

Dorlen M.'s counsel objected to admission of the developed pictures into evidence, arguing that the Sheriff's Department did not include the film on its inventory of the search warrant, and that Tonjia could not be exposed to the contents of an undeveloped roll of film. Although the judge initially declined to admit the pictures into evidence, ultimately the pictures were admitted over Dorlen M.'s counsel's objections.

Also at the December 2000 adjudicatory hearing, two mental health experts testified about whether Tonjia had been sexually abused or otherwise neglected. Margaret Tordella, a licensed clinical social worker and counselor, testified that she believed that Tonjia had been sexually abused and recommended no further contact between Tonjia and her father. Based on her ten interviews with Tonjia, Ms. Tordella testified that Dorlen M. had licked Tonjia's genitalia and buttocks, that Dorlen M. had sexual intercourse with his daughter five times, and had touched her between her legs. However, Ms. Tordella admitted that there were problems in consistency with the stories that Tonjia told, and that she had obtained information from Tonjia that some sexually inappropriate activity had occurred between Tonjia and another young boy in a foster home in which Tonjia was residing.

Next, Terry Laurita, a licensed psychologist, testified for Dorlen M. as a rebuttal to the testimony of Ms. Tordella. Ms. Laurita testified that there were numerous problems with Ms. Tordella's methodology, and that the evidence suggested that Tonjia could not tell the

difference between the truth and fantasy. Notably, Ms. Laurita did not interview Tonjia. Additionally, Ms. Laurita could not conclude from the information presented whether or not Dorlen M. molested his daughter.

At the conclusion of testimony by the two experts, the circuit court, on its own motion, recessed the adjudicatory hearing to allow an independent evaluation by a third evaluator, child psychologist Chanin Kennedy. On May 7, 2001, Ms. Kennedy testified that she could neither affirm nor disprove whether Tonjia had been sexually abused by her father, but Ms. Kennedy concurred with the other evaluators in finding that Tonjia exhibited sexual behaviors inconsistent with children of her own age group.

At the conclusion of the adjudicatory hearing held on June 27, 2001, the circuit court found that Tonjia was the victim of sexual abuse by her father, and that she was as a matter of law an abused and neglected child. The circuit court also found that there was no substantial likelihood that the circumstances of neglect or abuse could be corrected.

The circuit court held a dispositional hearing on August 28, 2001. At the hearing, the circuit court denied Dorlen M.'s request for a post-adjudicatory improvement period and terminated his parental rights.

Dorlen M. asserts the following assignments of error: (1) that the circuit court erred in concluding that Dorlen M. sexually abused his daughter in light of the challenged expert witness testimony; (2) that the circuit court erred in denying Dorlen M.'s motion for a six-month out-of-home post-adjudicatory improvement period; (3) that the circuit court erred in denying Dorlen M.'s supervised visitation with Tonjia during the fifteen months the

case was pending before the circuit court; and (4) that the circuit court erred in permitting the admission of sexually explicit photographs into evidence.

II.

Child abuse and neglect cases involve a delicate balancing between the interests of the parents and the rights of an innocent child. However, the law's overriding consideration is the best interest of the child or children involved. This Court has held that:

> Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.

Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

In abuse and neglect cases, we review the circuit court's findings under a clearly erroneous standard.

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syllabus Point 1, *In Interest Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Because of the serious consequences of abuse and neglect proceedings, certain safeguards have been statutorily installed. Under *W.Va. Code*, 49-6-2(c) [1996],[6] circuit courts must follow specific procedures when considering allegations of neglect or abuse; circuit courts must make specific findings, and those findings must be supported by clear and convincing evidence.

Pursuant to *W.Va. Code*, 49-6-5(a)(6) [1998],[7] a circuit court judge may permanently terminate parental rights only after finding that there in no reasonable likelihood

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[6]*W.Va. Code*, 49-6-2(c) [1996] states:

> In any proceeding pursuant to the provisions of this article, the party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

[7]*W.Va. Code*, 49-6-5(a)(6) [1998] states in pertinent part:

> upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial or guardianship rights and/or responsibilities of the abusing parent and commit the child . . . to either the permanent guardianship of the department or a licensed child welfare agency.

that the conditions of abuse can be substantially corrected.[8] With this standard in mind, this Court will now address whether the circuit court erred in terminating the parental rights of the petitioner.

Dorlen M. argues that the circuit court's finding that he sexually abused Tonjia is not well-founded or plausible because of the numerous errors contained in social worker Margaret Tordella's evaluation and substantial evidence showing that five-year-old Tonjia is not a credible and accurate reporter.

Three different evaluators testified as to their findings about Tonjia. Margaret Tordella, who was Tonjia's counselor and had at least ten sessions with Tonjia, testified that Tonjia was sexually molested by her father. Ms. Tordella, who spent the most time with Tonjia, was quite clear that Tonjia had been abused and subjected to other inappropriate sexual conduct. Terry Laurita, who never actually interviewed Tonjia, stated that she could neither confirm nor deny that Tonjia had been the victim of sexual abuse at the hands of her father. Finally, Chanin Kennedy said that she could not rule out sexual abuse by Dorlen M. and that she was concerned about Tonjia's obvious exposure to sexual information. All of the experts agreed that Tonjia had a level of sexual knowledge far beyond that appropriate for five-year-olds.

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[8]Under *W.Va. Code*, 49-6-5(b) [1998], "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected"

> . . . mean[s] that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help.

We conclude, based on the testimony of the three expert witnesses, the lay testimony, and other evidence submitted but not challenged by the appellant in this appeal, that the circuit court's finding that Dorlen M. abused and neglected Tonjia was not clearly erroneous.

The second issue that we address is whether the circuit court erred in denying Dorlen M. supervised visits with Tonjia during the fifteen months the case was pending before the circuit court. The law generally permits and supports visitation during the pendency of neglect or abuse hearings to allow the bonds of parent and child to remain intact in the absence of compelling evidence that visitation is not in the best interest of the child. In the instant case, the evidence of Dorlen M.'s inappropriate behavior, and of the grandmother attempting to "coach" Tonjia to recant her claims of sexual abuse supported the judge's decision to cancel visitation.

Dorlen M. next asserts that he satisfied the statutory requirements necessary for a post-adjudicatory improvement period. The language of *W.Va. Code*, 49-6-12(c) [1996][9] provides for a post-adjudicatory improvement period. However, there are limits to the granting

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[9]*W.Va. Code*, 49-6-12(c) [1996] states, in pertinent part, that:

> (c) The court may grant an improvement period not to exceed six months as a disposition pursuant to section five of this article when:
>
> (1) The respondent moves in writing for the improvement period;
>
> (2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period[.]

of a post-adjudicatory improvement period. *See* Syllabus Point 2, *State ex rel. West Virginia Dept. of Human Services v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987) (holding that a parent may move for and be granted an improvement period "unless the court finds compelling circumstances to justify a denial").

The circuit court has the discretion to refuse to grant an improvement period when no improvement is likely. In *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d. 865 (1996), this Court addressed a similar situation stating that:

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

197 W.Va. at 498, 475 S.E.2d. at 874.

At issue is whether a compelling reason existed to deny the petitioner an improvement period. The circuit court judge, in making his ruling, stated that he was not concerned with the petitioner's ability to clean his home or to provide a proper room for Tonjia. The circuit court expressed his concern by stating that "[w]hat concerns the Court, from the initial proceedings in this case, is . . . that Mr. [M.] continues to deny that he did sexually abuse or sexually molest his daughter. . . . I don't believe that counseling without an admission can be effective."

We have held that the granting of an improvement period is within the circuit court's discretion. Given the facts of this case, this Court cannot find that the circuit court abused its discretion in denying a post-adjudicatory improvement period.

Finally, given the overwhelming weight of the other evidence in support of terminating Dorlen M.'s parental rights, we will briefly address whether the circuit court erred in permitting the admission of sexually explicit photographs into evidence when the Lewis County Sheriff's Department did not document on the search warrant receipt the roll of film from which the pictures came, and when Tonjia was unable to view the photographs on the undeveloped roll of film. Given the weight of evidence against Dorlen. M. and because there was no jury involved, any error that might have occurred in admitting the photographs into evidence was rendered harmless.

III.

Looking at the evidence in its entirety, we conclude that the circuit court judge did not abuse his discretion in denying visitation during the pendency of the abuse hearing. The circuit court properly found Tonjia to be an abused child, and that finding of abuse was supported by clear and convincing evidence. The circuit court did not abuse his discretion in denying a post-adjudicatory improvement period. Further, the circuit court's finding that there was no reasonable likelihood that the conditions of neglect or abuse would be substantially corrected in the near future was not clearly erroneous. Likewise, the circuit court's subsequent termination of Dorlen M.'s parental rights was supported by clear and convincing

evidence and was not clearly erroneous. Finally, we find that the circuit court acted in the best interest of Tonjia throughout the underlying proceedings.

For all of the above reasons, we affirm the factual findings of the lower court.

Affirmed.

205 W. Va. 602, 519 S.E.2d 885

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 25840 & 25841
IN THE MATTER OF: TRACY C. AND RYAN B.
Submitted: June 1, 1999
Filed: July 14, 1999

SYLLABUS

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely." Syllabus Point 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

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The Opinion of the Court was delivered PER CURIAM.

Per Curiam:

This action is before this Court on two separate appeals. The Department of Health and Human Resources ("DHHR") and Charlotte C. See footnote 1 jointly appeal a November 16, 1998, order of the Circuit Court of Preston County. The DHHR and

Charlotte C. argue that the circuit court erred in failing to grant custody of Charlotte C.'s minor son, Ryan B., to Charlotte C., and in placing Ryan B. with Donna S., the mother of Nathan B., Ryan B.'s determined father. See footnote 2

The guardian ad litem also appeals the circuit court's denial of the guardian's motion to join as necessary parties to this action another child who was born to Charlotte during the pendency of this matter.

After reviewing the briefs and arguments of the parties and the record from the circuit court, we reverse the circuit court and remand the case for further proceedings consistent with this opinion.

I.

On January 5, 1995, 16-year-old Charlotte gave birth to Ryan. On the birth certificate Nathan B. was listed as the father of the child. Charlotte and Nathan were not married. At age 18, Charlotte quit school and married Wayne C., a soldier who was stationed in Texas. During this marriage, Charlotte and Wayne had one child, Tracy C. In June of 1997, Wayne went to Kuwait, and Charlotte moved to Preston County with her two children to live near Charlotte's family.

On August 27, 1997, the DHHR filed an abuse and neglect petition in the Circuit Court of Preston County. The petition alleged that Charlotte had failed to provide adequate adult supervision of her two children, Ryan B. and Tracy C. Specifically, the petition alleged that Charlotte had taken the two children to a bar so that she could make a phone call, and that while she made a phone call at a pay phone outside the bar, she left the two children unattended. During the 10-minute phone call, 2 1/2 year old Ryan was seen pushing 8-month-old Tracy along the side of the road in a baby carriage. After leaving the telephone, Charlotte began walking up the road with the two children. A Terra Alta Police Officer observed Charlotte pushing the baby carriage, but failing to adequately supervise Ryan as he walked along the road. The petition further alleged that Charlotte failed to show adequate concern for Ryan and by her actions placed her children at risk. Finally, after being confronted with these allegations by the DHHR, and after Charlotte refused to sign a “Protection Plan,”See footnote 3 [3]

the petition was filed.

Subsequent to the filing of the petition, without a hearing, the circuit court determined that imminent danger existed to the two children and ordered that custody of the children be immediately transferred to the DHHR for foster home placement. The court also appointed a guardian ad litem to represent the children.

On September 5, 1997, a preliminary hearing was conducted and the court found probable cause that the allegations of neglect set forth in the petition were true and continued the placement of the children with DHHR.

Wayne, father of Tracy, filed for a motion for "Father's Immediate Custody" moving the court to terminate the temporary custody of Tracy with the DHHR and requested that the court place full custody with him, her father. A hearing was conducted on October 6, 1997, and an agreement was reached between the parties granting physical and legal custody of Tracy to her father, Wayne. See footnote 4 Charlotte was granted visitation.

On November 12, 1997, an adjudicatory hearing was conducted. Charlotte admitted that she had gone to a telephone outside of the bar on the morning of August 27, 1997 in order to make a telephone call. Charlotte testified that at no time were the children out of her sight. However, Charlotte admitted that her control and supervision of the children had been inadequate and neglectful on that date. The court accepted Charlotte's admissions and adjudged her to have neglected her children by failing to adequately supervise them when they were close to a dangerous highway.

By order dated December 1, 1997, the court terminated the temporary custody of Ryan with the DHHR and granted temporary custody to Donna S., See footnote 5 the child's paternal grandmother, a resident of Garrett County, Maryland.

On December 19, 1997, Charlotte filed a motion for a "Post-Adjudicatory Improvement Period." The court granted the motion on February 17, 1998, and provided for a 3-month improvement period. See footnote 6

A hearing was conducted on April 6, 1998 to review Charlotte's progress in the improvement period. Testimony was offered that Charlotte had failed to meet some of her required tasks. The court was also informed that Charlotte was pregnant with her third child and was due to deliver her baby in July of 1998. At the conclusion of the hearing the circuit court did not extend the improvement period, and the case was set for disposition.

On July 22, 1998, Charlotte gave birth to her third child, Nicholas. The guardian ad litem moved to join baby Nicholas and his father, Nicholas D. ("Nick") as necessary parties to the action. The circuit court denied this motion.

On August 6, 27, and 28, and on October 15 and 29, 1998, the circuit court conducted a continuing disposition hearing regarding Ryan. At the beginning of the hearing, the guardian ad litem renewed her motion to join, as necessary parties, baby Nicholas and his father Nick. The circuit court again denied this motion.

During the initial stages of the disposition hearing, the question of Ryan's paternity was raised. Over the objection of the guardian ad litem, the court ordered that Nathan, Ryan, and Charlotte submit to blood tests. These tests revealed that there was a zero percent possibility that Nathan was Ryan's father.

During the disposition hearing, Sharon McMillen, a licensed psychologist, was called by DHHR. Ms. McMillen testified that she believed that Ryan could safely be placed with his mother, Charlotte. Ms. McMillen also stated she had concerns about continued placement with grandmother Donna. Ms. McMillen testified that the grandmother had been very reluctant to be evaluated by Ms. McMillen. She further testified that grandmother Donna had been instructed to set up an appointment with her and had failed to do so. Also of concern to Ms. McMillen were Ryan's actions indicating that he may have acquired inappropriate sexual knowledge. Ms. McMillen opined that Ryan should be evaluated to determine if there had been sexual abuse.

The court also heard testimony from Emma Steelman, a social worker of 25 years and site director of Wellspring Family Services, an agency from which Charlotte had been receiving assistance for parental skills. Ms. Steelman believed Ryan should be placed with his mother, and that this placement would be in the best interests of the child.

Lisa Williams, a child protective worker with DHHR who had worked extensively with the parties in this case, also testified. Ms. Williams stated that it was the department's plan to reunite Charlotte with Ryan. Ms. Williams stated that Charlotte had made great strides in adhering to the goals established by DHHR. Ms. Williams also testified that it would be in Ryan's best interest to be reunited with his mother.

The court heard from Richard Kutchman, a child protective service worker for Garrett County, Maryland. Mr. Kutchman testified that the grandmother Donna had lost custody of all five of her children -- partially based on physical abuse. Mr. Kutchman reported that there had been allegations of abuse in grandmother Donna's household over a 13 year period. Mr. Kutchman stated that the grandmother would not be appropriate for long term placement of a child. Mr. Kutchman testified that grandmother Donna had pled guilty to felony theft approximately 2 years prior to the disposition hearing. Finally, Mr. Kutchman also stated that Nathan B. had been uncooperative in Mr. Kutchman's investigation.

Cheryl Dixon, a second social worker with Wellspring Family Services who had provided assistance to Charlotte, also testified. Ms. Dixon also testified that it would be in the child's best interests to be reunited with his mother.

Linda Beeler, a supervised but not licensed psychologist, was called by the guardian ad litem to testify. Ms. Beeler stated that she had been hired by Donna S. to evaluate the S. family. Ms. Beeler stated that her reports did not indicate that the family was abusive. However, Ms. Beeler admitted that there were discrepancies between what Donna had told Ms. Beeler and the actual reports of child abuse from Maryland authorities.

Finally, DHHR called Tammy Titchenell, a licensed counselor. Ms. Titchenell was requested by DHHR to evaluate Ryan for potential sexual abuse following Ms. McMillen's testimony. Ms. Titchenell stated that there was a potential sexual abuse problem and that grandmother Donna was using intimidation tactics to keep the child from fully discussing the matter. Ms. Titchenell recommended that Ryan be placed with his mother.

The DHHR submitted a case plan pursuant to *W.Va. Code*, 49-6-5(a) [1998] and recommended that Ryan be returned to Charlotte's custody while retaining legal custody in DHHR. See footnote 7 The guardian ad litem however, recommended that Ryan continue to be placed with grandmother Donna until Charlotte obtained her GED.

Following all of the testimony, the circuit court did not terminate the parental rights of Charlotte, but found that she was unable to adequately provide for Ryan's needs and assure his safety. Consequently, the circuit court appointed grandmother Donna as Ryan's guardian and continued physical custody of Ryan with Donna in Maryland. The circuit court also found that Nathan B. was the determined father See footnote 8 of Ryan. Following the entry of the order, both the guardian ad litem and Charlotte, joined by the DHHR, appealed.

II.

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

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite

> and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

The DHHR and Charlotte jointly assert that the circuit court erred in failing to award Charlotte custody of Ryan, and in placing Ryan with grandmother Donna. Both the DHHR and Charlotte contend that the circuit court ignored the weight of evidence by refusing to grant Charlotte custody of Ryan. Conversely, the guardian ad litem argues that the circuit court weighed the evidence properly and that the placement of Ryan with his paternal grandmother was reasonable given the testimony offered during the disposition hearing.

The statutes of this State and opinions of this Court have traditionally protected the parent-child relationship. We have stated that "no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person." *In re Willis*, 157 W.Va. 225, 237, 207 S.E.2d 129, 136 (1973).

In the instant case, the circuit court heard the testimony of multiple child professionals, all of whom, with the exception of Ms. Beeler and Mr. Kutchman, stated that the placement of Ryan with his mother Charlotte would be in the child's best interest or could be done safely because his mother had remedied those problems that first put Ryan in danger. Ms. Beeler was hired by Ryan's paternal grandmother, Donna, to ascertain whether the home of grandmother Donna was a suitable placement for Ryan, and did not offer an opinion on the suitability of placement of Ryan with his mother Charlotte. Mr. Kutchman, a child protective service worker from Maryland, testified that due to the history of abuse, he believed that any long term placement of a child with grandmother Donna would be inappropriate.

The court also heard testimony from child workers Ms. McMillen and Ms. Titchenell, both of whom expressed concerns with grandmother Donna. Ms. McMillen stated that Donna appeared reluctant to be interviewed and failed to make an appointment as requested. Ms. Titchenell, who evaluated Ryan interacting with both mother Charlotte and on another occasion with grandmother Donna, stated that Ryan was more of a "typical three year old with his mother than with his grandparents." See footnote 9

The record contains a great deal of testimony indicating that the placement of the child with grandmother Donna would be inappropriate, while the mother of the child has apparently taken substantial steps to remedy any safety problems. We

have stated that "when the finding of a trial court in a case tried by it in lieu of a jury is against the preponderance of the evidence, is not supported by the evidence, or is plainly wrong, such finding will be reversed and set aside by this Court upon appellate review." Syllabus Point 1, in part, *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984). We have also held that "[a]s a general rule the least restrictive alternative regarding parental rights to custody of a child under *W.Va. Code*, 49-6-5 [1977] will be employed[.]" Syllabus Point 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Based on our review of the record we find that the circuit court did not properly weigh the preponderance of the evidence, and the decision to place Ryan in the custody of grandmother Donna was clearly erroneous. Accordingly, we reverse the circuit court's placement of Ryan with his paternal grandmother.

While we reverse the decision of the circuit court, we are mindful that Ryan has been in the care of his grandmother for some time, and that a transition period will be necessary in returning him to his mother. *See, e.g.*, Syllabus Point 3, *James v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991); *Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989). The court should address this transition on remand.

In the second appeal, the guardian ad litem argues that the circuit court erred by failing to join Nicholas D., the child born of Charlotte during the pendency of this matter, and his father Nick D. as necessary parties to the case.

W.Va. Code, 49-6-3(a) [1998] provides, in part:

> [i]n a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such children, each child in the home for whom relief is sought shall be made a party to the proceeding.

The language of this statute is clear: every child in the home "for whom relief is sought shall" be made a party. However, while each child in the care, custody or control of the alleged offending parent must be made a party, "[n]o decision to terminate parental rights could happen until the statutory requirements" are met. *In re Lacey P.*, 189 W.Va. 580, 586 n. 5, 433 S.E.2d 518, 524 n. 5 (1993).

Regarding the joining of the father, Nick, *W.Va. Code*, 29-6-19(b) [1992] provides in part that "[t]he petition and notice of the hearing shall be served upon both parents and any other custodian, giving to such parents or custodian at least ten

days' notice[.]" Since Nicholas was necessary as a party under *W.Va. Code*, 49-6-3(a), his father, Nick, also needed to be joined.

Consequently, the circuit court erred in denying the guardian ad litem's motion to join baby Nicholas and father Nick as necessary parties, and on this issue we reverse. See footnote 10

III.

Based upon the forgoing, the judgment of the Circuit Court of Preston County is reversed with respect to the placement of Ryan with his paternal grandmother Donna. We also reverse as to the circuit court's denial of the motion to join baby Nicholas and his father, Nick, as necessary parties.

We remand this case for further proceedings consistent with this opinion. We direct the court on remand to examine the best interests of the children of Charlotte, and mandate the DHHR to develop a plan that will result in a transition of custody of Ryan back to his mother, Charlotte.

Reversed and Remanded.

Footnote: 1 *Consistent with our practice in cases involving sensitive facts, we identify the parties by initial only. See In re Jeffrey R.L., 190 W.Va. 24, 26 n.1, 435 S.E.2d 162, 164 n.1 (1993).*

Footnote: 2 *It was established during the course of these proceedings that Nathan B. could not be the biological father to Ryan. The circuit court, however, found that Nathan B. was the "determined father" of Ryan. According to W.Va. Code, 48-4-1(h)[1997] a "Determined Father" means a person in whom paternity has been established pursuant to W.Va. Code, 48A-6-1 et seq. Paternity may be established under W.Va. Code, 48A-6-6 [1997] by "[a] written, notarized acknowledgment by both the man and woman that the man is the father of the named child," and once established as the father, the man is acknowledged as the father of the child for all purposes, including having the obligation for child support.*

Footnote: 3 *The protection plan was not made part of the record. During the disposition hearing, several of the witnesses opined that Charlotte did not sign the protection plan because of her low reading level and her inability to understand what was being asked of her by the protection plan.*

Footnote: 4 *Apparently Charlotte and Wayne separated during these events and have subsequently obtained a divorce from each other. The custody of Tracy has been settled and was not made part of this appeal.*

Footnote: 5 *It would appear from the record that Ryan's father of record, Nathan B., did not provide any financial support for Ryan since the child's birth. The circuit court found that Nathan had not taken on the role of supporting Ryan, and was therefore not a proper person to have custody. Nathan lives with his mother, Donna, in Maryland.*

Footnote: 6 *The conditions for the improvement period were:*

1. That temporary physical and legal custody of Ryan remain with the paternal grandmother, Donna S., pending completion of home studies to be conducted by the Garrett County, Maryland, Department of Social Services;

2. That custody and visitation of Tracy continue as set forth in the Agreed Custody Modification Order entered October 16, 1997;

3. That DHHR prepare and submit to the court for approval an individualized family case plan, to include but not limited to the following tasks by Charlotte C.:

(a) obtaining a permanent, safe, and suitable residence in Preston County, West Virginia,

(b) Securing employment;

(c) Working toward a G.E.D.;

(d) Attending and participating fully in counseling sessions and parenting classes; and

(e) Participating in regular, supervised visitation with Ryan[.]

Footnote: 7 *The DHHR case plan provided the following as a "Permanency Plan" for Ryan B.:*

It is the recommendation of the West Virginia Department of Health and Human Resources that [Ryan B.] be returned to the physical custody of his mother, with the state department retaining legal custody in order to monitor the placement and that the department be granted the ability to remove the child without prior court involvement if safety issues should arise. The department would then proceed with appropriate court action. The state department further stipulates that Charlotte will continue counseling as scheduled with Sharon McMillen and that these sessions will include Ryan. Charlotte will also participate in and cooperate with services provided by Wellspring. The department would also recommend that a transition period is not needed in the case, as Ryan has had continuous contact with his mother through weekly visits. If the court finds

reunification is not in the best interest of [Ryan B.], the department would not recommend continued long term placement in the home of [Donna S.] due to the concerns of past abuse issues noted in the home study completed by Garrett County Office of Social Services[.] (Emphasis in original.)

Footnote: 8 *See supra, note 2.*

Footnote: 9 *In her recommendation, Ms. Titchenell stated the following:*

Ryan has definitely been traumatized by his many placements and separation from his mother. He has an attachment to his mother which was very evident during their observation session. He is comfortable enough to share information with her and to express his feelings. He did not appear to have the same type relationship with [Donna S. and her husband]. He is also attached to them, but at a different level than his mother. Their interactions are more surface and side by side existence. Ryan's behavior was more typical of a three year old when he was with his mother than with his grandparents. Some of Ryan's behaviors and verbal cues lead me to believe his grandparents use intimidation tactics and speak poorly of his mother.

Footnote: 10 *The guardian ad litem also assigns as error the circuit court's order requiring a paternity testing with respect to Ryan. However, as the court ruled that Nathan B. was the determined father of Ryan and granted him visitation, we find the issue moot and do not address it at this time.*

206 W. Va. 478, 525 S.E.2d 669

Supreme Court Of Appeals Of West Virginia

IN RE: TRAVIS W.

No. 26640

Submitted: November 2, 1999
Filed: December 7, 1999

SYLLABUS BY THE COURT

1. "'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.' Syl. Pt. 1, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syllabus Point 1, *In re George Glen B.*, ___ W.Va. ___, 518 S.E.2d 863 (1999).

2. Circuit courts must comply with Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect by providing notice of the date, time, and place of the disposition hearing to all parties, their counsel, and the CASA representative, if one was appointed.

3. Pursuant to Rule 32 of the West Virginia Rules of Procedure for Child Abuse and Neglect, circuit courts may hold accelerated disposition hearings immediately following adjudication hearings if: (1) the parties agree; (2) the child's case plan which meets the requirements of W.Va. Code §§ 49-6-5 and 49-6D-3 is provided to the court or the party or parties waive the requirement that the child's case plan be submitted prior to disposition; and (3) notice is provided or waived.

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Maynard, Justice:
The appellant, Steve W., appeals the May 12, 1999 order of adjudication and disposition entered by the Circuit Court of Berkeley County, West Virginia. The appellant contends he received no notice that the circuit court would proceed immediately to disposition following the adjudication hearing. He also contends the West Virginia Department of Health and Human Resources (DHHR) did not file a child's case plan and that the circuit court wrongly determined he abandoned his child, Travis W. Because the West Virginia Rules of Procedure for Child Abuse and Neglect mandate that notice of the disposition hearing be provided, we reverse and remand.

The facts are essentially undisputed. Travis W. was born on September 29, 1997. His parents are Tessa F. and Steve W. In December 1998, DHHR filed two abuse and neglect petitions, designated 98-JA-35 and 98-JA-36, regarding Travis W. and Brandon F. respectively. See footnote 1Case number 98-JA-35, involving Travis W., made no allegations against Steve W. but rather simply stated that he is the father of the child. DHHR filed an amended petition on January 25, 1999, which recited the allegations contained in the original petition and added a paragraph that alleged the appellant failed and is unable to provide Travis W. with necessary food, clothing, shelter, supervision, and medical care.

An adjudication hearing on the original petition was held on January 22, 1999. At that time, the mother of both children, Tessa F., voluntarily relinquished her parental rights to Travis W. and Brandon F. and both children were placed in the custody of DHHR. The appellant made no appearance. A disposition hearing regarding the rights of both fathers was set for February 11, 1999. The appellant made no appearance; however, his counsel objected to proceeding with the hearing because his client may not have received copies of the petition and the amended petition. DHHR moved for a continuance and the disposition hearing was continued until March 12, 1999. The State then published notice of the court proceedings; the ad in the Martinsburg Journal advised that an adjudication hearing would take place regarding case 98-JA-35 on March 12, 1999.

On March 5, 1999, DHHR filed a child's case plan for Travis W. with the court. The case plan was copied to all attorneys of record and recommended termination of the appellant's parental rights. The case plan further identified a permanency

plan which "includes the child remaining in the physical and legal custody of the maternal aunt See footnote 2 with leave to adopt." On March 12, 1999, the court dismissed the Brandon F. case, case 98-JA- 36, because Brandon F. was placed with his maternal grandmother and further state intervention was not required.

On March 12, 1999, the court scheduled an adjudication hearing for Travis W. to take place on March 25, 1999. At that hearing, appellant's counsel filed a motion to dismiss alleging that: (1) the amended petition failed to state sufficient facts and allegations against Steve W.; (2) the final adjudicatory hearing was not held timely according to Rule 25 of the West Virginia Rules of Procedure for Child Abuse and Neglect; and (3) the amended petition was filed after the adjudication on the initial petition in contravention of Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect. The court granted the motion to dismiss.

A new petition, designated 99-JA-18, containing more specific allegations against Steve W. was filed on April 8, 1999. The petition alleged that Travis W.'s physical and mental health was threatened by the appellant's failure and inability to provide for the child; the appellant had only limited contact with the child since birth; the appellant has a history of physical abuse; and Tessa F. was residing with the appellant after voluntarily relinquishing her parental rights to the child. See footnote 3 DHHR was granted temporary legal and physical custody of Travis W. based upon the allegations in the petition and the proffers of Sharon Wiley, DHHR's agent. The temporary custody order appointed counsel for all of the parties and set the matter for an adjudication hearing on April 26, 1999.

All parties and counsel appeared at the adjudication hearing. The court heard testimony from several witnesses, then recessed and continued the matter due to the lateness of the day. All parties and counsel reconvened on May 10, 1999, at which time the court continued to hear testimony. At the conclusion of the hearing, the court determined that the appellant had abandoned the child and that it was in the best interests of the child to terminate the appellant's parental rights and to allow the child to reside permanently with his great-aunt, Wendy H. On May 12, 1999, the court entered an order, titled "ORDER OF ADJUDICATION/DISPOSITION," which concluded that:

> the Respondent father is adjudicated as guilty of Abandonment of the infant child and his parental rights are hereby terminated. The Motion for Improvement Period filed on behalf of the Respondent Father is hereby denied.

CUSTODY

Both legal and physical custody of the Respondent child shall remain [with] Wendy H. where his best interest is being served. Ms. H. shall be allowed to take

necessary steps for adoption.

It is from this order that Steve W. appeals.

The standard of review we apply in abuse and neglect cases was stated in syllabus point 1 of *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), and was reiterated in syllabus point 1 of *In re George Glen B.*, ___ W.Va. ___, 518 S.E.2d 863 (1999), as follows:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

On appeal, the appellant contends the circuit court erred by: (1) terminating his parental rights without conducting a disposition hearing; (2) proceeding to disposition without requiring DHHR to file the child's case plan; and (3) finding the child was abandoned. The initial issue which we must resolve is whether the circuit court erred by failing to follow procedural rules when the court terminated the appellant's parental rights without providing notice of the disposition hearing.

W.Va. Code § 49-6-5 (1998) controls the disposition of neglected or abused children and states in pertinent part:

> (a) Following a determination pursuant to section two [§ 49- 6-2] of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. . . . The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.

The Rules of Procedure for Child Abuse and Neglect require that notice of the disposition hearing be provided. Rule 31 states that “[n]otice of the date, time, and

place of the disposition hearing shall be given by the court to all parties, their counsel, and the CASA representative, if one was appointed." Rule 32 sets forth the time frame for the disposition hearing and provides for accelerated disposition hearings, but only after certain enumerated requirements have been met. This rule reads as follows:

> (a) *Time frame.* -- The disposition hearing shall commence within forty-five (45) days of the entry of the final adjudicatory order unless an improvement period is granted pursuant to W. Va. Code § 49- 6-12(b) and then no later than sixty (60) days.
> (b) *Accelerated disposition hearing.* -- The disposition hearing immediately may follow the adjudication hearing if:
> (1) All the parties agree;
> (2) A child's case plan meeting the requirements of W. Va. Code §§ 49-6-5 and 49-6D-3 was completed and provided to the court or the party or the parties have waived the requirement that the child's case plan be submitted prior to disposition; and
> (3) Notice of the disposition hearing was provided to or waived by all parties as required by these Rules.

In the case at bar, the circuit court conducted the adjudication hearing on two separate dates. The hearing commenced on April 26, 1999. At the close of the hearing, the court entered an order of partial adjudication which concludes by stating that "[d]ue to the lateness of the day **it is hereby Adjudged And Ordered that:** This matter shall come on for continuation of the Adjudicatory Hearing on May 10, 1999 at 4:00 p.m." The court reconvened the adjudication hearing on May 10, 1999. No one contends the appellant was provided with notice that the court would proceed to disposition at the conclusion of the adjudication hearing. DHHR argues instead that the appellant cannot object to immediate disposition for the first time on appeal after failing to object during the hearing and that the best interests of the child were promoted by immediate disposition. The guardian ad litem reasons the court did not err in terminating the appellant's parental rights at the close of the adjudication hearing without conducting a disposition hearing because the appellant was found to have abandoned the child.

We are not persuaded by either of these arguments. The appellant avers that the court provided no notice, either before or during the hearing, that disposition would take place at the close of the adjudication hearing. Thus, says the appellant, he had no opportunity to object prior to the court's announcement of termination. He states that he objected to the ruling as soon as the court stated its intention. The

order reflects this by stating, “The respondents objection to all adverse ruling[s] are noted by the Court[.]”

Pursuant to Rule 46 of the West Virginia Rules of Civil Procedure, this issue is preserved for appeal. Rule 46 reads as follows:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

This rule was explained in syllabus point 1 of *Konchesky v. S. J. Groves and Sons Co.*, 148 W.Va. 411, 135 S.E.2d 299 (1964), which states:

> Rule 46 of the West Virginia Rules of Civil Procedure provides that in lieu of a formal exception it is sufficient if a party against whom a ruling or order is made opposes the action taken by the court at the time it is made and indicates the action which he desires, or, if such party did not have an opportunity to object at the time any ruling or order was made by the trial court on a motion of the opposing party, no objection or exception is required and an appellate court may consider the alleged error even though no formal objection or exception was made or taken.

We do not have the advantage of the transcript of the hearing on appeal. Therefore, we cannot search for specific objections. Nonetheless, the court noted the appellant's objection to all adverse rulings and would not have done so if the appellant had not opposed the action taken by the court. As the objection complies with Rule 46, we will consider the merits of the alleged error.

We believe the judge determined the result would be the same regardless of whether he proceeded immediately to disposition after the adjudicatory hearing or held a separate disposition hearing. According to W.Va. Code § 49-6-5(a)(6) (1998), adoption cannot take place until all proceedings for termination of parental rights are final. Rather than continuing to hold the child in limbo, the judge decided that immediately instituting the permanency plan was in the child's best interest. Under the facts of this case, we do not disagree. However, the court's action does not comply with the rules in that the appellant was not provided with notice of the hearing. Notice is mandatory. Rule 31 provides that notice *shall* be

given by the court. See footnote 4Rule 32 provides that the court may hold an accelerated disposition hearing immediately following the adjudication hearing but only if the parties agree, the case plan was submitted or the requirement that the case plan be submitted prior to disposition was waived, and notice was provided or waived. It is not disputed that these requirements were not met in this case. The appellant contends that he was utterly surprised by the court's decision to terminate his rights. The circuit court must hold a disposition hearing which complies with these rules.

Pursuant to statutory law and the rules of procedure, circuit courts must provide the parties with notice of the disposition hearing prior to actually holding the hearing. We, therefore, hold that in conformance with Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect, notice of the date, time, and place of the disposition hearing must be given by the court to all parties, their counsel, and the CASA representative, if one was appointed. We further adjudge that pursuant to Rule 32, circuit courts may hold accelerated disposition hearings immediately following adjudication hearings if: (1) the parties agree; (2) the child's case plan which meets the requirements of W.Va. Code §§ 49-6- 5 and 49-6D-3 is provided to the court or the party or the parties waive the requirement that the child's case plan be submitted prior to disposition; and (3) notice is provided or waived.

The child's case plan is not as problematic. W.Va. Code § 49-6-5(a) dictates that a child's case plan must be filed with the court when a child is found to be abused or neglected. This code section also contains a detailed definition of “case plan” by stating:

> (a) Following a determination pursuant to section two [§ 49-6-2] of this article wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term case plan means a written document that includes, where applicable, the requirements of the family case plan as provided for in section three [§ 49-6D-3], article six-d of this chapter and that also includes at least the following: A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parent(s) home, facilitate return of the child to his or her own home or the permanent placement of the child, and address the needs of the child while

> in foster care, including a discussion of the appropriateness of the services that have been provided to the child. The term permanency plan refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian may be made at the same time reasonable efforts are made to prevent removal or to make it possible for a child to safely return home. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative placement for the child to include approximate time lines for when such placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child's case plan shall be sent to the child's attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing.

In the case at bar, a child's case plan was not submitted on Travis W.'s behalf when the new petition was filed; however, a case plan was submitted to the court in the companion case, 98-JA-35. That plan was copied to all the parties involved in Travis W.'s case. The appellant, the department, and the guardian ad litem attached a copy of the case plan to the briefs they submitted to this Court on appeal. The appellant attended the hearings which were held in the companion case. That case was dismissed for procedural reasons and the petition which was filed in this case is substantially, if not completely, identical to the dismissed petition. The permanency plan included in the case plan is the plan adopted by the court. We believe the parties were aware the child's case plan remained in full force and effect after the companion case was dismissed.

Moreover, DHHR suggests that if the judge had asked for a new case plan, the department would simply have copied the plan which was submitted in the companion case and would have resubmitted it to the court, causing needless procedural delay. Even though that is true in this case and does not constitute reversible error, the better practice for circuit courts to follow is to require that a child's case plan be filed in each and every child abuse and neglect action that is instituted.

The appellant does not strongly contend the court erred in finding he abandoned the child. His entire argument to this Court consists of the following:

> Appellant testified that he lived with the mother of the child for approximately the first six months of the child's life and that he was very involved in the care of the child. This testimony was corroborated by testimony from the child's mother. The Appellant further testified that the child's mother moved out with the child, and that, for many months she would not disclose her whereabouts to him. Appellant saw the child on occasion, mostly when the mother would come to visit, from the time she moved out, until the Department's involvement. Once Appellant became aware of the abuse and neglect proceedings, he participated and tried to gain custody of the child until the final order was entered.
>
> The child was not abandoned by Appellant, and the Court's ruling on that matter is clearly wrong.

The following people testified before the circuit court: Terry M., Travis W.'s maternal grandmother; Wendy H., the child's guardian and caretaker; Tiffany H., Wendy's daughter; Sharon Wiley, agent of DHHR; and the appellant. In its order of partial- adjudication, the court summarized the testimony of each of these witnesses. Terry M. testified that, to her knowledge, the appellant had seen Travis W. just two times in more than a year. She testified that she had seen the appellant assault Tessa F. and she herself had been hit by Steve W. Wendy H. testified that Travis W. had been in her physical care for thirteen months; during that time, the appellant had seen the infant two times. She testified that the appellant provides no support for the child, and she heard him say, “If he couldn't have Tessa he really didn't want Travis.”

Tiffany H. testified that the appellant “slammed” Brandon F. to the ground when the child was six or seven months old and the appellant was annoyed with him for crying. Sharon Wiley testified that she had not spoken with the appellant, but she was aware of another case in which the appellant had abandoned his child, Brian W., on three different occasions. She also stated that the terminated mother had said that she was trying to get the children back through this proceeding. Ms. Wiley noted that there is evidence that Brian W. sexually abused Brandon F.

The appellant testified that he had pushed Tessa F. in anger. She then fell against her mother, cutting Terry M.'s lip. He testified that he had seen Travis W. six or seven times during the months he did not live with him. He admitted he may have said he did not want Travis W. but did not mean it. He stated he had not abused his children. He admitted he has not sought visitation with Travis W. nor has he paid child support. He also testified that he has been employed for almost two years and can financially support the child.

Based on these representations, the court made the following findings of fact in its final order:

> The Respondent Mother lives in an apartment owned by and on the same premises as the Respondent Father;
> The Respondent Father was convicted of a domestic battery in his ex-wife in August 1996;
> There has been testimony of violence by the Respondent Father against Tessa F. and her mother;
> The Respondent Mother and Father lived together again after the Respondent Mother relinquished her parental rights;
> The Respondent Mother made the statement that she would try to get her child back;
> The Respondent Father made the statement that if he could not have Tessa F., he did not want Travis;
> The Respondent Father was not interested in any proceedings concerning his son Travis or visiting his son until the Respondent Mother relinquished her parental rights.

The court then concluded that Travis W. is an abandoned child. Based on the representations made to the trial court, we cannot say the court erred in reaching this conclusion. During the time the appellant was absent from Travis W.'s life, the child suffered spiral fractures of both legs, severe burns on his face, and numerous cuts and bruises. The appellant admits he made little or no attempt to contact the child and offered no support.

We believe the record shows the appellant abandoned Travis W. and that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected. W.Va. Code § 49-6-5(a)(6) (1998) provides that courts should terminate parental rights "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child[.]" Furthermore, "[f]or purposes of the court's consideration of the disposition custody of a child pursuant to the provisions of this subsection the department is not required to make reasonable efforts to preserve the family if the court determines: (A) The parent has subjected the child to aggravated circumstances which include abandonment[.]" W.Va. Code § 49-6-5(a)(7)(A) (1998), in part. The end result of this case will doubtless be the same regardless of whether or not the court provides notice of and holds a disposition hearing. However, neither this Court nor circuit courts can simply ignore mandatory procedural requirements. Circuit courts simply must comply with statutory law and the rules of procedure.

For the foregoing reasons, we affirm the finding of abandonment but reverse the disposition and remand for the circuit court to conduct a disposition hearing which complies with W.Va. Code § 49-6-5 and Rules 31 and 32 of the West Virginia Rules of Procedure for Child Abuse and Neglect.

Affirmed in part; reversed in part and remanded.

Footnote: 1 *Tessa F. is also Brandon F.'s mother.*

Footnote: 2 *Wendy H. is Travis W.'s maternal great-aunt with whom the child has lived for all but approximately six months of his life.*

Footnote: 3 *As we previously stated, Tessa F. relinquished her parental rights to Travis W. in case number 98-JA-35.*

Footnote: 4 *This Court has previously held that the word "shall," in the absence of language showing a contrary intent, will be afforded a mandatory connotation. See Syllabus Point 1, Nelson v. W.Va. Public Employees Ins. Bd., 171 W.Va. 445, 300 S.E.2d 86 (1982).*

189 W. Va. 210, 429 S.E.2d 492

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21460

STATE OF WEST VIRGINIA EX REL. GAIL TREADWAY, NOW CHARLOTTE RICHMOND, CHILD PROTECTIVE SERVICE WORKER, WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN SERVICES,

Petitioner Below, Appellee

v.

RICHARD MCCOY, FATHER; WILLARD MCCOY, INFANT; AND ANGELA PEARL MEADOWS, INFANT,

Respondents Below, Appellees

ANGELA PEARL MEADOWS, INFANT, RESPONDENT BELOW; AND CLETUS BROWNING AND JANET BROWNING, HIS WIFE, FOSTER PARENTS,

Appellants

Submitted: March 9, 1993

Filed: April 8, 1993

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JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. This Court has repeatedly held that in a contest involving the custody of an infant where there is no biological parent involved, the best interests of the child are the polar star by which the discretion of the court will be guided.

2. The best interests of a child are served by preserving important relationships in that child's life.

Neely, J.:

This is a custody dispute between foster parents, Cletis and Janet Browning, appellants, See footnote 1 who have looked after Angela Pearl Meadows since she was ten months old (and now want to adopt her) and little Angela's half-sister (who also wants to adopt Angela). The half-sister, Rita McCoy Stetson, has had virtually no contact with Angela since Angela's birth. The Brownings have cared for Angela since May, 1990, when Angela was less than a year old. The Circuit Court of Fayette County held that custody should be transferred to Ms. Stetson and her husband. However, the circuit court based his decision on the "rights" of the sister, not on the best interests of Angela. Our "polar star" in determining the custody of a child where there is no biological parent involved is the welfare and best interests of the child. We find that it is in the best interests of Angela to remain with her foster parents, the Brownings.

Angela was born on 20 June 1989. Her father, Richard McCoy, had a long history of sexually abusing his female relatives. Angela's mother, Stella Steele, was Richard McCoy's niece and a victim of incest at Mr. McCoy's hands. Angela was conceived from that union. Stella Steele and Mary McCoy, one of Mr. McCoy's daughters, brought incest charges against Mr. McCoy through the Fayette County Sheriff's Department. Mr. McCoy, upon discovering that Ms. Steele had filed incest charges against him, murdered Stella Steele on 13 April 1990. On 18 April 1990, Angela was removed from the McCoy home and taken into custody by the Department of Health and Human Resources (DHHR). Mr. McCoy is currently serving a life sentence for the murder of Angela's mother.

Ms. Stetson and her husband, appellees, were awarded custody of Angela by the Circuit Court. Ms. Stetson was born in 1963. Mr. McCoy, Angela's father, is also Ms. Stetson's father. When Ms. Stetson was seven years old, Mr. McCoy began sexually abusing her. Ms. Stetson ran away from home when she was twelve years old. She has not lived with her family since that time, and she has had virtually no contact with Angela. Ms. Stetson, as a result of the abuse by Mr. McCoy, cannot bear children. By all accounts Ms. Stetson is stable and has a loving relationship with her husband. The Rhode Island Department of Children and their Families conducted two home studies of the Stetsons and concluded both times that they would be fit parents.

On 30 April 1990, the circuit court held a custody review hearing. At this hearing, Rita McCoy Stetson came forward and asked to adopt Angela See footnote 2 However, Gail Treadway, the DHHR caseworker assigned to Angela told the court that she would need to have a home study performed by Rhode Island before she would agree to the adoption by Ms. Stetson. See footnote 3 Furthermore, the circuit court noted that paternity of the child had not yet been

established (there were two possible fathers, one of whom wanted custody). The court granted temporary custody of Angela to DHHR for six months. Inexplicably, no six month review hearing was held.

The next hearing was held by the circuit court on 15 May 1991. The circuit court was presented with the home study report, and the determination that Mr. McCoy was, in fact, the father. The court then held that the matter was not ripe for consideration because the Rhode Island home study was over seven months old and Mr. McCoy had not been present nor had he had a guardian ad litem been appointed to represent him. The court then ordered DHHR to request a new home study and Mr. McCoy to be represented by a guardian ad litem. DHHR did not request an updated home study from Rhode Island until 9 October 1991, nearly five months after the court ordered DHHR to request the report. DHHR received the second Rhode Island home study in December, 1991.

The most recent custody hearing was held on 28 February 1992. Richard McCoy admitted paternity and voluntarily waived all parental rights to Angela. See footnote 4 The circuit court reviewed the updated home study of the Stetsons, and heard the DHHR recommendation that custody of Angela should be awarded to the Stetsons. However, Angela's guardian ad litem objected to that recommendation, saying that Angela would be better served by being adopted by the Brownings, her custodians since before she was a year old.

Ever since May 1990, just after the initial custody hearing, Angela has resided with the Brownings under a foster care agreement. Throughout all of this litigation and bureaucratic delay, Angela has lived with the Brownings as their daughter. Angela suffers from cystic fibrosis; in order to make sure that Mr. and Mrs. Browning could care for Angela properly, the Brownings completed special training courses in how to care for a child with cystic fibrosis. At the February 1992, hearing, the Brownings testified to the circuit court that they wished to adopt Angela. The circuit court found that the Brownings had developed strong emotional ties with Angela.

Despite that finding of strong emotional ties, however, the circuit court, in his opinion letter of 6 March 1992 held:

It is regrettable, but true, that the State of West Virginia's administrative handling of this matter, insofar as Angela Pearl Meadows, infant, is concerned, certainly lacks the quality of work and attention one would and should expect in such a very delicate and important matter. Such poor work has, wrongly or rightly, caused the foster parents, Mr. and Mrs. Browning, to develop certain expectations about the outcome of this case, and certainly they have formed a loving attachment to the infant. Nevertheless, I am unaware of any law which vests contractual foster parents with any legal rights which would rise to the level of "parental rights".

We share the circuit court's shock and dismay at the conduct of DHHR in this matter. DHHR's bureaucratic bungling has created this regrettable situation. Had DHHR promptly requested the home study from Rhode Island and then promptly requested a hearing before the circuit court within six months of the initial custody placement (as it should have) then the circuit court would have been able properly to award custody of Angela to the Stetsons in the fall of 1990. Instead, the bureaucracy crept along at an incompetent pace and the child who was supposed to be in temporary custody wound up staying with the foster parents for nearly three years.

This is a travesty that all of us involved in the child welfare system (courts, lawyers, and executive agencies) must not allow to be repeated. Article III, § 17 of the West Virginia Constitution provides that "justice shall be administered without sale, denial or delay." This provision imposes an affirmative duty on the DHHR and the courts to ensure that child custody matters are resolved as quickly as possible. W. Va. Dept. of Human Serv. v. La Rea Ann C.L., 175 W. Va. 330, 337 n. 8, 332 S.E.2d 632, 638, n. 8 (1985). Finger pointing does no good, for the harm caused is irreparable. No matter who is responsible for the delay in this case, all of the parties involved are innocent and unwitting victims, caught up in the cogs of bureaucratic machinery.

Although we sympathize with the circuit court's desire to put the adult parties in the same position they would have enjoyed had the bureaucratic errors not occurred, we find that the circuit court erred by awarding custody to the Stetsons. Both statutory law and case law lead to the conclusion that custody should have been awarded to the Brownings.

"The controlling principle in every such case [where no biological parent is involved] is the welfare of the child and this Court has repeatedly said that in a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." State ex rel. Kiger v. Hancock, 153 W.Va. 404, 405 168 S.E.2d 798, 799 (1969) (quoted approvingly in Honaker v. Burnside, 182 W.Va. 448, 450-451, 388 S.E.2d 322, 324 (1989)). This discretion is limited by the right of a natural parent to raise his or her own child. See Honaker v. Burnside, 182 W.Va. 448, 451, 388 S.E.2d 322, 324-325 (1989).

Although the circuit court discussed "parental rights" in his opinion letter, such rights are not at issue in this case. See footnote 5 The question is not who, the Stetsons or the Brownings, has "better" rights to custody of Angela, but with which custodian are Angela's best interests served.

The Legislature has expressly encouraged foster parents who develop emotional ties to the children for whom they care to adopt those children. W.Va. Code 49-2-17 [1978]. This section subsidizes adoptions by such foster parents:

Whenever significant emotional ties have been established between a child and his foster parents, and the foster parents seek to adopt the child, the child shall be certified as eligible for subsidy conditioned upon his adoption under applicable adoption procedures by the parents.

The goal is to encourage foster parents not to treat the children placed in their care as an income producing commodity, but rather to love their foster children as their own. The Legislature wants foster parents to know that if they become attached to a child in their care, the bureaucrats will not come and take the child away. Presumptively, if a child is in a loving and caring foster home, the child will be harmed by being removed from that home and placed in a strange, unknown home. The state, therefore, has implemented a policy encouraging foster parents to adopt their foster children.

In our case law, we have also developed a policy that stable relationships should be preserved whenever feasible. We have held that the best interests of the child often include being kept with his or her siblings. James M. v. Maynard, 185 W.Va. 648, 658, 408 S.E.2d 400, 410 (1991). However, this is not a rule to be applied by rote:

The increased professional emphasis in social work on the sibling relationship is consistent with the broadening focus of the literature about separation. [Citation omitted] The growing legal emphasis on the best interests of the child as the primary criterion for child placement decisions facilitates efforts to preserve stable relationships for children. [Emphasis added] James M., 185 W.Va. at 658, 408 S.E.2d at 410. If a child has a close bond to a sibling, then an appropriate factor in considering the custody of the child is to keep the siblings together. Ms. Stetson, although a half-sister, has had virtually no contact with Angela at any time in Angela's life. The only stable relationship in Angela's life is with the Brownings.

In W. Va. Dept. of Human Serv. v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985), we acknowledged that sometimes these strong emotional bonds may rise to the level of overwhelming the rights of a natural parent:

[W]here the child has spent a substantial period of time in the home of foster parents, pending a ruling by the trial court on whether to approve a minor parent's relinquishment of child custody, extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance. In such a case the minor parent's right to revoke his or her relinquishment ceases to be absolute, due to the passage of the unreasonable period of time.

La Rea Ann C.L., 175 W.Va. at 335, 332 S.E.2d at 636. Accord, in re Baby Boy Reyna, 55 Cal.App.3d 288, 302, 126 Cal.Rptr 138, 147 (1976) (The best interests of the child are not served by "uproot[ing] the child from the care and

love of the nonparents with whom it has been living for a substantial period of time and plac[ing] it with the father with whom it has never had contact."); Honaker, 182 W.Va. at 452, 388 S.E.2d 322, 326 (1989) ("Elizabeth has been through a most traumatic ordeal by losing her mother at such a tender age. Taking away continued contact with the two other most important figures in her life would be detrimental to her stability and well-being.").

Although we sympathize with the plight of the Stetsons, we must look to the best interests of Angela today, not as her best interests might have been when the Stetsons first requested custody. See footnote 6 The best interests of a child are served by preserving important relationships in that child's life. Often, but not always, those relationships are with family members, such as a parent, a sibling or an aunt. However, in this case the most meaningful, stable relationship that Angela has is with the Brownings. Accordingly, Angela's best interests will be served by preserving that relationship and allowing the Brownings to adopt Angela.

For the foregoing reasons, the decision of the Circuit Court of Fayette County is reversed, and the case remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Footnote: 1 Angela's guardian ad litem, D. Clinton Gallaher, IV, is also an appellant in this case supporting the right of the Brownings to adopt Angela as being in Angela's best interests.

Footnote: 2 At the time of this hearing, paternity of Angela was not yet established. Boyd Steele, Jr. (Stella's widower), who had previously denied paternity, now claimed he was the father and requested custody. Blood tests later established that Mr. Steele was not the father.

Footnote: 3 On 30 June 1990, over two months after Ms. Treadway stated that Rhode Island needed to perform a home study, DHHR finally requested that Rhode Island perform the study. On 28 September 1990, Rhode Island sent its report to DHHR. DHHR does not account for its delay in requesting the study.

Footnote: 4 The circuit court terminated Mr. McCoy's parental rights at the 28 February 1992 hearing. See Transcript at 47-48. In the court's order of 1 April 1992, the court found "[t]hat Richard McCoy is the biological father of Angela Pearl Meadows, and that he has been fully advised of all of his parental rights, and furthermore, that he has relinquished all of his parental rights in regard to Angela Pearl Meadows." Order, 1 April 1992.

Footnote: 5 Consideration of parental rights is irrelevant in this case, as Angela's only living parent is Mr. McCoy, who has voluntarily relinquished his

parental rights. Therefore, the only consideration in this case is the best interests of Angela.

Footnote: 6 In La Rea Ann C.L., supra, we described a Pennsylvania court ruling that despite attachments developed subsequent to the bringing of the action, the Court felt compelled to decide the case as if it were the first hearing. We then rejected that position, holding, "we, on the other hand, believe that the appropriate procedure is to [decide the case] on the existing state of facts, rather than mak[e] a decision on a 'stale' record." La Rea Ann C.L., 175 W. Va. at 335, 332 S.E.2d at 636.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Memorandum Order

FILED
November 17, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia ex rel. Tristen K., Petitioner,

vs.) No. 35718

Honorable David R. Janes, Judge of the Circuit Court of Marion County, and the West Virginia Department of Health and Human Resources, Respondents.

Petition for Writ of Prohibition from the Circuit Court of Marion County
Civil Action No. 10-JA-2

On October 27, 2010, this Court issued a rule to show cause against the respondent, the Honorable David R. Janes, Judge of the Circuit Court of Marion County, as a result of a petition for writ of prohibition filed by the guardian ad litem (hereinafter "guardian") for the minor child, Tristen K.[1] (hereinafter "Tristen" or "minor"). The requested writ is based on an order, rendered orally by the lower court on September 9, 2010,[2] which granted a ninety-day, pre-adjudicatory improvement period for Tristen's biological parents: Joshua K. (hereinafter "Joshua" or "father") and Alexsis S. (hereinafter "Alexsis" or "mother"). The guardian requests this Court to prohibit the granting of the pre-adjudicatory improvement

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987) (citations omitted).

[2]There is no disagreement as to the terms of the oral order by the circuit court. This Court notes that, prior to the oral arguments before this Court, a written order memorializing the oral mandate was received. It was dated November 9, 2010, and entered into the records of the circuit clerk's office that same date.

periods so that the case may proceed immediately to adjudication.[3] Pursuant to a request under Rule 14(b) of the Rules of Appellate Procedure came the respondent, the West Virginia Department of Health and Human Resources (hereinafter "DHHR"), and filed its response. Having thoroughly considered the matters raised in the petition, the response thereto, the oral arguments of counsel, and the applicable law, we determine that the issue is moot. Accordingly, the petition is dismissed, and the writ is denied.

Factually, the minor, Tristen, who is the subject of the underlying action, was born August 5, 2009, to Alexsis and Joshua. The DHHR filed a petition for abused or neglected children on January 5, 2010. The petition alleged that Joshua puts his hand over Tristen's mouth to keep him from crying, that he yells at him to be quiet and calls him a "f*cking retard," and that he picks the baby up by the baby's shirt and lets his head fall back. The father admitted to the police that he covers the baby's mouth with his hand and that he took Tristen into the woods to go "coon hunting." The mother, Alexsis, admitted that she allows Joshua to cover Tristen's mouth with his hand and that she has heard the profanities used by Joshua toward Tristen. It also was alleged that Alexsis would hold the baby without supporting his head. Based on the allegations in the abuse and neglect petition, Joshua and

[3]During oral arguments before this Court, the guardian conceded that the parents have a right to an improvement period; however, the guardian's issue with the granting of the pre-adjudicatory improvement period lies in the fact that the lower court continually delayed the adjudicatory hearing and then granted a pre-adjudicatory improvement period after the already-substantial delays in the petition. The guardian argued that the case should proceed immediately to adjudication and that a post-adjudicatory improvement period could be requested and granted, if appropriate.

Alexsis were arrested for child abuse. Alexsis posted bond prior to the preliminary hearing. Joshua did not post bond until the following summer.

Alexsis filed a motion for a pre-adjudicatory improvement period on January 14, 2010. The preliminary hearing was held January 15, 2010, at which time both Alexsis and Joshua waived their rights to a preliminary hearing. An adjudicatory hearing was set for March 15, 2010; however, the date had to be rescheduled to May 6, 2010, due to a trial in the lower court that had not finished in the time expected. On March 16, 2010, Alexsis re-filed her motion for a pre-adjudicatory improvement period. A hearing was held May 6, 2010, for the purposes of adjudication; however, because the North Central Regional Jail failed to transport Joshua to the hearing, it was continued without objection from any of the parties. During the May 6th hearing, the DHHR informed the court that Alexsis was participating in services and following all recommendations of the multidisciplinary team (hereinafter "MDT"). The adjudicatory hearing was rescheduled to July 1, 2010.

In the interim, the lower court held a review hearing on June 1, 2010. The DHHR again reported that Alexsis was participating in all services and following all of the MDT's recommendations. Further, it was reported that Joshua was not participating in services due to his incarceration, but that services would be offered upon his release. The July 1, 2010, scheduled hearing was rescheduled due to the unavailability of a material witness. The new date was set for September 9, 2010. Prior to the hearing, on September 6, 2010, Joshua filed a motion for a pre-adjudicatory improvement period.

The lower court held a hearing on September 9, 2010, and considered the motions for pre-adjudicatory improvement periods filed by both Alexsis and Joshua. The DHHR represented that it was in accord with the granting of the requested improvement periods because both parents were participating in services and following the MDT's recommendations. The guardian, however, objected to the granting of the requested pre-adjudicatory improvement periods because of the eight-month delay between the inception of the abuse and neglect case and the date of the hearing. The circuit court granted a ninety-day pre-adjudicatory improvement period to each parent. It is from this order granting the pre-adjudicatory improvement periods that the petitioner seeks a writ of prohibition from this Court so that the case may proceed to adjudication.

Generally, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code* 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). In the underlying case, the argument revolves around the granting of pre-adjudicatory improvement periods and the guardian's disagreement therewith based on the guardian's position that the case should have proceeded to adjudication. Based on the lower court's order, an adjudicatory hearing is set for November 29, 2010, and it is reported that the parents are doing well participating in their

improvement periods.[4] The parties indicated, during oral argument before this Court, that the hearing had actually been set since the September 9, 2010, hearing. As such, the guardian's requests for relief from this Court has become moot. "Courts will not ordinarily decide a moot question." Syl. pt. 1, *Tynes v. Shore*, 117 W. Va. 355, 185 S.E. 845 (1936). "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908). Accordingly, because an adjudicatory hearing is already set to convene November 29, 2010, which will also evaluate the success of the pre-adjudicatory improvement periods, we find the issues before this Court to be moot.

While the guardian's requests are moot, we remain troubled by the expanse of time involved in this case and feel compelled to remind the lower court of the time frames involved in abuse and neglect cases, as well as the priority that should be placed on such cases. The petition was filed January 5, 2010, and the adjudicatory hearing, wherein the pre-adjudicatory improvement periods were granted, did not occur until eight months later on September 9, 2010, with the result of that hearing being a granting of pre-adjudicatory improvement periods and the setting of a new date for adjudication on November 29, 2010.

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[4]It is also recognized that no party had a need to request early termination of the improvement periods as is contemplated by W. Va. Code § 49-6-12(h) (1996) (Repl. Vol. 2009), which provides that "[u]pon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent has failed to fully participate in the terms of the improvement period."

As set forth in the statutory law:

> Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other civil action before the court, except . . . actions in which trial is in progress. Any petition filed under the provisions of this article shall be docketed immediately upon filing. . . .

W. Va. Code § 49-6-2(d) (2006) (Repl. Vol. 2009). This Court has explained that

> [t]he clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

Syl. pt. 5, *In Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991). "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. . . ." Syl. pt. 1, in part, *Carlita B.*, *id.* Prompt resolution in such cases serves as a protection for children from the turmoil associated with the lack of stability in their surroundings and in their caretakers. *See* Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991) ("It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians.").

Accordingly, while we do not condone the delays involved in the underlying case, we hereby find that the issues presented in the requested writ are moot as a result of the scheduled adjudicatory hearing set for November 29, 2010. Therefore, the writ of

prohibition is denied.

Writ Denied.

227 W. Va. 184, 706 S.E.2d 381

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

FILED
February 19, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30908

RELEASED
February 20, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: TYLER D., ALEXANDER A., AND NEVAEH D.

Appeal from the Circuit Court of Mineral County
Honorable Andrew N. Frye, Judge
Civil Action Nos. 01-JA-23, 01-JA-24 and 01-JA-25

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 14, 2003
Filed: February 19, 2003

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syllabus Point 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

2. "'W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988)." Syllabus Point 3, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

3. "'Termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such

nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.' Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991)." Syllabus Point 5, *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996).

4. "'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va.Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus Point 4, *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

5. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 S.E.2d 79, 479 S.E.2d 589 (1996).

6. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such

request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

7. "There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process." Syllabus Point 3, *State ex rel. Amy M. v. Kaufman,* 196 W.Va. 251, 470 S.E.2d 205 (1996).

Per Curiam:

This abuse and neglect case is before this Court upon appeal of a final order of the Circuit Court of Mineral County entered on July 1, 2002. Pursuant to that order, the abuse and neglect petition brought against the appellee and respondent below, Amanda D.,[1] with regard to her three children, Tyler D., Alexander A., and Nevaeh D., was dismissed, and custody of the children was returned to Amanda D.[2]

In this appeal, the appellants, the West Virginia Department of Health and Human Resources (hereinafter "DHHR") and the children's guardian ad litem, contend that the circuit court erred by dismissing the abuse and neglect petition and returning custody of the children to Amanda D. They further assert that the circuit court erred by not terminating Amanda D.'s parental rights. After carefully reviewing the petition for appeal, the entire record, and the briefs and argument of counsel, we agree with the appellants. Thus, for the reasons set forth below, the final order of the circuit court is reversed, and this case is remanded to the circuit court with directions as set forth herein.

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[1]We follow our traditional practice in cases involving sensitive facts and use initials to identify the parties rather than their full names. *See In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n.1, 387 S.E.2d 537, 538 n.1 (1989).

[2]As discussed herein, Thomas L., the biological father of Tyler D., and Joseph A., the biological father of Alexander A. and Nevaeh D., were also named as respondents, but the petition contained no allegations that either one abused or neglected the children. Thomas L. and Joseph A. are not parties in this appeal.

I.

FACTS

In October 2000, the DHHR began receiving reports of physical abuse and neglect of Tyler D., born on October 2, 1997, and Alexander A., born on May 15, 1999. The children were in the physical custody of their mother, Amanda D., who at that time was allegedly living with her boyfriend, Jeff W. On January 26, 2001, Amanda D. gave birth to a third child, Nevaeh D.

In February 2001, the DHHR received another referral regarding the children containing allegations of neglect and lack of supervision. In particular, it was reported that while Amanda D. was sleeping, Tyler D. dropped a box of cereal on a gas stove burner which had been left on for heating purposes and a fire ensued. It was also reported that Jeff W. had a tendency to act aggressively toward the children.

In March 2001, another referral indicated that the children were inadequately clothed, had poor housing, and lacked supervision. A month later, it was reported that Tyler D. had a burn mark on his arm from a cigarette, scratches on his stomach, a bruised eye, and a burn on his buttocks. When asked about his eye, Tyler D. said that Jeff W. had hurt him. Following another referral just a few weeks later, Tyler D. stated that Jeff W. had hit him again. This time, Tyler D. had a bruise over his left eye.

The DHHR investigated and substantiated these referrals. In April 2001, the DHHR referred Amanda D. to Action Youth Care (hereinafter "AYC") for services. A referral to a speech therapist was also made for Tyler D. Amanda D. did not keep the initial appointments made for her with AYC, but when informed by DHHR that her attendance was mandatory, she attended a June 5, 2001 meeting. At that meeting, Amanda D. reported that Jeff W. no longer lived with her. However, it was later determined that this information was not true.

Additional referrals were made to the DHHR on June 12 and 14, 2001. On June 21, 2001, the DHHR went to the family's residence to complete its investigation. At that time, Tyler D. had a small open burn or blister injury. He indicated that Jeff W. had burned him with a light. Amanda D. maintained that a lamp fell on Tyler causing the burn. Tyler also stated that Jeff W. threw him on the floor and against the walls. Amanda D. initially claimed that Jeff W. no longer lived with her and the children, but later admitted that he stayed there for the most part.

When the DHHR arrived at the home on June 21, 2001, all three children were dirty with hair stuck to their necks and smelled of a strong odor. In addition, there was an odor of urine in the boys' bedrooms. Amanda D. was unable to produce immunization records for the children and was unsure when Nevaeh D., who appeared to be sick, had last been to a doctor.

At the same time, the DHHR learned that an AYC worker had recently observed Jeff W. take Tyler D. to the back of the trailer to the shower after he soiled his pants. The child could be heard crying. After checking on Tyler D., Amanda D. reported that Jeff W. had placed Tyler D. in a cold shower. She said she turned on warm water for him.

Based on all the above, the DHHR sought emergency custody of the children on June 21, 2001. On June 27, 2001, the DHHR filed a lengthy abuse and neglect petition naming Amanda D. as a respondent. Tyler D.'s father, Thomas L., was also named as a respondent along with Joseph A., the father of Alexander A. and Nevaeh D. However, the petition contained no allegations against Thomas L. or Joseph A. At the preliminary hearing, Jeff W. was also named as a respondent.

After they were removed from the home, the children were examined by a pediatrician. Tyler D. was also examined by an ophthalmologist because of his eye injury. It was determined that Tyler D. had sustained a blood clot in his left eye which was likely caused by blunt trauma. Subsequently, Tyler D. underwent surgery to have the blood clot removed from his eye.[3]

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[3]Documents filed in this appeal indicate that Tyler D. is now blind in his left eye.

During the adjudicatory hearing on August 17, 2001, Amanda D. stipulated to various allegations of neglect contained in the petition. She requested and was granted a post-adjudicatory improvement period. The court took no action with regard to Jeff W. although he was noted on the comprehensive treatment plan. Upon receipt of a favorable home study, the circuit court placed Tyler D. in the custody of his father, Thomas L., who was living in Kentucky. The other two children remained in foster care.

Soon after he began living with this father, Tyler D. started counseling with Hank Mayfield, a licensed psychotherapist. Amanda D. was granted extended visitation with Tyler D. The visits were to take place in Maryland at the home of David D., Tyler D.'s maternal grandfather. After one of his weekend visits at David D.'s home, Tyler D. disclosed to Mr. Mayfield that he had been sexually abused by his grandfather. Mr. Mayfield reported this disclosure to the authorities and visitation in David D.'s home was stopped immediately.

As the case progressed, Jeff W. reported that he no longer had a relationship with Amanda D. and was not living with her and the children. He filed a motion seeking to be dismissed from the case. The motion was granted on March 19, 2002, based on Jeff W.'s representations that he had ended his relationship with Amanda D. and her children.

Subsequently, the DHHR requested a disposition hearing. The DHHR recommended that Amanda D.'s parental rights be terminated. The children's case plan prepared by the DHHR stated:

> Although stipulations were presented at the August 17, 2001 adjudicatory hearing, almost three months later Cindy Hay [Amanda D.'s counselor] wrote that Amanda would like to know what she did that was neglectful. Two states, Maryland and Kentucky, have both found that Tyler was sexually abused by Amanda's father David [D.]. In order for Amanda to remedy the problem of abuse and/or neglect, she must first acknowledge that abuse and/or neglect has occurred. Amanda has not done this. In the absence of recognition by Amanda that abuse and/or neglect has occurred, the children remain at risk and it would be unsafe to return the children to their mother. For the above-stated reasons, the [DHHR] recommends that the parental rights of Amanda . . . [D.] to [her children] be terminated.

The disposition hearing was held over the course of two days. Mr. Mayfield testified regarding the sexual abuse Tyler D. reported. He indicated that once the visitations in David D.'s house were suspended, Tyler's interactions with his peers and females improved "a hundred percent." Sarah W., a cousin of Amanda D., testified that Amanda D. asked her to lie about Thomas L. by testifying that she was his mistress and that he had tried to run over her with a van. She stated that Amanda D. had also instructed her to file false criminal charges against Thomas L.[4] Sarah W. further indicated that Jeff W. was still a part of Amanda D.'s life and that she had seen him hit Tyler D. on one occasion in the presence of Amanda D. Margaret Brown, a service coordinator for the West Virginia Birth to Three Program also testified. She had assessed Alex A.'s lack of speech development. Ms. Brown testified that Alex A.'s delays were not caused by a genetic disorder, but instead were attributable to risk factors. Finally,

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[4]Sarah W. stated that Amanda D. was able to force her to tell these lies about Thomas L. because Amanda D. was the payee on her social security checks.

child protective service workers from Maryland and Kentucky testified with regard to the sexual abuse reported by Tyler D. They, like Mr. Mayfield, testified that Tyler's reports of sexual abuse by his grandfather were credible.

At the close of the evidence, the court found that there was no evidence to show that Amanda D. had not complied with the improvement period, nor was there any evidence to show why it was not in the best interests of the children to be returned to their mother. Consequently, the court dismissed the abuse and neglect petition and ordered the children to be returned to their mother's custody. The final order was entered on July 1, 2002, and this appeal followed.

II.

STANDARD OF REVIEW

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

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the

> definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

With this standard in mind, we now consider whether the circuit court erred in this case.

III.

DISCUSSION

A. Jurisdiction

At the outset, we must address this Court's jurisdiction in this case. Pursuant to W.Va. Code § 58-5-1 (1998), "[a] party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court[.]" As noted above, the DHHR and the guardian ad litem are appealing from a final circuit court order, and thus, this Court has appellate jurisdiction in this case. However, shortly after the circuit court entered its July 1, 2002 final order, Amanda D. moved to Maryland with the children. Consequently, in this appeal, Amanda D. has asserted that this Court no longer has jurisdiction because she and her children are not presently residents of this State. In addition, this Court was advised on January 13, 2003, by the guardian ad litem in this case, that Tyler D., Alexander A., and Nevaeh D. are now in the legal custody of the Allegheny County Department of Social Services of the State

of Maryland based on alleged abuse and neglect of the children by Amanda D. Thus, the initial issue we must resolve is whether this Court should render an opinion in this case.

When more than one state becomes involved in determining the custody of a child, the Uniform Child Custody Jurisdiction and Enforcement Act, codified at W.Va. Code §§ 48-20-101 to -404 (2001) (hereinafter "UCCJA"), applies along with the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994) (hereinafter "PKPA"). In *West Virginia Dept. of Health and Human Resources ex rel. Hisman v. Angela D.*, 203 W.Va. 335, 342, 507 S.E.2d 698, 705 (1998), this Court recognized that the definition of "custody proceeding" within the UCCJA expressly includes abuse and neglect proceedings. This Court further determined that "'the PKPA is applicable to all interstate custody proceedings affecting a prior custody award by a different State, including [abuse,] neglect and dependency proceedings.'" *Id., quoting In re Van Kooten*, 126 N.C.App. 764, 769, 487 S.E.2d 160, 163 (1997).

> Pursuant to W.Va. Code § 48-20-206(a) (2001):
>
> (a) Except as otherwise provided in section 20-204 [§ 48-20-204],[5] a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has

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[5]W.Va. Code § 48-20-204 (2001) addresses temporary emergency jurisdiction where a child is present in this state and has been abandoned or is subjected or threatened with mistreatment or abuse.

> been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under 20-207 [§ 48-20-207].[6]

(Footnotes added). However, in Syllabus Point 6 of *Angela D.*, this Court explained that:

> "Notwithstanding their intent to require states adopting the Uniform Child Custody Jurisdiction Act to recognize custody decrees entered by sister states, the Act's drafters in no uncertain terms provided jurisdiction to both the original 'custody court' and other courts to determine whether modification of the initial custody decree is in the best interest of the child." Syl. Pt. 2, *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990).

In this case, we believe the best interests of the children require this Court to address the merits of this appeal. Given the errors made by the circuit court in this case, we feel that we would be remiss if we did not do so. With that said, this Court recognizes that at this juncture there appears to be litigation involving these children currently ongoing in Maryland. Therefore, this Court has determined that upon remand, and pursuant to the provisions of the UCCJA, the circuit court should immediately contact the Circuit Court of Allegheny County, Maryland. Based on documents filed with this Court, the Maryland Court appears to be conducting proceedings concerning custody of these children. The Maryland Court needs to be aware of the proceedings that have occurred in West Virginia and this Court's decision as set forth herein. In this fashion, the Circuit Court of Mineral County, West

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[6]This Court is unaware of any stay of the proceedings in Maryland.

Virginia, and the Circuit Court of Allegheny County, Maryland, can determine the appropriate forum for addressing the future of these children consistent with the laws of this State and the laws of the State of Maryland. While it now appears that Maryland is presently the proper forum, in the event that Maryland defers jurisdiction to this State, the circuit court should proceed to enter an order terminating Amanda D.'s parental rights, develop a permanency plan for the children, and determine whether Amanda D. should be afforded continued visitation with her children as set forth below.

B. Findings of Abuse and Neglect

Having resolved the jurisdiction issue, we now turn to the assignments of error raised by the DHHR and the guardian ad litem. They first contend that the circuit court's findings and conclusions were contrary to the evidence. In the final order, the circuit court stated:

> 6. The State of West Virginia has failed to show by clear and convincing evidence that the minor children were abused and/or neglected.
> 7. The State has also failed to show why placing T.D., A.A., and N.D. under the custody of Amanda [D.] was not in the best interests of the children.
> . . .
> 9. Allegations in petition to support termination of Amanda [D.'s] parental rights are unsubstantiated and unfounded.
> 10. The minor children herein were not abused and/or neglected by Respondent Amanda [D.]

The DHHR and the guardian ad litem firmly assert that the court's finding that there was no evidence that the children were abused and neglected is clearly erroneous given the stipulations made by Amanda D. during the adjudicatory hearing in this case. We agree.

On August 17, 2001, Amanda D. signed a document stipulating to the allegations of lack of supervision, poor living conditions, and not paying enough attention to the children. She further stipulated that there were occasions when the children were unclean and had an odor due to having no water in the home and that Tyler D.'s clothing was too small for him. Based on these stipulations, the circuit court entered an order on September 10, 2001, finding that Amanda D. neglected Tyler D., Alexander A., and Nevaeh D. However, the court's final order entered on July 1, 2002, states that there was no evidence that the children were neglected. The court clearly erred in that regard.

In addition, we believe that the circuit court erred by finding that there was no evidence that the children had been abused. Contrary to the findings of the circuit court, there was clear and convincing evidence that Tyler D. was physically abused. Specifically, there was evidence that Tyler D. was hit in the face and as a result, suffered a blood clot in his left eye which required surgery. Tyler D.'s physician indicated that Tyler's eye injury was caused by "blunt trauma." Tyler D. also reported that Jeff W. had burned him with a light and threw him on the floor.

Furthermore, there was clear and convincing evidence that Tyler D. was sexually abused. While there was no physical evidence, three witnesses testified that Tyler D's reports of sexual abuse were credible. In particular, Mr. Mayfield, Tyler's psychotherapist, testified that he believed that Tyler was telling the truth about being sexually abused based upon the language he used, the consistency in his statements, and the details he provided. Likewise, Beverly Green, a child protective services investigator with the Allegheny County Department of Social Services in Maryland, testified that the consistency in Tyler's statements about the sexual abuse indicated that he was being truthful. Finally, Glenda Razo, a case manager for child abuse and neglect in Fort Knox, Kentucky, testified that Tyler's allegations of sexual abuse were credible. All three witnesses indicated that they have considerable experience in dealing with sexually abused children. This evidence cannot simply be ignored.

Although there was no evidence that Alexander A. and Nevaeh D. were physically or sexually abused, they must be considered abused children because they resided in the home where the abuse of Tyler D. occurred. As this Court explained in Syllabus Point 2 of *In re Christina L.*,194 W.Va. 446, 460 S.E.2d 692 (1995):

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W.Va.Code, 49-1-3(a) (1994).

Thus, given all of the above, we find that the circuit court erred by concluding that there was no clear and convincing evidence that these children were abused and neglected.

C. Termination of Parental Rights

The DHHR and the guardian ad litem further contend that the circuit court erred by not terminating Amanda D.'s parental rights. The DHHR and the guardian ad litem acknowledge that there were no allegations that Amanda D. directly abused or injured her children. However, they assert that the evidentiary record establishes a classic case of failure to protect by a parent. In other words, they contend that Amanda D.'s refusal to acknowledge that Tyler D. was physically and sexually abused puts him and his siblings at risk for further abuse, and thus, warrants the termination of Amanda D.'s parental rights.

In Syllabus Point 3 of *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), this Court held that:

> Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

As this Court explained in Syllabus Point 3 of *West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996):

> "W.Va.Code, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Moreover,

> "Termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va.Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syllabus Point 5, *Doris S.*

In this case, Amanda D. has continuously and persistently denied that Tyler was physically and sexually abused. When speaking with her case workers, Amanda D. was adamant in her denials of abuse of Tyler D. both by her father and her boyfriend. She also denied that she neglected the children after earlier stipulating to that fact. During the disposition hearing, Amanda D. was asked whether she believed that her father, David D., had sexually abused Tyler.

She replied, "Let's not say that I do and I do not, I guess anything is possible." Amanda D. then said, "I've never had any concerns about not letting them [my children] around my father."

Amanda D. was also questioned about the allegation that Jeff W. had physically abused her children. She testified as follows:

> Q. Do you believe that Jeff [W.] was ever physically abusive to your children?
> A. No. I do not, --
> Q. Was he ever physically abusive to you?
> A. No.
> Q. Okay, are you aware, from Doctor [sic] Mayfield's testimony, that Tyler has said that Mr. [W.] was abusive to him?
> A. I believe that its [sic] possible, and, it could have happened, but I've never witnessed it.

While Amanda D. testified at the disposition hearing that she no longer had a relationship with Jeff W., she had previously made the same statement to her case workers, but then later admitted that Jeff W. still lived with her. At one point, Amanda D. asked Sarah W. to pose as Jeff W.'s girlfriend at a multidisciplinary treatment team meeting in an effort to convince the DHHR that she no longer had a relationship with Jeff W. At the disposition hearing, Sarah W. testified that she had seen Amanda D. with Jeff W. during the week before the disposition hearing.[7] Amanda D.'s false testimony and her solicitation of perjured testimony, as well as her recruitment of Sarah W. in the scheme to mislead and defraud the court regarding her relationship with Jeff W. is in and of itself compelling evidence of abuse and neglect. It was

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[7]During this appeal, this Court was advised by the parties that Amanda D. married Jeff W. two weeks after the circuit court entered its final order in this case.

a contemptible scheme designed to obstruct and obfuscate so as to allow continued exposure of her vulnerable, helpless children to serious physical abuse at the hands of Jeff W.

Having reviewed the entire record, it is obvious to this Court that Amanda D. has never acknowledged that her children were physically and sexually abused. Although Amanda D. participated in the improvement period granted to her following the adjudicatory hearing, she continued to disbelieve her son's reports of physical abuse by Jeff W. and sexual abuse by David D. Furthermore, despite the stipulations she made at the adjudicatory hearing, Amanda D. never acknowledged that she neglected her children. Three months after she made those stipulations she was asking her counselor "what she did that was neglectful."

In *Doris S., supra,* 197 W.Va. at 498, 475 S.E.2d at 874, this Court explained that:

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

Given Amanda D.'s refusal to acknowledge that her children have been abused and neglected, we believe that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected. In Syllabus Point 4 of *In the Matter of Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989), this Court held that:

> "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va.Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

"Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syllabus Point 3, *In re Katie S.*, 198 S.E.2d 79, 479 S.E.2d 589 (1996). If we were to affirm the circuit court's decision in this case, the health and welfare of Tyler D., Alexander A., and Nevaeh D. would be in serious jeopardy. Amanda D. has not demonstrated any ability or even willingness to protect her children from further abuse. Furthermore, her ability to correct the conditions of neglect in which the children were found is clearly in serious doubt. This is especially true considering the facts that have come to light since the circuit court entered its final order.

Notwithstanding this Court's findings in this opinion, to be absolutely fair to the trial judge, given the evidence available at the time of the disposition hearing, the court's initial efforts to reunite these children with Amanda D. were reasonable and fair. There is certainly a strong impetus in our law to keep families together if at all possible. At the time the trial judge returned the children to Amanda D., he could not have anticipated that Tyler D. would

lose sight in his eye, nor could he have known that Amanda D. would marry Jeff W. In fact, Amanda D. had indicated that she no longer had a relationship with Jeff W., and he had been dismissed from the case based on his representations that he had ended his relationship with Amanda D. and her children. Moreover, Amanda D. did satisfy the requirements of her improvement period. Simply put, the trial judge was faced with a difficult set of facts at the conclusion of the evidence in the disposition hearing. Nevertheless, we are compelled to reverse the final order of the circuit court and remand this case with instructions to enter an order terminating the parental rights of Amanda D.

Upon remand, the circuit court is further instructed to enter a permanency plan for the children. Based upon the record, it appears to this Court that the appropriate placement for Tyler D. is with his father, Thomas L. Unfortunately, the record is unclear with regard to the appropriate placement for Alexander A. and Nevaeh D. While the case was pending below, there was an effort made to determine whether Alexander and Nevaeh could be placed with their paternal grandmother, Connie A. At Connie A.'s request, her home study was never completed, and the children remained in foster care. Upon remand, the circuit court should explore the possibility of placing Alexander A. and Nevaeh D. with Connie A.[8]

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[8]Documents filed in this appeal state that after the children were removed from their mother's custody in Maryland, the Allegheny Department of Social Services recommended that Alexander A. and Nevaeh D. be placed in the custody of Connie A. and that Tyler D. be placed in the custody of his father, Thomas L.

Finally, the court should also consider whether it is in the children's best interests to have continued visitation with their mother. This Court has held that:

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best intere

Syllabus Point 5, *Christina L., supra.* Although there was some testimony during the disposition hearing suggesting that it would not be in the children's best interests to have continued contact with their mother, we do not believe that this evidence was fully developed. Accordingly, upon remand, the circuit court should hear argument from all parties on this issue, and take additional evidence if necessary, before determining whether continued visitation or other contact with Amanda D. is in the best interests of the children.

D. Excluded Testimony

While we have already determined that the final order in this case must be reversed, we, nonetheless, are compelled to address one final assignment of error raised by the DHHR and the guardian ad litem. The alleged error concerns the circuit court's refusal to allow Cathy Vibostak, the child protective services worker who filed the abuse and neglect petition in this case, to testify during the disposition hearing. The transcript of the disposition proceedings shows that the State, on behalf of the DHHR, attempted to call Ms. Vibostak to

testify during the second day of the hearing. The State had indicated to the court earlier that it had rested its case except for presenting the testimony of Glenda Razo who was going to testify by phone from Fort Knox, Kentucky. While waiting for Ms. Razo to become available, the State attempted to call Ms. Vibostak to testify. Although Ms. Vibostak had been listed as a potential witness for the State, the court refused to allow her to testify because the State had rested its case except for Ms. Razo's testimony. Thereafter, the guardian ad litem attempted to call Ms. Vibostak to testify. Counsel on behalf of Amanda D. objected, stating that the guardian ad litem had failed to provide a witness list. The circuit court sustained the objection and Ms. Vibostak was not permitted to testify.

Pursuant to Rule 30 of the Rules for Child Abuse and Neglect Proceedings, the parties must provide a list of witnesses at least five days prior to the disposition hearing.[9] It appears that the guardian did not do so in this case. However, this Court has long since held that the best interests of the children are paramount in abuse and neglect cases. To that end,

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[9]Rule 30 of the Rules of Procedure for Child Abuse and Neglect Proceedings states:

> At least five (5) judicial days prior to the disposition hearing, each party shall provide the other parties, persons entitled to notice and the opportunity to be heard, and the court a list of possible witnesses, with a brief summary of the testimony to be presented at the disposition hearing, and a list of issues of law and fact. Parties shall have a continuing obligation to update information until the time of the disposition hearing.

the children are entitled to effective representation through a guardian at litem. In Syllabus Point 3 of *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996), this Court explained that:

> There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) (1995) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

While the guardian ad litem in this case should have provided a list of witnesses he intended to call to testify at the disposition hearing, we believe the circuit court imposed an unreasonable limitation upon his representation of the children in this matter by not allowing him to present Ms. Vibostak's testimony. A guardian ad litem is certainly required to comply with the Rules for Child Abuse and Neglect Proceedings, and he or she should make every effort to fulfill the role of guardian ad litem as defined by this Court in *In re Jeffrey R.L.*, *supra*. However, a mere procedural technicality does not take precedence over the best interests of the children. In this instance, Ms. Vibostak was listed as a witness by the State, and thus, all parties had notice of her testimony. The circuit court clearly erred by not allowing the guardian ad litem to present Ms. Vibostak's testimony.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Mineral County entered on July 1, 2002, is reversed. This case is hereby remanded to the circuit court with directions to immediately contact the Circuit Court of Allegheny County, Maryland, to ascertain the status of the proceedings concerning the children in Maryland; to advise that court of this opinion; and to determine the proper forum for addressing the future of these children. If the Maryland court defers jurisdiction to this State, the circuit court is directed to enter an order terminating the parental rights of Amanda D. to her children, Tyler D., Alexander A., and Nevaeh D.; develop a permanency plan for the children; and determine whether Amanda D. should be afforded continued visitation with her children.

Reversed and remanded with directions.

197 W. Va. 456, 475 S.E.2d 548

Supreme Court Of Appeals Of West Virginia

STATE OF WEST VIRGINIA EX REL. VIRGINIA M.,
Petitioner Below, Appellee

v.

VIRGIL EUGENE S. II, AN INFANT;
GINA LYNN S. AND RALPH M., HIS PARENTS,
Respondents Below, Appellants

No. 22949
Submitted: January 17, 1996
Filed: July 19, 1996

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, In the Interest of Tiffany Marie S., ___W.Va. ___, 470 S.E.2d 177 (1996).

2. "W.Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Syl. Pt. 2, State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987).

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Per Curiam:
The Appellant, Gina Lynn S., appeals from an order of the Circuit Court of Braxton County dated September 20, 1994, terminating her custodial rights to her son, Virgil Eugene S., and granting permanent custody to the child's paternal grandmother, Virginia M. See footnote 1 The order also terminated the custodial rights of the father, Ralph M., who does not join in this appeal. Gina Lynn S. asserts that her custodial rights should not have been terminated, and that the circuit court should have granted her an improvement period prior to termination. Based on our review of the record, we agree that the circuit court erred when it denied her request for an improvement period, and we remand the case for further proceedings consistent with this opinion.

I.

Virgil Eugene S. ("Gene") is seven years old. He was a premature baby, and suffers from a host of physical problems, including mild cerebral palsy, hyperactivity, eye problems, and asthma. From the time he left the hospital as an infant, Gene has spent more time in the Braxton County home of his paternal grandmother, Virginia M., than in Charleston with his mother, Gina Lynn S. This arrangement was mutually satisfactory for several years, including a period in which the mother and grandmother informally agreed to alternate care for Gene every two weeks.

Gina Lynn S. has two other children and limited resources, so Virginia M.'s participation in Gene's upbringing helped her to provide for his special physical and medical needs. There is also evidence that early in the child's life Gina Lynn S. often entrusted him to her mother-in-law to avoid exposing him to domestic violence perpetrated by Ralph M. (Virginia M.'s adopted son), who is no longer in the home. Later, Gina Lynn S. testified that she felt some pressure to leave Gene with Virginia M. for longer visits when the grandmother represented that both she and her husband had cancer. Gina Lynn S. testified that Virginia M. seemed to want Gene near her, and that she complied because she feared the grandmother would not be alive much longer. Nevertheless, Gina Lynn S. did participate significantly as Gene's parent, having him in her home often and consenting to his extended stays with Virginia M., prior to the initiation of these proceedings.

Early in 1993, after over four years of sharing Gene's care, Virginia M. became dissatisfied. She contacted the Department of Health and Human Resources ("DHHR") for help, complaining that Gina Lynn S. allowed Gene to reside with

her for extended periods of time, but did not provide financial help or Gene's Medicaid card. Virginia M. also wanted to enroll Gene in preschool, but did not have legal authority to sign papers as his parent or guardian. DHHR determined that the case did not warrant intervention, because Gina Lynn S. had properly provided for the child by placing him with his grandparents. See footnote 2 DHHR then referred Virginia M. to the county prosecutor for a possible solution to her problems.

On January 11, 1993, the Prosecuting Attorney for Braxton County filed a petition on behalf of Virginia M. alleging abuse and neglect, and requesting a grant of temporary custody under West Virginia Code 49-6-3 (1995). The Circuit Court of Braxton County granted emergency temporary custody to Virginia M. the same day.

The circuit court held a preliminary hearing on January 27, 1993, after which it granted continued custody to Virginia M., and visitation rights to Gina Lynn S. On March 17, 1993, the lower court held a hearing on a motion by the State to terminate visitation. Following that hearing, the court made a finding of neglect, See footnote 3 but did not terminate visitation. Almost a year later, on February 7, 1994, the court held a third hearing, See footnote 4 after which it granted continued custody to Virginia M., and denied Gina Lynn S.'s motion for an improvement period pursuant to West Virginia Code 49-6-2(b) (1995). The court conducted a dispositional hearing on March 11, 1994, again denied the mother's motion for an improvement period, and issued its final order on September 20, 1994.

The majority of the evidence at these hearings was testimony by Virginia M. and Gina Lynn S. The grandmother asserted that she had most of the responsibility for her grandson's care, and that she and her husband provided him with a good home. She commented on her daughter-in-law's poor housekeeping, drinking, and slovenly habits, but tempered these criticisms with remarks such as, "I think the world and all of Gina, but I don't approve of the way she takes care of the baby," and conceded that Gina could be a decent mother if given an opportunity.

For her part, Gina Lynn S. testified that she stayed with Gene day in and day out for four months in the hospital after his premature birth, and looked after his special needs by taking him to various physicians in Charleston, and to the Shriners' hospital in Kentucky. Most of the housekeeping problems, according to Gina Lynn S., were attributable to Ralph M., who was chronically unemployed, abused alcohol, and abused Gina Lynn S. Although the two were never married, they lived together "off and on" for about four years. Ralph M. has not, however, been in the household since February, 1992, approximately one year before this action was filed. Since Gene was removed from her custody, Gina Lynn S. has

attended every hearing, visited Gene in Braxton County when she was able, talked with him on the phone, and brought him Christmas presents.

The most damaging evidence concerned an incident that occurred after the court's grant of custody to Virginia M. at the January 27, 1993, hearing. Dr. William Douglas Given See footnote 5 testified at the March 17, 1993, hearing on the State's motion to terminate visitation. Dr. Given had examined Gene a few days after Gene returned from a weekend visit with Gina Lynn S. on March 6th and 7th. Dr. Given found several areas of bruising consistent with being struck with an object, and also noted a "marked failure to thrive." When questioned by Dr. Given, Gene reported that his three-year-old cousin had beaten him with a "razor stroke." Dr. Given concluded that, in his opinion, the child was abused. Dr. Given based his opinion, in part, on Gene's "failure to thrive," because his weight and height were less than the 50th percentile for his age. Because Gene resided with his grandparents more than with his mother, and failure to thrive in the context of child abuse is generally considered to be the result of long-term conditions of physical and/or emotional neglect, See footnote 6 we are inclined to discount this factor as evidence of any mistreatment by Gina Lynn S. It is cause for concern, and may have indicated that there was neglect in this case. However, the record is unclear as to whether Gene's size was in any way related to his cerebral palsy or other medical problems.

In this appeal, Gina Lynn S. asserts that the circuit court erred by (1) failing to dismiss the case at the preliminary hearing for failure to present a prima facie case of abuse or neglect; (2) finding that the evidence of abuse and neglect met the "clear and convincing" standard; and (3) refusing to grant her an improvement period. See footnote 7 The guardian ad litem, on behalf of the child, requests that this Court affirm the lower court's grant of custody to Virginia M., but remand the case to the circuit court for consideration of an improvement period for Gina Lynn S., or another custodial arrangement, in order to provide for the best interests of the child in the event that Gene outlives his grandmother. See footnote 8

II.

Our standard of review in an abuse and neglect proceeding has been summarized as follows:

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when,

> although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 1, In the Interest of Tiffany Marie S., ___W.Va. ___, 470 S.E.2d 177 (1996).

We address first the Appellant's assertion that the Appellees failed to present a prima facie case of abuse or neglect at the preliminary hearing. The trial court's initial ruling granting custody of Gene to his grandmother was based on West Virginia Code 49-6-3 (1995), the provision for temporary custody of an abused or neglected child. West Virginia Code 49-6-3(a) gives a court the authority to order a grant of temporary custody only "if it finds that: (1) There exists imminent danger to the physical well-being of the child, and (2) there are no reasonably available alternatives to removal of the child . . . ." In this case, no imminent danger was even alleged. The grandmother's sole complaint was that Gina Lynn S. was not providing any financial or medical contribution to Gene's care. Further, the child was already in the grandmother's custody, with his mother's permission, when the petition was filed. This made "removal of the child" unnecessary and, from the grandmother's perspective, undesirable. Thus we conclude that the trial court's initial grant of emergency custody under West Virginia Code 49-6-3 and the denial of an improvement period were clearly wrong.

West Virginia Code 49-6-1(a)(1995) provides the appropriate procedure for resolving non-emergency abuse or neglect situations:

> If the state department or a reputable person believes that a child is neglected or abused, the department or the person may present a petition setting forth the facts to the circuit court in the county in which the child resides . . . . The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the state department to remedy the alleged circumstances and the relief sought.

When, as in this case, the child is not in imminent danger, the court can thus consider whether the child is abused or neglected prior to a transfer of custody.

Although this case might more properly have been brought as a domestic/custody matter, it is here as an abuse and neglect proceeding and thus we will treat it as such.

II.

Gina Lynn S. twice asked the circuit court to grant her an improvement period, and both times the court refused. This Court addressed a similar situation in State ex rel. West Virginia Department of Human Services v. Cheryl M., 177 W.Va. 688, 356 S.E.2d 181 (1987). There we said, "W.Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial." Id., Syl. Pt. 2 (emphasis added). The Court in Cheryl M. quoted with approval the following explanation:

> Clearly, the statute presumes the entitlement of a parent to an opportunity to ameliorate the conditions or circumstances upon which a child neglect or abuse proceeding is based pending final adjudication, no doubt in recognition of the fundamental right of a parent to the custody of minor children until the unfitness of the parent is proven. See, e.g., In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973). The statute permits the court to deny such a request only upon a finding of 'compelling circumstances.'" See footnote 9

177 W.Va. at 691-92, 356 S.E.2d at 184-85 (quoting State v. Scritchfield, 167 W.Va. 683, 692-93, 280 S.E.2d 315, 321 (1981)).

The record includes one instance of alleged abuse, which produced bruises, as well as evidence that Gina Lynn S. left Gene in his grandmother's care for extensive periods of time. Though not to be taken lightly, this one incident does not constitute the "compelling circumstances" sufficient to deny the natural mother in this case any chance for rehabilitation. In fact, the court appeared to rely more on Gina Lynn S.'s abandonment of the child to his grandmother's care as evidence of her neglect. This was an agreed-upon arrangement, however, and thus did not constitute abandonment. The grandmother conceded at the preliminary hearing, the very first time the court heard evidence, that Gina Lynn S. could be a good mother if given an opportunity. The lower court should have recognized this as a situation in which a well-designed and well-implemented improvement period could provide that opportunity. We therefore conclude that the lower court erred in permanently terminating custodial rights without granting Gina Lynn S. an improvement period pursuant to West Virginia Code 49-6-2(b).

As part of the improvement period, the court on remand should order DHHS to prepare a family case plan pursuant to West Virginia Code 49-6D-3 (1995), as

required by Code 49-6-2(b). The family case plan should provide detailed standards by which improvement can be measured, as well as a blueprint for DHHS to monitor, and specific information for the court to consider at disposition. See In re Carlita B., 185 W.Va. 613, 624, 408 S.E.2d 365, 376 (1991); Cheryl M., 177 W.Va. at 693, 356 S.E.2d at 186. This appears to be a case in which a child has two willing caretakers who love and care for him, and he needs them both. The improvement period should be designed to maximize the benefits of both relationships, to help Virginia M. and Gina Lynn S. cooperate in Gene's care, and to help them work together to promote the best interests of the child.

III.

This Court has said repeatedly that "matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis. . . ." In re Carlita B., 185 W.Va. 613, 625, 408 S.E.2d 365, 377 (1991). We reiterated that urgency recently in In the Interest of Tiffany Marie S., ___W.Va. ___, 470 S.E.2d 177, 184-85 (1996). This case has dragged on for over three years without ever affording the mother a formal improvement period, and without establishing any real permanency plan for Gene as required by West Virginia Code 49-6-5(a) (1995). Meanwhile, Gene has become firmly entrenched in his grandparents' household. See footnote 10 Undoubtedly there are strong emotional bonds between Gene and his grandparents. As in Cheryl M., however:

> [C]onstitutional considerations as reinforced by the [West Virginia Child Protective Services Act] mandate preservation of parental rights. It is only when bona fide attempts at counseling fail or the original abuse and neglect is so egregious that an improvement period will be of no avail that a court may be warranted in severing parental rights.

177 W.Va. at 695, 356 S.E.2d at 188. This Court's decision in Lemley v. Barr, 176 W.Va. 378, 343 S.E.2d 101 (1986) may prove instructional to the circuit court when considering this case on remand. In Lemley, we acknowledged that returning custody to a natural parent may not always be in the best interests of the child, even in the case of two relatively innocent parties. The dispute in that case was between the natural mother and the child's adoptive parents. Although we concluded that the adoption was invalid, we nevertheless held that there must be a determination of what physical custody arrangement was in the child's best interests, because the five-year-old child had spent almost his entire life with adoptive parent. Id. at 385-86, 343 S.E.2d at 109.

This does not appear to be a case in which a parent abandoned her child with no intent to return. See footnote 11 What started out as a consensual arrangement deteriorated into a custody battle on account of support issues. There must be an

equitable resolution that both serves the best interests of the child and protects the rights of the natural mother and the grandmother. An important consideration the court must weigh in determining an arrangement that will serve the best interests of the child in this case is the age and health of the grandmother, and her ability to continue to care for Gene. Gene has special needs, and may need care beyond the age of majority. Reuniting him with his mother, or at least ensuring that their relationship is strengthened and sustained, would help to provide for this long-term contingency.

It would have been far better if the parties in this case had approached the challenge of Gene's custody from a humanistic perspective, rather than having their lawyers drawing the lines of battle in the sand. It is obvious that this child needs both of these people in his life. His special medical and educational needs make it difficult for his mother to care for him, and his grandmother's advanced age makes it unlikely that she can provide the permanent care that Gene may well need. The social services and the legal system in such a case should work to facilitate a relationship with both "mothers," instead of choosing an all-or-nothing custodian. The circuit court on remand should be mindful also that no matter who becomes Gene's primary custodian, he has the right to a continued relationship with both his grandmother and his mother. See Honaker v. Burnside, 182 W.Va. 448, 388 S.E.2d 322 (1989), and to continued association with his siblings, see Syl. Pt. 5, In re Christina L., 194 W.Va. 446, 460 S.E.2d 692(1995), in appropriate circumstances.

Furthermore, should it be determined that Gene should be restored to the full custody of his mother, any such significant alteration in his physical custody should be made in the form of a gradual transition to reduce any possible trauma associated with a dramatic change in custody. See, e.g., Syl. Pt. 3, James v. Maynard, 185 W.Va. 648, 408 S.E.2d 400 (1991); Honaker v. Burnside, 182 W.Va. 448, 343 S.E.2d 101 (1989). We said in Honaker:

> For the transition period to be effective in accomplishing this purpose, it should provide for ever-increasing amounts of visitation for the natural [parent] so as to lead to a natural progression to full custody. Such transition plan should give due consideration to both parties' work and home schedules and to the parameters of the child's daily school and home life, and should be developed in a manner intended to foster the emotional adjustment of these children to this change while not unduly disrupting the lives of the parties or the children.
>
> 182 W.Va. at 453, 388 S.E.2d at 326.

For the foregoing reasons, the judgment of the Circuit Court of Braxton County is affirmed with respect to the grant of custody and reversed with respect to the grant of an improvement period. We, therefore, remand this case for further proceedings consistent with this opinion. We direct the court on remand to order an improvement period for Gina Lynn S., to examine the needs of the child in this case, with the help of the Department of Human Services, if necessary, and to consider a plan that would result in a gradual transition of custody back to Gina Lynn S.

Reversed and Remanded.

Footnote:1 We follow our past practice in domestic and juvenile cases that involve sensitive facts, and do not use the last names of the parties. See, e.g., State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M., 177 W.Va. 688, 689, 356 S.E.2d 181, 182 n.1 (1987).

Footnote: 2 It appears that this case might have more appropriately been brought as a custody matter, rather than as an abuse and neglect proceeding. See, e.g., In re Cottrill, 176 W.Va. 529, 346 S.E.2d 47 (1986). The petition alleged only that the child lived with his grandmother most of the time, that he had special medical and educational needs, and that (quoting the statutory definition of "neglected child" in W.Va. Code 49-1-3(g)(1)) "when he is in the possession of his mother . . . his physical and mental health is harmed and threatened by a present refusal, failure and inability of the said [mother] to supply said child with necessary food, clothing, shelter, supervision, medical care and education."

Footnote: 3 The court's finding of neglect was based on the testimony of Dr. Givens, discussed below. The court's order finding neglect included no findings of fact. The court found on the record, however, that Gene had sustained bruises while on a weekend visit with Gina Lynn S., that the bruises were intentionally inflicted, and that it was unlikely that the bruises had been inflicted by a child, which was Gene's explanation.

Footnote: 4 It is totally unclear from the record why the court and the lawyers let this matter languish without any resolution for this length of time.

Footnote: 5 Dr. Given is a general practitioner in Gassaway, West Virginia. He examined Gene only once, and had no continuing responsibility for his care. The record reflects that Virginia M. took Gene to the Public Health Department on March 9, 1993, because he returned with several bruises after a weekend visit with his mother. The Public Health Department nurse referred Gene to Dr. Given for an evaluation of child abuse.

Footnote: 6 See generally The Merck Manual 1964-67 (15th ed. 1987).

Footnote: 7 The Appellant also asserts that she received ineffective assistance of counsel in the lower court proceedings. Because we reverse and remand the case on other grounds, we do not reach this issue.

Footnote: 8 At the time oral argument, Virginia M. was 71 years old. Gina Lynn S. was 25. Gina Lynn testified that Virginia M. had said that both she and her husband had cancer. Virginia M. testified, however, that she was in good health.

Footnote: 9 We note that West Virginia Code 49-6-12 (1996), recently enacted by the West Virginia Legislature, now requires a parent seeking an improvement period in cases of
neglect or abuse to file a written motion requesting it, and to demonstrate by clear and convincing evidence that he or she is likely to fully participate in the improvement period. Thus rather than presuming the entitlement of a parent to an improvement period, as under Cheryl M., quoted in the text above, the law now places on the parent the burden of proof regarding whether an improvement period is appropriate. We review this case, however, under the law as in effect at the time of the circuit court's decision.

Footnote: 10 Virginia M.'s husband lives with her and is approximately 65 years old. For reasons that were not explained to the Court, he is not a party to these proceedings.

Footnote: 11 This case must be distinguished from cases such as Department of Human Servs. v. La Rea Ann C.L., 175 W.Va. 330, 332 S.E.2d 632 (1985), in which a minor voluntarily gave her child up for adoption.

201 W. Va. 108, 492, S.E.2d 167

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1997 Term

No. 23881

JOSEPH LARRY WALKER,
Petitioner Below, Appellee
V.
WEST VIRGINIA ETHICS COMMISSION,
Respondent Below, Appellant

AND

No. 23890

JOSEPH LARRY WALKER,
Petitioner Below, Appellant
V.
WEST VIRGINIA ETHICS COMMISSION,
Respondent Below, Appellee

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 95-AD-457-B

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH INSTRUCTIONS

Submitted: April 23, 1997
Filed: July 21, 1997

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JUSTICE DAVIS delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. A reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.

2. In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

3. Although an express grant of powers to an administrative agency will be determined to include such other powers as are necessarily or reasonably incident to the powers granted, the agency's powers should not be extended by implication beyond what may be necessary for their just and reasonable execution.

4. The West Virginia Ethics Commission has the authority to remand cases to a hearing examiner for further proceedings in accordance with the Commission's directives, regardless of whether such authority has been specified in the statutes establishing the powers and duties of the Commission.

5. """Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).' Syllabus point 1, *Courtney v. State Dept. of Health of West Virginia*, 182 W. Va. 465, 388 S.E.2d 491 (1989)." Syllabus point 3, *Francis O. Day Company, Inc. v. Director, Division of Environmental Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994).

Davis, Justice:

In this administrative appeal, the West Virginia Ethics Commission,[(1)] appeals a memorandum opinion, issued May 17, 1996, and a final order, entered June 14, 1996, by the Circuit Court of Raleigh County, which ordered, in part, the dismissal, for procedural reasons, of Count 5 of the Commission's statement of charges against Joseph Larry Walker. Count 5 concerned Walker's knowing approval of a subordinate's falsified travel expense form. Additionally, Walker appeals from that part of the circuit court's final order affirming the Commission's prior finding that Walker had committed the ethics violations alleged in Count 3 of the Commission's statement of charges, which charged Walker with the falsification of a travel expense form. As both appeals relate to the same administrative proceedings and involve the same parties, we have consolidated these two appeals for purposes of rendering a decision therein. Upon a review of the record and the parties' arguments, and for the reasons stated below, we

affirm in part and reverse in part the decision of the Circuit Court of Raleigh County and remand this case for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

In 1992, Joseph Larry Walker [hereinafter "Walker"], was employed as a District Supervisor with the West Virginia Division of Rehabilitation Services [hereinafter "DRS"][(2)] and was headquartered in the Beckley district office. As a result of this employment, Walker was classified as a public employee[(3)] whose conduct was governed by the West Virginia Governmental Ethics Act, W. Va. Code § 6B-1-1, *et seq.* [hereinafter "the Ethics Act"].[(4)] The state agency charged with the enforcement of the Ethics Act is the West Virginia Ethics Commission [hereinafter "the Commission"].[(5)]

Pursuant to the Ethics Act, alleged ethics violations are brought to the Commission's attention by way of verified complaint.[(6)] Upon receiving a verified complaint, the Commission assigns an investigative panel to review the allegations.[(7)] If the Panel finds probable cause exists to believe the named employee committed the alleged ethics violations, the Commission issues a statement of charges and a notice of hearing informing the employee of the specific instances of alleged unethical behavior and scheduling a hearing for the taking of evidence therein.[(8)] Following a hearing before a hearing examiner or hearing board, the entire record and a recommended decision are tendered to the Commission which then enters a final decision.[(9)]

The events forming the basis of the instant appeal occurred in late fall, 1992, and mid-spring, 1993. Three employees who worked with Walker in the Beckley DRS district office filed a verified complaint with the Ethics Commission on March 31, 1993. Verified complaint No. 93-06 alleged:

This complaint charges Joseph Larry Walker and Thomas E. Hurley,[(10)] employees of the Division of Rehabilitation Services, Beckley District Office, with using their positions for personal gain.

Mr. Hurley, while on salary, routinely files false itineraries and charges the Agency mileage for trips he does not make. Mr. Walker approves Mr. Hurley's itineraries and expense accounts and certainly is aware of Mr. Hurley's indiscretions. Mr. Walker also is guilty of falsifying his itineraries and expense accounts.

This is a critical time for our Agency. We have exhausted our funds for case services to disabled individuals, yet these men continue to falsify expense accounts for non-existent travel and work not performed.

By letter dated April 6, 1993, the Commission notified Walker of the pending complaint and the designation of an investigative panel to assess these allegations. Following assignment of Investigative Panel "D" to review the charges and a finding by this Panel of probable cause to believe that Walker violated W. Va. Code § 6B-2-5(b)(1) (1992) (Repl. Vol. 1993),[(11)] the Commission issued a statement of charges dated October 12,

1993. This statement charge[d] that Joseph L. Walker, a Supervisor in the Beckley branch office of the Division of Rehabilitation Services, did unlawfully, knowingly and intentionally use his office for private gain as hereinafter set forth.

Count 1

On November 24, 1992, from approximately 1:24 p.m. until the end of his workday, Joseph L. Walker engaged in personal business unrelated to his duties for the Division of Rehabilitation Services. He did not take annual leave or leave without compensation for this time.

Count 2

On November 25, 1992, from approximately 2:23 p.m. until the end of his workday, Joseph L. Walker engaged in personal business unrelated to his duties for the Division of Rehabilitation Services. He did not take annual leave or leave without compensation for this time.

Count 3

On or about December 1, 1992 [sic] Joseph L. Walker submitted a Travel Expense Account Settlement form which claimed expenses for a trip allegedly taken from Beckley to Hinton on November 25, 1992. Mr. Walker subsequently accepted reimbursement for the mileage claimed on that day even though he did not make such a trip.

Count 4

On or about April 6, 1993 [sic] Joseph L. Walker took a trip from Beckley, WV to Princeton, WV that was related to his state employment. Rather than return to his office in Beckley, however, he exited from the West Virginia Turnpike at the Ghent exit ramp at approximately 12:15 p.m. He did not return to the Beckley office until approximately 4:00 p.m. that day and did not take annual leave or leave without compensation for the time between 12:15 p.m. and his return to the office.

On February 10, 1994, Thomas Hurley, who, along with Walker, was charged in the verified complaint with violating certain ethics provisions, entered a conciliation agreement with the Commission. As a result of Hurley's agreement, the Commission received supplemental information suggesting grounds for charging Walker with an additional count of unethical behavior.[(12)] Counsel for the Commission moved for a continuance to permit Investigative Panel "D" to examine this information and determine the propriety of additional charges, but the hearing examiner denied the motion. As a result, a hearing was held on February 17, 1994, as previously scheduled, with respect to the four counts with which Walker was initially charged. After receiving testimony and other evidence, the hearing examiner granted Walker's motion for a directed verdict, pursuant to Rule 50 of the West Virginia Rules of Civil Procedure, and dismissed the

four counts of the statement of charges. The hearing examiner tendered a recommended decision to the Commission, dated August 22, 1994, recommending dismissal of the statement of charges because "[t]he West Virginia Ethics Commission failed to prove beyond a reasonable doubt that Respondent, Joseph L. Walker, violated West Virginia Code § 6B-2-5[(b)(1)] and the allegations contained in the Statement of Charges."

The Commission, by order entered October 7, 1994, affirmed the hearing examiner's recommendation to dismiss Counts 1, 2, and 4 and dismissed the same. However, the Commission rejected the hearing examiner's recommended dismissal of Count 3 and, upon a review of the hearing testimony, concluded that Walker received reimbursement for a trip to Hinton, West Virginia, on November 25, 1992, which he did not make. In conclusion, the Commission found "the proposed decision of the Hearing Examiner to dismiss Count 3 is in error and should be remanded for further hearing."

Meanwhile, Investigative Panel "D" pursued its inquiry of the additional information garnered from Hurley's conciliation agreement and again found probable cause sufficient to believe that Walker violated W. Va. Code § 6B-2-5(b)(1).[(13)] Consequently, the Commission issued a second statement of charges. This statement, dated April 12, 1994, charge[d] that Joseph L. Walker, an employee of the West Virginia Division of Rehabilitation Services, did unlawfully, knowingly and intentionally use his office for the private gain of another as hereinafter set forth.

Count 5

On or about October 1992, Joseph L. Walker approved an Itinerary form for a subordinate, Thomas Hurley. That Itinerary form indicated that Mr. Hurley planned to take an official business trip on October 29, 1992 [sic] from Beckley to Welch, WV. Mr. Walker approved the form knowing that Mr. Hurley did not plan to take that October 29 [sic] trip. On or about the end of October 1992 [sic] Mr. Walker approved a Travel Expense Account Settlement form submitted by Mr. Hurley which sought reimbursement for expenses incurred in [sic] aforementioned trip from Beckley to Welch on October 29, 1992. Mr. Walker approved that Travel Expense Settlement form knowing Mr. Hurley did not take that trip. As a result of Mr. Walker's actions, Mr. Hurley received reimbursement for official travel he did not take.

By prior order of the Commission, entered October 7, 1994, the hearing on Count 5 was consolidated with the remand hearing on Count 3. Following the taking of evidence during the November 4, 1994, hearing, the hearing examiner submitted a recommended decision to the Commission dated March 24, 1995. In this decision, the hearing examiner opined, with respect to Count 3, that "it would be difficult for the Respondent [Walker] to be in Hinton, West Virginia, on the date and time indicated in the submitted travel documents." Finding "no evidence in this record to dispute that the Respondent [Walker] did not go to Hinton, West Virginia, on November 25, 1992, as reflected on his Itinerary and Travel Expense Account Settlement," the hearing examiner concluded that "[i]t is clear, from the evidence presented, that on November 25, 1992, the Respondent

[Walker] was in Beckley, West Virginia." Accordingly, the hearing examiner found that "the record contains sufficient evidence beyond a reasonable doubt to support a material violation of West Virginia Code § 6B-2-5(b)[(1)] as contained in Count 3 of the Statement of Charges."

Likewise, with respect to Count 5, the hearing examiner noted:

Although the amount of money involved in this transaction was small, nevertheless, the conduct of the Respondent [Walker] was the type the West Virginia Ethics Act was enacted to prevent. The evidence submitted clearly shows that the Respondent [Walker] used his office as District Supervisor for the private gain of another, namely, Thomas Hurley.

Thus, the hearing examiner recommended that "[t]he record contains sufficient evidence beyond a reasonable doubt to support a material violation of West Virginia Code § 6B-2-5(b)[(1)]" with regard to Count 5 of the statement of charges. By final decision entered May 4, 1995, the Commission affirmed the hearing examiner's recommendations finding that Walker had violated the Ethics Act as charged in Counts 3 and 5.[(14)]

On June 5, 1995, Walker filed a petition for appeal in the Circuit Court of Raleigh County. The circuit court issued a memorandum opinion on May 17, 1996. With respect to Count 3, the court affirmed the Commission's decision finding that Walker had violated the Ethics Act. The circuit court determined that the Commission properly decided that the evidence submitted as to Count 3 was sufficient to overcome Walker's Rule 50 motion for a directed verdict. In the same manner, the court concluded that the investigative panel properly complied with the forty-five-day time limit contained in W. Va. Code § 6B-2-4(d) (1990) (Repl. Vol. 1993).[(15)] The court construed this provision as requiring the Panel to "proceed to consider," or commence a review of, the complaint allegations, any response, and additional evidence within forty-five days of mailing to the respondent the notice of investigation, but not mandating that the investigation be completed within this time frame.

By contrast, the circuit court rejected the Commission's finding as to Count 5 and dismissed this Count for procedural reasons. First, the court noted W. Va. Code § 6B-2-4(v) (1990) (Repl. Vol. 1993), which recites "[t]he provisions of this section shall apply to violations of this chapter occurring . . . within one year before the filing of a complaint under subsection (a) of this section[.]" In this regard, the court recognized that the events alleged in Count 5 occurred in October, 1992, and were recited in a verified complaint filed March 31, 1993; yet the investigative panel did not meet to consider adding Count 5 until March 3, 1994, and the statement of charges containing Count 5 was not filed until April 12, 1994.[(16)] Thus, the court ruled:

The record is clear that the investigative panel was not appointed as to Count [5] nor was the complaint filed as to Count [5] within one year of the violation. Respondent [the Commission] argues that the filing of the complaint on March 31, 1993, is timely as to Count [5] because it was later amended to include Count [5]. That argument would be

persuasive if the original complaint put Walker on notice that he would have to defend the allegations stated in Count [5], but it did not. The first formal statement of charges as to Count [5] was filed on April 12, 1994, following the convening of a panel for that purpose on March 3, 1994.

Thus, the court determined that the Commission's decision as to Count 5 should be reversed because Count 5 was not timely filed pursuant to W. Va. Code § 6B-2-4(v). By order entered June 14, 1996, the circuit court incorporated its earlier memorandum opinion affirming the Commission's decision as to Count 3 and reversing the Commission's decision as to Count 5. It is from these rulings of the circuit court that both parties appeal to this Court.

II. DISCUSSION

Before this Court, the Commission appeals the circuit court's ruling dismissing, on procedural grounds, Count 5 of the statement of charges, which concerned Walker's knowing approval of a subordinate's falsified travel expense form. The Commission assign as error the circuit court's interpretation of the applicable statute of limitations contained in W. Va. Code § 6B-2-4(v). Walker appeals that portion of the circuit court's decision that affirms the Commission's prior finding that Walker had committed the ethics violations alleged in Count 3 of the statement of charges, which charged Walker with the falsification of a travel expense form. Walker raises the following assignments of error: (1) the Commission improperly relied upon evidence obtained illegally by an unlicensed private investigator; (2) the Commission improvidently determined the procedural course of Count 3; (3) the Commission failed to abide by the statutory time periods prescribed by W. Va. Code § 6B-2-4(d) and W. Va. Code § 6B-2-4(*l*); and (4) the circuit court utilized the wrong standard of review in affirming the Commission's prior order as to Count 3.[(17)] Following a brief discussion of the appropriate standard of appellate review, we will address the parties' contentions.

A. Standard of Review

In West Virginia, various administrative agencies and commissions have been established to oversee particularized areas of governmental functioning. Included within the statutory authority of these agencies is the power to hear and decide matters within an agency's specific field of expertise and to render final decisions in these disputes. *See* W. Va. Code §§ 29A-5-1 to -3 (1964) (Repl. Vol. 1993). *See also* Syl. pt. 1, *Appalachian Power Co. v. Public Serv. Comm'n*, 170 W. Va. 757, 296 S.E.2d 887 (1982) ("The Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine.").

Once an agency has issued an order, the aggrieved party is permitted to request judicial review of the adverse decision. W. Va. Code § 29A-5-4(a) (1964) (Repl. Vol. 1993). Upon appeal to the appropriate circuit court,

[t]he court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1964) (Repl. Vol. 1993). Clarifying the extent of a circuit court's review of an agency decision, we previously have explained that:

[A] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts. *Anderson v. City of Bessemer City*[*, N.C.*], 470 U.S. 564, 57[3]-7[4], 105 S. Ct. 1504, 1511-12, 84 L. Ed. 2d 518, 528[-29] (1985).

Frank's Shoe Store v. West Virginia Human Rights Comm'n, 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986). In this manner,

"the task of the circuit court is to determine 'whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 824, 28 L. Ed. 2d 136, 153 (1971)[(citations omitted)]. However, these deferential standards have no application if an agency's decision is based upon a mistaken impression of the legal principles involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.

West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996).

Following the entry of a final order by the circuit court, further appeal may be had to this Court:

Any party adversely affected by the final judgment of the circuit court under this chapter [State Administrative Procedures Act] may seek review thereof by appeal to the supreme court of appeals of this state, and jurisdiction is hereby conferred upon such court to hear and entertain such appeals upon application made therefor in the manner and within the time provided by law for civil appeals generally.

W. Va. Code § 29A-6-1 (1964) (Repl. Vol. 1993). In this regard, we have defined the scope of appellate review of a circuit court order as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995) (citation omitted).

Accordingly,

"[i]n reviewing the judgment of the lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, *Burks v. McNeel*, 164 W. Va. 654, 264 S.E.2d 651 (1980).

Syllabus, *Bolton v. Bechtold*, 178 W. Va. 556, 363 S.E.2d 241 (1987) (per curiam). We now apply these principles to our evaluation of the parties' contentions.

B. Issue raised by the Commission respecting Count 5 (knowing approval of subordinate's falsified travel expense form): The circuit court incorrectly interpreted the applicable statute of limitations contained in W. Va. Code § 6B-2-4(v).

The Commission argues that the circuit court erroneously interpreted the applicable statute of limitations. W. Va. Code § 6B-2-4(v) (1990) (Repl. Vol. 1993) states "[t]he provisions of this section shall apply to violations of this chapter occurring . . . *within one year before the filing of a complaint under subsection (a) of this section*[.]" (Emphasis added). Thus, the Commission suggests that, strictly construing the applicable statute of limitations, the circuit court's opinion that the statute of limitations had expired prior to the issuance of the second statement of charges was erroneous.

The Commission notes further that its actions complied with this statutory time frame. In the proceedings below, the verified complaint was filed on March 31, 1993, and contained information, alleging perceived transgressions involving both Walker and Hurley, which later formed the basis of Count 5. Consequently, Walker had timely notice of the Count 5 allegations involving Hurley because they were contained in the verified complaint, itself.

Walker responds that the circuit court properly found that the Commission failed to file Count 5 within the one-year statute of limitations. The court noted that "[t]he statement of charges as to Count [5] was filed on April 12, 1994," which pertained to "misconduct that occurred in the month of October, 1992." Given that the alleged violations occurred in October, 1992; that the statute of limitations requires a complaint to be filed within one year of the alleged violations; and that the statement of charges containing Count 5 was not issued until April, 1994, more than one year after the alleged violations occurred, Walker contends that the circuit court correctly determined that the Commission had not filed this charge within the applicable statute of limitations.[(18)]

With this assignment of error, we are requested to interpret the statute of limitations within which a verified complaint must be filed with respect to particular allegations of ethics violations. As set forth above, a plain reading of W. Va. Code § 6B-2-4(v) (1990) (Repl. Vol. 1993) requires a verified complaint to be filed "within one year" of the commission of the alleged ethics violation(s) to which it relates. *See, e.g.,* Syl. pt. 3, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Protection*, 191 W. Va. 134, 443 S.E.2d 602 (1994) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." (Citations omitted).). We recently have reiterated that statutes of limitations should be strictly construed to preserve their intended effect: to timely provide notice that litigation has been commenced against the named individual. *See Perdue v. Hess*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 10 (No. 23745 Feb. 21, 1997) (noting that "[d]efendants have a right to rely on the certainty the statute [of limitations] provides" (citations omitted)).

In the proceedings below, Walker's co-workers filed the verified complaint on March 31, 1993, generally describing perceived transgressions by both Walker and Hurley. Following a general statement charging Walker with "using [his] position[] for personal gain," the relevant portion of the verified complaint alleges: "Mr. Hurley, while on salary, routinely files false itineraries and charges the Agency mileage for trips he does not make. Mr. Walker approves Mr. Hurley's itineraries and expense accounts and certainly is aware of Mr. Hurley's indiscretions. Mr. Walker also is guilty of falsifying his itineraries and expense accounts." The parties do not contest that this complaint sufficiently apprised Walker of the charges contained in Counts 1-4, which suggest that he failed to report for work on certain enumerated days and did not account for these absences via annual leave or leave without compensation. Nonetheless, Walker contests, and the circuit court so found, that the above-quoted statement did not place him on notice as to the charges in Count 5, alleging his knowing approval of Hurley's falsified travel expense form. Surprisingly, the dispute regarding appropriate notice and compliance with the applicable statute of limitations centers around that Count which the verified complaint more clearly alleges and establishes. The primary purpose of a statute of limitations being notice to the charged party of impending litigation, we find that Walker certainly had notice of the charges in Count 5 upon receipt of the verified complaint.

More particularly, a strict reading of the applicable statute of limitations also suggests that the Commission complied with the applicable statutory time period. As previously noted, the verified complaint in this case, which contained general allegations of unethical behavior by both Walker and Hurley, was filed on March 31, 1993. Count 5 alleged that Walker had engaged in unethical behavior in October, 1992. Pursuant to the applicable statute of limitations, conduct described in the verified complaint had to occur within the one-year period preceding the date the complaint was filed. Accordingly, conduct occurring as early as March, 1992, could have been referred to in this complaint. Thus, the October, 1992, conduct alleged in Count 5, which occurred within the twelve months immediately preceding the complaint's filing date, was well within the statute of limitations for the March 31, 1993, verified complaint. Consequently, we find that the circuit court erroneously determined that the Commission had not complied with the applicable statute of limitations in dismissing, for procedural reasons, Count 5 of the statement of charges. Therefore, we reverse that portion of the circuit court's order procedurally barring Count 5 and remand that count to the Circuit Court of Raleigh County for a decision on the merits of Walker's appeal from the Commission's ruling thereon.

C. Issues raised by Walker with respect to Count 3 (falsification of travel expense form)

1. The Commission improperly relied upon evidence obtained illegally by an unlicensed private investigator.

Walker first argues that the Commission's reliance upon the testimony of Morgan, an unlicensed private investigator employed by Walker's co-workers, mandates dismissal of Count 3. W. Va. Code § 30-18-8(a) (1994) (Supp. 1996) specifically states that "[n]o person shall engage in the private investigation business . . . without having first obtained from the secretary of state a license to conduct such business." In the same manner, employment as a private investigator, while being unlicensed so to act, is a misdemeanor punishable by a fine of up to $5,000 and a jail sentence of up to one year. W. Va. Code § 30-18-11(a) (1994) (Supp. 1996). Thus, Walker urges that "the use of illegally obtained evidence to further the goal of ethics in government is a moral oxymoron of the highest order. It is simply unseemly to use such evidence in pursuit of fostering ethical values." Accordingly, he requests this Court to dismiss all charges against him in order to manifest disapproval with the Commission's tactics.

The Commission responds that the fact that Walker's co-workers illegally obtained evidence by hiring Morgan does not support a reversal of this case. *See State v. Oldaker*, 172 W. Va. 258, 304 S.E.2d 843 (1983) (holding evidence unlawfully seized by a citizen, acting in a purely private capacity, is not subject to the exclusionary rule); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) (ruling that constitutional protections against unreasonable searches and seizures apply only to state and federal governments and not to private individuals). Because co-workers, and not the Ethics Commission, itself, hired Morgan to follow Walker, the Commission contends that the hearing examiner's decision to permit Morgan's testimony was not in error as the evidence was obtained by private, rather than state, actors.

We note initially that, at the time of the events forming the basis of the instant appeal, W. Va. Code § 30-18-1 (1960) (Repl. Vol. 1993)[(19)] prohibited engagement in private investigations without a license:

No person . . . shall engage in the business of private detective or investigator . . . or in the business of furnishing or supplying information as to the personal character or activities of any person . . . or as to the character or kind of business and occupation of any person . . . for fee, hire, or reward . . . without having first obtained from the office of the secretary of state a license so to do[.]

Furthermore, W. Va. Code § 30-18-8 (1959) (Repl. Vol. 1993) directed:

Any person . . . who shall engage in the business of private detective as defined in section one [§ 30-18-1] without having first obtained a license as required under this article . . . shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

The record in the case *sub judice* suggests that Morgan, who was employed by Walker's co-workers to observe Walker's whereabouts in preparation for their filing of the verified complaint, was not licensed to work as a private investigator. Consequently, Walker urges this Court to reverse the hearing examiner's, Commission's, and circuit court's findings as to Count 3, claiming that without Morgan's information, the Commission would not have been able to prove that he committed the acts alleged in that Count.

Notwithstanding the disfavor with which we view the Commission's apparent reliance upon such evidence, we are unable to render a decision on the merits of this contention. Our well-established practice has required us, on many previous occasions, to decline to determine an issue raised by the parties because that issue had not been passed upon by the circuit court. *See, e.g., Kronjaeger v. Buckeye Union Ins. Co.*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 34-35 (No. 23829 July 11, 1997) (declining to determine issue on appeal that had not been finally decided by circuit court); *Trumka v. Clerk of Circuit Court of Mingo County*, 175 W. Va. 371, 374-75, 332 S.E.2d 826, 830 (1985) (stating that "the issue was . . . not passed upon by the circuit court" and that "[t]his ordinarily forecloses our review of the issue" (citations omitted)). The case presently before us is, unhappily, one such case. A review of the circuit court's memorandum opinion indicates that, although Walker had raised the issue of the unsavory testimony of an unlicensed private investigator in his petition for appeal before the circuit court, that court did not determine or otherwise render a final ruling with respect to this matter.

Despite our inability to resolve this issue on the merits, we nevertheless wish to take this opportunity to caution the Ethics Commission upon the utilization of, and reliance upon, evidence that has been obtained by allegedly unlawful methods. The fact that we decline further review of this alleged error does not signify that we approve or in any way condone the Commission's actions in using evidence that, under certain

circumstances, would constitute a criminal offense. Rather, we emphasize that the Ethics Commission, which is charged with monitoring the conduct of state employees to ensure that their behavior conforms with the West Virginia Governmental Ethics Act, should hold itself to at least as high a level of ethical behavior as the level required of those employees whose conduct it oversees.

2. The Commission improvidently determined the procedural course of Count 3.

In sum, Walker's third contention is that the Commission improvidently determined the procedural course of Count 3. In this manner, Walker complains that the Commission erroneously remanded Count 3 to the hearing examiner; the hearing examiner improperly reversed his original decision as to Count 3; and the Commission incorrectly adopted the hearing examiner's second recommended decision as to Count 3.

First, Walker states that the Commission had no power to remand Count 3 to the hearing examiner. In this regard, Walker asserts that the Commission's powers are definitely determined by statute, and, in the absence of any statutory authority to remand, the Commission exceeded the scope of its permissible authority. *See* Syl. pt. 3, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973) (holding, in part, that administrative agencies "must find within the statute warrant for the exercise of any authority which they claim"). *See also State Human Rights Comm'n v. Pauley*, 158 W. Va. 495, 497, 212 S.E.2d 77, 78 (1975) (providing that "an administrative agency . . . can exert only such powers as those granted by the Legislature"). Walker also contends the Commission cannot claim it has an implied authority to remand because its permissible powers are very intricately described in its governing statutes.

The Commission counters that remand was proper. In the proceedings below, the Commission rejected the hearing examiner's recommendation to dismiss Count 3 because it found that certain critical pieces of evidence had not been evaluated. The Commission then remanded this Count so that Walker could present evidence on his own behalf as Count 3 had been dismissed at the close of the Commission's case-in-chief. Accordingly, the Commission replies that it had the authority, as the ultimate fact finder, to remand the case in order to assure the reviewing court that the Commission had considered all proposed findings. *See Pauley*, 158 W. Va. at 498, 212 S.E.2d at 78-79 (defining authority of administrative agency as including reasonable and necessary implied powers).

Second, Walker proposes that the hearing examiner erred, upon remand, by reversing his original decision as to Count 3 because no additional dispositive evidence regarding this Count was presented at the remand hearing. Walker insists that the only evidence presented as to Count 3 during the second hearing tended to support his contention that he did, in fact, travel to Hinton on November 25, 1992. Because the Commission did not present additional evidence regarding Count 3 and because the hearing examiner earlier dismissed Count 3 either because the Commission had not established a prima facie case of an ethics violation or because the Commission's evidence did not prove,

beyond a reasonable doubt, that Walker had committed the acts alleged in Count 3, the hearing examiner erroneously reversed his prior dismissal of this Count. The Commission disputes Walker's contentions that the evidence was insufficient to support the hearing examiner's decision on remand.

Third, and last, Walker asserts that the Commission erred by adopting the hearing examiner's final recommendation as to Count 3. Walker argues that the hearing examiner improperly determined that "there is no evidence in this record to dispute that [Walker] did not go to Hinton, West Virginia, on November 25, 1992[.]" Rather, Walker contends that the evidence suggests that he could, in fact, have traveled to Hinton on the day in question. The Commission maintains that its decision to adopt the hearing examiner's final recommendation as to Count 3 was proper and amply supported by the record evidence.

With the presentation of these issues, the parties essentially request us to determine the extent of the Commission's authority to remand a case for redetermination by the hearing examiner and the power of the hearing examiner and the Commission to issue further decisions in the matter after it has been remanded. We have generally recognized that:

[A]n administrative agency . . . can exert only such powers as those granted by the Legislature[,] and . . . if such agency exceeds its statutory authority, its action may be nullified by a court. A further sound principle of law . . . is that an administrative agency possesses, in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act[.]

. . . .

"An administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted, that is, those powers which are necessarily, or fairly or reasonably, implied as an incident to the powers expressly granted."

Pauley, 158 W. Va. at 497-98, 212 S.E.2d at 78-79 (citations omitted) (quoting 1 Am. Jur. 2d *Administrative Law* § 44). Expounding upon these principles, we have held, in Syllabus point 1, in part, of *Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review*:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

188 W. Va. 418, 424 S.E.2d 763 (1992) (citations omitted). Despite the inescapable link between an agency's authority and the legislative statutes enumerating its powers,

though, there are certain circumstances in which an agency may perform a function that is implied, but not specifically permitted, by statute. In this regard, we have stated that:

Although an express grant of powers will be determined to include such other powers as are necessarily or reasonably incident to the powers granted, the powers should not be extended by implication beyond what may be necessary for their just and reasonable execution.

Walter v. Ritchie, 156 W. Va. 98, 108, 191 S.E.2d 275, 281 (1972) (citations omitted).
In the case *sub judice*, the Commission's actions in deciding a case are delineated, in part, by W. Va. Code § 6B-2-4 (1990) (Repl. Vol. 1993). While no general power to remand is articulated in this provision, subsection (u) grants the Commission the authority to remand the matter for further proceedings "[i]f the commission determines that a criminal violation has not occurred[.]" W. Va. Code § 6B-2-4(u) (1990) (Repl. Vol. 1993). Thus, the Commission definitely has the power to remand within the narrow context of cases in which no criminal violation has been found.

It is well-recognized, though, that administrative agencies have a broader authority to remand matters for further proceedings before a hearing examiner, even if such authority is not specifically listed in the agency's statutory powers. This implied power to remand is necessary for the agency to render a full and complete decision on the matters which it is statutorily empowered to decide. *See* 2 Am. Jur. 2d *Administrative Law* § 375 (1994) ("An agency has the power to remand a case to a hearing officer to obtain additional evidence on specified issues, for an explanation of the reasons underlying the decision, or for further proceedings. Such a remand may be for a limited purpose, without the need to completely reopen the hearing." (Footnotes omitted).).

Given the extensive power granted to the Ethics Commission, by W. Va. Code § 6B-2-4, to commence investigations of alleged ethics violations, conduct hearings, and to render final decisions, it is apparent that the Commission has the inherent power to enter orders which may, on occasion, necessitate the remand of the case to the hearing examiner for further proceedings. In fact, the implied power of an administrative agency to remand is a necessary accompaniment to its statutory authority to make final determinations in contested matters. Accordingly, we hold the West Virginia Ethics Commission has the authority to remand cases to a hearing examiner for further proceedings in accordance with the Commission's directives, regardless of whether such authority has been specified in the statutes establishing the powers and duties of the Commission. Finding the Commission properly remanded this matter to the hearing examiner, we decline to address Walker's remaining contentions as to the propriety of the hearing examiner's ruling upon remand or the Commission's acceptance of this recommended decision.

3. The Commission failed to abide by the statutory time periods prescribed by W. Va. Code § 6B-2-4(d) and W. Va. Code § 6B-2-4(l)

Walker additionally claims that the Commission failed to comply with the forty-five-day time periods provided by W. Va. Code § 6B-2-4(d) and W. Va. Code § 6B-2-4(*l*). W. Va. Code § 6B-2-4(d) (1990) (Repl. Vol. 1993) requires:

Within the forty-five day period following the mailing of a notice of investigation, the investigative panel *shall proceed to consider* (1) the allegations raised in the complaint, (2) any timely received written response of the respondent, and (3) any other competent evidence gathered by or submitted to the commission which has a proper bearing on the issue of probable cause.

(Emphasis added). Although Walker raised this issue in the circuit court, the court refused this argument finding that "proceed to consider" is satisfied so long as the investigative panel has commenced its investigation within this time period. Walker disagrees with this characterization and contends that the investigation should be completed within this time period. *See State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977) (construing "proceed").

Walker argues further that the Commission failed to abide by another forty-five day requirement, namely: "[t]he final decision of the commission shall be made by the commission members who have not served as members of the investigative panel *in writing within forty-five days* of the receipt of the entire record of a hearing held before a hearing examiner[.]" W. Va. Code § 6B-2-4(*l*) (1990) (Repl. Vol. 1993) (emphasis added). *See also* 11A W. Va. C.S.R. § 158-3-15.5 (1993) (same). Walker represents that the hearing examiner submitted the record to the Commission, following the first hearing, on August 22, 1994. However, the Commission did not render a final decision in this matter until May 4, 1995.

The Commission replies that it did not violate either forty-five day time limit. In this regard, the Commission indicates that it satisfied the forty-five day rule that the investigative panel "proceed to consider" the complaint allegations and other evidence, as required by W. Va. Code § 6B-2-4(d). Disagreeing with Walker's interpretation of this provision, the Commission proposes that this statute requires that the investigation merely be started within this time period.

Likewise, the Commission maintains that it complied with the decisional time period mandated by W. Va. Code § 6B-2-4(*l*). The Ethics Commission has the authority to enact rules to clarify the legislative statutes governing the Commission. One of these rules, 11A W. Va. C.S.R. § 158-3-17.1 (1993), provides that the entire administrative record includes: the hearing transcript or recording; all exhibits introduced into evidence during the hearing; all documents filed; and "the proposed decisions *and any briefs submitted by the parties*." (Emphasis added). The Commission claims that it did not receive the entire record in this case until it received the transcript of the second hearing before the hearing examiner *and* the parties' briefs. It contends that it received the

Commission's brief in support of the recommended decision on April 10, 1995, and that Walker decided not to file a brief. Because the final decision, rendered May 4, 1995, was within forty-five days of the receipt of the record in its entirety, the forty-five day rule was not violated.

At issue in this assignment of error is whether the Commission complied with the applicable time periods in its case management of Count 3. The first relevant statutory provision, W. Va. Code § 6B-2-4(d) (1990) (Repl. Vol. 1993) directs the investigative panel to "proceed to consider" the complaint allegations, the response of the respondent, and any other evidence regarding probable cause which the panel has before it, within forty-five days of the date on which the commission notifies the respondent of the pending investigation. Walker contends that the language "proceed to consider" connotes that the investigative panel conclude its investigation within the prescribed time period. With Walker's characterization of this provision, we simply cannot agree.

As we have recited so many times before,

"'[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968)." Syllabus point 1, *Courtney v. State Dept. of Health of West Virginia*, 182 W. Va. 465, 388 S.E.2d 491 (1989).

Syl. pt. 3, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Protection*, 191 W. Va. 134, 443 S.E.2d 602. Upon reviewing the statutory language before us, we conclude that the language employed in W. Va. Code § 6B-2-4(d) is clear and without ambiguity. The word "proceed" is commonly used in legal parlance to signify the commencement or beginning of a particular action. *See, e.g.,* William C. Burton, Legal Thesaurus 408, 896 (deluxe ed. 1980); Bryan A. Garner, Dictionary of Modern Legal Usage 680 (2d ed. 1995). *See also* 8 Oxford English Dictionary 1406-07 (1970); Random House Dictionary of the English Language 1542 (2d ed., unabridged 1987); Webster's New Collegiate Dictionary 910 (1979). In this manner, the circuit court correctly interpreted the plain meaning of "proceed to consider" when it commented that "[t]hat phrase requires the Commission to begin, but not necessarily to complete, its consideration of the complaint, the response, and the evidence available to it, within forty-five days." Therefore, because the record evidence suggests that the investigative panel did, in fact, commence its consideration of the evidence before it within forty-five days of the Commission's notice to Walker, we find that the Commission did not violate this statutory time period.

Walker also claims that the Commission failed to issue a final decision within forty-five days of receiving the entire record in violation of W. Va. Code § 6B-2-4(*l*) (1990) (Repl. Vol. 1993). We similarly find this contention to be without merit. W. Va. Code § 6B-2-4(k) (1990) (Repl. Vol. 1993) provides that "[t]he recording of the hearing or the transcript of testimony, as the case may be, and the exhibits, together with all papers and requests filed in the proceeding, and the proposed findings of fact of the hearing

examiner and the parties, constitute the exclusive record for decision by the commission[.]"[(20)]

A review of the record in this case indicates that the Commission issued its final decision within the requisite time constraints. Pursuant to W. Va. Code § 6B-2-4(k), the exclusive record includes the hearing examiner's proposed findings of fact. In the proceedings below, the hearing examiner held a consolidated hearing as to the remand determination of Count 3 and the initial evaluation of Count 5. The hearing examiner thereafter issued a recommended decision of this hearing on March 24, 1995,[(21)] and forwarded a copy of this decision to the Commission on that same date. Within forty-five days of this mailing date, which is not necessarily the same as the date on which the Commission received this recommendation, the Commission rendered its final decision in this matter on May 4, 1995. Thus, the Commission properly complied with this provision.

4. The circuit court utilized the wrong standard of review in affirming the Commission's prior order as to Count 3.

Walker asserts finally that the circuit court erroneously concluded that Rule 50 of the West Virginia Rules of Civil Procedure, which the hearing examiner apparently believed was the basis for Walker's motion for a directed verdict during the first hearing, governed a review of the underlying proceedings because the case had previously been disposed of on Rule 50 grounds. As a result, the circuit court, analogizing the proceedings to a civil case, reviewed the Commission's findings of fact for an abuse of discretion and applied a *de novo* review to the Commission's conclusions of law.

Walker contends, though, that the administrative proceedings before the circuit court were not governed by the Rules of Civil Procedure, but rather by 11A W. Va. C.S.R. § 158-1-1 (1990),[(22)] which governs the Commission's administration and enforcement of the Ethics Act. *See also Broomfield v. Jackson*, 18 Va. App. 854, 858, 447 S.E.2d 880, 882 (1994) (stating generally that "rules of civil procedure do not apply to administrative proceedings unless the rules specifically so provide" (citations omitted)). Walker represents that the West Virginia Rules of Civil Procedure do not state that they apply to administrative proceedings. Likewise, W. Va. Code § 6B-2-4 (1990) (Repl. Vol. 1993), governing Ethics Commission proceedings, is silent as to the applicability of the Rules of Civil Procedure. Accordingly, the underlying administrative proceedings were more akin to a criminal case because the Commission was required to "find[] by evidence beyond a reasonable doubt" that the party against whom charges had been filed had committed the alleged ethics violations. W. Va. Code § 6B-2-4(q) (1990) (Repl. Vol. 1993). As such, the proper review of the case should have been the standard enunciated in Syllabus point 2, in part, of *State v. Broughton*, 196 W. Va. 281, 470 S.E.2d 413 (1996): "Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. . . . [T]he question is *whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt*." (Emphasis added; citations omitted). Thus, Walker maintains that the proper standard was whether the Commission had presented

"substantial evidence" to establish, beyond a reasonable doubt, that Walker had committed the ethics violations charged in Count 3.

On the other hand, the Commission suggests that the circuit court acted within the proper scope of judicial review of an administrative agency's decisions. A court may set aside an agency's findings of fact only if such findings are clearly or plainly wrong. *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). In the same manner, a reviewing court may not reverse an agency's findings merely because the court would have decided the case differently. *Frank's Shoe Store v. West Virginia Human Rights Comm'n*, 179 W. Va. at 56, 365 S.E.2d at 254. The Commission asserts that the circuit court properly applied this standard in affirming the Commission's decision with respect to Count 3: the record evidence established, beyond a reasonable doubt, that Walker had committed the ethics violations contained in Count 3.

We note at the outset the well-reasoned approach to discerning the applicable standard of review proposed by Walker. Nevertheless, we find that the circuit court did not utilize the wrong standard of review in ruling upon the parties' appeals from the final decision of the Ethics Commission. As we noted in Section II.A., above, a circuit court reviewing an agency decision has the discretion to affirm the agency order or to remand the matter for further proceedings. W. Va. Code § 29A-5-4(g) (1964) (Repl. Vol. 1993). In addition, the circuit court must reverse the agency decision if the "substantial rights of the petitioner or petitioners have been prejudiced" as a result of various enumerated acts by the agency, including rendering an order that is "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record" or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.*

We have explained the scope of the circuit court's review of an agency decision seizing upon the "'clearly wrong'" and "'arbitrary and capricious'" standards delineated by statute. *West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. at 334-35, 472 S.E.2d at 419-20. In employing these standards, the "reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision." *Frank's Shoe Store v. West Virginia Human Rights Comm'n*, 179 W. Va. at 56, 365 S.E.2d at 254 (citation omitted). More simply stated, "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. at 292, 387 S.E.2d at 527 (citations omitted).

Turning now to the record of the circuit court proceedings in the present case, we conclude that the circuit court did not err in reviewing the Commission's final decision under an abuse of discretion/clearly erroneous/*de novo* standard of review as enunciated in *Phillips v. Fox*, 193 W. Va. 657, 458 S.E.2d 327 (1995), because the *Phillips* standard is analogous to the standard required by W. Va. Code § 29A-5-4(g). The circuit court enunciated that the standard by which the Commission should have reviewed the hearing examiner's second recommended decision mirrored the appellate standard of review of circuit court orders set forth by this Court in *Phillips v. Fox*:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

193 W. Va. at 661, 458 S.E.2d at 331 (citation omitted). Similarly, as noted above, W. Va. Code § 29A-5-4(g) commands the circuit court, when reviewing an agency's final order, to consider whether the agency abused its discretion in rendering the decision; to ascertain whether the agency's final determination was clearly wrong given the record evidence; and to determine whether any errors of law affected the decision.

In the proceedings below, the circuit court evaluated the Commission's review of the hearing examiner's second recommended decision employing the *Phillips* standard. By separately evaluating the Commission's rulings as to factual findings and legal conclusions, the circuit court necessarily followed a similar approach itself in reviewing the Commission's final decision. As this method of review parallels the standard set forth in W. Va. Code § 29A-5-4(g), the circuit court employed an appropriate standard of review in evaluating the parties' contentions as to Count 3. Accordingly, we find no error in this regard.

III. CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the decision of the Circuit Court of Raleigh County and remand this case for further proceedings consistent with this opinion.

Affirmed in part, Reversed in part, and Remanded with Instructions.

1. During the administrative proceedings before the West Virginia Ethics Commission, the Ethics Commission was the complainant, and Joseph Larry Walker was the respondent. Following the administrative hearings, Walker's appeal to the Circuit Court of Raleigh County caused the parties to be titled procedurally as the petitioner (Walker) and the respondent (the Commission). Before this Court, each party has filed an appeal, rendering each party the appellant in its respective appeal; because each party also has filed a response to the opposing party's appellate brief, each party also is nominated the appellee with regard to its respective challenges. Accordingly, for ease of reference, the parties hereinafter will be referred to as "Walker" and "the Commission."

2. During oral argument before this Court, counsel for Mr. Walker indicated that Walker is no longer employed in his prior position. Walker's present employment is not relevant to the matters before this Court.

3. *See* W. Va. Code § 6B-1-3(h) (1989) (Repl. Vol. 1993) (defining "public employee").

4. *See generally* W. Va. Code § 6B-1-2 (1989) (Repl. Vol. 1993) (reciting purpose of West Virginia Governmental Ethics Act).

5. *See* W. Va. Code § 6B-2-1 (1994) (Supp. 1996) (creating West Virginia Ethics Commission); W. Va. Code § 6B-2-2 (1989) (Repl. Vol. 1993) (describing Commission's "general powers and duties").

6. W. Va. Code § 6B-2-4(a) (1990) (Repl. Vol. 1993) (providing for the "filing by any person with the commission of a complaint which is duly verified by oath or affirmation").

7. *Id.*

8. W. Va. Code § 6B-2-4(f) (1990) (Repl. Vol. 1993).

9. W. Va. Code §§ 6B-2-4(j), (*l*) (1990) (Repl. Vol. 1993).

10. Thomas Hurley, a subordinate of Walker, was employed as the branch office manager for the Beckley DRS district office.

11. W. Va. Code § 6B-2-5(b)(1) (1992) (Repl. Vol. 1993) states, in pertinent part: "(b) *Use of public office for private gain.* --- (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person."

12. Specifically, the conciliation agreement contained the following findings of fact implicating Walker:

4. On or about October 20, 1992, Mr. Hurley submitted an Itinerary for travel, Form WVDRS-01, which indicated that on October 29, 1992, he would spend the entire workday on a trip to the Welch Branch office.

5. Mr. Hurley's Itinerary was approved on October 26, 1992, by his Supervisor, Joseph L. Walker, even though Mr. Walker knew that Mr. Hurley did not intend to take the trip to Welch on October 29, 1992.

. . . .

8. Subsequent to submitting his October, 1992, Travel Expense Account Settlement, *Mr. Hurley received and cashed a check drawn on an account containing public monies for the full amount requested, including the expenses for the October 29 [sic] trip to Welch he did not take, with the knowledge and approval of his Supervisor, Joseph L. Walker.*

. . . .

10. The reason the trip to Welch was not taken on October 29, 1992, and Mr. Hurley claimed a reimbursement therefor was to help defray the costs of an Open House held at the Beckley office of the Division of Rehabilitation Services on October 15, 1992. The Open House at the Beckley office of the Division of Rehabilitation Services was to exhibit the newly remodeled offices as an example of compliance with the aid to Americans with Disabilities Act. Guests were by invitation and included doctors and other professionals, along with public officials. The cost of the reception was Five Hundred Sixty and 00/100 Dollars ($560.00) [sic] and there were not sufficient funds budgeted from the State of West Virginia to defray all the costs. The State of West Virginia paid Five Hundred and 00/100 Dollars ($500.00) toward the expenses. *The additional Sixty and 00/100 Dollars ($60.00) of excess expenses for the cost of the reception were defrayed by Mr. Hurley and his Supervisor, Joseph L. Walker, from their personal finances.* The reimbursement [of $28.60] from the trip to Welch on October 29, 1992, which was not taken [sic] was to pay back Mr. Hurley for personal funds he expended for the benefit of the Beckley office of the Division of Rehabilitation Services[.]

(Emphasis added). The record suggests that Walker approached Hurley and solicited him to contribute thirty dollars to the above-described budget shortage. Apparently, Walker further hinted to Hurley that he, Hurley, could recoup his personal contribution by submitting the fraudulent travel reimbursement forms for his non-existent trip to Welch.

13. For the applicable text of W. Va. Code § 6B-2-5(b)(1), see *supra* note 11.

14. For the violations contained in Count 3, the Commission sanctioned Walker by publicly reprimanding him "for accepting reimbursement for mileage claimed for a trip . . . even though he did not make such a trip"; ordering him "to cease and desist from accepting reimbursement for trips which he does not take"; requiring him "to pay to the State of West Virginia[] restitution in the amount of $13.00"; and imposing "a fine in the amount of $1,000." With respect to the violations of Count 5, the Commission sanctioned Walker by way of public reprimand ("for approving a Travel Expense Settlement form relating to a trip which he knew was not taken"); an order to cease and desist ("from approving Travel Expense Settlement Forms for trips which are not taken"); and a $500 fine.

15. W. Va. Code § 6B-2-4(d) (1990) (Repl. Vol. 1993) mandates:

Within the forty-five day period following the mailing of a notice of investigation, the investigative panel shall proceed to consider (1) the allegations raised in the complaint, (2) any timely received written response of the respondent, and (3) any other competent evidence gathered by or submitted to the commission which has a proper bearing on the issue of probable cause[.]

16. It should be noted that the circuit court erroneously stated that "[t]he Complaint that contained Counts [1] through [4] was filed in March 1993." A review of the verified complaint in this matter demonstrates that the complaint, itself, was not divided into

counts. Rather, Counts 1 through 4 did not exist until Walker was charged with these violations in the statement of charges dated October 12, 1993.

17. We have reviewed the remaining assignments of error asserted by the parties and decline to address them as being without merit. In this regard, we further dismiss any error alleged with respect to the Commission's statement of charges containing Counts 1, 2, and 4 because such error, if it in fact exists, has been rendered harmless by the Commission's dismissal of these charges pursuant to Walker's motion for a directed verdict thereon.

18. In further support of his position, Walker attempts to analogize the Commission's subsequent issuance of the statement of charges containing Count 5 either to W. Va. R. Civ. P. 15, relating to the amendment of pleadings, citing *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 287, 445 S.E.2d 219, 228 (1994), or to the amendment of an indictment, given the allegedly quasi-criminal nature of ethics proceedings, citing *United States v. Castellano*, 610 F. Supp. 1359, 1380 (S.D.N.Y. 1985). Because we are able to resolve this issue based solely upon an interpretation of the relevant statutory language, we decline to discuss these arguments.

19. Walker asserts that W. Va. Code § 30-18-8(a) (1994) (Supp. 1996) renders unlicensed private investigation a criminal offense and that W. Va. Code § 30-18-11(a) (1994) (Supp. 1996) supplies the penalties for this misdemeanor. A review of the applicable statutory provisions, though, indicates that these statutes were not in effect at the time of the underlying proceedings. Accordingly, the statutes previously in effect, which created this crime and established the accompanying penalties, govern our resolution of this issue. *See* W. Va. Code § 30-18-1 (1960) (Repl. Vol. 1993) (defining crime of unlicensed private investigation); W. Va. Code § 30-18-8 (1959) (Repl. Vol. 1993) (enumerating punishments for misdemeanor offense of unlicensed private investigation).

20. The Commission alternatively suggests that reference to 11A W. Va. C.S.R. § 158-3-17 (1993) is necessary to discern the contents of the "entire record." This legislative rule more specifically designates the components of the "entire record": "The exclusive record for decision is: the transcript or recording of testimony at the hearing; exhibits introduced into evidence at the hearing; all documents filed in the proceeding, [sic] and the proposed decisions and any briefs submitted by the parties. 11A W. Va. C.S.R. § 158-3-17.1 (1993) (internal numbering omitted). However, because this regulation was adopted after the underlying proceedings had been commenced, we conclude that it does not govern our decision of this case.

21. At this juncture, we note that, under the regulations currently in effect, the decision of the hearing examiner in this case would have been untimely. *See* 11A W. Va. C.S.R. § 158-3-15.2 (1993) (providing that "[t]he hearing examiner has forty five [sic] (45) days from receipt of the proposed findings and conclusions from the parties to issue his or her recommended decision"). However, because this regulation was not in effect at the

time of the underlying proceedings and because the parties do not raise this issue, we decline to further address this matter.

22. Upon consulting 11A W. Va. C.S.R. § 158-1-1 (1990), we have been unable to establish which particular subsection Walker relies upon for this argument. A brief review of this provision demonstrates that it governs generally the "practice and procedure" to be followed by the Ethics Commission in carrying out its statutory duties, but does not provide any specific guidance for circuit court review of the Commission's final decisions.

231 W. Va. 108, 743 S.E.2d 919

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2013 Term

No. 12-0973

FILED
May 24, 2013
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: Walter G.

Appeal from the Circuit Court of Preston County
Honorable Lawrance S. Miller, Jr.
Civil Action No. 12-JA-6

REVERSED

Submitted: April 17, 2013
Filed: May 23, 2013

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The opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

2. "'W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.' Syllabus point 1, [in part], *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981)." Syl. Pt. 2, in part, *In re Bryanna H.*, 225 W.Va. 659, 695 S.E.2d 889 (2010).

Per Curiam:

This matter is before this Court upon the appeal of an Adjudicatory Hearing Order of the Circuit Court of Preston County, West Virginia, entered on July 19, 2012, finding that the petitioner and respondent below, Brittany S.,[1] neglected her twin infant children, Walter G. and Joseph G., by failing to provide them with appropriate supervision on January 26-27, 2012, leading to the death of Joseph G. Following a six-day adjudicatory hearing, the circuit court concluded that the surviving twin, Walter G., is a neglected child and that it is contrary to his welfare to reside with the petitioner in her home. On appeal, the petitioner contends that the circuit court committed error in its adjudicatory finding that Walter G. was a neglected child.[2]

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[1]We follow our traditional practice in child abuse and neglect matters and other cases involving sensitive facts and refer to the parties by their first names and last initials only. *See State ex rel. W.Va. Dept. of Human Resources v. Yoder*, 226 W.Va. 520, 522 n.1, 703 S.E.2d 292, 294 n.1 (2010); *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 226 n.1, 470 S.E.2d 177, 180 n.1 (1996).

[2]On appeal, the petitioner also sought the immediate legal and physical custody of Walter G. and the implementation of a parenting plan between her and the child's biological father. The biological father is not a party to the instant appeal.

On April 8, 2013, pursuant to Rule 11(j) of the West Virginia Rules of Appellate Procedure, the guardian *ad litem* filed an update on both the status of Walter G. and the instant abuse and neglect proceeding, indicating that the petitioner successfully completed her post-adjudicatory improvement period and that Walter G. was returned to her legal and physical custody. The petitioner and the biological father also executed a parenting plan which provided for frequent and regular visitation between the minor child and his father. The abuse and neglect proceeding against the petitioner was dismissed. Therefore, the only issue before this Court is whether the circuit court erred in adjudicating Walter G. a neglected child.

I. Factual and Procedural Background

The following relevant facts, which were elicited during the course of the adjudicatory hearing in this matter, are, for the most part, not in dispute. The petitioner, Brittany S., is the biological mother of twins Joseph G. and Walter G., who were born on February 5, 2011. At all times relevant, the twins resided with the petitioner and her boyfriend, Tony A., at the petitioner's home in Preston County. Also residing in the home were the petitioner's brother, Joshua S., and his girlfriend, Brandy H.

The petitioner is a certified nursing assistant employed full time at a nursing home located approximately fifteen minutes from her home. She regularly works a 3:00 p.m. to 11:00 p.m. shift. On January 26, 2012, Tony A.'s father and sister watched the twins beginning at 2:30 p.m.[3] During the course of the afternoon, several other members of Tony A.'s family arrived at the petitioner's home, where they prepared and ate dinner and fed the twins. It is undisputed that the children spent most of the afternoon playing in the living room area, which was set off from the rest of the house by baby gates.

Tony A. arrived home from work at approximately 5:00 p.m. By 6:00 p.m., Tony A. and the twins were there alone. The petitioner testified that Tony A. always took

[3]Ordinarily, the petitioner's mother, Kathy S., babysat the twins while the petitioner was at work; however, Kathy S. was unable to babysit that day due to her own work schedule.

good care of them. Tony A. testified that, other than preparing their bottles in the kitchen, he watched the twins in the living room the entire evening while he sat in a recliner and watched television. He further testified that while he fed Walter his bottle at approximately 10:30 p.m., Joseph pushed a bag of baby wipes around on the floor and, at one point, fell asleep. Tony A. testified that he did not find this to be unusual because, prior to that evening, Joseph had been falling asleep in his "bouncer." Joseph awakened and Tony A. fed him a bottle between 10:30 p.m. and 10:45 p.m. Because they had stuffy noses and some congestion, he administered .2 cc of Benadryl to each of them.[4] He then put the children to bed, each in his own crib.

[4]The twins' pediatrician, Dr. Elizabeth J. Neely, testified that they received their first set of flu shots on December 9, 2011. When they were seen on December 12, 2011, for their nine-month check-up, they were suffering from ear infections and upper respiratory symptoms and were prescribed antibiotics. She retreated their ear infections on January 18, 2012, noting they still had some coughing and nasal drainage. On January 25, 2012, two days before Joseph's death, the twins' eyes, ears and lungs were sufficiently clear to be given their second flu shot. Dr. Neely testified that congestion and cough can linger after an infection clears and that her notes indicated that Joseph continued to have a "little bit of a stuffy nose at that point" and that both children were teething. She testified that although she did not make a written notation prescribing Benadryl, she indicated that she routinely recommends it for coughs and nasal congestion. Dr. Neely further testified that "loose coughs show up at night . . . [s]o if there had been some residual loose cough it wouldn't have been inappropriate to give the Benadryl at bedtime." In addition to Benadryl, the petitioner ran a humidifier in the twins' bedroom to help alleviate their symptoms. Finally, Dr. Neely testified that she had no concerns about the quality of care the petitioner gave the twins. To the contrary, she stated they were "[v]ery well cared for[;] [v]ery happy[;] [v]ery happy children" and that the petitioner was fully involved in their treatment and care.

When the petitioner arrived home at 11:15 p.m., the twins were already asleep. The petitioner testified that she sat in the living room and asked Tony about the boys. According to the petitioner, "nothing he told me was unusual for that night." Although Tony mentioned to her that Joseph had fallen asleep on the floor, the petitioner testified that she did not find it to be unusual because the twins had previously begun to fall asleep on their own. It is undisputed that the petitioner did not check on the twins before she and Tony went to bed at approximately 11:30 p.m.[5] The petitioner testified that if the children were already asleep in their cribs when she arrived home from work, she usually did not enter their bedroom to check on them because if one of them were to awaken, it would cause the other one to awaken, too.

The following morning, Walter awakened between 9:00 a.m. and 9:15 a.m., at which time Tony A. took him out of his crib. When the petitioner went into the twins' room to then check on Joseph, she saw that his face was blue and his body was stiff. When the petitioner screamed for help, someone in the home called 911; the petitioner's mother, Kathy S., was also called because she is a nurse and lives just across the field from the petitioner's home. Kathy S. attempted to revive Joseph until emergency medical personnel arrived; however, he was already dead.

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[5]Joshua S., the petitioner's brother, and Brandy H., his girlfriend, who had gone out for the evening, arrived home shortly thereafter. They also went to bed at approximately 11:30 p.m.

According to the testimony of Dawn Spears, Preston County Medical Examiner/Coroner, who arrived at the petitioner's home the morning of Joseph's death after being notified by Preston County 911, she observed vomit on the bedding in Joseph's crib. In an Unexplained Infant/Early Childhood Death Investigation Report prepared by Ms. Spears in connection with her investigation of Joseph's death, she reported that the vomit contained two pieces of what appeared to be "black vinyl" matching the material of the sofa in the living room of the home.[6]

Approximately one month later, toxicology tests determined that Joseph's cause of death was the ingestion of buprenorphine,[7] also known by the proprietary name of

[6]The petitioner had a black imitation leather sofa in her living room, which was given to her and Tony A. by his father. The petitioner testified that the sofa had rips in it when they got it and that, over time, the rips had gotten larger from use and that pieces of the sofa would sometimes fall to the ground. Both she and Tony testified that the twins would sometimes put things in their mouths that they picked up off the floor. The petitioner further testified that she tried to keep the sofa covered in blankets to keep the twins from picking at it.

[7]Buprenorphine is available in sublingual dissolvable pill form, which is orange in color and, according to Dr. Hamada Mahmoud, Deputy Chief Medical Examiner in the West Virginia Office of the Chief Medical Examiner, a child could easily mistake it for candy. Buprenorphine is also available in a transdermal patch, as an injection (for children), and in the form of a film which dissolves on the tongue. Dr. James Kraner, Chief Toxicologist inthe Chief Medical Examiner's office, testified that it was difficult to determine how much of the drug the child ingested but that a single two milligram tablet could have produced the level found in Joseph's body upon death.

Suboxone, with diphenhydramine (Benadryl) adding to its adverse effects.[8] Buprenorphine is an opiate derivative prescribed to treat drug addiction and is sometimes prescribed for pain. It is also known to be abused as a street drug. Dr. Hamada Mahmoud, Deputy Chief Medical Examiner of the West Virginia Office of the Chief Medical Examiner, testified that the time of Joseph's death was estimated at approximately 7:00 a.m. on January 27, 2012, with ingestion of the buprenorphine occurring between 6:00 p.m. and midnight the previous evening.

It is undisputed that neither Joseph nor Walter had a prescription for buprenorphine. It is further undisputed that the petitioner did not have a prescription for this drug nor was there any evidence that she ever abused it or any other prescription drug. After the toxicology report was issued, the petitioner underwent a court-ordered drug screen, which was negative for buprenorphine as well as for all of the other substances for which she was screened. According to Tina Krentz, the petitioner's supervisor at the nursing home where she worked, the petitioner's mandatory pre-employment drug screen was negative.[9]

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[8]Dr. Kraner testified that although diphenhydramine (Benadryl) is an accepted medication for children of Joseph's age, it had an adverse additive effect in this case when ingested with the buprenorphine, causing Joseph to stop breathing.

[9]The petitioner began employment at the nursing home on May 4, 2011. Ms. Krentz testified that additional drug testing is conducted on employees only when there is a suspicion that there is a substance abuse problem. She further testified that the petitioner has never been required to undergo additional drug testing. According to Ms. Krentz's testimony, the petitioner does not have access to drugs at the nursing home and (continued...)

The petitioner testified that she was shocked to learn that Joseph's cause of death was the lethal ingestion of buprenorphine. She further testified that she did not know anyone who used the drug and had no information as to how the drug would have been accessible to her children. It is undisputed that she was very cooperative with the police and Child Protective Services ("CPS") investigations into Joseph's death. According to CPS worker Lawrence Taylor, CPS had no prior referrals or reports involving the petitioner or her family. Mr. Taylor testified that there was no indication that the petitioner has a drug problem and that, in this case, the department was exclusively concerned with where the buprenorphine originated and that it "could . . . have something to do with the caretakers" of the twins.

Furthermore, there was no evidence that any of the other people then living in the petitioner's home–Tony A., Joshua S. (the petitioner's brother) and Brandy H.[10] (Joshua's girlfriend)–had a prescription for buprenorphine or otherwise abused it. Similarly, there was no evidence that any of the other people at the petitioner's home on the day preceding Joseph's G.'s death were either using or abusing buprenorphine or any other drug.

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[9](...continued)
buprenorphine is not used by any of the residents there. Ms. Krentz indicated that the petitioner is an excellent employee who is well liked by the nursing home residents.

[10]Like the petitioner, Brandy H. was a certified nursing assistant and was employed at the same nursing home where the petitioner worked. Her employment supervisor, Ms. Krentz, testified that Brandy's pre-employment drug screen was negative. Ms. Krentz further testified that she had never seen Brandy under the influence of drugs.

During the course of the investigation,[11] it was learned that, one to two years prior to Joseph's death, Tina C., Tony A.'s sister who, along with Tony A.'s father, babysat the twins the day before Joseph's death, had a prescription for Suboxone. However, she told investigators that she had stopped taking it because it made her ill.[12] The petitioner testified that she was unaware that Tina C. ever had a prescription for Suboxone and was further unaware of the reasons for which it was prescribed until after the toxicology report in this matter was disclosed. Ultimately, neither the investigations by law enforcement and CPS nor the petitioner's own inquiries into Joseph's death were able to determine how Joseph ingested the drug or where it originated.

On February 28, 2012, the West Virginia Department of Health and Human Resources ("DHHR") filed an Imminent Danger Petition pursuant to West Virginia Code § 49-6-1, et seq., alleging that Walter G. was a "neglected and/or abused child" based upon the death of Joseph G. resulting from a "lethal ingestion of Suboxone." The circuit court ordered immediate transfer of the legal and physical custody of the child to the DHHR pending a preliminary hearing. Walter G. was placed with his maternal grandparents. On March 7,

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[11]It is undisputed that everyone who was present at the petitioner's home on January 26, 2012, was very cooperative with the police and CPS investigations into Joseph's death.

[12]Tina C. was prescribed Suboxone after she had attempted suicide. She was prescribed the drug in the dissolvable strip form. There is no evidence that Tina C. had a prescription for Suboxone at the time of Joseph's death, or that she was otherwise illegally abusing the drug.

2012, the petitioner waived her right to a preliminary hearing and the circuit court found that the best interests of Walter G. would be served by remaining in the temporary custody of the DHHR with continued placement in the home of the maternal grandparents. The petitioner was granted liberal visitation. It is noted that during the pendency of the abuse and neglect proceedings against the petitioner, Tony A., Joshua S., and Brandy H. all moved out of the petitioner's home.

At a hearing conducted on April 27, 2012, the circuit court denied the petitioner's motion for a three-month pre-adjudicatory improvement period. As previously indicated, adjudicatory proceedings were conducted over a course of six days during which the facts set forth above were elicited.[13] In an Adjudicatory Hearing Order entered July 19, 2012, the circuit court found that the petitioner "neglected her twin infant children, including Walter [G.], by failing to provide them with appropriate supervision on January 26-27, 2012, leading to the death of Joseph [G.], and posing an imminent danger to the health and/or well-being of his surviving twin, Walter [G.]." The circuit court concluded that the death of

[13]During the course of the adjudicatory proceedings, the prosecuting attorney moved to withdraw as counsel for the DHHR based upon his belief that there was not enough evidence to go forward. The prosecuting attorney's position was in conflict with that of his client, the DHHR, which sought to pursue the matter. Ultimately, the circuit court denied the motion to withdraw and ordered the prosecuting attorney to continue to represent the DHHR pursuant to *In re Ashton M.*, 228 W.Va. 584, 723 S.E.2d 409 (2012) (holding that in civil abuse and neglect proceedings, DHHR is client of county prosecutors and prosecutor had duty to represent DHHR's recommendation of termination of custodial and parental rights).

Joseph G. "was a result of a non-accidental oral ingestion of buprenorphine (Suboxone) as combined with diphenhydramine (Benadryl)" and that

> the failure of the [petitioner] or anyone to check on the children[14] and the [petitioner's] failure to have a responsible caregiver constitutes neglect to provide appropriate supervision when taken in the context of the uncontroverted testimony that the children were ill, had just received their second flu shot the day before, were being administered Benadryl, and that Joseph had fallen asleep while playing, which was an unusual event for him. The Court also notes and FINDS that the presence of black material in Joseph's vomit is believed by the parties to have been from the peeling, cracked naugahyde couch in the living room, supports the conclusion that inadequate supervision was provided on January 26, 2012, because the parties conceded, in all probability, that Joseph consumed pieces of the naugahyde while being watched by [Tony A.]. The Court further FINDS the death of Joseph unexplained, but according to the medical examiner, due to the oral ingestion of buprenorphine, which was accessible to the children on January 26, 2012.

(footnote added). It is from this order that the petitioner now appeals.

II. Standard of Review

This Court has stated that "'[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against

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[14]The circuit court emphasized that after Tony gave the twins Benadryl and put them to bed, "he did not check on them for the remainder of the night." The circuit court further emphasized that the petitioner "returned home from work at approximately 11:15 p.m., but she testified that she did not check on the twins until awakened by the surviving twin, Walter, at approximately 9:30 a.m. the next morning."

a clearly erroneous standard.' *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000)." *In re Gordon G.*, 216 W.Va. 33, 36, 602 S.E.2d 476, 479 (2004). Additionally, in syllabus point one of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 225-26, 470 S.E.2d 177, 179-80 (1996), this Court held the following:

> Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

See Gordon G., 216 W.Va. at 36, 602 S.E.2d at 479. We now apply this standard of review to the case *sub judice*.

III. Discussion

A. Non-Accidental Ingestion

At the outset, we address the circuit court's conclusion that Joseph's death "was a result of a *non-accidental* oral ingestion of buprenorphine (Suboxone) as combined with diphenhydramine (Benadryl)." (Emphasis added). We find this conclusion–which

clearly suggests that Joseph's ingestion of the drug was intentional–to be contrary to the evidence. In fact, there was no evidence whatsoever presented below that even remotely suggested that the ingestion was intentional. Moreover, during oral argument, the DHHR conceded that the facts herein do not support such a conclusion and surmised that, in all likelihood, the circuit court mistakenly included this finding in its order. Be that as it may, we are mindful that "[i]t is a paramount principle of jurisprudence that a court speaks only through its orders." *Legg v. Felinton*, 219 W.Va. 478, 483, 637 S.E.2d 576, 581 (2006). *See State v. White*, 188 W.Va. 534, 536 n.2, 425 S.E.2d 210, 212 n.2 (1992) ("[H]aving held that a court speaks through its orders, we are left to decide this case within the parameters of the circuit court's order." (citations omitted)); *State ex rel. Erlewine v. Thompson*, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973) ("A court of record speaks only through its orders[.]" (citations omitted)). Accordingly, this Court concludes that, given the facts of this case, the circuit court clearly erred in its conclusion that Joseph's death was caused by a non-accidental ingestion of buprenorphine.

B. Appropriate Supervision

Next, we address the primary issue in this appeal: Whether the circuit court clearly erred in concluding that the petitioner neglected her children, including Walter G., by failing to provide appropriate supervision on January 26-27, 2012.

West Virginia Code § 49-1-3(11)(A) (2009) (Supp. 2012) defines a "neglected child" as a child:

> (i) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or
>
> (ii) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian[.]

The petitioner argues that the circuit court's factual findings do not support its conclusion that she neglected her children on January 26-27, 2012, by failing to have a responsible caregiver for them and by failing to check on them after she returned home from work. The petitioner further contends that her conduct did not constitute a lack of proper supervision which warranted a finding that Walter G. is a "neglected child" as that term is defined by West Virginia Code § 49-1-3(11)(A). However, the DHHR and the guardian *ad litem* contend that the circuit court did not err in finding that Walter G. was a neglected child by virtue of the petitioner's failure to supervise. At issue, therefore, is whether there was sufficient proof leading to the circuit court's conclusion that the petitioner neglected her child, Walter G.

This Court has previously held as follows:

> "W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Health and Human Resources], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.'" Syllabus point 1, [in part], *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. Pt. 2, in part, *In re Bryanna H.*, 225 W.Va. 659, 661, 695 S.E.2d 889, 891 (2010). As indicated above, the circuit court concluded, in relevant part, that

> [t]he failure of the [petitioner] or anyone to check on the children and the [petitioner's] failure to have a responsible caregiver constitutes neglect to provide appropriate supervision when taken in the context of the uncontroverted testimony that the children were ill, had just received their second flu shot the day before, were being administered Benadryl, and that Joseph had fallen asleep while playing, which was an unusual event for him.

Based upon our appellate review of all of the evidence, this Court is of the opinion that the circuit court's adjudicatory finding of neglect was not based upon clear and convincing evidence and was, therefore, clearly erroneous. *See Tiffany Marie S.*, 196 W.Va. at 225-26, 470 S.E.2d at 179-80, syl. pt. 1. The adjudicatory hearing transcript indicates that, contrary to the circuit court's conclusion that it was "an unusual event" for Joseph to have fallen asleep on the floor, both the petitioner and Tony A. testified that, in fact, they were *not* concerned because the boys had previously begun falling asleep on their own. The petitioner specifically testified that "nothing [Tony] told me was unusual for that night." Furthermore, although the children had previously been ill, Dr. Neely testified that their eyes, ears, and

lungs were sufficiently clear to be able to receive their flu shots on January 25, 2012. There was no evidence that the shots caused the twins to suffer any ill effects or that their lingering coughs and stuffy noses were of particular concern.

The evidence further established that, prior to and including the date of Joseph's death, the petitioner was an attentive mother who was fully committed to the welfare of her children. The twins' pediatrician, Dr. Neely, testified that the petitioner brought them in for regular medical check-ups and vaccinations and sought medical attention for them when they were ill. In her objective opinion, the petitioner was a very involved mother and that the children appeared to be happy and well cared for.[15]

Additional evidence adduced during the adjudicatory proceedings demonstrated that Tony A. routinely watched the children after he arrived home from work at 5:00 p.m. and that, prior to Joseph's death, the petitioner had no reason to believe that he was not an appropriate caregiver. Indeed, she testified that he always took good care of the children. Importantly, the DHHR offered no evidence to the contrary.

[15]Furthermore, the petitioner's supervisor at the nursing home where the petitioner is employed testified that she is an excellent employee who is well liked by the residents.

With regard to the hours preceding Joseph's death, the evidence showed that on January 26, 2012, after everyone left the home at approximately 6:00 p.m., Tony A. attended to the twins in the living room the entire evening. He admitted to leaving them alone briefly to make their bottles in the kitchen. He testified that he fed Joseph a bottle between 10:30 p.m. and 10:45 p.m. He also administered Benadryl to each child in the appropriate dosage for treatment of their lingering stuffy noses and congestion. Tony A. put the twins to bed and they were asleep before the petitioner arrived home from work shortly thereafter, at approximately 11:15 p.m.

When the petitioner arrived home from work, she asked Tony A. about the boys and, as indicated above, he told her that nothing unusual had occurred. Although she did not check on the twins before going to bed at 11:30 p.m. (less than one hour after Tony A. had placed them in their cribs), there is no medical evidence that if she had checked on Joseph, that it would have prevented his death, which, according to expert medical testimony, did not occur until approximately 7:00 a.m. the following morning. The petitioner testified that, as a matter of course, if the twins were already asleep in their cribs when she arrived home from work, she did not enter their bedroom to check on them because if one of them were to awaken, it would cause the other one to awaken, too.

This Court is mindful that Joseph's death was caused by the lethal ingestion of a narcotic, the source of which has never been uncovered. There was no evidence, however, that either the petitioner or Tony A. used or had access to buprenorphine or that the petitioner had reason to believe that anyone living in or visiting her home on January 26, 2012, was either using or abusing it.[16] Investigations by police and CPS, and the petitioner's own inquiries into where the drug originated and how Joseph was able to ingest it, were unsuccessful. It is clear, therefore, that the petitioner could not have foreseen that her children would either have access to or accidentally ingest buprenorphine while under Tony A.'s care or at anytime.

In consideration of all of the above, this Court finds that the circuit court clearly erred in concluding that Walter G. was a neglected child. In so holding, we are cognizant that "[a]lthough parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect . . . must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 82, 479 S.E.2d 589, 592 (1996). Indeed, "'[t]he best interests of the child is the polar star by which decisions must be made which affect children.' *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989)

[16]As previously established, the petitioner learned *after* the toxicology report was disclosed that Tina C., Tony A.'s sister, had been prescribed Suboxone one to two years earlier. According to the police investigation and the petitioner's own inquiries, Tina C. stopped taking the medication because it made her ill. There was no evidence that Tina C. was using buprenorphine at the time of Joseph's death.

(citation omitted)." *In re Isaiah A.*, 228 W.Va. 176, 182, 718 S.E.2d 775, 781 (2010). *See In re Amber Leigh J.*, 216 W.Va. 266, 272, 607 S.E.2d 372, 378 (2004) ("Of course, [in abuse and neglect cases] the best interests of the child are paramount." (internal quotations and citation omitted)). In this case, the circuit court, the DHHR, and the guardian *ad litem* clearly endeavored to protect the health, safety, and welfare of Walter G. following the death of his brother, Joseph G., by instituting the instant proceedings. In removing Walter from the home and granting the petitioner an improvement period, the circuit court was then able to evaluate the petitioner's fitness as a parent. Ultimately, the circuit court correctly reunified Walter with his mother and dismissed the abuse and neglect proceedings against her. However, in reviewing the entire record on appeal, this Court concludes that there was no clear and convincing evidence to support the circuit court's adjudicatory finding of neglect in the first instance.[17]

[17]Finally, we note that the Adjudicatory Hearing Order refers to *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993), and several of its progeny, which held that parental rights may be terminated where there is clear and convincing evidence of physical abuse of a child while in the custody of a parent and where it is unlikely the conditions of abuse can be corrected "because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." 190 W.Va. at 25-26, 435 S.E.2d at 163-64, syl. pt. 3, in part. *See also In re Kaitlyn P.*, 225 W.Va. 123, 127, 690 S.E.2d 131, 135 (2010); Syl. Pt. 2, *In re Danielle T.*, 195 W.Va. 530-31, 466 S.E.2d 189-90 (1995). Our review of the circuit court's order clearly indicates that the court referred to these cases only to the extent that the DHHR relied on them in support of its position below and that its finding of neglect was not based upon the failure to identify the source of the buprenorphine.

IV. Conclusion

For the reasons stated herein, the Adjudicatory Hearing Order entered July 19, 2012, is hereby reversed.

Reversed.

200 W. Va. 627, 490 S.E.2d 714

Supreme Court Of Appeals Of West Virginia

IN RE: WILLIAM JOHN R., DANA R., AND SIDNEY L., JR.

No. 23888
Submitted: June 24, 1997
Filed: July 11, 1997

SYLLABUS BY THE COURT

1. "When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." Syl. pt. 1, McCormick v. Allstate Insurance Company, 197 W. Va. 415, 475 S.E.2d 507 (1996).

2. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. pt. 3, In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996).

3. "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest." Syl. pt. 5, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995).

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Per Curiam:
This case is before this Court upon an appeal from the final decision of the Circuit Court of Marshall County, West Virginia, entered on June 25, 1996. This case concerns the improvement period granted to the appellant, Evelyn R., following an adjudication that she had abused and neglected her two minor children, William John R. and Dana R. See footnote 1 Pursuant to the final order, the circuit court terminated the improvement period and granted permanent guardianship of the children to the West Virginia Department of Health and Human Resources (hereinafter "Department").

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. Upon a careful consideration of the record, and for the reasons stated below, this Court holds that the circuit court acted within its discretion in terminating the improvement period and granting permanent guardianship of the children to the Department. Moreover, based upon the representation of counsel to this Court concerning the commitment of the Kanawha County foster parents to the children, we further hold that William John R. and Dana R. be permanently placed in that foster home, i.e., the home of Mr. and Mrs. M., where the children have resided since 1994, subject to the periodic monitoring by the Department as required by law. In addition, however, this Court remands this case to the circuit court upon the question of visitation between the appellant and the children.

I.

The appellant is the natural mother of William John R., born on February 26, 1988, and Dana R., born on September 12, 1989. The appellant, the children and her husband Sidney L., Sr., lived in Moundsville, West Virginia. The appellant's step-child, Sidney L., Jr., the son of Sidney L., Sr., also lived in the home.

Both William John R. and Dana R. are "special needs children." Both children are mildly mentally retarded or impaired. Moreover, William John R. has been diagnosed with attention deficit/hyperactivity disorder. Dana R., on the other hand, has been diagnosed with post-traumatic disorder symptoms (arising from a history of child abuse) and behavioral problems. Consequently, as the record indicates, both children are in need of continuing, specialized care. Unfortunately, the appellant also suffers from significant mental problems, including mild mental retardation, various personality disorders, depression and anxiety.

On February 17, 1994, following the monitoring of the family for some period of time, the Department filed a petition in the circuit court alleging that the appellant and her husband had abused and neglected William John R., Dana R. and Sidney L., Jr. W. Va. Code, 49-6-1 [1992]. Upon review, the circuit court granted temporary custody of the children to the Department, appointed counsel for the appellant and her husband and appointed a guardian ad litem to represent the children. Soon after, the appellant and her husband separated, and divorce proceedings were instituted. As a result, Sidney L., Jr., was allowed to remain with his father, and they were, ultimately, dismissed from the proceedings. See footnote 2

In March 1994, the circuit court granted the appellant a pre-adjudicatory improvement period and supervised visitation with William John R. and Dana R. At that time, the two children were in foster care in the Moundsville area. However, in September 1994, William John R. and Dana R. were moved to a foster home in Kanawha County, West Virginia, where they began to receive specialized care concerning their special needs. The moving of the children to Kanawha County placed them several hours drive from the appellant. As a result, the opportunities for visitation between the appellant and her children were significantly reduced. Weekly visits between the appellant and her two children became monthly visits.

Thereafter, in August 1995, the circuit court conducted an adjudicatory hearing upon the abuse and neglect petition. W. Va. Code, 49-6-2 [1992]. During the hearing, the evidence indicated (1) that the appellant, her husband, and the children exercised little or no personal hygiene in the home, See footnote 3 (2) that the children were not adequately fed, (3) that the home was dirty, roach infested, and had dog feces and urine upon the floor, (4) that the appellant had, on one occasion, struck Dana R. with a stick and (5) that, on other occasions, the appellant had, according to Dana, burned her with a cigarette and pulled out a section of Dana's hair. In addition, evidence was adduced at the hearing to the effect that, in one instance while at preschool, Dana displayed knowledge of sexual matters inappropriate for her age.

Following the adjudicatory hearing, the circuit court, on September 14, 1995, entered an order finding that the appellant and her husband had abused and neglected William John R. and Dana R. An appeal to this Court from that order was refused on May 29, 1996. W. VA. Code, 49-6-2(e) [1992].

In November 1995, the circuit court granted the appellant a post-adjudicatory improvement period, over the objection of the Department and the guardian ad litem. In addition, the circuit court directed the Department to develop a family case plan concerning the appellant and her children, and the Department was

further directed to locate an appropriate foster home for William John R. and Dana R. "as close as possible" to Moundsville.

Subsequently, the circuit court entered an order in February 1996 stating that the Department should continue in its effort to locate local, specialized foster care for the children. In that order, however, the circuit court observed that "there is no appropriate foster placement in this area at this time, to meet the children's needs." Thereafter, the guardian ad litem moved to terminate the post-adjudicatory improvement period, and, in May and June 1996, the circuit court conducted evidentiary hearings.

The testimony received in evidence during those hearings was adduced from two witnesses, i.e., Shawna Bowles, a child therapist, and Dr. Charles William Hewitt, a clinical psychologist. Ms. Bowles, who had observed the appellant with the children, indicated that the appellant did not possess the skills necessary to work with William John R. and Dana R. More specifically, Dr. Hewitt, who had evaluated the appellant in March 1994 and in April 1996, indicated that no amount of parenting classes or on-the-job training could enable the appellant to independently manage the children. Consequently, according to Dr. Hewitt, it would be "in the best interest of the children to go into permanent guardianship with visits with their mother." Indicating that William John R. and Dana R. were "getting better," Dr. Hewitt testified that "[t]he important thing is to just be sensible about adapting the visiting schedule with the realities of where the child is placed."

Following the May and June 1996 hearings, the circuit court entered the final order of June 25, 1996. Although observing that the Department had failed to develop the family case plan previously ordered, the circuit court found "no reasonable likelihood" that William John R. and Dana R. could be reunited with the appellant. As a result, the circuit court terminated the post-adjudicatory improvement period and granted permanent guardianship of the children to the Department. In addition, the circuit court, without elaboration, ordered the Department to provide visitation between the appellant and the children. Although permanent guardianship was granted to the Department, the circuit court did not specifically terminate the appellant's parental rights to William John R. and Dana R.

In May 1997, this Court entered an order directing that the children not be moved from their Kanawha County placement, pending this appeal.

II.

In syllabus point 1 of In the Interest of: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996), this Court held that, although conclusions of law are subject to

a de novo review, a circuit court's findings of fact, in a child abuse and neglect case, shall not be set aside unless clearly erroneous. See also syl. pt. 1, State ex rel. Virginia M. v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996). In this case, however, the issue of whether abuse and neglect occurred is not before this Court in this appeal. That issue was adjudicated by the circuit court in 1995, and, as indicated above, an appeal from a finding of abuse and neglect was refused by this Court in May 1996. Rather, the issue before us concerns the termination of the appellant's subsequent improvement period and the granting of permanent guardianship to the Department of Health and Human Resources. Therefore, we acknowledge the more general standard of review, comparable to that expressed in Tiffany Marie S., set forth in syllabus point 1 of McCormick v. Allstate Insurance Company, 197 W. Va. 415, 475 S.E.2d 507 (1996):

> When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

See also State v. Jarvis, ___ W. Va. ___, ___, 483 S.E.2d 38, 43 (1996).

As stated above, the circuit court, in terminating the improvement period, found "no reasonable likelihood" that William John R. and Dana R. could be reunited with the appellant. As provided in W. Va. Code, 49-6-5(a)(6) [1992], permanent custody or guardianship of an abused or neglected child may be granted to the Department "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child [.]" In particular, W. Va. Code, 49-6-5(b) [1992], states:

> As used in this section, 'no reasonable likelihood that conditions of neglect or abuse can be substantially corrected' shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse and neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances, which shall not be exclusive:
>
> . . . .
>
> (6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper

> parenting skills or sufficiently improving the adequacy of such skills.

In this case, the appellant contends that the granting of permanent guardianship of William John R. and Dana R. to the Department constituted error because, inasmuch as her contact with the children necessarily diminished after they were moved to Kanawha County, she was denied a meaningful improvement period. Specifically, citing State ex rel. Department of Human Services v. Cheryl M., 177 W. Va. 688, 356 S.E.2d 181 (1987), the appellant suggests that, in the absence of compelling circumstances, she was entitled to a more appropriate improvement period as a matter of right. See footnote 4 On the other hand, contending that the rights of the appellant were subordinate to the interests of her children, the guardian ad litem asserts (1) that it is undisputed that William John R. and Dana R. are "special needs children" requiring specialized care, (2) that the move to Kanawha County was in the children's best interests and (3) that the appellant could never, under any circumstances, independently manage them. Thus, citing In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991), the guardian ad litem indicates that the circuit court was not compelled to "exhaust every speculative possibility of parental improvement" prior to granting permanent guardianship to the Department. See footnote 5 The Department contends before this Court that the equities require either the restoration of the appellant's improvement period or the granting of meaningful visitation to the appellant.

Recently, in syllabus point 3 of In re Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996), this Court held: "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Here, the circuit court acknowledged that the placement of William John R. and Dana R. in specialized foster care in Kanawha County significantly reduced the contacts between the children and the appellant during both the pre-adjudicatory and post-adjudicatory improvement periods. Moreover, the circuit court noted that the Department of Health and Human Resources failed to develop the family case plan previously ordered. See footnote 6 Clearly, those circumstances have been detrimental to the appellant in this case. However, as the guardian ad litem correctly points out, it is undisputed that William John R. and Dana R. are "special needs children." Importantly, as the record before us demonstrates, those children are currently receiving in Kanawha County the continuing, specialized care they need. As the circuit court observed in 1996: "[T]here is no appropriate foster placement in this [Moundsville] area at this time, to meet the children's needs." An examination of the record reveals that the Department made attempts to locate an appropriate, local foster home throughout the history of this litigation.

Moreover, the evidence indicates that the appellant suffers from an "emotional illness, mental illness or mental deficiency of such duration or nature as to render . . . [her] incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills" within the meaning of W. Va. Code, 49-6-5(b) [1992]. The appellant has been diagnosed with significant mental problems, including mild mental retardation, various personality disorders, depression and anxiety, and, as stated above, Dr. Hewitt indicated that no amount of parenting classes or on-the-job training could assist her with regard to the children. See footnote 7 In fact, during oral argument before this Court, the guardian ad litem stated that the appellant could not grasp the concept of the nurturing parent, and counsel for the appellant acknowledged that the appellant needs help concerning the children. As stated above, the family had been monitored by the Department prior to the filing of the abuse and neglect petition in February 1994. As the April 29, 1996, report of Dr. Hewitt explains:

> [The appellant] can take care of her everyday adaptive needs, including personal hygiene, most of the time, but she is easily exploitable and needs someone to take care of her money. When she isn't supervised she sometimes neglects her personal hygiene. . . . Her memory processes are consistent with mild mental retardation, she has a poor sense of time, and she is an unreliable reporter of many important events in her life, and she certainly doesn't report abuse and neglect matters accurately or with any meaningful insight. . . . Her children have special needs, but special needs aside, she is not able to independently manage the ordinary needs of her children or any other children. . . . [I]n spite of the bonding, the children are, in their own way, requesting protection from their mother, though they do not articulate their concerns maturely. . . . Because of [the appellant's] irremediable difficulties related to child rearing, and because there is a significant bond between [the appellant] and her children, and because [the appellant's] children need to be protected and their special needs managed, it is recommended that the children be placed in permanent foster care, that [the appellant] be allowed periodic visits with them, and that the children be told in therapy that they will be in permanent care and allowed to have contact with their mother [.]

Although this Court does not sanction the reduction in contacts between the appellant and William John R. and Dana R., occasioned by the placement of those children in Kanawha County, and does not sanction the failure to develop a family case plan, it is clear that the childrens' special needs are currently being addressed in Kanawha County (in the absence of an appropriate foster home in the Moundsville area) and the appellant, as well, has special needs within the meaning

of W. Va. Code, 49-6-5(b) [1992], rendering her incapable of adequately parenting the children. The circumstances herein, thus, lead this Court to the inexorable conclusion that the avenues of justice, in this difficult case, were not narrowed by the final order of June 25, 1996. Accordingly, this Court is of the opinion that the circuit court acted within its discretion in terminating the improvement period and granting permanent guardianship of William John R. and Dana R. to the Department of Health and Human Resources. In that respect, therefore, the final order is affirmed. Furthermore, based upon the representation of counsel to this Court concerning the commitment of the Kanawha County foster parents to the children, we further hold that William John R. and Dana R. be permanently placed in that foster home, i.e., the home of Mr. and Mrs. M., where the children have resided since 1994, subject to periodic monitoring by the Department as required by law.

The problem of visitation, however, is, no doubt, derivative of the absence of the family case plan. Moreover, the circuit court, without elaboration, simply ordered the Department to provide visitation between the appellant and the children.

As this Court observed, generally, in syllabus point 5 of In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995):

> When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

See also In re Danielle T., 195 W. Va. 530, 535, 466 S.E.2d 189, 194 (1995).

In this case, the record contains evidence of bonding between the appellant and the children. Moreover, inasmuch as the above principle of In re Christina L. was expressed in the context of the termination of parental rights, here, where the appellant's parental rights were not specifically terminated, visitation, a fortiori, is warranted. We note, however, that the visitation exercised by the appellant, during the proceedings below, was supervised.

Upon all of the above, therefore, this Court affirms the final order of the Circuit Court of Marshall County, entered on June 25, 1996, to the extent that the

appellant's improvement period was terminated and permanent guardianship of William John R. and Dana R. was granted to the West Virginia Department of Health and Human Services. Furthermore, William John R. and Dana R. shall be permanently placed in their Kanawha County foster home, i.e., the home of Mr. and Mrs. M., where the children have resided since 1994, subject to periodic monitoring by the Department as required by law. However, we remand this case to the circuit court for the development and execution of a plan of supervised visitation between the appellant and the children. Upon remand, the circuit court shall consider and establish a time, no later than which the Department shall submit the visitation plan for the circuit court's review, in order for the appellant to soon have appropriate contact with her children.

Affirmed, in part, and remanded with directions.

Footnote: 1 We follow our practice in domestic relations cases involving sensitive matters and use initials to identify the parties, rather than full names. In the matter of Jonathan P.,182 W. Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote: 2 Following the separation of the appellant and Sidney L., Sr., and the institution of divorce proceedings, Sidney L., Jr., who is considerably older than William John R. and Dana R., remained with his father. Thereafter, in September 1995, the circuit court entered an order dismissing both Sidney L., Jr., and his father from these proceedings. The September order specifically noted that Sidney, L., Jr., and his father, had successfully completed the goals set for them by the Department.

Footnote: 3With regard to personal hygiene, Jennifer Horton Bloch, a case aid services worker, testified as follows: "The children were very dirty, had a very prominent odor to them. Their clothes were often ill-fitting and food all over them. When we informed [the appellant] that she needed to do some hygiene with her children, there was often soap left in their hair."

Footnote: 4 W. Va. Code, 49-6-2, provides for improvement periods in child abuse and neglect cases, and, referring to that statute, syllabus point 2 of Cheryl M., states: "W. Va. Code, 49-6-2(b) (1984), permits a parent to move the court for an improvement period which shall be allowed unless the court finds compelling circumstances to justify a denial."

Footnote: 5 In Carlita B., 185 W. Va. at 629, 408 S.E.2d at 381, this Court cited syllabus point 1 of In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980), which states in part: "[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened."

Footnote: 6 *As stated in W. Va. Code, 49-6-2(b) [1992], an order entered by a circuit court granting an improvement period shall require the Department "to prepare and submit to the court a family case plan[.]"*

Footnote: 7 *Dr. Hewitt's report dated March 27, 1994, states: "[The appellant] is not empathetic, and this is one of the reasons she finds it very difficult to protect her children. Her lack of empathy is associated with her highly neurotic style which probably leads to histrionic and hysterical episodes."*

Workman, C.J., concurring:

While I agree with the majority's ultimate conclusion affirming the final order of the Circuit Court of Marshall County, I write separately to emphasize the importance of the circuit court taking the time to develop a workable plan for a continued relationship between these children and their mother. This case is a hard one, not only because of the geographic distance between the children and their mother made a meaningful improvement period difficult, but also because of the strong emotional bond that still exists between these children and their mother. Because the record clearly demonstrates Appellant's limited ability to care for the special needs of her children and because these children have a permanent foster home placement (with parents willing to make a permanent commitment to them and with whom they have lived for three years), I agree that it is in the children's best interest to affirm the placement. As this Court stated in In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991):

> In the difficult balance which must be fashioned between the rights of the parent and the welfare of the child, we have consistently emphasized that the paramount and controlling factor must be the child's welfare. "[A]ll parental rights in child custody matters," we have stressed, "are subordinate to the interests of the innocent child." David M., 182 W. Va. [57,] at 60, 385 S.E.2d [912,]at 916 [(1989)].

Id. at 629, 408 S.E.2d at 381. Nevertheless, it also is important in appropriate cases to develop a meaningful plan for children to have a continued relationship with their parents. See generally Syl. Pt. 5, In re Christina L., 194 W. Va. 446, 460 S.E.2d 692 (1995). See footnote 1 The majority recognizes such a situation exists in this case and, therefore, remanded this case for the circuit court to develop and execute a plan of supervised visitation.

In developing this plan, the circuit court must take care in assuring that the plan is realistic and workable. This evaluation shall include even the most basic of issues that must be resolved in order for the children to have visitations with Appellant. For instance, by way of analogy, in footnote fifteen of In re Carlita B., this Court mentioned with respect to improvement periods that the circuit court must be apprised of any foreseeable "obstacles to compliance with the plan of improvement, and the court should make any directives necessary to obliterate such obstacles." 185 W. Va. at 625 n.15, 408 S.E.2d at 377 n.15. For example, we said "[i]f the parent indicates he is unable to attend a specified program due to lack of transportation or conflict with hours of employment, the circuit court can direct the D.H.S. to assist with transportation or arrange a program which does not conflict with the parent's work schedule." Id. Likewise, in the instant case, to meet the best interest of these children, the circuit court may find it necessary to involve itself in the most minute of details, such as specifically directing the Department to provide bus (or other) transportation for Appellant in order to get her to and from her visits, or arranging and paying for lodging if Appellant cannot afford it. Although these details seem tedious and mundane, unless the time is taken to examine considerations like these, the visitation plan will be useless and, inevitably, the children will not have the benefit of a continued relationship with someone they love.

These permanent foster care parents also will have challenges before them. Broken human relationships (and in this case, a long-distance continued relationship with the mother) can be inconvenient and at times discouraging for these foster parents. The Department should also work to assist them in the transition to this new arrangement. If needed, the children, the foster parents, and the biological mother should be provided with family counseling. In other words, the lower court on remand will be called upon to do both legal and social work to help make this work for the children. However, if the judge is successful, the work he does here will be more meaningful and significant than any multi-million dollar civil litigation he might preside over.

Footnote: 1 Syllabus point 5 of In re Christina L. provides:

When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Id.

Starcher, Justice, dissenting:

I understand the position taken by the majority in this case, but I believe we should require the circuit court to allow the improvement period to continue. I am concerned that we not too hastily sever the bonds between children and parents who, because of limited abilities, are less than ideal parents.

The majority opinion does not note that all of the parties to this case, including the guardian ad litem, asked this court on April 22, 1997 to postpone the hearing of this appeal, because they were still trying to reach an agreed settlement. (They had already requested and received one continuance, in January, 1997, for the same purpose.)

The parties' second request for a continuance included the following statements:

> Although the children continue to reside in a specialized foster care home in Kanawha County, significant effort is being made by the Department to locate an appropriate foster home much closer to their mother. Currently a home study is being completed regarding a potential foster home in Wellsburg, West Virginia.

Counsel for the parties met with members of the Multi-Disciplinary Team (MDT) on March 7, 1997, and participated in discussions with Ms. W[.], her family, and representatives from the service agencies which assist both she and her children. Counsel for the Department attended the children's Individualized Treatment Team (ITT) meeting on April 11, 1997, and all counsel have been invited to an MDT meeting to be held on May 2, 1997.

According to counsel for Evelyn Richards W[.], the respondent mother does not want to proceed with the oral arguments. Although Ms. W[.] clearly wants her children to be placed in a nearby foster home, she also appears to understand the careful attention which must be given to the placement. To the best of this writer's knowledge, visitation with the children in the Moundsville area is scheduled for the weekend of April 25, 1997 or May 2, 1997. Additionally, it is possible that the foster parents may transport the children and remain in the Moundsville area during the visitation. This was discussed at the ITT meeting as a means to reduce the amount of disruption to the children's lives. There is some evidence that Dana R[.] (seven years old) exhibits regressive behaviors when her routine and expectations are altered.

A new family case plan is being developed through the MDT process. During the meeting on March 7, 1997, . . . Ms. W[.]'s therapist, noted the respondent mother's increased understanding and responsibility. The children's therapist . . . commented that during a recent visit with her children, Ms. W[.] had attempted to explain to them the court system and its role in their lives. Both Ms. W[.] and her husband, Harold "Frank" W[.] agreed to cooperate in all efforts which address the best interests of the children. Additionally, Ms. W[.] is being encouraged to continue her increased commitment to programs of community integration, socialization, and individual therapy.

This Court denied the request for a second continuance -- feeling, I believe, that we needed to hear exactly what was happening, and first-hand.

In its brief before this Court, the DHHR acknowledged that it was fair to say that equity favored allowing the improvement period to continue. I can't improve on the eloquence and sincerity of the statements made to this Court by the agency that has the most intimate knowledge of the situation:

As noted in the statement of facts, counsel for the parties hereto attempted to resolve this matter. At the time it appeared as if the circuit court's statements regarding the Department's "winning" and its clear frustration with the inability of the foster care system to accommodate Billy and Dana would result in a favorable decision for the Petitioner. The undersigned believed such a favorable decision would order the Department to find a more local specialized foster care home and develop a "pragmatic" family case plan. Although the oral argument on May 6, 1997, cast a different light upon the appeal and its outcome, the Department believes it would be ingenuous to ignore the expectations and efforts of Evelyn and her family.

My colleagues in this matter would no doubt agree that we learned more about the complexities and inadequacies of the system of care for special children than we perhaps wanted to know. The "specialness" of Billy and Dana and their need for appropriate nurturing, understanding, and patience was the primary and guiding factor. Evelyn also has very special needs and, sadly, she may not be blessed with the capacity to meet her children's needs.

Perhaps the guardian ad litem is correct in his analysis that "a reluctance to visit such a fate upon a woman who will never understand why it happened resulted in the granting of more opportunities for improvement than were warranted by the evidence." (Guardian's brief, p. 19). We are justifiably outraged and punitive when abuse and neglect is visited upon children out of malice or angry illness; however, the response is not so definitive when the parent suffers from mental retardation

and "neurotic dysfunction." Children must be assured safety in either situation, but an intellectual capacity which will not allow for that protection does not always signify a lack of love. It is prudent as well as humane to exercise greater caution when the respondent parents are mentally challenged, if only because of the realization that only a matter of "grace" separates any of us from Evelyn, Billy, or Dana.

There have been months of intensive effort directed toward the location of an appropriate placement for Billy and Dana in a foster home closer to their mother. Evelyn and her husband, Frank, as well as the children's maternal grandmother, have fully cooperated with any suggestions made by the MDT members. [T]he Department's caseworker, has invested innumerable hours in the quest for a home and in the formulation of the framework of a family case plan. The Department is steadfast in its belief that all children must be safe and protected from inadvertent as well as intentional harm, but the obvious complexities of this case are further complicated by the reality of Evelyn's love for her children. Hence, the greater willingness to allow her an opportunity for improvement.

Furthermore, there is an acute awareness that if Evelyn had lived in Kanawha County instead of Marshall County, her children would most likely have been placed close by and her compliance with a plan of improvement much more easily evaluated. The Department recognizes the Court's frustration with the length of time these children have been in care, but the Court is no more frustrated than the Department with the dearth of foster homes for children with special needs in Marshall and the surrounding counties. The circuit court noted its ascent from "denial" regarding the availability of a local home. . . . And although it is easy to attribute this lack to some insufficiency on the Department's part, the problem is systemic. Consequently, the issue becomes one of fairness -- the respondent's mother's essential argument.

It is out of this sense of fairness that the Department remains committed to finding a more local placement for Billy or Dana. Not only for Evelyn and the meaningfulness of an improvement period, but because the record is not consistent regarding the effects upon the children of separation from her. Dr. H[.] reported "significant bonding if not the best of bonding," and he testified that the children should have continued contact with their mother because of the amount of bonding which exists between them. . . .

No one is more aware than the Department of the length of time Billy and Dana have been in their current placement. However, the record is clear that the Department has, from the beginning, attempted to comply with the orders of the circuit court. Intimate contact with this case reinforces the knowledge that assessing blame is futile and misplaced. It is imperative that children in the

Department's custody be assured safety and nurturing care; therefore, not everyone can or should be a foster parent. And to successfully parent a special needs child the foster parents must be willing to undergo training and education as well as facilitate the necessary medical or mental health care and attention.

Because Billy and Dana have been out of their mother's care for over three years and out of her geographic locale for much of that time, it is difficult to know exactly what the best interests of the children are. Similarly, although the professionals seem to agree that Evelyn cannot parent independently, that too is an unknown. During the pendency of this appeal the Department has had indications that Evelyn is not wholly dissatisfied with the placement of Billy and Dana into foster care. This is understandable in light of her limitations and may reflect Evelyn's recognition of those limitations. However, Evelyn and her family consistently express a desire to see Billy and Dana and have gone to extraordinary lengths to do so.

This Court in its holdings and in its comments from the bench has recognized that if in the best interests of the children, visitation with the natural parents may continue even after the termination of parental rights. *In re Christina L.*, 460 S.E.2d 692 (W.Va. 1995). However, just as my colleagues and I learned much about the placement of special children, the undersigned was enlightened as to the sheer logistics of visitation between parents and children at distant points. Clearly, this Court is committed to maintaining visitation when there is significant bonding; however, it is imperative to recognize the realities of visitation - transportation, expense, time, and a setting within which to visit.

There is ample legal and factual evidence of record to support an affirmation of the circuit court's order of June 25, 1996. There are also equitable and good faith reasons to restore Evelyn R.'s improvement period, or in the alternative, provide for meaningful visitation by the placement of Billy and Dana is a more local but abundantly appropriate foster home.

Because I agree with this reading of the fairness issue, I would restore the improvement period.

194 W. Va. 525, 460 S.E.2d 771

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
January 1995 Term

No. 22575

STATE OF WEST VIRGINIA
Plaintiff Below, Appellee
v.
FORREST WOOD,
Defendant Below, Appellant

Appeal from the Circuit Court of Cabell County
Honorable Dan O'Hanlon, Judge
Criminal Action No. 93-F-00061
AFFIRMED, IN PART;
REVERSED, IN PART; AND REMANDED.

Submitted: May 9, 1995
Filed: July 14, 1995

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CHIEF JUSTICE McHUGH delivered the Opinion of the Court.

JUSTICE BROTHERTON AND JUSTICE RECHT did not participate.

JUDGE FOX and RETIRED JUSTICE MILLER sitting by temporary assignment.

RETIRED JUSTICE MILLER and JUSTICE CLECKLEY concur, in part, and dissent, in part, for the same reasons stated by Justice Miller in his dissent in State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990).

SYLLABUS BY THE COURT

1. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, State v. Miller, No. 22571, ___ W. Va. ___, ___ S.E.2d ___ (May 18, 1995).

2. West Virginia Rules of Evidence 608(a) permits the admission of evidence in the form of an opinion or reputation regarding a witness's character for truthfulness or untruthfulness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The admission of testimony pursuant to W. Va. R. Evid. 608(a) is within the sound discretion of the trial judge and is subject to W. Va. R. Evid. 402, which requires the evidence to be relevant; W. Va. R. Evid. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and W. Va. R. Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment.

3. "Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury." Syl. pt. 7, State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990).

4. """"Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, Overton v. Fields, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990).' Syl. pt. 3, Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993)." Syl. pt. 5, Mayhorn v. Logan Medical Foundation, ___ W. Va. ___, 454 S.E.2d 87 (1994).

5. "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, State v. Miller, No. 22571, ___ W. Va. ___, ___ S.E.2d ___ (May 18, 1995).

6. "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. pt. 6, State v. Miller, No. 22571, ___ W. Va. ___, ___ S.E.2d ___ (May 18, 1995).

7. "'Under ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.' Syl. pt. 1, Adkins v. Bordenkircher, 164 W. Va. 292, 262 S.E.2d 885 (1980)." Syl. pt. 6, State ex rel. Collins v. Bedell, No. 22781, ___ W. Va. ___, ___ S.E.2d ___ (June 19, 1995).

8. "A procedural change in a criminal proceeding does not violate the ex post facto principles found in the W. Va. Const. art. III, § 4 and in the U. S. Const. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed." Syl. pt. 7, State ex rel. Collins v. Bedell, No. 22781, ___ W. Va. ___, ___ S.E.2d ___ (June 19, 1995).

McHugh, Chief Justice:

Following a one-day jury trial, the appellant, Forrest M. Wood, was convicted of two counts of first degree sexual assault and two counts of incest in the Circuit Court of Cabell County. The appellant was sentenced to prison terms of fifteen to thirty- five years on each of the first degree sexual assault counts and to five to fifteen years on each of the incest counts, with all sentences running consecutively.

The appellant appeals his convictions raising the following four assignments of error: (1) whether the admission of the testimony of Mr. Donald Pace, a teacher, wherein he stated that he determined the victim's allegations against the appellant were true before he took any action regarding those allegations, was error; (2) whether the admission of the expert testimony of Elizabeth Brachna was error in that (a) she was not properly qualified as an expert, (b) she testified that the victim's allegations were credible, and (c) she based her testimony upon the child sexual abuse profile; (3) whether the appellant was denied effective assistance of counsel; and (4) whether the appellant was sentenced in violation of the ex post facto principles set forth in the West Virginia and United States Constitutions. For reasons set forth below, we affirm, in part, reverse, in part, and remand this case to the circuit court for the defendant's resentencing in accordance with this opinion.

I.

The appellant married the mother of the victim, Betty A., See footnote 1 in 1981, thereby becoming Betty A.'s stepfather. At trial, Betty A. testified that once or twice a week in 1989, when she was approximately eight or nine years old, she was forced to engage in various sexual acts with the appellant.See footnote 2 Betty A. first reported the sexual assaults in the spring of 1992 to her behavior disorder teacher, Donald Pace, who testified at trial. Additionally, Elizabeth Brachna, a licensed social worker, and Vicki Riley, a supervised psychologistSee footnote 3 in private practice, who were qualified as experts on abused and assaulted children, both testified that in their opinion Betty A.'s behavior fit the profile of a sexually abused child. Betty A.'s mother's testimony supported Betty A.'s and the experts' testimonies. Conversely, the appellant testified that he did not sexually assault Betty A.

The appellant and Betty A.'s mother separated in November of 1989, and a divorce action soon ensued. The evidence at trial indicates that Betty A. has had no contact with the appellant since her mother and the appellant separated.

II.

The appellant asserts that the admission of Donald Pace's testimony regarding the truthfulness of Betty A.'s allegations against the appellant was error. However, as the appellant concedes, the appellant's trial attorney did not object to the admission of this testimony.See footnote 4 Therefore, the admission of this testimony must invoke the plain error doctrine before this Court will reverse the appellant's conviction. In syllabus point 7 of State v. Miller, No. 22571, ___ W. Va. ___, ___ S.E.2d ___ (May 18, 1995) this Court held that in order "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." See also syllabus point 4, in relevant part, State v. England, 180 W. Va. 342, 376 S.E.2d 548 (1988) (The plain error "doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.")

The appellant complains about the admission of the following testimony by Donald Pace:

Q [This excerpt of testimony occurs after Mr. Pace has testified that he did not report Betty A.'s allegations until he determined whether or not they were true] [by the State] You indicated that you had come to the conclusion that [Betty A.] was not making this up; is that correct?

A [by Mr. Pace] That's correct.

Q Why do you say that?

A Well, for one thing, after I had established a relationship with [Betty A.], I found out that when she was lying, if I pursued my questioning, she would always tell me the truth.

Q Now, wait a minute. So, you're saying that [Betty A.] has lied to you?

A In terms that she may deny that she had done something, and when I questioned her about that, she would often say, 'Oh, no, Mr. Pace, that wasn't me, I didn't do that, I didn't do that,' and when I pursued the matter, she would always own up to it.

Q Always?

A Well, to my knowledge, yes.

. . . .

Q So, in your opinion, based on your work with [Betty A.], she's basically a truthful person?

A Oh, yes. Now, qualifying that, if she could get out of trouble, she would.

. . . .

Q . . . Did you investigate [Betty A.'s allegations of sexual assault], to your satisfaction, to determine whether or not she was, in fact, telling you the truth?

A Yes, I did because -- in fact, we had -- you know, I explained the severity of making an accusation like that. . . . [S]he at that time convinced me that she was telling the truth.

At the outset, we note that this issue involves the admission of testimony regarding the credibility of a witness. As observed by the United States Court of Military Appeals, "[t]here are three evidentiary stages which concern the credibility of witnesses at trial: bolstering, impeachment, and rehabilitation." United States v. Toro, 37 M.J. 313, 315 (C.M.A. 1993). Bolstering occurs when a party seeks to enhance a witness's credibility before it has been attacked. Id. Bolstering is generally disallowed. Impeachment occurs anytime a witness's credibility is attacked, and it may be accomplished in several different ways including, inter alia, the following: a witness's character trait for untruthfulness pursuant to W. Va. R. Evid. 608(a); prior convictions pursuant to W. Va. R. Evid. 609(a); instances of misconduct not resulting in a conviction pursuant to W. Va. R. Evid. 608(b); and prior inconsistent statements pursuant to W. Va. R. Evid. 613.See footnote 5 See Id. Rehabilitation, which occurs after a witness's credibility has been attacked, also may be accomplished in a number of different ways including "explanations on redirect examination, corroboration, a character trait for truthfulness, or prior consistent statements." Toro, supra at 315 (citation omitted). Credibility issues concerning a witness may be addressed by questioning that witness or through the testimony of another witness.

Although not briefed by the appellant, the resolution of the issue before us involves an analysis of W. Va. R. Evid. 608. W. Va. R. Evid. 608(a) allows for the admission of evidence which either attacks or supports the credibility of a witness in the form of opinion or reputation subject to two limitations:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

W. Va. R. Evid. 608(a).

The first limitation found in 608(a)(1), which states "the evidence may refer only to character for truthfulness or untruthfulness[,]" explicitly "permits [opinion] testimony concerning a witness's general character or reputation for truthfulness or untruthfulness but prohibits any [opinion] testimony as to a witness's truthfulness on a particular occasion." State v. Rimmasch, 775 P.2d 388, 391 (Utah 1989) (citations omitted). The rationale behind disallowing opinion testimony as to a witness's truthfulness on a particular occasion is that "it prevents trials from being turned into contests between what would amount to modern oath-helpers who would largely usurp the fact- finding function of judge or jury." Id. at 392. See also United States v. Azure, 801 F.2d 336, 341 (8th Cir. 1986) (The "opinion evidence went beyond the limitation in Rule 608(a)(1) of only addressing character for truthfulness and addressed the specific believability and truthfulness of [the witness's] story."); People v. Koon, 713 P.2d 410, 412 (Colo. Ct. App. 1985) ("[N]either a lay nor expert witness may give opinion testimony with respect to whether a witness is telling the truth on a specific occasion." (citations omitted)).

We implicitly acknowledged the wisdom of the above rationale in syllabus point 7, in relevant part, of State v. Edward Charles L., 183 W. Va. 641, 398 S.E.2d 123 (1990), when we held that an expert on child sexual abuse "may not give an opinion as to whether he personally believes the child . . . as [this] would improperly and prejudicially invade the province of the jury."

The second limitation found in W. Va. R. Evid. 608(a)(2), states "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise[.]" This limitation disallows the bolstering of a witness's credibility. See 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 6.8(A)(1) (3d 1994) and 3 Jack B. Weinstein, et al., Weinstein's Evidence ¶ 608[08] (1995). After all, "a person's character is assumed to be good unless evidence exists to indicate otherwise." Cleckley, supra at § 6-8(A)(2). See also Weinstein, supra at ¶ 608[08] at 608-64. ("'[T]here is no reason why time should be spent in proving that which may be assumed to exist.'" (quoting Wigmore, Evidence § 1104 (3d ed. 1940)).

Moreover, W. Va. R. Evid. 608(a) is subject to the protections of W. Va. R. Evid. 402, which requires the evidence to be relevant; W. Va. R. Evid. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and W. Va. R. Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment. See Weinstein, supra at ¶ 608[01] at 608-13 and Cleckley, supra at § 6- 8(A)(2). Thus, the admissibility of evidence regarding a witness's character for truthfulness or untruthfulness is within the sound discretion of the trial judge, and depends upon the totality of the circumstances of a given case. See Id.

Accordingly, we hold that West Virginia Rules of Evidence 608(a) permits the admission of evidence in the form of an opinion or reputation regarding a witness's character for truthfulness or untruthfulness, subject to two limitations: (1) the evidence

may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The admission of testimony pursuant to W. Va. R. Evid. 608(a) is within the sound discretion of the trial judge and is subject to W. Va. R. Evid. 402, which requires the evidence to be relevant; W. Va. R. Evid. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and W. Va. R. Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment.

In the case before us, we find that Mr. Pace's testimony violates the two limitations set forth in W. Va. R. Evid. 608 in that Mr. Pace gave his opinion as to Betty A's truthfulness on a specific occasion and testified as to her truthfulness before her character for truthfulness had been attacked. As we previously indicated, no objection was made at trial. Thus, we must determine if the admission of Mr. Pace's testimony was plain error. We conclude that it is not.

As we previously stated, Mr. Pace, who was Betty A.'s behavior disorder teacher, was the first person to whom Betty A. reported the sexual assaults. At trial, Mr. Pace, the State's first witness, testified that when Betty A. first told him of the sexual assault he did not immediately report her allegations because he wanted to make sure they were true.

However, the record reveals that there was no need for the prosecutor to engage in the questioning of Betty A.'s character for truthfulness in that Betty A.'s credibility had not yet been attacked. In fact, Betty A.'s credibility was not an issue until the prosecutor made it an issue.See footnote 6 As we previously stated, a witness's character for truthfulness is assumed to be truthful until attacked. Thus, the admission of Mr. Pace's testimony regarding Betty A.'s character for truthfulness was error pursuant to W. Va. R. Evid. 608(a) because it was admitted before her character for truthfulness had been attacked. Furthermore, Mr. Pace's opinion testimony as to whether Betty A.'s allegations of sexual assault were believable is error pursuant to W. Va. R. Evid. 608(a) in that it improperly invades the province of the jury.

However, as the testimony above reveals, Mr. Pace was merely giving an historical account as to how he learned of Betty A.'s sexual assault allegations and as to how he determined what actions he should take regarding those allegations. Although Mr. Pace's testimony violates W. Va. R. Evid. 608(a), his testimony was not given for the purpose of determining Betty A.'s character for truthfulness which is the paramount concern of W. Va. R. Evid. 608, but rather was given as historical information. Cf. United States v. Blackwell, 853 F.2d 86 (2d Cir. 1988) (Fed. R. Evid. 608(a) does not preclude testimony by an accused of his lack of a criminal record because such testimony is essentially background information); Government of Virgin Islands v. Grant, 775 F.2d 508, 513 n. 7 (3d Cir. 1985) (The Court of Appeals for the Third Circuit noted that the line between background evidence and character evidence is blurred). Thus, although we find that the admission of the above testimony by Mr. Pace violates W. Va.

R. Evid. 608(a), we recognize that it is a close call considering the purpose for which this testimony was introduced. Cf. United States v. Toledo, 985 F.2d 1462, 1469-70 (10th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 218 (An expert's statement in a case in which a child was kidnapped and sexually assaulted that the child's consistency in her story was "'consistent with a high likelihood that this occurred'" did not warrant review under the plain error doctrine because it is a close call and therefore not an obvious error affecting the fundamental fairness of the trial).

Accordingly, although the admission of Mr. Pace's testimony regarding Betty A.'s character for truthfulness was error pursuant to W. Va. R. Evid. 608(a), given the context in which this particular testimony occurred we find that it does not "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings" thereby implicating review pursuant to the plain error doctrine. Syl. pt. 7, Miller, supra.

III.

Although not clearly defined, it appears that the appellant raises the following three issues regarding the testimony of Elizabeth Brachna, who testified as an expert on abused and assaulted children, which are as follows: (a) whether Ms. Brachna was properly qualified as an expert; (b) whether Ms. Brachna's testimony regarding the truthfulness of Betty A.'s story violates syllabus point 7 of Edward Charles L., supra; and (c) whether the law in Edward Charles L., supra, regarding the admission of a child sexual abuse profile is a sound principle or whether the case should be overruled.

A.

The appellant's trial counsel objected to Ms. Brachna being qualified as an expert on abused and assaulted children because she was not a treating psychiatrist or psychologist. In syllabus point 7 of Edward Charles L., supra, this Court held that expert psychological testimony regarding child sexual abuse is permissible:

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

Furthermore, in syllabus point 5 of Mayhorn v. Logan Medical Foundation, ___ W. Va. ___, 454 S.E.2d 87 (1994) this Court stated:

"""Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, Overton v. Fields, 145 W. Va. 797 [117 S.E.2d 598 (1960)].' Syllabus Point 4, Hall v. Nello Teer Co., 157 W. Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12,

Board of Education v. Zando, Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990).' Syl. pt. 3, Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993).

Appellant's contention that Ms. Brachna must have a certain educational background in order to testify as an expert on abused and assaulted children is misplaced. "[A] witness may be qualified as an expert by practical experience in a field of activity conferring special knowledge not shared by mankind in general[.]" Syl. pt. 2, in relevant part, State v. Baker, 180 W. Va. 233, 376 S.E.2d 127 (1988). For instance, in Cargill v. Balloon Works, Inc., 185 W. Va. 142, 405 S.E.2d 642 (1991), we found that a certified pilot of hot air balloons had a sufficient background regarding the operation, safety, construction and flight of hot air balloons to be qualified as an expert in the design and manufacture of a hot air balloon that crashed even though the pilot did not possess an engineering or design degree.

We concluded in Cargill that W. Va. R. Evid. 702, which enunciates the standard by which the qualification of an expert is determined, "cannot be interpreted to require . . . that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven." Id. at 146-47, 405 S.E.2d at 646-47.See footnote 7 Instead, a witness may be qualified as an expert based upon his or her knowledge, skill, experience, training, or education. Board of Educ. v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796 (1990) (This Court held that a witness was qualified as an expert on structural matters even though he had not been educated as a structural engineer because of his experience in the construction business).

Thus, Ms. Brachna need not be a treating psychiatrist or psychologist as asserted by the appellant. The facts indicate that Ms. Brachna is a licensed social worker who works as a counselor with victimized children. Additionally, Ms. Brachna has a bachelor's degree in sociology and an uncompleted master's degree in behavioral disorders. Most importantly, the record reveals that Ms. Brachna has nine years of experience with troubled adolescent girls in group homes, and that she has seen more than one hundred abused and/or traumatized children.

As the State points out, other states have qualified non- psychologists as experts on abused and assaulted children because of their experience and training. See, e.g., People v. Pollard, 589 N.E.2d 175, 180 (Ill. App. Ct. 1992), appeal denied, 596 N.E.2d 635 (assault program worker, who was a foster mother specializing in sexually abused children); and Commonwealth v. Thayer, 634 N.E.2d 576 (Mass. 1994) (licensed psychiatric social worker). Accordingly, based on Ms. Brachna's training and experience of working with abused and traumatized children, the trial court did not abuse its discretion by qualifying Ms. Brachna as an expert on abused and assaulted children.

B.

The appellant next contends that Ms. Brachna's testimony regarding the truthfulness of Betty A.'s allegations violates syllabus point 7, in relevant part, of Edward Charles L., supra, which states: "Such an expert may not give an opinion as to whether

he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury." As we previously explained, W. Va. R. Evid. 608(a) prohibits any testimony as to a witness's truthfulness on a particular occasion.

There are two questionable times in which Ms. Brachna's testimony borders on giving an opinion as to whether Betty A. was being truthful. The first incident occurred in the following exchange:

> Q [by the State] I do not want to relate specifically what [Betty A.] told you. That is not my purpose in having you testify. I only want you to inform this Court whether or not you made observations of [Betty A.] in her testimony which would cause you to be able to render to this Court an opinion as to whether or not [Betty A.] fit within the profile that you have previously described to this Court as that of a sexually abused child?
>
> A [by Ms. Brachna] Yes. When I do a taped interview, there are criteria I am watching and observing for. . . . [I]t . . . allows us to look back and check to see if the age and the emotion matches the trauma the child is reporting. One particular criterion I look for when doing this is if the child or adolescent uses age appropriate terminology for their body, their body parts, the alleged perpetrator's body parts[.] . . . I also start each taped interview with questions which helps me determine if the child can determine right from wrong, or more importantly, truth from a lie, or also show some type of suggestibility. . . . In [Betty A.'s] case, she was not highly suggestible. She maintained what she perceived as the truth. That helps me as a guideline to go on with my questioning. . . . When I'm looking for a child that's been coached, I'm looking for more -- either a street language or even maybe the correct terminology for genitalia, which she did not have or give me. Her knowledge of sexual acts seemed age appropriate. . . . To my opinion, she demonstrated an appropriate level of anxiety, meaning her emotion did reflect the trauma that she was reporting[.] . . . So, it was a very credible statement to me as far as those components that I look for.

(emphasis added). The second incident occurred after the State asked the following: "Was there anything . . . she said or her behavior or demeanor that would signal to you that there was something wrong with her statement, that there may be some falsity to it?" Ms. Brachna responded: "Not that I could tell. There was not what I would term as motive for her to give me that."

The appellant's trial attorney, however, did not object to the admission of the above statements nor did the trial judge give a cautionary instruction.See footnote 8 Therefore the admission of this testimony must invoke the plain error doctrine before we will reverse on this ground. As we previously stated, in order "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, Miller, supra.

In the case before us, Ms. Brachna admitted, on cross- examination, that if a child were indeed lying, she would have no way of knowing, thereby neutralizing her prior testimony which suggested that she believed Betty A.'s allegations to be true. Thus, if

Ms. Brachna's testimony on direct examination was error, such error did not "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, Miller, supra. See State v. Folse, 623 So.2d 59 (La. Ct. App. 1993) (The expert testified, without objection, on direct examination that he believed the victim was telling the truth about having been sexually abused; however, the court found that this did not violate rule 608 of the rules of evidence because the defendant's cross-examination corrected the direct testimony by making clear that the expert could not say whether or not the victim was telling the truth). Cf. United States v. Rosales, 19 F.3d 763 (1st Cir. 1994) (In a sexual abuse case the expert's testimony implicitly sent a message to the jury that the children had testified truthfully; however, review pursuant to the plain error doctrine was not warranted because the jury was presented with expert testimony which directly contradicted the objectional testimony and because the trial court instructed the jury that they were free to reject the opinions of the experts); United States v. Provost, 875 F.2d 172 (8th Cir. 1989), cert. denied, 493 U.S. 859 (The expert's testimony that two incidents described by the victim of a sexual assault "'both occurred"' was an isolated statement which did not constitute reversible error because it was harmless); Toledo, supra (An expert's statement in a case in which a child was kidnapped and sexually assaulted that the child's consistency in her story was "'consistent with a high likelihood that this occurred"' did not warrant review under the plain error doctrine because it is a close call and therefore not an obvious error affecting the fundamental fairness of the trial). Accordingly, because the appellant's trial counsel clarified that Ms. Brachna would have no idea whether a child was lying, the admission of Ms. Brachna's testimony regarding whether Betty A.'s allegations were truthful, if error, did not "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceedings" thereby implicating review pursuant to the plain error doctrine. Syl. pt. 7, Miller, supra.

C.

Although the appellant's brief is unclear, it appears that the appellant contends that the admission of expert testimony based upon a child sexual abuse profile is error. More specifically, the appellant asserts that the theory that sexually abused children manifest particular identifiable characteristics is not supported by accepted medical or scientific opinion as is required by W. Va. R. Evid. 702. See syl. pt. 2, Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993), cert. denied, ___ U.S. ___, 114 S. Ct. 2137 (1994) (This Court outlines how the admissibility of expert testimony should be analyzed pursuant to W. Va. R. Evid. 702).

However, as the appellant concedes, this Court held the following in syllabus point 7 of Edward Charles L., supra, in relevant part, regarding the admission of expert testimony on the profiles of child sexual abuse victims:

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused.

We decline to revisit our holding in Edward Charles L., supra.See footnote 9 Accordingly, the admission of Ms. Brachna's testimony regarding the psychological and behavioral profile of a child sexual abuse victim was not error.See footnote 10

IV.

The appellant asserts that he was denied his right to effective assistance of counsel under the sixth amendment to the United States Constitution and under Article III, § 14 of the West Virginia Constitution.

We recently explained why addressing ineffective assistance of counsel claims on direct appeal is usually inappropriate: "In cases involving ineffective assistance on direct appeals, intelligent review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior." Miller, at ___, ___ S.E.2d at ___ (slip op. at 22) (footnote omitted). See also State v. Triplett, 187 W. Va. 760, 771, 421 S.E.2d 511, 522 (1992) ("it is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal"). When addressing an ineffective assistance of counsel claim, however, the following analysis should be used:

5. In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

6. In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Syl. pts. 5 and 6, Miller, supra.

In the case before us, the appellant asserts that his trial counsel was ineffective because he, inter alia,: (1) failed to call character witnesses or any other witnesses other than the appellant; (2) failed to object to Mr. Pace's testimony which was previously discussed in this opinion; (3) failed to object to Ms. Brachna's testimony on whether Betty A.'s allegations against the appellant were true; (4) failed to call an expert who would attest that appellant's psychological profile would suggest that he did not commit the crimes charged; (5) failed to have the trial court give a cautionary instruction that the testimony of Ms. Riley, who, as we previously stated, was qualified as an expert on abused and assaulted children, regarding the hearsay statements made by Betty A., was only being offered to show the basis of her opinion and was not being offered to

support the truth of what Betty A. said; (6) failed to request that Betty A. undergo psychological evaluation in order to see if there were psychological problems which may make her testify falsely; (7) failed to offer a jury instruction which stated that Betty A.'s testimony should be scrutinized with caution since it was uncorroborated; and (8) failed to offer any evidence of mitigating circumstances at appellant's sentencing hearing.

However, as the State points out, there may have been tactical reasons for appellant's trial counsel's lack of action. For instance, there may not have been any witnesses who could testify as to appellant's character pursuant to W. Va. R. Evid. 404(a)(1)See footnote 11 nor may there have been any evidence of mitigating circumstances to offer at appellant's sentencing hearing. Our review of the record does not reveal "whether, in light of all the circumstances, the identified acts or omissions [of the appellant's trial counsel] were outside the broad range of professionally competent assistance . . . [without] engaging in hindsight or second-guessing of [appellant's trial counsel's] strategic decisions." Syl. pt. 6, in part, Miller, supra. As we stated in Miller, at ___, ___ S.E.2d at ___ (slip op. at 29), "[i]t is apparent that we intelligently cannot determine the merits of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions." Accordingly, we decline to further address this issue on direct appeal.

V.

The appellant asserts that the trial judge violated ex post facto principles found in W. Va. Const. art. III, § 4 and U. S. Const. art. I, § 10See footnote 12 by sentencing him to serve a term of not less than fifteen nor more than thirty-five years in prison for sexual assault pursuant to W. Va. Code, 61-8B-3(b) which was effective on July 1, 1991. The appellant contends that the 1984 version of W. Va. Code, 61-8B-3(b), which provides for a term of "not less than fifteen nor more than twenty-five years[,]" is the applicable Code section because the indictment charges that he committed the crimes in 1989.

Similarly, on the incest charges, the appellant was sentenced to a prison term of not less than five years nor more than fifteen years pursuant to W. Va. Code, 61-8-12(c) which was effective in 1991. In that the appellant was charged with committing incest in 1989, the appellant contends that he should have been sentenced according to the 1986 version of W. Va. Code, 61-8-12(c) which provides for a term of not less than five years nor more than ten years.

This Court held the following in syllabus points 6 and 7 of State ex rel. Collins v. Bedell, No. 22781, ___ W. Va. ___, ___ S.E.2d ___ (June 19, 1995):

6. 'Under ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.' Syl. pt. 1, Adkins v. Bordenkircher, 164 W. Va. 292, 262 S.E.2d 885 (1980).

7. A procedural change in a criminal proceeding does not violate the ex post facto principles found in the W. Va. Const. art. III, § 4 and in the U. S. Const. art. I, § 10

unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

(emphasis added). Clearly, applying the 1991 versions of W. Va. Code, 61-8B-3(b) and 61-8-12(c) increased the appellant's punishment, thus, violating the ex post facto principles found in the W. Va. Const. and U. S. Const. Accordingly, we reverse the sentences imposed upon the appellant and remand this case to the circuit court for resentencing in accordance with this opinion.

VI.

In summary, we reverse appellant's sentences on the sexual assault counts and incest counts, and remand this case to the circuit court for resentencing in accordance with this opinion. Otherwise, we affirm the appellant's conviction.

Affirmed, in part; reversed, in part; and remanded.

Footnote: 1 Since this case involves sensitive matters, we follow our traditional practice and use only the last initial of the juvenile involved in this case. See State v. Michael S., 188 W. Va. 229, 230 n. 1, 423 S.E.2d 632, 633 n. 1 (1992). (citation omitted).

Footnote: 2 Though the record describes the sexual acts in graphic detail, considering our resolution of the issues in this case, it is not necessary to recount those facts in detail in this opinion.

Footnote: 3 Ms. Riley is working as a psychologist under the supervision of Dr. Betsy Evans until she obtains a license in psychology.

Footnote: 4 We held the following in syllabus point 2 of State v. Stewart, 187 W. Va. 422, 419 S.E.2d 683 (1992): ""Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived." Syl. Pt. 4, State v. Michael, 141 W. Va. 1, 87 S.E.2d 595 (1955).' Syllabus point 7, State v. Davis, 176 W. Va. 454, 345 S.E.2d 549 (1986)." However, W. Va. R. Evid. 103(d) states that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

Footnote: 5 W. Va. R. Evid. 608(a) states, in relevant part, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation[.]"

W. Va. R. Evid. 609(a) states, in pertinent part, that the credibility of an accused in a criminal case may be attacked by "evidence that the accused has been convicted of a crime . . . but only if the crime involved perjury or false swearing." The credibility of a witness other than the accused may be attacked by "evidence that the witness has been convicted of

a crime . . . subject to Rule 403 . . . if the crime was punishable by death or imprisonment in excess of one year . . . and . . . [by] evidence that the witness has been convicted of a crime . . . [involving] dishonesty or false statement, regardless of the punishment." Id.

W. Va. R. Evid. 608(b) states, in relevant part, that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a witness other than the accused (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

W. Va. R. Evid. 613(b) states, in pertinent part, that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require."

Footnote: 6 At least one court has noted that if a witness's character for truthfulness is eventually attacked during the trial after opening statements which indicate that the credibility of a witness will be attacked, then the admission of the testimony of a witness's truthful character before such attack is harmless error. United States v. Beaty, 722 F.2d 1090, 1097 (3d Cir. 1983) ("'In view of the inevitability of defense counsels' attack on [the witnesses'] credibility and the formidable assault which in fact was made in the defense openings, cross-examinations and summations, the error in the timing of the introduction of the [truthfulness promise] does not require reversal in this case[:]" the prosecutor elicited on direct examination that the witness had promised to tell the truth in connection with a plea bargain (citation omitted)).

Subsequent to Mr. Pace's testimony, the appellant's trial counsel did attack Betty A.'s character for truthfulness. Therefore, the State asserts that since Mr. Pace's testimony
regarding Betty A.'s character for truthfulness would have been admissible once the appellant's trial counsel attacked her character for truthfulness, the admission of Mr. Pace's testimony in the facts before us was harmless error.

However, unlike the case above, the prosecutor had no indication in the opening statement of the appellant's trial attorney that Betty A.'s credibility would be attacked. Thus, it is arguable whether the appellant would have attacked Betty A.'s credibility if the prosecutor had not delved into the issue during Mr. Pace's testimony. Moreover, we do not condone this type of questioning because it could still amount to error which is not harmless depending on the totality of the circumstances in a given case.

Footnote: 7 W. Va. R. Evid. 702 states:

***Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.*

Additionally, this Court held the following in syl. pt. 4 of Mayhorn, supra:

Pursuant to West Virginia Rules of Evidence 702 an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert's opinion.

Footnote: 8 The trial judge did in his charge to the jury give the following instruction submitted by the appellant:

The jury is instructed that the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call 'expert witnesses.' Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matter, in which they have been qualified to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decided [sic] that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reason given in support of the opinion is not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Footnote: 9 We recognize that the admission of expert testimony regarding the child sexual abuse profile is a disputed point. Justice Miller has written a very detailed dissent to Edward Charles L., supra, regarding this issue. However, the majority opinion in Edward Charles L., which authorizes the admission of such testimony, has not been overruled.

Footnote: 10 Although it is not clear, the appellant also appears to argue that Ms. Brachna did not provide a basis for her knowledge of the sexual assault profile. However, as the State points out, W. Va. R. Evid. 705 does not require the expert to disclose the underlying facts or data which support his or her opinion unless the trial court requires the disclosure or unless during cross-examination he or she is asked to disclose that information:

***Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.*

Moreover, appellant's assertion that Ms. Brachna's one- time interview with Betty A. was insufficient to enable Ms. Brachna to form an expert opinion, and appellant's assertion that Ms. Brachna failed to conduct a full-scale psychological and developmental evaluation of the child and underlying family dynamics are more appropriately explored through cross- examination which allows the trier of fact to weigh the credibility of the expert's opinion rather than on appeal. Cf. 2 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 7-2(A)(1) at 28 (3d ed. 1994) ("Should the [expert] witness later fail to adequately define or describe the relevant

standard of care, opposing counsel is free to explore that weakness in the testimony. The trier of fact may then choose to discount the testimony." (citations omitted)).

Footnote: 11 W. Va. R. Evid. 404(a)(1) states, in relevant part, that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except: (1) Character of Accused.--Evidence of a pertinent trait of his character offered by an accused, or by the prosecutor to rebut the same[.]"

Footnote: 12 The W. Va. Const. art. III, § 4 states, in relevant part: "No . . . ex post facto law . . . shall be passed." The U. S. Const. art. I, § 10 provides, in relevant part: "No State shall . . . pass any . . . ex post facto Law[.]"

205 W. Va. 171, 517 S.E.2d 36

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
STATE OF WEST VIRGINIA EX REL. DAVID V. WRIGHT and CHRISTOPHER DAVID WRIGHT, Petitioners,
v.
HONORABLE JAMES C. STUCKY, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, and
MARCELLA GHERKE, parent, next friend and legal guardian of George Adam Smoot, a minor, Respondents.

No. 25839
Submitted: May 4, 1999
Filed: June 17, 1999

SYLLABUS BY THE COURT

1. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

2. Neither the statutory limitation created by *W.Va. Code*, 57-2-3 [1965], nor a protective order under Rule 26(c) of the *West Virginia Rules of Civil Procedure*, provide the "use immunity" protection that permits a court to require a person to answer questions in civil discovery, over a constitutional objection based on the Fifth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution*, where the answers to the questions may be self-incriminating.

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CHIEF JUSTICE STARCHER delivered the Opinion of the Court:

In the instant case, we issue a writ of prohibition barring the enforcement of an order by the Circuit Court of Kanawha County. The order prohibited David and Christopher Wright from refusing to answer questions in a civil deposition based on their constitutional right not to give self-incriminating testimony.

I. Facts and Background

George Smoot, a minor (by his mother Marcella Gherke), filed a lawsuit against the petitioners David Wright and Christopher Wright, for injuries that George Smoot allegedly sustained in an assault. Criminal charges were also filed against the Wrights in connection with the alleged assault.

The Wrights agreed to respond to discovery requests in the Smoot/Gherke civil case, on the condition that the Wrights' criminal case was resolved by the time their discovery response in the civil case was due. When the criminal case was not resolved by the due date for the discovery responses, the circuit court (in the civil case) granted the Wrights a protective order, under Rule 26(c) of the *West Virginia Rules of Civil Procedure*,[1998] See footnote 1 excusing the Wrights from answering written discovery requests, based on the Wrights' assertion of their constitutional protection against compelled self- incrimination (we shall refer to this as their "self-incrimination right").

However, the circuit court denied the Wrights' request for a protective order with respect to their depositions. The circuit court concluded that *W.Va. Code*, 57-2-3 [1965] See footnote 2 would protect the Wrights' self-incrimination right in the depositions -- and that therefore the Wrights could not refuse to answer questions posed to them in their civil depositions based upon their self-incrimination right. The circuit court also sealed and prohibited the distribution of the transcripts of the Wrights' depositions, and prohibited the dissemination of information obtained in those depositions. See footnote 3

The Wrights filed a writ of prohibition with this Court, seeking to prevent the enforcement of that portion of the circuit court's order that bars the Wrights from refusing to answer deposition questions based on their self-incrimination right.

II. Standard of Review

This Court addressed the standard for determining the appropriateness of a writ of prohibition in Syllabus Point 1 of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979):

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, *constitutional*, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

(Emphasis added.)

Additionally, we stated in Syllabus Points 2 and 3 of *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995):

> 2. "'A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.' Syllabus Point 1, *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992)." Syllabus Point 3, *State ex rel. McCormick v. Zakaib*, 189 W.Va. 258, 430 S.E.2d 316 (1993).
>
> 3. When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate.

Our review of legal issues in a writ of prohibition, of course, is *de novo*.

III. Discussion

The Fifth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution* prohibit the compelling of self-incriminating testimony in both criminal and civil proceedings -- unless neither the testimony nor its fruits are available in a criminal proceeding. *See* Syllabus Point 1, *State ex rel. Osburn v. Cole*, 173 W.Va. 596, 319 S.E.2d 364 (1983). *See also State v. Beard*, 203 W.Va. 325, 507 S.E.2d 688 (1998); *State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 188 W.Va. 501, 425 S.E.2d 177 (1992). See footnote 4

This constitutionally-based limitation on the use of compelled, self- incriminating testimony is commonly known as "use immunity." *Beard, supra.*

A related, statutorily-based limitation on the evidentiary use of certain self-incriminating statements is created by *W.Va. Code*, 57-2-3 [1965]. This statute, which was relied upon by the circuit court in the instant case, states:

> In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.

We have never held that the limitation on the use of certain statements that is created by *W.Va. Code*, 57-2-3 [1965] is as broad as or co-extensive with constitutionally- based "use immunity." The language of *W.Va. Code*, 57-2-3 [1965] addresses only the admissibility of a statement in court, and does not address a statement's possible "use" for other purposes related to a criminal investigation or prosecution. See footnote 5

Similarly, while a circuit court under Rule 26(c) has the power to grant a protective order limiting the use of a civil deposition -- as the circuit court did in the instant case -- it does not appear that we have ever held that such an order confers broad criminal "use immunity" with respect to the contents of the statement. Nor have we held that such a protective order necessarily binds or limits the rights of parties who are strangers to the litigation -- such as public criminal investigators and prosecutors.

Other courts addressing the issue have consistently held that a civil protective order sealing a deposition does not automatically bar the obtaining or use of the deposition in a criminal context. *See, e.g., In Re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988), *cert. denied*, 487 U.S. 1240, 108 S. Ct. 2914, 101 L.Ed.2d 945 (1988), where the court held that the issuance of a Rule 26 protective order in a civil proceeding is not grounds to quash a grand jury subpoena for the deposition transcript. See footnote 6

In a statement that is particularly pertinent to the instant case, the Fourth Circuit in *In Re Grand Jury Subpoena* said:

> In contrast with a grant of immunity, the government may not use a protective order to compel a witness to testify during a criminal or civil proceeding. Absent a grant of immunity, the deponents were entitled, *with or without a protective order*, to assert their fifth amendment privilege in answer to potentially incriminating questions in a civil proceeding.

836 F.2d at 1471 (emphasis added).

We conclude from the foregoing discussion that neither the statutory limitation created by *W.Va. Code*, 57-2-3 [1965], nor a protective order under Rule 26(c) of the *West Virginia Rules of Civil Procedure*, provide the "use immunity" protection that permits a court to require a person to answer questions in civil discovery, over a constitutional objection based on the Fifth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution*, where the answers to the questions may be self- incriminating.

In the instant case, the circuit court's order that is challenged by the petitioners was premised on the court's conclusion that the petitioners -- by virtue of the court's Rule 26(c) protective order and the limitations imposed by *W.Va. Code*, 57-2-3 [1965] -- would have an immunity with respect to their answers to deposition questions that was fully protective of their constitutional self-incrimination right.

Because we have held that this legal conclusion by the circuit court was erroneous, we must find that the circuit court erred in issuing its order based upon such a premise. We therefore grant the requested writ and prohibit the enforcement of the circuit court's order to the extent that the order requires the petitioners to make discovery responses -- including the giving of answers to questions at depositions -- over the petitioners' *bona fide* assertion of the constitutional right to remain silent about information that might tend to be self-incriminating. See footnote 7

Writ Granted as Moulded.

Footnote: 1 *Rule of Civil Procedure 26(c) [1998] states in pertinent part: the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .*

Footnote: 2 *W.Va. Code, 57-2-3 [1965] states: In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.*

Footnote: 3 *The circuit court's order, in pertinent part, read as follows: The Court, after hearing arguments of counsel and after review of the record with respect to the Motion for Protective Order, does find that the deposition testimony sought by the Plaintiff is protected under West Virginia Code §57-2-3, and does, accordingly DENY the Defendants' Motion for a Protective Order regarding the scheduled depositions of David and Christopher Wright. The Court, further finds*

that the written discovery, which is currently outstanding to the Defendants, is not protected by West Virginia Code §57-2-3 as a legal examination, and does, accordingly GRANT the Defendants' Motion for a Protective Order with regard to the outstanding written discovery requests.

The Court further Orders that the transcripts of David and Christopher Wrights' deposition be used only in the context of this civil action and further distribution and/or dissemination is strictly prohibited. The only exception to this prohibition is for the limited purposes of providing copies of the transcript to the Defendants' criminal attorney, Thomas Patrick Maroney. The Court further Orders that all persons attending the deposition of the Defendants are prohibited from discussing or disseminating any information gleaned from the Defendants at their civil depositions outside of the context of prosecuting this civil action.

The Court further Orders that a civil deposition does constitute a legal examination under West Virginia Code § 57-2-3, and does thereby Order that the Defendants will not be permitted to assert their Fifth Amendment right against self incrimination with respect to questions posed to them during their civil depositions. The Court further Orders that the Defendants be required to fully respond to all questions properly posed to them pursuant to the West Virginia Rules of Civil Procedure, to which there are no valid objections.

Footnote: 4 Additionally, compelled testimony in a criminal proceeding implicates "transactional immunity" with respect to the subject matter of the testimony. See W.Va. Code, 57-5-2 [1923].

Footnote: 5 In State v. Price, 113 W.Va. 326, 328, 167 S.E. 862, 863 (1933), we stated: This is a time-honored statutory provision. We inherited it from the mother state. Code of Virginia 1860, chapter 199, section 22. The rule is thus applied in State v. Hall, 31 W. Va. 505, 7 S. E. 422: "No statement made by one accused of crime, while a witness testifying on his own behalf before a justice on his preliminary examination, can be used against him on his trial."

None of our cases appear to discuss how W.Va. Code, 57-2-3 [1965] "interfaces" with constitutional self-incrimination jurisprudence -- but the statute appears to arise out of the same principles that animate the constitutional protection.

Footnote: 6 The Ninth Circuit (In Re Grand Jury Subpoena, 62 F.3d 1222 (9th Cir. 1995)) and the Eleventh Circuit (In Re Grand Jury Proceedings (Williams) v. U.S., 995 F.2d 1013 (11th Cir. 1993)), take the same approach as the 4th Circuit, holding that Rule 26 protective orders may always be overcome by a grand jury subpoena. Taking an opposite approach, the Second Circuit requires the government to show a "compelling need" to enforce a grand jury subpoena for sealed civil discovery. Martindell v. ITT, 594 F.2d 291 (2d Cir. 1979). The First Circuit takes a middle-ground approach, placing the burden on the person seeking to avoid the subpoena to show that it should not be enforced. In Re Grand Jury Subpoena, 138 F.3d 442 (1st Cir. 1998).

Footnote: 7 The balancing of the self-incrimination right vis-a-vis other rights in civil proceedings is a complex area of jurisprudence. A wide array of options are available to courts in performing this balancing. See generally Osburn, supra, 173 W.Va. at 598 n.5, 319 S.E.2d at 366 n.5; Wright and Miller, Federal Practice and Procedure, Chapter 6, "Depositions and Discovery," Section 2018, "Privilege Against Self-Incrimination;" Mark Youngelson, "The Use of 26(c) Protective Orders: 'Pleading the Fifth' Without Suffering Adverse Consequences," 1994 Ann.Surv.Am.L. 245; Gerald W. Heller, "Is 'Pleading the Fifth' a Civil Matter? How the Constitution's Self-Incrimination Clause Presents Special Challenges for the Civil Litigator," 42 Federal Lawyer 27 (September 1995).

Mindful that there are many permutations of this balancing act, with varying equities in each permutation, in this opinion we deliberately go only as far as is necessary to resolve the narrow issue before us. We express no opinion as to what options may be properly employed by the circuit court in any balancing that is necessary in the underlying lawsuit in the instant case.

We do, however, observe that not every question at a deposition -- or request for admission, or document request, or other discovery request -- will necessarily require a response that in its entirety is potentially self-incriminating. It would seem therefore that the self-incrimination right, if it is asserted, should ordinarily be asserted in response to specific questions or other specific discovery requests -- as opposed to a blanket objection to a form of discovery -- unless such a procedure would be demonstrably futile.

Additionally, we observe that in some circumstances, a party may permissibly be required to risk adverse consequences in civil proceedings, as a result of their silence based on the assertion of their right against compelled self-incrimination. See Syllabus Point 2, West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996) (silence can lead to adverse inference in child abuse and neglect proceedings); see generally Osburn, supra, and the discussion of this issue in the other authorities noted supra in this footnote.

203 W. Va. 616, 509 S.E.2d 897

Supreme Court Of Appeals Of West Virginia

IN THE MATTER OF: ZACHARY WILLIAM R., infant;
JESSE LEE R., infant; and KAREN J. R., mother of said infants;
WILLIAM J. R., father of Zachary William R.;
HOWARD TODD H.; putative father of Jesse Lee R.; and
AUDRA B. M., aunt and custodian of said infants, Respondents below,
ZACHARY WILLIAM R., infant, Respondent below,
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Appellees,
v.
JESSE LEE R., Respondent below,
LARRY AND SHERRY R., Intervenors below, Appellants.

No. 25012
Submitted: September 23, 1998
Filed: December 10, 1998

SYLLABUS BY THE COURT

1. "A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." Syllabus Point 11, *In re Jonathan G.,* 198 W.Va. 716, 482 S.E.2d 893 (1996).

2. "The best interests of a child are served by preserving important relationships in that child's life." Syllabus Point 2, *State ex rel. Treadway v. McCoy,* 189 W.Va. 210, 429 S.E.2d 492 (1993).

3. "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

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Per Curiam:

The *guardian ad litem* for the child Jesse R. and the former foster parents of Jesse R. -- Sherry and Larry R. -- together appeal a December 10, 1997 order of the Circuit Court of Nicholas County. The circuit court's order denied Sherry and Larry R.'s request for visitation with Jesse R. We vacate the circuit court's order and remand this case for an evidentiary hearing regarding allegations of sexual abuse that were made against Sherry and Larry R. Following this hearing, the circuit court should reconsider the visitation issue, in light of the best interests of Jesse R.

I.

In 1994, Jesse R., See footnote 1 then 4 years old, was removed from his biological mother's custody by an emergency petition and order of the court, and placed in the custody of the West Virginia Department of Health and Human Resources ("DHHR"). Following an abuse and neglect proceeding, the biological mother relinquished her parental rights, and the legal custody of Jesse R. was placed in the DHHR. See footnote 2

Jesse R.'s biological father, Todd H., was not a party to the abuse and neglect proceeding. However, Todd H. subsequently voluntarily relinquished his parental rights, so that Jesse R. could be adopted by his foster parents, Sherry and Larry R.

Sherry and Larry R. subsequently began proceedings to adopt Jesse R. All of the necessary steps for the adoption had been completed and the final paperwork was being prepared when -- in October of 1997 -- a teenaged girl whom Sherry and Larry R. had assisted over the years accused Sherry and Larry R. of sexually abusing her.

As a result of these accusations, after being with his foster parents Sherry and Larry R. for approximately 3 years, Jesse R. was removed from this home by the DHHR. The record indicates that the accusations of sexual abuse of the teenaged girl by Sherry R., were later retracted by the girl, and that the judge was aware of this recantation. The record before this Court in the instant case contains no further information about any proceedings regarding the girl's accusations of sexual abuse.

After Jesse R. was removed from their home, Sherry and Larry R. filed a motion in the circuit court seeking visitation with Jesse R. The circuit court held a hearing on December 10, 1997. In findings of fact, the circuit judge stated that he did "not know if visitation with Mr. and Mrs. [R.] would be beneficial or detrimental to the infant respondent Jesse . . . at this time." However, the circuit judge went on to conclude that it was in the best interests of Jesse R. not to permit visitation.

Sherry and Larry R. appeal the circuit court's decision to this Court, joined by the *guardian ad litem,* and contend that visitation of Jesse R. by Sherry and Larry R. would be in the best interests of Jesse R.

II.

This Court has repeatedly recognized the needs of children whose custodial situation has been altered to have continued contact with individuals with whom the children have formed an emotional bond.

For example, we have held that visitation should be permitted between a child and her stepfather and half-brother, *Honaker v. Burnside,* 182 W.Va. 448, 388 S.E.2d 322 (1989); that circuit courts should consider whether continued association with siblings in other placements following an abuse and neglect proceeding would be in a child's best interest, *James M. v. Maynard,* 185 W.Va. 648, 408 S.E.2d 400 (1991); that visitation rights may be granted to a parent whose parental rights have been terminated due to abuse or neglect proceedings, *In re Christina L.,* 194 W.Va. 446, 460 S.E.2d 692 (1995); and that a child has a right to continued association with a foster parent after being placed with natural parents, if the contact is

in the best interest of the child, *In re Jonathan G.,* 198 W.Va. 716, 482 S.E.2d 893 (1996).

Regarding continued association with foster parents, this Court has stated:

> A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child.

Syllabus Point 11, *In re Jonathan G.,* 198 W.Va. 716, 482 S.E.2d 893 (1996).

We have held:

> It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

Syllabus Point 3, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Clearly "[t]he best interests of a child are served by preserving important relationships in that child's life." Syllabus Point 2, *State ex rel. Treadway v. McCoy,* 189 W.Va. 210, 429 S.E.2d 492 (1993).

Sherry and Larry R. were the foster parents of Jesse R. for approximately 3 years and had formed a significant relationship with the child. See footnote 3 It appears that Jesse R. was removed from the one stable home he had known, and was placed elsewhere, without any type of transition and without affording his foster parents any visitation.

Applying the foregoing principles, we conclude that the circuit court did not have a sufficient record to support its determination to deny visitation to the appellants. Consequently, such a denial was an abuse of the circuit court's discretion.

We are troubled that the circuit court did not consider, examine and weigh any evidence concerning the alleged sexual abuse. See footnote 4 Instead, it appears that the circuit court relied upon the mere fact of (retracted) allegations of abuse of another child to deny Sherry and Larry R. visitation with Jesse R.

We reverse the circuit court's order of December 10, 1997. We remand this case to the Circuit Court of Nicholas County with directions to conduct an evidentiary hearing. The circuit court should determine, *inter alia,* what evidence if any exists supporting the allegations of sexual abuse against Sherry R. We further require the circuit court to re-examine the issue of visitation, in light of the evidence adduced at the hearing and the principles enunciated in this opinion, and to make full findings of fact and conclusions of law on the issue of whether visitation by Sherry and Larry R. would be in the best interests of Jesse R.

Reversed and Remanded with Directions.

Footnote: 1 Consistent with our general practice, we use initials rather than full names in cases involving sensitive matters. See In re Jonathan P., 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

Footnote: 2 Jesse R.'s half brother, Zachary, then aged 12, was also removed from his mother's custody.

Footnote: 3 Dr. Christina Arco, Ph.D., a licensed psychologist, examined Jesse R. for adoption purposes just a few months before he was removed from Sherry and Larry R.'s home. Dr. Arco stated in her report that Jesse R. deserved to stay with the R.'s "where [Jesse] feels safe, secure, and loved for the first time in his young lifetime."

Footnote: 4 While this appeal only addresses the circuit court's denial of Sherry and Larry R.'s motion for visitation, we note that the legislature has established rules and guidelines for the removal of children from foster homes. These guidelines are found in W.Va. Code, 49-2-14 [1995] it provides, in pertinent part:
(a) The state department may temporarily remove a child from a foster home based on an allegation of abuse or neglect, including sexual abuse, that occurred while the child resided in the home. If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement and preclude contact between the children and the foster parents. If, after

investigation, the allegation is determined to be true by the department or after a judicial proceeding a court finds the allegation to be true or if the foster parents fail to contest the allegation in writing within twenty calendar days of receiving written notice of said allegations, the department shall permanently terminate all foster care arrangements with said foster parents: Provided, That if the state department determines that the abuse occurred due to no act or failure to act on the part of the foster parents and that continuation of the foster care arrangement is in the best interests of the child, the department may, in its discretion, elect not to terminate the foster care arrangement or arrangements.

(b) When a child has been placed in a foster care arrangement for a period in excess of eighteen consecutive months and the state department determines that the placement is a fit and proper place for the child to reside, the foster care arrangement may not be terminated unless such termination is in the best interest of the child and:

(1) The foster care arrangement is terminated pursuant to subsection (a) of this section;

(2) The foster care arrangement is terminated due to the child being returned to his or her parent or parents;(3) The foster care arrangement is terminated due to the child being united or reunited with a sibling or siblings;

(4) The foster parent or parents agree to the termination in writing;

(5) The foster care arrangement is terminated at the written request of a foster child who has attained the age of fourteen; or

(6) A circuit court orders the termination upon a finding that the state department has developed a more suitable long-term placement for the child upon hearing evidence in a proceeding brought by the department seeking removal and transfer.